Ref: 20TACD2018

REDACTED

APPELLANT

V

REVENUE COMMISSIONERS

RESPONDENT

DETERMINATION

Introduction

1. This is an appeal against a Notice of Estimation dated 2nd September 2014 raised against **Company Name Redacted** (the Company) for income tax in the following amounts and covering the following periods:

Year Ended 31st December 2008	€15,844
Year Ended 31st December 2009	€ 9,690
Year Ended 31st December 2010	€ 6,929
Year Ended 31st December 2011	€ 5,676
Total	**€38,139**

2. The Appellant asserts that the expense payments made by the Company were reimbursement of expenses incurred by him in the performance of his work.

3. The position of the Respondent is that the expenses were not incurred wholly, exclusively and necessarily in the performance of his duties as prescribed by Taxes Consolidation Act 1997(TCA), section 114.

4. In order to provide the Appellant with an opportunity to have his case heard before the Tax Appeal Commission with regard to an entitlement to deduct for expenses pursuant to TCA, section 114 claim, contemporaneous income tax assessments also issued directly to the Appellant reflecting the identical liability.

5. While there is an issue with regard to the raising of a double assessment contrary to TCA, section 959F, the Respondents gave an undertaking that the personal assessments raised on the Appellant would be vacated in the event that I find in the Respondent's favour.

6. At the hearing, the Respondent also undertook to withdraw the assessments for the year ended 31st December 2008 in accordance with TCA, section 959AA(1) on the basis that the assessments were raised outside the prescribed time limit.

7. Furthermore, during the course of the hearing, an issue arose with regard to the alignment of the tax years for the Company and the Appellant. The parties thereafter agreed that the Appellant would prepare a schedule detailing the expenses associated with each contract and the years in which they were incurred.

8. A supplemental hearing took place on 8th August 2018, at which the Appellant provided evidence of the vouched business related expenditure.

Background

9. The Company has its base in **Location Redacted**, where the Appellant also resides. The Company specialises in the installation, commissioning and initial qualification of **Activities Redacted**.

10. During the years under appeal, the Company supplied engineering services to end-user clients in the **Industry Redacted** at a multitude of locations. The Company supplied services to many different clients without geographical boundary.

11. During the years under appeal the Company engaged in the following activities:

    (a) participation in equipment design and related facility interface design at various locations
    (b) completing factory acceptance testing of equipment at the equipment vendors' premises.
    (c) ensuring the equipment is installed correctly as per design, vendor recommendations, Regulations and laws and above all to ensure that it is done so safely at the end user client's premises.
    (d) commissioning the equipment at the end user clients' premises which involves:
        i. putting the equipment into service as per the vendor recommendations
        ii. testing key operational and safety features of the equipment
        iii. troubleshooting technical problems that arise during start-up
    (e) ensuring that initial qualification of the equipment is completed.

12. Once the commissioning and qualification of the equipment has been completed, the end-user takes ownership of the equipment and commences the trialing, validating and ultimately production of **Redacted** products for sale.

Legislation

Taxes Consolidation Act 1997

13. The parties agree that the relevant charge to taxation was pursuant to Taxes Consolidation Act 1997 (TCA), section 112 which provides:

> *(1) Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.*
>
> *(2) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.*

14. Section 114 TCA 1997 deals with the deductibility of expenses for Schedule E purposes and reads as follows:

> *"Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed".*

15. Section 117 TCA 1997(1) provides:

> *(1) Subject to this Chapter, any sum paid In respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.*
>
> *(2) The reference in subsection (1) to any sum paid in respect of expenses includes a reference to any sum put by a body corporate at the disposal of a director or employee and paid away by him or her,'*

16. Section 118(1) TCA 1997 contains the general charging provisions for benefits in kind and provides:

> *(a) 'Subject to this Chapter, where a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of-*
>
> *(i) living or other accommodation,*
> *(ii) entertainment,*
> *(iii) domestic or other services, or*
> *(iv) other benefits or facilities of whatever nature, and*
>
> *(b) apart from this section the expense would not be chargeable to income tax as income of the director or employee then, sections 112, 114 and 897 shall apply in relation to so much of the expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount of the expense had been refunded to the director or employee by the body corporate by means of a payment in respect of expenses, and income tax shall be chargeable accordingly. "*

Evidence

17. The Appellant gave evidence that on 9th August 2007, the Company entered into a 19 month contract with **Redacted** to provide engineering staff to work on a project for **Client Name Redacted**. Under the terms of the contract, the Appellant, on behalf of the Company, was engaged in the management of installation, commissioning and qualification of **Work Redacted** in **European Location Redacted**. The work also included traveling to the main equipment vendor in **European Location Redacted** and to local vendors and engineering service providers in the **European Locations Redacted**.

18. Between September 2009 to March 2011, the Company contracted with **Redacted** to provide engineering services to **Client Name Redacted** in **Irish Location Redacted**. The services involved the commissioning and initial qualification of a new **Redacted**.

19. During the month of April 2011 and from June to December 2011, **Client Name Redacted** engaged the Company in 'trouble shooting' work in respect of a **Work Redacted** on the site of **Client Name Redacted** in **Irish Location Redacted**.

20. The Appellant proceeded to give evidence on the assortment of business related expenditure. He also confirmed that he was paid subsistence payments in line with the published guidelines of the Respondent.

21. During cross examination, the Appellant confirmed that he was based in **Irish Location Redacted** for a period of 18 months and considered himself to be an *"itinerant*" worker. He also confirmed that he typically travelled from the Company's office in **Location Redacted** to **Irish Location Redacted** on a Sunday night or Monday morning, stay in the rented apartment in **Irish Location Redacted** until Friday morning and return to **Irish Location Redacted** on the Friday evening.

22. In support of the expenditure on the rented apartment in **Irish Location Redacted**, the Appellant produced the following evidence:

    (a) A letter from **Bank** dated 23rd October 2017 confirming that €750 per month was paid from his account to an bank account under the narrative "Rent 3 **Location Redacted**' from November 2009 to March 2011 inclusive.
    (b) A receipt from **Rental Management Company**, **Location Redacted**, confirming receipt of €750 on 27th October 2009 in respect of the property **Location Redacted**
    (c) A letter from PRTB dated 13th April 2010 confirming the landlord's registration of the Appellant's tenancy at **Location Redacted**
    (d) An assortment of ESB bills in respect of **Location Redacted**.

23. The Appellant confirmed that a substantial part of his work required him to be physically present on site. The functions undertaken at the Company's office constituted in the main, administrative and accounting functions.

24. At the supplemental hearing on 8th August 2018, having previously furnished a schedule highlighting the total expenditure reimbursed by the Company, the Appellant proceeded to give evidence in relation to the vouched business related expenditure:

Year Ended 31st December 2009		Vouched	Unvouched	
		€	€	€
European Contract 1	Accommodation	4,071		
	Travel	2,377		
	Car Hire	363		
	Flights	433		
	Subsistence		3,090	
European Contract 2	Flights & Car Hire	838		
Irish Contract 1	Accommodation	1,377		
	Rent	1,500		
	Light & Heat	79		
	Travel & Subsistence		4,050	
		11,038	7,140	18,178
Year Ended 31st December 2010		**Vouched**	**Unvouched**	
		€	€	€
Irish Contract 2				
	Rent	9,000		
	Light & Heat	427		
	Travel & Subsistence		10,956	
		9,427	10,956	20,383
Year Ended 31st December 2011		**Vouched**	**Unvouched**	
		€	€	€
Irish Contract 3	Rent	2,250		
	Light & Heat	148		
	Subsistence		4,016	
Irish Contract 4	Hotel accommodation	6,711		
	Travel & Subsistence		2,751	
European Contract 2	Hotel & Travel	305		
		9,414	6,767	16,181

Submissions – Appellant

25. The Appellant submitted that the Company reimbursed him for the vouched expenses and in respect of the round sum expenses, in accordance with Revenue Guidance notes.

26. The vouched expenditure arose from his obligation to perform engineering services and could not be said to be the reimbursement of expenses that gave rise to a personal advantage or that they constituted "*some element of personal profit".*

27. With regard to the round sum expenses, the Appellant relied on practice statements of the Respondent and in particular SP – IT/2/07 at paragraph 2.1 where it states:

> *"Arising from an employee's or office holder's entitlement to a tax deduction in respect of certain expenses, there exists a long-standing practice under which employers may reimburse tax-free to office holders and employees the expenses of travel (and subsistence relating to that travel) subject to certain conditions being fulfilled."*

28. The Appellant thereafter placed significant reliance on *Horton v. Young* [1972] Ch 157, a case involving a 'labour only' sub-contracting bricklayer who worked for a building contractor building houses on sites in Sussex and beyond. The taxpayer lived at his home in Eastbourne where he kept his tools and the books of his trade. Before each contract, the building contractor would see the taxpayer at his house and agree the site to be worked and the rate to be paid. The taxpayer was the leader of a team of bricklayers, generally three. He collected the others in his car and took them daily to the site and back until the work was completed, usually over a period of up to three weeks. The different sites were at varying distances from Eastbourne, ranging, in the year of assessment, from 5 to 55 miles. Sometimes the taxpayer had to travel from one site to another in one day. He claimed to deduct the whole of his travelling expenses in computing his income for tax purposes in the year as 'money wholly and exclusively laid out or expended for the purposes of his trade. The Crown contended that the taxpayer's trade was a shifting base as he moved from one building site to another and that accordingly he was only entitled to deduct the expenses of travelling between sites. The Court of Appeal ruled in favour of the taxpayer noting that his base from which he carried on his business was his home in Eastbourne, and the travelling between his base and the sites on which he worked was an essential part of his trade. It therefore followed that the expenditure on such travelling was for the purpose of enabling him to carry on and earn profits in his trade and was thus 'wholly and exclusively for the purposes of his trade.'

29. The Appellant argued that if he was an engineer working with one company all of the time, his position could not be considered to be temporary. However, the nature of his work involved living in temporary accommodation, hiring cars and travelling to various locations to work on the installation of engineering works. The Appellant submitted that he undertakes work on behalf of a client within a prescribed period of time and the contractual commitment thereafter terminates. As such the type of work undertaken was of a temporary nature.

Submissions – Respondent

30. Based on a detailed consideration of the jurisprudence, the Respondent argued that the Appellant's normal place of work was at the site of the end user enterprise. As such, the Appellant was not entitled to claim 100% of the travel and subsistence expenditure representing the "home to work" element.

31. The Respondent submitted that the entitlement to the deduction for travel expenses must be in accordance with the first limb of TCA, section 114 in respect of which he was "*necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties."*

32. With regard to other employment type expenses, TCA section 114 requires that such expenses be incurred "*wholly, exclusively and necessarily in the performance of those duties".* As such there is a much narrower focus on other employment type expenses.

33. The Respondent's submissions commenced with *Ricketts v Colquhoun* [1926] A.C 1. In that case a barrister, residing and practising in London, was engaged as a Recorder of a provincial borough. The emoluments of his office had been assessed to income tax under Schedule E of the Income Tax Act, 1918 in respect of certain travelling expenses incurred by him in travelling from London to the borough and back, and certain hotel expenses incurred while in the borough. In disallowing the travelling expenses Viscount Cave at page 4, observed that travel expenses:

> *"must be expenses which the holder of an office is necessarily obliged to incur - that is to say, obliged by the very fact that he holds the office and has to perform its duties - and they must be incurred in - that is, in the course of - the performance of those duties.*
>
> *The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them"*

34. Viscount Cave thereafter distinguished travelling expenses when stating at page 5 that a claim for hotel expenses depends:

> *"upon the latter part of r. 9, which allows the deduction of money, other than travelling expenses, expended "wholly, exclusively and necessarily in the performance of the said duties." In considering the meaning of those words it is to be remembered*

that a decision in favour of the appellant would operate in favour, not only of Recorders, but of any holder of an office or employment of profit who is liable to be assessed under Sch. E, and would or might enable every holder of such a position to deduct his living expenses while away from his home. It seems to me that the words quoted, which are confined to expenses incurred in the performance of the duties of the office, and are further limited in operation by the emphatic qualification that they must be wholly, exclusively and necessarily so incurred, do not cover such a claim. A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance."

35. As such the entitlement to a deduction for such expenses must conform with the wording of the statute which is "*perfectly rigid".*

36. The Respondent progressed to the concurring judgment of Lord Blanesburgh and in particular the objective requirement of the rule when stating at page 7:

"the language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties - to expenses imposed upon each holder ex necessitate of his office, and to such expenses only. It says: "If the holder of an office" - the words, be it observed, are not "If any holder of an office" - "is obliged to incur expenses in the performance of the duties of the office" - the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective: the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition."

37. Relying on that interpretation, the Respondent argued that the travel from **Irish Location Redacted** to **Irish Locations Redacted** is not a requirement imposed by the particular office concerned as it applied to *"expenses imposed upon each holder ex necessitate of his office and to such expenses only".*

38. The Respondent submitted that the facts in *Bennett v. Revenue Commissioners* [2007] STC (SCD) 158, a decision of the Special Commissioners in which reliance was made on *Ricketts,* was particularly relevant to this appeal. In *Bennett*, the taxpayer, who lived in Lancashire, was a scaffolder employed on various construction sites in the London area which involved finding accommodation during the week. Reading from the headnote, the Respondent highlighted the following passage:

"The expenses incurred by the taxpayer in travelling between his accommodation address in London and the construction sites merely put him in a position to carry out his duties. They were not incurred in the performance of his duties within the meaning of section 198(1)(b). Moreover, because the London sites were not temporary workplaces within paragraph 4 of schedule A to the 1988 Act, travelling to and from those sites was ordinary commuting. Accordingly, the travel expenses were not deductible. As to the claim for subsistence costs and accommodation expenses, as the taxpayer's travel expenses were not allowed as relating to commuting, neither for the same reason were his subsistence and accommodation claims."

39. *Elderkin v Hindmarsh* [1988] STC 267 was also cited by the Respondent as particularly relevant. In that case the taxpayer owned a house where he lived with his family. He was employed as an inspector by consulting engineers specialising in pipe laying and he was required to undertake assignments necessitating his living away from home for long periods. The taxpayer met the cost of his day to day living expenses but received a fixed weekly sum from his employer as a living allowance.

40. Mr Hindmarsh was denied a deduction for the living allowance a decision which was successfully appealed before the General Commissioners. The Crown appealed, contending that the taxpayer's duties were not itinerant duties such as those of a commercial traveller and that his living expenses when working away from home were not incurred in the performance of his duties. In allowing the appeal Vinelott J. determined at page 270 that:

"*The very restricted range of expenses which the holder of an office of employment within Schedule E is entitled to deduct has often been commented on and contrasted with the provisions applicable to Schedule D which permit the deduction....*
....
... before expenditure can be deducted under s 189(1) the taxpayer must be able to show not only that the expenditure was of moneys which he was necessarily obliged to expend 'wholly, exclusively and necessarily' but also that the moneys were so expended in the performance of the duties of his office or employment. Vaisey J once described the language of the predecessor of section 189(1) as 'deceptive' in that the requirements which have to be satisfied of expenditures deducted are so stringent that in many, if not in most, cases the subsection gives the taxpayer little or no relief."

41. The Respondent noted that although the facts clearly established that Mr Hindmarsh was obliged to incur the expenditure caused by having to work away from home in order to put himself in a position to carry out the duties, the expenditure was not incurred in the performance of those duties which ceased when the day's work was done. Similarly in this case, the Appellant could not have performed his work unless he had arrived in

European Location Redacted or in **Irish Location Redacted.** It was therefore clear that the expenditure incurred merely placed the Appellant in a position to carry out his duties.

42. With regard to the requirement to incur expenditure in the performance of the employment duties, Vinelott J made the following observation commencing at page 271:

> *"In the instant case the expenditure which the taxpayer seeks to deduct is similarly expenditure which he had to incur if he was to put himself in a position to do the work which he was employed to do and for which he was paid: and moreover, it seems to me that any person employed to do that work would have been bound to incur at least some part of this expenditure, though of course it may be that Spence & Partners could have employed someone who lived near at least one of the sites. Be that as it may, the expenditure was not incurred in the performance of those duties.*
> *….*
> *The taxpayer was directed by his employers to work at a particular site. He started work when he arrived at the site and finished when his day's work was over. He had to find accommodation nearby so that he could be ready for work the next day or in case he was called out to meet some emergency, which sometimes happened, if for instance he had to inspect materials delivered at night. It was to that extent necessary for him to find accommodation nearby but he did not live in this accommodation in the course of performing his duties.*
>
> *The taxpayer stressed that he has not claimed the cost of travelling from his home to the sites where he was sent. The taxpayer presented the case himself, who presented it modestly and well, impressed me as a man who was anxious not to claim more than he felt he was fairly entitled to claim, but in the context of this case it is in fact illogical to claim the expense of living away from home so as to be near the sites where he was sent but not the expense of travelling to them and the two stand or fall together*."

43. The Court concluded at page 272:

> "*The strict application of section 189(1) in the context of a case like this where an employer makes a lodging allowance in order to meet expenses which as a practical matter he has to incur in order to do his work and where it is then rendered inadequate for that purpose because the employee has to pay tax on it will no doubt be widely perceived as unfair. However section 189(1) reproduces provisions which have been part of the income tax legislation ever since it was reimposed as a permanent tax in 1853 and if it has survived the many criticisms which have been directed to it, it must I think be because of the difficulties that are encountered in framing a provision that will abide these harsh consequences in particular cases without opening the doors to unacceptable abuse."*

44. The Respondent proceeded to cite *Nolder v Walters* 15 TC 380 a case in which an airline pilot drove to the airport on receipt of a phone call to fly to a prescribed destination and claimed for the cost of travelling between his home and the airport. The High Court determined that the travelling expenses were not allowable as they were incurred to put the pilot in a position to carry out his duties and not in the actual performance of those duties.

45. In *Kirkwood v. Evans* [2002] EWHC 30 (CH), a civil servant who chose to work from home was not entitled to deduct the cost of travelling from his home to his employer's premises. In that case Mr. Evans worked at home for four days per week. While the Court confirmed that his home was also a workplace, his journey to his employer's premises on one day per week was nonetheless ordinary commuting and so did not qualify for relief. Patten J determined at paragraph 12:

> *"The necessity of travelling to Leeds is dictated by his choice of the place where he lives and not by the nature and the terms of the job itself."*

46. *Warner v. Prior* [2003] STC (SCD) 109 related to a teacher who had two places of work, one at the schools where she taught and the other where she marked homework and made preparations for class. She claimed travel expenses between the two places of work. The Special Commissioners found that although she had two places of work and it was objectively necessary for her to have a place of work somewhere other than the schools, decided that the travel expenses between the two were not deductible *"in other words she could move house and not lose her job as it wasn't an intrinsic part of it."*

47. In relation to contractual obligations, the Respondent distinguished *Revenue and Customs Commissioners v Banerjee* [2011] 1 All ER 985, a Court of Appeal decision involving a taxpayer employed under a training contract. Reading from the headnote, the Respondent referred to the following passage:

> *"Throughout her period of employment, the written statement of the terms and conditions of her contract included a training clause which provided that employment was dependent on the retention of a National Training Number. She was also required to attend meetings, courses and conferences held for training purposes. The training courses were compulsory and a prerequisite for her maintaining her post and employment. She would not have been allowed to continue her employment as a Specialist Registrar if she had failed to attend external training sessions."*

48. The Respondent noted the classification of Dr Banerjee's contractual position where Rimer LJ classified at page 999 as:

"being employed exclusively for training purposes. That was the whole purpose of the contract. The relevant expenditure was therefore incurred in participating in the training exercises which she was employed to undergo in fulfilment of such purpose and for which participation she was being paid a salary".

49. Furthermore, Rimer J. in agreeing with the finding of the High Court, determined, also at page 999 that:

"the true nature of Dr Banerjee's employment during the relevant years was that she was employed under a training contract under which she was being paid not just to attend patients on the wards but also to attend the compulsory training that was as much part of the obligations of her job owed to her employer as was her attendance upon patients. She was, in short, being employed exclusively for training purposes. That was the whole purpose of the contract. The relevant expenditure was therefore incurred in participating in the training exercises which she was employed to undergo in fulfilment of such purpose and for which participation she was being paid a salary."

50. The Respondent distinguished the Appellant's position with that of Dr Banerjee on the basis that the whole essence of Dr Banerjee's contract was a training contract and she would have effectively been dismissed if she had not undergone that training. However, in the Appellant's cases, there was no corresponding requirement to travel from **Irish Location Redacted** to the various site locations.

Irish Jurisprudence

51. Reference was thereafter made to *Phillips (Inspector of Taxes) v Keane* IR 1925 Vol II 48 a case concerning a principal of national school who lived six miles from the school due to the difficulty in finding a suitable home anywhere closer. As such, he was obliged to keep a pony and trap and employ a man to transport him from his home to the school and back and claimed a deduction from his Schedule E income as an expense necessarily incurred as a result of travelling in the performance of his duties of an office or employment.

52. Reference to *Ricketts* was contained in the review of submissions of the Revenue Commissioners, but not in the short decision of Sullivan J. who concluded at page 50:

"We do not think that the expenses in question here were incurred in the performance of the duties of the Respondent's office. His case is therefore not within Rule 9 of Schedule E of the Income Tax Act 1918 and the deduction is not admissible."

53. In *S P O'Broin (Inspector of Taxes) v Mac Giolla Meidhre*, 1957 IR 98, a county engineer employed by a county council appealed against an assessment to income tax under

Schedule E claiming a deduction in respect of the expenses including travelling expenses. In holding that the travelling expenses were not allowable, Teevan J. cited the following passage from *Ricketts* at page 103:

> *"The expenses must "exclusively" relate to the performance of the duties of the office, and the case fails to state facts showing the requisite exclusiveness.*
>
> *Of the authorities cited in support of the inspector's contention I need only refer to the words of Lord Blanesburgh in Ricketts v Colquhoun 10 TC 118, [1926] AC 1 where he says at page 7, while discussing Sch E rule 9:*
>
> *It (rule 9) says: "if the holder of an office", the words, be it observed, are not "if any holder of an office", "is obliged to incur expenses in the performance of the duties of the office", the duties again are not the duties of his office. In other words, the terms are strictly, and, I cannot doubt, purposely, not personal but objective; the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition."*

54. Further reference to *Ricketts* was made in *H F Kelly (Inspector of Taxes) v Commandant Owen Quinn* [1961] IR 488, a case in which an officer in the defence forces, claimed expenses comprising rent and costs of mess, travelling expenses between his home and army quarters, and gratuities to a batman as deductions against his income. The Circuit Court determined that only the gratuities paid to the batman were incurred wholly, exclusively and necessarily in the performance of his duties and disallowed the other expenses.

55. In the High Court, distinctions were drawn between TCA, section 81, the provision governing the deductibility of expenses for self employed persons and TCA, section 114, where commencing at page 493, Kenny J. observed that the:

> *"test for deduction under Schedule D is expenditure for the purposes of the trade, profession or vocation and the word 'necessarily' does not apply at all or appear at all. The next feature is that the expenditure which may be deducted under Rule 9 is that which is necessary in the performance of the duties of the office or employment and not as in Schedule D for the purpose of the trade, profession or vocation. If Rule 9 included monies expended "for the performance of the duties of the office or employment" the test to be applied would be much more liberal. The third feature is that the Rule does not speak of "any holder" of an office or employment of profit but of "the holder of an office or employment of profit'' and this introduces an objective test. By this I mean that the Court has to consider whether the person holding the office or employment is obliged, by the terms and duties of that office or employment, to expend the monies the deduction of which is claimed. The question is*

not whether the person holding thought that he had to, or ought to, expend that sum.

An examination of the more authorative cases on this matter supports these conclusions. In Ricketts v Colquhoun (1) Lord Blanesburgh said:--"It [Rule 9] says: 'If the holder of an office'--the words, be it observed, are not 'If any holder of an office'--'is obliged to incur expenses in the performance of the duties of the office'--the duties again are not the duties of his office. In other words, the terms employed are strictly, and I cannot doubt, purposely, not personal but objective: the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition." This passage was cited with approval by Mr Justice Teevan in Ó Broin v Mac Giolla Meidhre. Then there is the decision of the English Court of Appeal in Brown v Bullock [1961] 2 All ER 129 (Mr Bullock being the Inspector of Taxes), which was not cited in this case. In it Lord Justice Donovan (as he then was), a great authority on income tax matters, said:--"Under r 7 [our Rule 9] of the Rules applicable to Schedule E to the Income Tax Act, 1952, the taxpayer must show that any expense he wishes to be deducted in arriving at his assessable emoluments was inter alia necessarily incurred in the performance of the duties of the office or employment. For the taxpayer here it is contended that the fact is proved by showing that the employer prescribed some duty for his own employee which involved the relevant expense. This contention in my view is not correct. The test is not whether the employer imposes the expense, but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay. This result follows in my opinion from the decision of the House of Lords in Ricketts v Colquhoun [1926] AC11.

As there was no legal obligation on the taxpayer to pay any gratuities to his batman and as the batman had to do his duties as batman whether the gratuities were paid or not, the taxpayer was not necessarily obliged to expend the sums which he has claimed as deductions: on this ground the claim fails. If this conclusion be wrong, the next difficulty for the taxpayer is that the gratuities were not paid in the performance of his duties: they were, in my opinion, paid for the purpose of making it possible for him to perform his duties and on this ground the claim also fails. There is, in addition, the further difficulty that the gratuities were not monies expended necessarily in the performance of the taxpayer's duties because, it seems to me, he could have performed his duties without the assistance of a batman. The duties of batman as stated in the Case could have been performed by the taxpayer and the fact that he could not do so without loss of prestige and respect does not, unfortunately, seem to me to be relevant."

56. *MacDaibhead v SD* III ITR 1 was the final case in the Respondent's review of Irish jurisprudence, a case in which the taxpayer held directorships in a number of

companies, some of which had external connections. His duties, as director necessitated a considerable amount of travelling around the world. The bulk of these expenses were paid by the relevant companies. However, some incidental fares e.g. taxi fares and phone calls, of which he did not keep exact details, were paid from his own pocket. A deduction for these expenses was claimed against his Schedule E income.

57. The claim was refused by the Inspector on the grounds that such expenses were not wholly exclusively and necessarily incurred in the performance of the duties of the office or employment. The Appeal Commissioner found in favour of the taxpayer and the case was stated for the opinion of the High Court.

58. The High Court ruled that as the incidental expenses were of the same nature as the expenses which were defrayed by the companies, they could probably have been recovered from some or all of the companies if the taxpayer had made such a claim. The Court could see no reason why the taxpayer could not have estimated these expenses for the companies just as easily as he had done so for the Appeal Commissioner. It was the taxpayer's responsibility to prove that the expenses are wholly, exclusively and necessarily related to the office of employment.

59. While reference to *Ricketts* was contained in the review of submissions of the Revenue Commissioners there was no mention to that case in the Court's judgment where McWilliam J concluded that there was not sufficient evidence before the Appeal Commissioner "*by which he could make a deduction of any of these incidental expenses*."

Respondent's review of the Appellant's submissions

60. The Respondent submitted that the cases relied upon by the Appellant related to self-employed taxpayers and as such involved a different statutory test. Furthermore *Horton v. Young* [1972] Ch. 157 was not relevant as it related to itinerant working arrangements described by Brighton J. as applying to a person having:

> *"no fixed place or places at which he carries on his trade or profession but moves continuously from one place to another, at each of which he consecutively exercises his trade or profession on a purely temporary basis and then departs, his trade or profession being in that sense of an itinerant nature, the travelling expenses of that person between his home and place is where he happens to be exercising his trade or profession will normally be wholly and exclusively laid out and expended for the purpose of the trade."*

61. The Respondent further distinguished the Appellant's position to the extent that in *Horton,* the taxpayer was continuously moving from one place to another.

Respondents' Conclusions

62. Based on a review of the jurisprudence, the Respondent submitted that the nature of Appellant's work required him to perform his duties of the employment at the various sites of the end user enterprises. As such, each site became his place of work and the cost of travel between home and those sites was not allowable.

63. Furthermore, the Appellant could not be considered to be an itinerant worker as his circumstances differed to that of a salesman or commercial traveller. He was not in that category as his working commitments, apart from the couple of foreign trips, involved turning up on a Monday and remaining on site for the remainder of the week.

64. The Appellant's interpretation of a temporary workplace did not comply with the substantial body of case law specifically as two of the contracts in the years under appeal were almost 19 months in duration while the contract to work in **Location Redacted** was for six months.

65. Furthermore, the work carried out at the Appellant's home did not constitute a base. The expenses were incurred purely to put him in a position to carry out his duties. As such the expenses were not incurred wholly, exclusively and necessarily in the performance of his duties.

66. Finally, all of the expense payments constitute emoluments and are assessable to tax under TCA section 112. The Respondent noted that if the legislation was adhered to strictly, a myriad of claims would arise under TCA, section 114 by individual taxpayers. As such the Respondent issued guidance to employers in relation to what expenses can be paid tax free and thereby avoid a myriad of claims under TCA, section 114 subject to clearly defined parameters. As such the payments made to the Appellant do not fall within those guidelines and therefore were assessable to tax in the normal way.

Analysis

Overview

67. During the course of proceedings, the Appellant referred to the policy directions of the Respondent in an assortment of publications including Tax Briefings and statements of practice with regard to the payment of travel and subsistence expenses without deduction of tax. The Appellant argued that the Respondent had resiled from that stated position and as a consequence, the Appellant has been prejudiced by the failure of the Respondent to apply the law consistently.

68. However, as I was reminded by Counsel for the Respondent, the jurisdiction of the Appeal Commissioners does not extend to a review of the administrative actions of the Respondent or indeed to commercial or economic policy issues notwithstanding any purported inequity. As such, my role is confined to the interpretation and application of the statutes with the assistance of relevant jurisprudence.

69. In this regard and in light of the submission of the Respondent, I have limited myself to determining the extent to which the payment of expenses by the Company to the Appellant constituted income falling within the charge to tax pursuant to TCA, sections 112, 117 or 118 and thereafter consider whether there is a statutory entitlement to deduct prescribed expenses against the Appellant's income in accordance with TCA, section 114.

Charge to Tax

70. The Respondent asserted that if the expenses did not fall within the charge to tax pursuant to TCA, section 112 as "*salaries, fees, wages, perquisites or profits*", they fell to be taxed under TCA, section 117, the deeming provision which taxes any sum paid in respect of expenses as perquisites chargeable to tax under Schedule E.

71. In the alternative, the Respondent argued that the reimbursement of expenses fell within the charge to tax pursuant to TCA, section 118 as a benefit in kind in respect of the provision by an employer of, *inter alia*, "*other benefits or facilities of whatever nature*". That section however, also acts as a fallback provision in event that the emolument would not otherwise be chargeable to tax.

72. While "perquisites" are not statutorily defined, the House of Lords in *Owen v Pook* 1970 A.C. 244, considered whether the reimbursement of employment expenses incurred by the taxpayer fell within the charge to tax under the UK equivalent of TCA, section 112 as a perquisite of employment. In that case, Lord Pearce concluded at page 259 that the:

> *"reimbursements of actual expenses are "clearly not intended by "salaries", "fees", "wages" or "profits." It is contended that they are "perquisites." The normal meaning of the word denotes something that benefits a man by going "into his own pocket."*

73. In considering whether Dr Owen was assessable to tax on the expenses payments, Lord Guest at page 255 made the following observation:

> *"The fact that "emolument" as defined includes "perquisites and profits" does not, in my view, advance the Revenue's argument. "Perquisite" is merely a casual emolument additional to regular salary or wages. But the allowance must, to be chargeable, accrue "in respect of the office or employment" (Schedule E). In*

Hochstrasser v. Mayes [1960] A.C. 376 Viscount Simonds, at p. 388, quotes with approval a passage from the judgment of Upjohn J. to the following effect:

> *"'In my judgment,' he said, 'the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.'"*

74. At page 256 he went to state that:

> *"if the proper test is whether the sum is a reward for services, then, in my view, the travelling allowances paid to Dr. Owen are not emoluments. To say that Dr. Owen is to that extent "better off" is not to the point. The allowances were used to fill a hole in his emoluments by his expenditure on travel. The allowances were made for the convenience of the employee to allow him to do his work at the hospital from a suitably adjacent area. In my view, the travelling allowances were not emoluments."*

75. Lord Pearce, concurring, highlighted the inequity of taxing the expenses at page 257:

> *"Suppose that there were some constantly recurring emergency in the most distant part of Pembroke which he was constantly expected to deal with gratuitously and without any extra pay, but he was merely reimbursed for the railway tickets which he had taken to get there and back (or only for two-thirds of his rail tickets so that each time he incurred an actual loss). In that case he would admittedly, if the argument of the Revenue is correct, pay tax on all the reimbursements or partial reimbursements of his railway tickets.*
>
> *Such a situation would be obviously unjust. If it be correct, it is clear that something has gone seriously wrong with the enactments or the case law or with both. It must be disturbing to the citizen if such a situation can arise. Such an injustice is not in the interests of anyone - certainly not of the Revenue, since injustice causes evasion. Each year there is an adjustment of the mechanism of taxation wherever that is necessary to ensure that ingenious schemes of avoidance shall not succeed. There is a corresponding duty to adjust the mechanism where it is found to be creating a clear injustice"*

76. The learned judge continued at page 258:

"The reimbursements of actual expenses are clearly not intended by "salaries", "fees", "wages" or "profits." It is contended that they are "perquisites." The normal meaning of the word denotes something that benefits a man by going "into his own pocket." It would be a wholly misleading description of an office to say that it had very large perquisites merely because the holder had to disburse very large sums out of his own pocket and subsequently received a reimbursement or partial reimbursement of these sums. If a school teacher takes children out for a school treat, paying for them out of his (or her) own pocket, and is later wholly or partially reimbursed by the school, nobody would describe him (or her) as enjoying a perquisite. In my view, perquisite has a known normal meaning, namely, a personal advantage, which would not apply to a mere reimbursement of necessary disbursements. There is nothing in the section to give it a different meaning. Indeed, the other words of the section confirm the view that some element of personal profit is intended."

77. Lord Donovan, concurring said at page 260:

"On the footing that the travelling expenses paid to Dr. Owen simply reimbursed what he had spent (or part of what he had spent) on travelling in performance of his duties, I do not think they should be regarded as emoluments of his employment within the meaning of Schedule E. I think the case is distinguishable from Fergusson v. Noble where a cash allowance was paid to the employee which, although he may have been required to spend it on buying a civilian suit, yielded a benefit or advantage to him.

78. However, and notwithstanding that the reimbursement of travel and subsistence by a body corporate to any of its directors or employees may not provide any personal benefit to such individuals, the deeming provision contained within TCA, section 117 treats such payments to be perquisites for the purposes of TCA, section 112. Therefore, while such expenses fall within the charge to tax, TCA, section 117 contains a corresponding entitlement to claim a deduction for expenses that were incurred wholly, exclusively and necessarily in the performance of the duties of the office or employment pursuant to TCA, section 114.

Application of the Law

79. In satisfaction of its contractual obligations, the Company undertook to provide a suitably qualified person to perform engineering services. The Appellant, as the only employee, was therefore required to travel and work in **Locations Redacted** as the bespoke nature of the engineering services required an onsite presence and therefore could not be performed from his base in **Location Redacted**.

80. The imposition of tax on the reimbursement of the vouched expenditure on accommodation constituted a personal cost for the Appellant as the cost of accommodation was in addition to the cost of maintaining his own residence in **Location Redacted**. Furthermore, it would be arbitrary to differentiate the cost of hotel accommodation from private rented accommodation incurred while working in **Location Redacted** as both serve the same purpose. Furthermore, the vouched expenditure on travel, car hire and flights was also unavoidable and as such no "*personal advantage*" was "*yielded*"

81. It is irrelevant that there was an element of duality of purpose specifically in context of the accommodation costs and to the extent that the vouched expenditure merely placed the Appellant in a position to perform his duties as the crucial test as set out in *Owens v Pook*, is that to fall within the charge to tax pursuant to TCA, section 112, was that Appellant "*yielded a benefit or advantage*".

82. Therefore, the Appellant incurred a cost while on duty on behalf of his employer. Had there been no requirement to work on site, the Appellant would have saved on that expenditure. There was no evidence that the Appellant profited from the reimbursement of vouched expenses. On the contrary such reimbursement left him in a neutral position and therefore operated "*to fill a hole in his emoluments by his expenditure".*

83. However as considered above, the application of TCA, section 117 treats the payments of expenses by a body corporate to any of its directors or employees as "perquisites" and as a consequence such payments fall within the charge to tax notwithstanding that no personal benefit was derived.

84. In relation to the unvouched subsistence expenses, while paid in accordance with the Respondent's published guidelines, such payments fall within the charge to tax as indicative expenditure that the Appellant would have had to incur as a basic cost for human hydration and nutrition to sustain normal life regardless of whether he was in Ireland or indeed in Europe.

85. Similarly, the expenditure on light and heat was a cost that the Appellant would have incurred had he been residing at his home in **Location Redacted** and therefore a personal benefit was derived.

86. In this regard, it is only necessary to determine whether the Appellant has an entitlement to claim a deduction for the vouched expenditure as expenses incurred wholly, exclusively and necessarily in performing the duties of his office or employment in accordance with TCA, section 114.

87. However, and notwithstanding that the Appellant relied on the representations of Respondent when claiming the reimbursement of the unvouched expenses, the jurisdiction of the Appeal Commissioners does not extend to supervising the administrative actions or any purported inequity in the Respondent's application of the tax code. As such no consideration of such expenditure can be considered under TCA, section 114.

Deductibility of Expenses

88. The rules governing the procedure for deducting expenses against employment income is set out in TCA, section 114 and provides:

> *"Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed".*

89. The Respondent confirmed at the hearing that "*a myriad of claims would arise*" under TCA, section 114 which prompted the publication of guidelines dispensing with the statutory obligation of a formal claim process. In the Respondent's publications, specifically 'SP IT/2/07' paragraph 2.1 it states:

> *"there exists a long-standing practice under which employers may reimburse tax-free to office holders and employees the expenses of travel (and subsistence relating to that travel) subject to certain conditions being fulfilled."*

90. The entitlement to the deduction for travel expenses is with reference to the first limb of the rules governing expenses and requires that a person "*is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties".* As such, travelling expenses can be distinguished from the second limb of the rule concerning other employment type expenses which requires strict conformance with the obligation for the expense to be incurred "*wholly, exclusively and necessarily in the performance of those duties".*

91. As such the Respondent through its assortment of guidance notes, permits an employer to pay certain employment expenses. However, such a procedure is not easily reconciled with the express statutory wording of TCA, section 117 and thereafter TCA, section 114 which requires a formal claim process.

92. Furthermore, while there has been no substantial consideration of the allowability of subsistence payments in this jurisdiction, regard can be had to *Ricketts v Colquhoun* 10 TC 118 where Viscount Cave, L.C. in disallowing subsistence payments observed at page 134:

> *"A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance."*

93. This interpretation is endorsed in subsequent jurisprudence opened by the Respondent. To this extent and as noted by Vinelott J. in *Elderkin v Hindmarsh* [1988] STC 267 at page 270, the UK equivalent of TCA, section 114 is so stringent *"that in many, if not in most, cases the subsection gives the taxpayer little or no relief."*

94. Highlighting the strict nature of expense deductibility, Rowlatt J. in *Nolder v Walters* 15 TC 380, observed at page 388:

> *"his board and his lodging in a sense, eating and sleeping, are the necessities of a human being, whether he has an office, or whether he has not, and therefore, of course, the cost of his food and lodging is not wholly and exclusively laid out in the performance of his duties, but the extra part of it is."*

95. In considering that judgment, Maguire, Income Tax 2018, Butterworths at paragraph 10.302 expresses the view that:

> *"in general, subsistence costs should be allowed if they are regarded as an inherent element of the expense of travelling. In Nolder v Walters, Rowlatt J observed:*
>
> > *I think it always has been agreed, that when you get a travelling office, so that travelling expenses are allowed, those travelling expenses do include the extra expense of living which is put upon a man by having to stay at hotels and inns, and such places, rather than stay at home.*
>
> *The question of hotel expenses incurred while travelling on the employer's business raises a further question related to 'home savings'. While Rowlatt J accepted that the extra expense which the employee had to incur on hotel, etc expenses were deductible under Sch E, he considered that the cost of food and lodging was not wholly and exclusively laid out in the performance of the duties, but only the extra part of the cost. This view seems to overlook the fact that the Sch E expenses rule does not impose a 'wholly and exclusively' requirement in respect of travelling*

expenses. Further, it seems likely that if the 'wholly and exclusively' rule did apply, the duality principle would strictly mean that no part of the cost should be allowed"

96. Duality of purpose, in context of employment expenses, has been considered on numerous occasions and most recently by the High Court England and Wales in *Revenue & Customs Commissioners v Banerjee* 80 TC 205, where Henderson J observed at 216:

> *"Wrapped up in this second requirement are a number of important distinctions. Expenditure which is not incurred in the actual performance of the taxpayer's duties, but merely in order to put the taxpayer in a position to perform his or her duties, is not deductible. Again, any duality of purpose is fatal: that is the force of the word "exclusively".*

97. The same approach was adopted in *Revenue & Customs Commissioners v Banerjee* [2011] 1 All ER 985 in the appeal of that decision to the UK Court of Appeal where Rimer J. said at page 998:

> *"As for Henderson J's decision, Mr Grodzinski pointed out that the judge (at [29]) correctly reminded himself that any duality of purpose in the incurring of the expenditure was fatal to the satisfaction of the 'exclusively' requirement"*

98. In this regard, the word "*exclusively*" is a notoriously strict adverb and in the absence of any Irish authority that permits the deductibility of subsistence expenses, I am of the view that I am precluded from permitting the deduction of such expenses as to do otherwise would usurp the role of the Oireachtas contrary to the Constitutional scheme.

99. A further issue, addressed in the *Banerjee,* was the nature of obligations imposed by the employment contract. In that case, the UK Court of Appeal held that the expenses were incurred in performance of the prescribed contractual obligations. As such, this development required a consideration of TCA, section 114 and the extent to which the employment contractual conditions imposes the obligation to incur expenses in the performance of the duties of employment. However, as the Appellant did not provide any evidence in support of his contractual obligations, no analysis of this aspect of law could be considered.

100. Therefore, the current statutory structure of TCA, section 114, as highlighted in the jurisprudence opened by the Respondent, limits the entitlement to a deduction for travel expenses "*in the performance of the duties*" of an office or employment to a very limited number of taxpayers. I believe that the authorities considered in this determination show that the current administrative arrangements, which provides for less onerous conditions, cannot be reconciled with the express wording of the legislation.

101. Similarly, an amendment of section 114 would also be required to permit a deduction for subsistence expenses incurred in the performance of the duties of employment as the adverb "*exclusively*" forbids any duality of purpose. In addition, the jurisprudence relied upon by the Respondent clearly demonstrates that any expenditure on accommodation and subsistence incurred "*before or after*" the performance of duties of the office or employment does not qualify for a deduction under TCA, section 114.

102. Finally, the Respondent's discretionary arrangements which dispenses with the formal claims process and authorises employers to reimburse certain travel and subsistence expenditure without deduction of tax cannot be reconciled with the legislation as it currently stands. These arrangements could only be continued if there were enacted specific statutory amendments similar to the amendments recently introduced permitting the payment of travel and subsistence allowances to, *inter alia*, state examiners and non-resident directors.

Conclusion

103. The deeming provisions contained in TCA, section 117 treat the payment of expenses by a body corporate to any of its directors or employees as a perquisite for the purposes of TCA, section 112 notwithstanding that no personal benefit may have been derived. Furthermore, as none of the vouched expenditure was incurred wholly exclusively and necessarily in performing the duties of the office or employment, no claim can be made seeking a deduction for such expenses in accordance with TCA, section 114.

104. The jurisdiction of the Appeal Commissioners does not extend to supervising the administrative actions or any purported inequity in the Respondent's application of the tax code. As such, the payment of the unvouched travel and subsistence payments in accordance with the Respondent's published guidelines fall within the charge to tax as perquisites with no corresponding entitlement to a deduction for those expenses pursuant to TCA, section 114.

105. This appeal is therefore determined in accordance with TCA, section 949AK and as a consequence the assessments for the years ended 31st December 2009 to 31st December 2011 stand.

Appeal Commissioner
24th September 2018

No request was made to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.