



# The September Fest 2020

## Tax Stream

### Tax on Property 2020 Update

#### **Presenter:**

Daragh O'Shaughnessy - AITI, Chartered Tax  
Advisor

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## Tax on Property: 2020 Update

Daragh O'Shaughnessy  
O'Shaughnessy Tax

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## Introduction

- Common reason for personal tax advice
- Recent appeals cases on common issues:
  - Trading income v rental income
  - Meaning of "sole or main residence"
  - Rental income and travel expenses
  - Property ownership tax trigger points

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## Trading income v rental income

- Public controversy over Airbnb
- Published Revenue guidance on issue
- Independent analysis in TAC case 09TACD2020
- Emergency accommodation agreement with DCC
- Appellant claimed as rental income

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## Trading income v rental income

- 14 beds for €10,220 per month
- House rules for residents and staff displayed
- Complaints procedure
- Curfew imposed
- Notification of absences to DCC
- 24 hour staff and room for visiting staff
- Light/heat/furniture/cutlery/bed linen changing

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## Trading income v rental income

- Section 75 TCA
  - Case V = "rent" or "easement"
- Section 96 TCA
  - "Rent" includes *"any rentcharge, fee farm rent and any payment in the nature of rent"*
  - "Easement" includes *"any right, privilege or benefit in, over or derived from premises"*

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## Trading income v rental income

- J Twomey (IOT) v Bernard Hennessy – HC 2007
  - "rent" = "a payment by a lessee to a lessor in the context of a landlord and tenant relationship"
  - This relationship is "crucial ingredient"
- Irish Landlord & Tenant Law - Wylie
  - Lodger v tenant
  - Control over premises
  - Independent possession

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## Trading income v rental income

- No landlord-tenant relationship in TAC case
  - Neither DCC nor occupants took possession of property
  - Services provided more extensive than expected of landlord
- Possible benefits to trading classification
  - Income tax losses
  - CGT Retirement Relief
  - CGT Entrepreneur's Relief
  - CAT Business Relief

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## “Sole or main residence”

- Important concept in CGT/CAT/IT reliefs
- No statutory definition
- Tax appeal case 92TACD2020 considered for LPT purposes

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## “Sole or main residence”

- LPT exemption for property purchased in 2013
- Withdrawn if sold or no longer “sole or main residence”
- Appellant moved to USA in March 2014
- Appellant claimed Irish house remained “main residence”

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## “Sole or main residence”

- Frost v Feltham – UK 1980
  - Mortgage interest relief case – pub landlord living at premises
  - “Main” in “sole or main residence” = “principal” or “most important”
  - Question not determined solely by how time divided between properties

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## “Sole or main residence”

- AC agreed that Irish property was “main residence”
- Important supporting considerations:
  - Not entitled to residence in USA
  - Regarded himself as temporarily abroad
  - Visited property when he could
  - Kept property vacant
  - Maintained property

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## Rental income & travel expenses

- Section 97 TCA – specific and general expenses
- Only published view of travel expenses is on foreign rental income
- 130TACD2020 claim for travel to meet possible tenants/collect rents/repairs/prep between lettings
- Vouched expenses allowed

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### Property ownership & tax triggers

- Tax liability arises at different points for different taxes – CGT/VAT/Stamp Duty/CAT
- 91TACD2020 concerned with ownership for LPT
- Contract October 2013 and closing January 2014
- LPT exemption only applied if she purchased the property in 2013

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### Property ownership & tax triggers

- Tempamy v Hynes – Supreme Court 1976
  - Beneficial interest in property passes with consideration
- S.52 Land & Conveyancing Law Reform Act 2009
  - Beneficial interest passes with enforceable contract
  - Contract can specify otherwise
- Appellant claimed ownership in 2013 based on LCLRA

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### Property ownership & tax triggers

- LPT legislation does not refer to “beneficial interest”
- Liable person has “immediate possession”
- Appellant did not have possession until early 2014

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## Property ownership & tax triggers

- CGT – date of disposal
- VAT – time of supply
- CAT – date of gift or inheritance
- Stamp duty – execution of instrument

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## Further questions?

***Daragh O'Shaughnessy***  
***O'Shaughnessy Tax***  
***37 Adelaide Road***  
***Dublin 2***

**T:** 087-6182261  
**E:** daragh@oshaughnessytax.ie

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# **TAX ON PROPERTY**

## **2020 UPDATE**

**Daragh O'Shaughnessy**  
**O'Shaughnessy Tax**

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## Tax on Property – 2020 Update

**Daragh O'Shaughnessy**  
**O'Shaughnessy Tax**

### **Background**

Even in these extraordinary times, the treatment of property transactions remains one of the most prominent reasons for clients to seek personal tax advice – whether on letting, buying, selling, gifts or inheritances.

A number of recent tax appeals have given an insight into Revenue's approach to certain areas of taxation on property, and the interpretation of the Appeals Commissioners on matters of potential dispute.

The aim of this presentation is to review the relevant parts of the recent determinations with a view to highlighting areas that may assist in advising our personal tax clients on commonly raised issues.

### **Trading income v rental income**

Discussions on the technical classification of different sources of income for tax purposes are usually confined to academic texts and professional journals. However, a few years ago the precise tax treatment of income from lettings through Airbnb was widely discussed in the mainstream media following the submission by the company of certain client details to Revenue.

The discussion largely centred on whether or not income received from such lettings could in principle qualify for "rent a room" relief as provided for in Section 216A TCA. Following the controversy, Revenue released a guide on the broader issue of how income received for the provision of certain types of accommodation should be classified for tax purposes.

This is the question that was subject to review in a recent case before the Tax Appeals Commission (case number 09TACD2020)

### *Background details*

The Appellant in this case provided emergency accommodation under an agreement with Dublin City Council (DCC) and declared the income therefrom as rental income taxable under Schedule D Case V. The Appellant had therefore sought to shelter this income from tax using Section 23 relief available to him from the purchase of another property.

Revenue's view was that the income from DCC arose from the operation of a trade and as it was taxable under Schedule D Case I, the income could not be sheltered by Section 23 relief.

### *Agreement between Appellant and DCC*

The contract between the Appellant and DCC obliged the Appellant to provide accommodation and bed occupancy for up to 14 homeless persons for a monthly fee of €10,220, in accordance with DCC's terms and conditions for such accommodation. These terms and conditions included the following obligations:

- To display clear house rules in writing for residents and staff
- To provide a complaints procedure for residents in writing
- To make any bed available for a referral by DCC on being notified before 2am
- To impose a curfew for residents of 11pm Monday to Thursday and 1 am Friday to Sunday
- To notify DCC on a resident leaving or not being in occupation for more than 24 hours
- To make a room available for visiting staff, e.g. doctor, nurse or social worker
- To provide Garda-cleared staff on a 24-hour basis to ensure the implementation of house rules
- To provide lighting, heating, furniture including television, bed linen, cutlery, washing machine and utilities. There was a specific obligation for the Appellant to change bed linen at least once a week and every time a new resident was allocated a place

In practice, the Appellant himself was present on the premises during the working day, had a secretary on site too and engaged a caretaker to supervise the premises at night and at the weekend. The Appellant retained control of the common areas and the visiting rooms for doctors etc and the kitchen. He had access to all rooms in the event of an emergency and maintained control over the premises subject to some degree of oversight by DCC in terms of routine inspections and reporting. He provided heating and lighting to the entire property, cleaning services for the communal areas and employed a housekeeper who washed and dried the bed linen.

### *Legislation*

In his analysis, the Appeals Commissioner quoted from the legislation which provides definitions of the relevant terms in deciding whether income is considered rental income or not.

Section 75 TCA states that *"... the profits or gains arising from ... any rent in respect of any premises, and ... any receipts in respect of any easement ... shall be chargeable under Case V"* of Schedule D.

The definitions of "rent" and "easement" are therefore very important in determining whether or not a particular source of income is taxable under Case V.

Section 96 TCA provides these definitions as follows:

*"'easement' includes any right, privilege or benefit in, over or derived from premises"*

*“rent’ includes ... any rentcharge, fee farm rent and any payment in the nature of rent, notwithstanding that the payment may relate partly to premises and partly to good and services ...”*

The Appeals Commissioner noted that the precise nature of rent was not defined by the Oireachtas in the above extract and therefore recourse must be made to the interpretation of the courts for assistance.

#### *Twomey v Hennessy*

In the 2007 case of *J Twomey (Inspector of Taxes) v Bernard Hennessy*, the High Court considered whether income from the provision of accommodation should be taxed as trading income or rental income. The accommodation in question was a single premises containing 26 self-contained one- to three-bed units which were used to provide self-catering accommodation to tourists, business travellers and third-level students. In that case, it was the taxpayer who was arguing that the income was trading income and Revenue who argued that the income was rental income. The High Court found that the income was trading income. In her judgement, Laffoy J stated that

*“... the definition of ‘rent’, in my view ... means a payment by a lessee to a lessor or landlord in the context of a landlord and tenant relationship. That is both its ordinary or colloquial meaning and what lawyers and property experts would understand it to mean”*

She referred to the existence of a landlord and tenant relationship as *“the crucial ingredient”* in determining whether a payment falls within the definition of “rent” for the purposes of Section 96 and found that this “crucial ingredient” was missing in the case before her.

#### *Legal distinction between tenants and lodgers*

Revenue’s submissions in the recent tax appeals case had referred to the legal commentaries and texts on landlord and tenant law and specifically the factors that render a particular occupation as that of a tenant rather than a lodger. Their contention was that it is the retention of control by the owner over the premises occupied by a lodger and the lodger’s lack of possession independent of the owner which distinguishes a lodger from a tenant. Revenue noted that the same principle would apply to similar occupiers such as hotel residents and guests. A lodger or hotel resident’s right to occupy a part of building does not amount to “possession” as the relevant part of the property remains under the “control” of the grantor of the occupational rights. A tenant on the other hand, has exclusive possession as he is in control and can keep the landlord out of the area under his control for as long as his tenancy lasts.

### *Appeals Commissioner conclusion*

The Appeals Commissioner considered the nature of the relationship between the Appellant and DCC and the specific obligations undertaken by the Appellant in the agreement with DCC.

The Appeals Commissioner agreed with Revenue's argument that a well-established feature of a lease is the exclusive possession of the property by the tenant for the duration of the lease. He found that it was clear that in this case, DCC never went into possession of the property nor did the occupants have exclusive occupation of the property.

The Appeals Commissioner considered the services provided by the Appellant under the agreement with DCC, including the provision of a person on the premises 24 hours a day for health, safety and security reasons; the provision of bed linen; the setting of a curfew and notification to DCC when an occupant did not attend for more than 24 hours. He found that these services were significantly more extensive than what would be expected under a landlord and tenant relationship.

On the basis of the above, the Appeals Commissioner found in Revenue's favour that the income from the property should be taxed as trading income under Schedule D Case I

### *Possible benefits to classification as trading*

In this case, the taxpayer wanted to argue that income from the provision of accommodation should be taxed as rental income rather than trading income due to the tax reliefs available to him which could only be used against rental income. However, the classification of income from a property as trading income could mean the opportunity to avail of a variety of other tax reliefs:

- While losses incurred on letting out a rental property may be only be offset against rental profits, losses incurred from a trade of providing accommodation may be offset against total income in a given year
- The definition of "qualifying assets" for CGT Retirement Relief includes assets used for a trade but excludes assets held as investments
- The definition of "qualifying business" and "chargeable business assets" for CGT Entrepreneur's Relief excludes letting businesses and assets held as investments
- The definition of "relevant business property" for CAT Business Relief excludes businesses that consist wholly or mainly of making or holding investments, e.g. a business of letting property

Therefore, the reasoning argued by Revenue in the above case, and in particular the rationale of the High Court in *Twomey v Hennessy*, should be closely studied in advising clients on the possible capital tax planning options that may be available to them in the sale of assets used for businesses related to the provision of residential accommodation.

### Meaning of “sole or main residence”

The concept of what constitutes a person’s “main residence” is an important one for a variety of tax reliefs in Irish legislation:

- The CGT PPR relief under Section 604 TCA provides relief from CGT on a gain arising on the disposal of a property occupied as a person’s “*only or main residence*”
- The dwellinghouse exemption under Section 86 CATCA provides an exemption from CAT on the inheritance of a property that was occupied as the “*only or main residence*” of the deceased and the successor
- The rent-a-room relief exemption under Section 216A TCA provides an exemption from income tax on income from the provision of accommodation in a person’s “*sole or main residence*”
- The help-to-buy scheme under Section 477C TCA provides a subsidy to first-time buyers in purchasing or building a property to be occupied as their “*sole or main residence*”

It is perhaps surprising that there is no statutory definition of what constitutes a person’s “only or main residence” or “sole or main residence” given the prevalence of these terms in the legislation governing commonly claimed tax reliefs and exemptions.

A recent case before the Tax Appeals Commission (case number 92TACD2020) considered this issue in the context of an exemption from Local Property Tax.

#### *Background details*

The Appellant purchased a residential property and claimed an exemption from Local Property Tax under Section 8 of the Finance (Local Property Tax) Act 2012.

Section 8 of that Act provided an ongoing exemption from LPT for first time buyers who purchased their property in the year 2013. The Act provided that this exemption would cease to apply if the property was sold or ceased to be “*used as the sole or main residence*” of the claimant.

In this case, the Appellant claimed the relief and then moved to live and work in the USA in March 2014. Revenue therefore sought to withdraw the exemption from LPT on the basis that the property in Ireland had ceased to be “*used as the sole or main residence*” of the Appellant.

The Appellant disputed this and argued that just because he mainly resided in the USA, this does not mean that his “main residence” was in the USA. He advised that his trip to the USA was a long term vacation and that he had paid taxes, received mail, paid water and electricity charges, paid his TV licence etc at the Irish property. He advised that for a variety of reasons, he did not on a daily basis leave for work from that address, but that did

not mean it was not his main residence. He advised that while he was temporarily abroad, he visited the Irish property when he could, kept the property vacant and continued to maintain it.

He noted that he owned only one property anywhere in the world and that property was the one in Ireland.

#### *Appeals Commissioner analysis*

The Appeals Commissioner noted that the question was not necessarily whether or not the property was his only or main residence, but whether or not it was used as such, and noted that *“the word ‘used’ does not imply any necessity for successive or permanent deployment”*

It was accepted that the property could not be considered his “sole” residence while he worked and resided in the USA. In the absence of a statutory definition or Irish judicial guidance on the meaning of “main residence”, the Appeals Commissioner therefore considered the guidance from the UK courts with respect to similar provisions in UK tax law. In particular, the Appeals Commissioner considered the case of *Frost v Feltham* [1980] 55 TC 10

#### *Frost v Feltham*

The appellant in this 1980 UK case was a self-employed licensee of a pub in Essex for 17 years, under an agreement which required him to live on the premises although this condition was not rigidly enforced. He bought a house in Wales with his wife which they furnished and equipped as a home. They spent “some time” there each month in the year 1976/77 (which was taken by the court to mean two or three days a month) but spent most of their time living at the pub in Essex..

In the absence of a statutory definition of the word “main” in the phrase “only or main residence”, the judgement noted that the word should be interpreted in line with the Oxford English Dictionary as meaning “principal” or “most important”. It was found that where someone lives in two houses, the question as to which is the principal or most important one cannot be determined solely by reference to the way he divides his time between the two, and judgement was found in favour of the taxpayer.

#### *Appeals Commissioner conclusion*

The Appeals Commissioner agreed with the principle in *Frost v Feltham* that “main” can be interpreted to mean “principal” or “most important” in the context of determining a person’s “main residence”. He expressed the view that the Appellant regarded his property in Ireland as his principal or most important residence, and noted that this view was supported by the important facts that the Appellant:

- Was not entitled to residency in the USA
- Regarded his status as being temporarily abroad

- Visited the property when he could
- Kept the property vacant
- Continued to maintain the property

The Appeals Commissioner therefore found in favour of the taxpayer on the basis that the property had not ceased to be used as his main residence and he was entitled to a continued exemption from LPT.

### **Rental income and travel expenses**

Section 97 TCA sets out the details of what expenses are allowable as deductions in calculating taxable rental income. Some expenses are specifically mentioned e.g. rent payable on a head lease, interest on a loan used to purchase the property, repairs, maintenance and insurance. However, many allowable rental expenses fall within the general category of costs of *“management of the premises”*.

Revenue have occasionally published details of specific expenses that will be accepted as falling within the scope of this general deductible category, e.g. premiums on mortgage protection policies, accountancy fees for the preparation of rental accounts etc.

However, Revenue’s published view on the deductibility of travel expenses incurred with respect to a rental property relates only to foreign rental properties. The Revenue website guide on deductible expenses against foreign rental income states that *“you can only claim for the cost of travelling to your property if the journey is undertaken wholly and exclusively for the purpose of earning rental income from the property”*.

Although it is not specified, it might be inferred that this principle should also apply to travel expenses incurred for the purpose of earning rental income from a property located in Ireland. In practice, many landlords with Irish properties do claim a deduction for such travel expenses.

One such landlord was the Appellant in a recent case before the Tax Appeals Commission (case number 130TACD2020). The Appellant owned a number of rental properties in Ireland and claimed a deduction based on the flat rate civil service kilometric rates for mileage undertaken for the purposes of the rental business. The trips were undertaken to meet prospective tenants, to tidy and redecorate properties between lettings, to collect rents and to carry out maintenance and repairs on the properties.

Revenue did not allow a deduction for these costs based on the flat rate scheme, but did allow a deduction based on the actual amount of costs incurred. This published determination by TAC therefore provides a welcome confirmation in the public domain of Revenue’s view towards the deductibility of travel costs for domestic rental purposes.

The Appellant had also claimed a deduction against his rental income for the cost of insurance, road tax, NCT, repairs and maintenance with respect to his motor vehicle and appealed Revenue's refusal to allow same. The Appeals Commissioner agreed with Revenue's refusal but indicated that this was on the basis that no receipts or other documentation had been produced as evidence for these expenses. While this does not necessarily mean that such expenses would have been allowable if they had been supported by documentation, it certainly hints at that being the case.

### **Property ownership and tax trigger points**

There are a number of different transactional taxes that can be triggered by the change in ownership of a property – CGT, VAT, stamp duty and perhaps CAT. However, the precise point at which ownership of the property can be said to have passed from one person to another is also important for taxes associated with the ownership and use of the property, e.g. income tax or Local Property Tax.

This issue came under scrutiny at a recent Tax Appeals Commission case (case number 91TACD2020). The Appellant purchased a residential property and claimed an exemption from Local Property Tax under Section 8 of the Finance (Local Property Tax) Act 2012. Section 8 of that Act provided an ongoing exemption from LPT for first time buyers who purchased their property in the period from 1 January 2013 to 31 December 2013 and occupied it as their sole or main residence. The matter in dispute in this case was precisely when the Appellant had purchased the property – she claimed it was in the year 2013, while Revenue claimed the purchase occurred in the year 2014.

The Appellant's case was largely based on the terms of the Land and Conveyancing Law Reform Act 2009 (LCLRA), which made some fundamental changes with regard to the law governing changes in ownership of property. Section 52 LCLRA provides that the entire beneficial interest in a property being purchased passes to the purchaser on the making of an enforceable contract, unless the contract states otherwise. Prior to the enactment of the LCLRA, the beneficial interest in a property was considered to pass only to the extent that consideration had been paid – this doctrine had been established by the Supreme Court in the 1976 case of *Tempany v Hynes*.

The Appellant signed an irrevocable contract to purchase the property in October 2013. The contract did not contain any provisions to disapply Section 52 LCLRA. She paid LPT on the property for the year 2014 on the understanding that she was the liable person on the liability date of 1 November 2013. The formal closing and conveyance of the property took place on 16 January 2014.

Revenue agreed that under property law, the Appellant may have been entitled to the beneficial interest in the property from October 2013. However, the LPT legislation does not refer to the "beneficial interest" in a property in determining who is liable to LPT or entitled to an exemption on a particular date. Rather, in the definition of "liability date", the LPT legislation refers to the person who holds an interest in the property



entitling them to *“the immediate possession of such property for a period that may equal or exceed 20 years”*. Revenue’s position was that the Appellant was not entitled to *“immediate possession”* of the property until the sale closed on 16 January 2014 and she was not therefore entitled to the exemption as she did not become the liable person for LPT purposes until after 31 December 2013.

The Appeals Commissioner agreed with Revenue’s position and upheld the refusal of the exemption. The LPT for the year 2014 should in fact have been paid by the vendor of the property as the liable person on 1 November 2013.

This result is a reminder that the trigger point for different taxes can arise at different stages of a property transaction, depending on the tax:

- CGT is triggered by the “date of disposal”. This is generally the date that an unconditional contract for the sale of an asset is signed (or a condition precedent is met in a conditional contract). The tax trigger point for CGT was therefore essentially unaffected by the changes made by Section 52 LCLRA.
- VAT is triggered by the “time of supply”. The supply of goods is generally considered to take place when the purchaser acquires the right to dispose of the goods as owner themselves. Prior to the enactment of Section 52 LCLRA, the time of supply in a property transaction was usually considered to be the date of closing rather than the date that the contract was signed. In Tax Briefing 81, Revenue confirmed that their view was that the time of supply for VAT purposes would not be affected by the enactment of LCLRA, as a purchaser would still not acquire the right to dispose of a property as owner until the property was formally conveyed to them.
- The transfer of property by way of a gift or inheritance would not usually involve the full formal process of pre-contract negotiations and contract signing followed by a conveyance which occurs in arms-length property transactions. The effect of Section 52 LCRA on contracts would therefore be unlikely to be relevant to transactions involving a gift or inheritance. In any event, CAT is triggered by a person becoming beneficially *“entitled in possession”* to a benefit – the reference to “possession” being a requirement for a CAT liability means that CAT is likely to arise only on the formal conveyance of a property in a similar way to the operation of the LPT legislation.
- Stamp duty is technically a tax on documents rather than a tax on transactions. A charge to stamp duty generally arises on an instrument of conveyance or transfer which has the effect of implementing a contract for the transfer of property. In Tax Briefing 5/2010, Revenue confirmed their view that this position was not affected by the enactment of Section 52 LCLRA.