THE HIGH COURT

[2026] IEHC 448

[Record No. 2024/186 R]

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 949 AQ OF THE TAXES CONSOLIDATION ACT, 1997, AS AMENDED

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

AND

AVAYA INTERNATIONAL SALES LIMITED

RESPONDENT

JUDGMENT of Ms Justice Marguerite Bolger dated the 3rd of July 2026

1. This is Revenue's appeal by way of case stated from a determination of the Tax Appeal Commissioners (hereinafter referred to as "TAC") of 13 December 2023 in relation to the tax treatment of foreign royalties withholding tax (hereinafter referred to as "FWHT") incurred on royalty income earned abroad. For the reasons set out herein, I have found that each of the points of law on which this Court's opinion is sought, identifies errors of law.

2. The appellant will be identified as "Revenue" and the respondent as "Avaya".

The Case Stated

3. Revenue formulated points of law in its request to TAC to state a case. Avaya made representations objecting to them, which were not accepted by the Commissioner, although the Commissioner did accede to Avaya's request to append the transcript of the two-day oral hearing before TAC to the case stated. The points of law on which TAC request this Court's opinion are the points as proposed by Revenue, objected to by Avaya and agreed to by the Commissioner without amendment.

Material facts

4. The material facts, as found by the Commissioner, give a good summary of the background to the case and I therefore set them out below (other than 12.9 and the tables included therein as I do not consider the figures involved to be relevant to the legal issues on which this Court is to furnish its opinion to TAC).

"*12.1 The Appellant is an Irish registered and tax resident company whose principal activity consists of the provision of communication solutions to its international client base. It also has a separate treasury trade.*

12.2 The Appellant's revenue stream from its principal activity comprises of a number of different elements which include the sale of communication hardware, software and associated services.

12.3 In carrying out its principal activity, the Appellant licences technology solutions to licensees which are tax resident in foreign jurisdictions.

12.4 Licensees in a number of those foreign jurisdictions deduct RWHT at source in accordance with local withholding tax rules.

12.5 Where Licensees deduct RWHT in accordance with local tax rules, they provide the Appellant with a deduction certificate which evidences the payment of the RWHT to the foreign tax authority.

12.6 During the Relevant Periods the Appellant licenced its technology solutions to Licensees which were resident in various overseas territories outside of North America and Mexico.

12.7 The Appellant does not have a branch or permanent establishment for Corporation Tax purposes in any of the overseas territories where the Licensees who withhold RWHT are tax resident.

12.8 In each of the Relevant Periods, the Appellant was in receipt of foreign source royalties in respect of the licenced technology solutions from *customers in treaty countries and also from customers in non-treaty countries.*

12.11 The Appellant was not in a Corporation Tax payable position for the Relevant Periods. This was due to the Appellant's Corporation Tax liability for the accounting periods ending 30 September 2010 and 30 September 2011 being fully offset by R&D tax credits and the Appellant's taxable profits arising in the other accounting periods being fully sheltered by relevant trade charges and/or R&D tax credits.

12.12 In calculating its adjusted taxable trading income for the Relevant Periods, the Appellant claimed a tax deduction for the RWHT incurred as set out in Table A.

12.13 The Respondent has denied a tax deduction for the RWHT incurred by the Appellant as set out in Table A.

12.14 The RWHT which the Appellant incurred during the Relevant Periods was imposed on gross royalties payable in all jurisdictions save and except for Argentina.

12.15 The Appellant has not established that the RWHT incurred by the Appellant during the Relevant Periods in Argentina was imposed on gross royalties payable."

Determination of TAC

5. The Commissioner found that Avaya was entitled to a deduction pursuant to s. 81 of the Taxes Consolidation Act 1997, as amended (hereinafter referred to as "the Act") in respect of FWHT it had incurred in all relevant jurisdictions save and except for Argentina (for the reasons identified at 12.15 above, which issue is not the subject of the within judgment).

Points of law on which the opinion of this Court is sought

6. One of the 11 points was, by agreement, not pursued, leaving the following 10 points;

"37.1 Whether the Commissioner was correct in determining that the Appellant is entitled to a deduction pursuant to section 81 TCA 1997 in relation to the foreign royalty withholding tax (RWHT) suffered by the Appellant in all jurisdictions save and except for Argentina.

37.2 Whether the Commissioner was correct in determining that there is no general principle of law which specifically denies a deduction for taxes *in accordance with the prescribed rules as set out pursuant to section 81 TCA 1997, where those taxes are not calculated after the ascertainment of profit.*

37.3 Whether the Commissioner erred in her interpretation and application of the relevant case law to the facts in this case when determining deductibility of RWHT pursuant to section 81 TCA 1997.

37.4 Whether the Commissioner was correct in determining that the absence of volition was not a significant factor in determining whether the RWHT was deductible pursuant to Section 81 TCA 1997.

37.5 Whether the Commissioner was correct in determining that, based on the relevant case law, the determinant or test is whether the tax in question was a tax on profits (which would not be deductible) or a tax incurred in earning profits (which should be deductible).

37.6 Whether the Commissioner was correct in proceeding to determine deductibility for foreign RWHT pursuant to section 81 of the TCA 1997 on the basis that the Appellant was not in a position to derive any benefit from double taxation relief pursuant to Schedule 24 of the TCA in relation to the RWHT incurred, in circumstances where the Commissioner stated that she had made no specific findings on this point.

37.7 Whether the Commissioner was correct in interpreting section 81 of the TCA 1997 as effectively permitting a deduction of foreign RWHT as being in the nature of an alternative or complementary scheme of relief to the specific provisions of Part 35 TCA 1997 and Schedule 24 TCA 1997 and section 77(6B) TCA 1997.

37.9 Whether the Commissioner was correct in taking into account compulsory deductions imposed on businesses which are permissible as a deduction pursuant to Section 81 TCA 1997 such as Irish and Foreign stamp duty, Irish and foreign irrecoverable VAT, rates levied on commercial property, local authority charges and employer's PRSI.

37.10 Whether the Commissioner was correct in determining that a digital services tax (DST) is a 'tax on income' and that there is no bar to a tax on income being treated as a deduction for the purposes of section 81 of the TCA1997.

37.11 Whether there was sufficient evidence before the Commissioner on which to base the following findings of fact and/or did the Commissioner draw inferences from the primary facts which no reasonable Commissioner could have drawn:

37.11.1 That the foreign RWHT which the Appellant incurred during the Relevant Periods was imposed on gross royalties payable in all jurisdictions save and except for Argentina.

37.11.2 That the foreign RWHT must be incurred by the Appellant in order to earn or profit from the trade; that it was part and parcel of the Appellant's business activity; that it was a foreseeable condition of earning income and gains; that the sale cannot be made without incurring the concurrent obligation to discharge or suffer RWHT on the sale; and that it was not possible for the Appellant to trade in those jurisdictions imposing RWHT without incurring the imposition of RWHT."

Jurisdiction of the Case Stated procedure

7. In a recent decision of this Court, arising from a similar (though not identical) case stated to this Court from TAC (*Accenture Global Solutions Limited v The Revenue Commissioners [2026] IEHC 305*), I found as follows in relation to the jurisdiction of this Court in the case stated procedure;

"18. The Tax Appeals Commissioner is an expert administrative tribunal and is entitled to curial deference from this Court in relation to their findings of fact, which applies even where this Court may feel it would have reached a different decision on those facts. The deference owed is not, as pointed out by Murray J. in Stanberry Investments v Commissioner for Valuation [2020] IECA 33 at para. 52 "a supercharged presumption of validity". Where inferences are drawn from facts that no reasonable decision maker could draw, they should be set aside. A finding that is unsupported by any evidence can be set aside.

19. The position was well summarised by Blaney J. in O'Cúlacháin v. McMullan Brothers Ltd [1995] 2 I.R. 217, endorsing the test set out by Kenny J. in Mara (Inspector of Taxes) v. Hummingbird [1993] ILRM 421 as follows:

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them;*
>
> *(2) Inferences from primary facts are mixed questions of fact and law;*
>
> *(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside;*
>
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw;*
>
> *(5) Some evidence might point to one conclusion, other evidence to the opposite: these were essentially matters of degree and the judge's conclusions should not be disturbed (even if the court did not agree with them, for it was not retrying the case) unless they were such that a reasonable judge could not have arrived at them or they were based on a mistaken view of the law".*

8. No curial deference is owed to the Commissioner on pure issues of law and so, a conclusion based on the wrong view of the law can and should be set aside. In *Hade v Revenue Commissioners [2025] IEHC 385* Cahill J. correctly stated at para. 30 of her decision on a similar case stated from the Tax Appeal Commissioner that the judgment of the Court of Appeal in Stanberry *"does not allow for any deference on questions of law, such as those presented in the case stated here."*

9. However, in this case, a separate issue arose in relation to this Court's jurisdiction. Avaya contend that Revenue had improperly sought to introduce the issue that it was not possible to claim a deduction for FWHT under s. 81(2)(a) of the Act due to there being a specific standalone statutory regime in Schedule 24 of the Act (hereinafter referred to as "the issue"). Avaya say this had not been argued before or determined by the Commissioner and therefore, in reliance on the decision of the Supreme Court in *Westlink Toll Bridge Ltd v Commissioner of Valuation [2013] IESC 42*, they say this was a new matter that did not arise on the case and this Court has no jurisdiction to entertain it. Counsel for Avaya cited *Arlum Ltd v The Revenue Commissioners [2024] IEHC 402* where the High Court declined to allow Revenue to make an argument that Revenue accepted had not been addressed in the TAC determination or the case stated. Quinn J unsurprisingly found this fell outside the case stated and, in accordance with the decision of the Supreme Court in *Lough Swilly Shellfish Growers Co- Operative Society Ltd & Anor v Bradley & Anor [2013] IESC 16* held that it did not arise on the case stated. Counsel for Avaya also relied on *Murphy v The Revenue Commissioners [2023] IECA 160* where Haughton J found, at para. 45**;**

> *"45. In my view similar considerations apply in the instant appeal. No issue in relation to s.956 was properly raised or canvassed, either in evidence or in argument, before the Circuit Court. Had any such an issue been raised (and assuming for the present purposes that the Circuit Court could have had jurisdiction to address it) it would have required evidence from the appellant. It would then have been open to the respondent to call relevant evidence and argue, for instance, that the 4-year time limit in s.956 was disapplied by virtue of ss.(1)(c) on the basis that the returns made in 2009 were "insufficient" having been completed in a fraudulent or negligent manner. This would have involved new facts and would necessarily have required that evidence be adduced by the respondent. That opportunity was not afforded to the respondents. It is not surprising that as a consequence, no s.956 issue was raised in the Case Stated. In the words of McMenamin J. in Westlink, the new matter did not 'arise on the case'. It was therefore not within the jurisdiction of the High Court to embark on any s.956 issue, and it follows that this Court should not allow the appellant to pursue it as part of his appeal on the Case Stated."*

10. Revenue contended that the issue had been raised before TAC and highlighted the discussion at the oral hearing about a 2018 TAC determination and, in particular, that counsel for Revenue had stated the following to the oral hearing on day 2, set out at page 72 of the transcript:

> *"I think the way the taxpayer ran that appeal was, well look, we're making a claim under Schedule 24, but to the extent it's not recoverable, we are saying that's Section 81. And one of the reasons the Commissioner found against them there was that, look, you can't at the same time accept it's a tax for the purpose of the Double Taxation Agreement and then go off and say ah no, it's not a tax at all, it's deductible under Section 81. You can't run those two arguments effectively."*

The submission made by Counsel for Revenue at the oral hearing appears to refer to the issue that Revenue sought to argue before this Court.

11. Counsel for Revenue also sought to rely on other extracts from the oral hearing that he said addressed the issue of the intersection between Schedule 24 and s. 81 though counsel for Avaya said those extracts related to a different point that arose before the TAC hearing about making a Schedule 24 claim if their s. 81 claim was refused.

12. The issue also seems to have arisen in Avaya's written submissions to TAC, at paras. 12 and 16, which state**,**

> *"12. The Appellant made losses during the period from 1st October 2009 to 30 September 2015 and therefore is not in a position to claim a credit for the foreign withholding tax against its Irish taxes pursuant to Taxes Consolidation Act 1997 (TCA), Schedule (Sch.) 24, paragraph 4. It submits however that it is entitled to deduct the foreign tax withheld in calculating its Irish taxable income.*
>
> *16. In the event that the Appeal Commissioners consider that the Appellant has no entitlement to claim a deduction for the foreign withholding taxes in respect of accounting periods beginning on 1st October 2011 and ending 30 September 2014 pursuant to TCA, section 77(6B). For the periods ended 30 September 2011, the Appellant will seek to claim a deduction for non-treaty foreign withholding taxes pursuant to TCA, section 81. Finally, in the event that the Appeal Commissioners consider that the Appellant has no entitlement to claim a deduction pursuant to TCA, Sch 24, paragraph 7(3)(c), TCA, Sch 24 paragraph 9DB (5) or TCA, section 77(6B), the Appellant submit it is entitled to claim a deduction for the foreign withholding taxes in respect of all accounting periods beginning on 1st October 2009 and ending 30 September 2015 pursuant to TCA, section 81, irrespective of the treaty status of the countries in question."*

13. It seems to me that the issue about the intersection between Schedule 24 and s. 81 was raised in submissions and oral argument before TAC, albeit undoubtedly not as centrally as the s. 81 argument about whether FWHT could be a deductible expense. However, significantly and beyond what points were raised before TAC, is what the Commissioner said in her determination at paragraph 23 where she sets out how she examined Schedule 24 (albeit briefly) and then moved to a consideration of s. 81 as follows:

> *"123. For the purposes of considering whether the Appellant is entitled to deduct RWHT pursuant to section 81 of the TCA1997, the Commissioner will proceed on the basis that the Appellant is not in a position to avail of any relief for foreign RWHT either under Schedule 24 or section 77(6B) of the TCA1997. As a result, the Commissioner will proceed to consider the provisions of section 81 of the TCA1997 hereunder, in the context of the Appellant's argument that foreign RWHT is a final cost of the Appellant and that no credits for foreign RWHT are available to the Appellant, in accordance with the position of the Respondent."*

14. The Commissioner gave a brief consideration of Schedule 24, found Avaya was "*not in a position to avail of any relief for foreign RWHT either under Schedule 24 or section 77(6B) of the TCA 1997*" and therefore moved to consider the s. 81 claim made by Avaya. The brevity of her consideration and/or assumptions in relation to Schedule 24 does not remove the issue from her determination.

15. In addition to being included in the Commissioner's determination at para. 123, the issue is raised in the points of law in the case stated at 37.6 and 37.7 thereof,

> *"37.6 Whether the Commissioner was correct in proceeding to determine deductibility for foreign RWHT pursuant to section 81 of the TCA 1997 on the basis that the Appellant was not in a position to derive any benefit from double taxation relief pursuant to Schedule 24 of the TCA 1997 in relation to the RWHT incurred, in circumstances where the Commissioner stated that she had made no specific findings on this point.*
>
> *37.7 Whether the Commissioner was correct in interpreting section 81 of the TCA 1997 as effectively permitting a deduction of foreign RWHT as being in the nature of an alternative or complementary scheme of relief to the specific provisions of Part 35 TCA 1997 and Schedule 24 TCA 1997 and section 77(6B) TCA 1997."*

Avaya had submitted to the Commissioner that both questions should be removed from the case stated on the basis that Revenue had failed to identify any error of law by the Commissioner in either question. Avaya further contended that Revenue's position was that the Commissioner had concluded that FWHT was deductible pursuant to s. 81 and it was therefore unnecessary to consider Schedule 24, i.e. a sequencing type argument that sought to frame the issue as one concerning the interaction between s. 81 and Schedule 24 rather than addressing the fact that Schedule 24 constituted a stand-alone statutory regime precluding a claim that FWHT was deductible pursuant to s. 81. I do not agree with Avaya's submission. That sequencing may have been part of the arguments made to TAC but the sequencing of what the Commissioner held at para. 123 clearly placed the consideration of s. 81 after her (albeit brief) consideration of the applicability of Schedule 24. In so doing, the issue arises as to whether the Commissioner fell into an error of law by failing to treat Schedule 24 as a stand-alone and exclusive regime governing the tax treatment of FWHT, a point which, in my view, the Commissioner acknowledged in the points of law stated to this Court at paras. 37.6 and 37.7, set out above. If I am wrong in that, then I am satisfied that the issue was raised before TAC, primarily in the submissions made in relation to the 2018 determination where Schedule 24 as a stand-alone exclusive regime was discussed (at the transcript of Day 2 before TAC, at p. 72). Whether that discussion properly reflected the content of the determination is not the point. I am satisfied that the submissions made by counsel for Revenue raised the issue about Schedule 24 constituting an exclusive stand-alone regime for the tax treatment of FWHT.

16. Given that the Commissioner stated the questions to this Court, despite Avaya's challenge, gives rise to this Court's statutory obligation pursuant s. 949 AR to "*hear and determine*" the points of law arising therein. No application was made for this Court to send the case stated back to TAC for amendment as per s. 949 AR(2). Counsel for Revenue contended that Avaya's failure to make such a preliminary application, as was made in *Revenue Commissioners v Getty Images International ULC* [2025] IEHC 268 which resulted in one of the questions being amended by this Court, establishes this Court's jurisdiction to deal with the issue. However, the Court's jurisdiction to do so does not mean that Avaya were required to address the matter by way of a preliminary application such as was made in *Getty*. Avaya's submissions on this Court's jurisdiction to deal with the issue was addressed in their written and oral submissions to this Court. Whilst I am not with them on the substantial jurisdiction point, for the avoidance of doubt, I wish to make it clear that there is no criticism to be made of them for not addressing the matter by way of a *Getty* type preliminary application.

17. Finally, if I am wrong in my finding that the issue that Revenue have made part of their case about the stand-alone exclusive jurisdiction of Schedule 24 which disallows a s. 81 application to be made in relation to the treatment of FWHT, then I find that the issue arises as a matter of law in relation to the correct interpretation of s. 81 before this Court. It is neither a new point of law such as arose in *Yesreb Holding Limited v Revenue Commissioners* nor a new legal issue on which evidence may have been required as arose in *Murphy*. The interpretation of s. 81 was before the TAC and has been raised before this Court, particularly at 37.3 where the following point of law was raised,

> *"37.3 Whether the Commissioner was correct in determining that there is no general principle of law which specifically denies a deduction for taxes in accordance with the prescribed rules as set out pursuant to section 81 TCA 1997, where those taxes are not calculated after the ascertainment of profit".*

Section 81(2) is expressly stated to be "*subject to the Tax Acts*". The relevant part of those Acts in relation to a claim to treat FWHT as a deductible expense must be the statutory double taxation regime of ss. 826 and 826A which provide for relief in accordance with Schedule 24.

18. Therefore, I am satisfied that the issue was properly part of the points of law arising in the case stated to this Court which this Court is required, pursuant to s. 949AR of the Act, to hear and determine. In this regard, I follow the approach of the Court of Appeal in *Hanrahan v Revenue Commissioners [2024] IECA 113* where, similar to here, the facts were as found in the case stated, leaving this Court only responsible for determining the correct interpretation of the law. In their joint judgment, Donnelly and Butler JJ stated**,**

> *"98. in the present case however, the issue is not one of ascertaining the facts: the facts themselves are as found in the case stated. The issue here is one of law; whether a transaction, which has been found to have no commercial or business purpose, is not, by virtue of s.811(3)(ii) TCA, a tax avoidant transaction. It is difficult to see how any particular burden, other than one of seeking to persuade by way of argument that as a matter of law the transaction is not one that falls foul of s.811 TCA, could arise in such a situation. Ultimately when an Appeal*

Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation. The High Court cannot be bound by an interpretation of law by an administrative body. It is the role of the courts to apply the law, and it is therefore difficult to see how reference to this particular burden goes beyond the usual burden that a moving party would bear before a court when seeking to persuade a court of the correctness of their position at law."

19. For those reasons I find that the issue about the interaction of Schedule 24 and s. 81 in relation to a claim about the treatment of FWHT as a deductible expense pursuant to s. 81, is properly before this Court. As it is an issue of law, the burden of proof rests on Revenue, as the appellant, to persuade this Court of the correctness of their position at law (as per *Hanrahan*, at para. 98 set out above).

Discussion of the substantive case

20. Four issues arise from the points of law that have been raised:

(i) The interaction between Schedule 24 and s. 81 of the Act.

(ii) Whether FWHT is deductible as an expense under s. 81.

(iii) Whether the Commissioner was correct in taking account of taxes, rates and charges that are permissible as s. 81 deductions, and in determining digital services tax as a tax on income leading to the conclusion that there was no bar on a tax on income being treated as a deduction pursuant to s. 81.

(iv) Errors in relation to facts/inferences drawn from the evidence given.

(i) The interaction between Schedule 24 and s. 81 of the Act.

21. This issue and the legal context thereof, has previously been the subject of a decision of this Court in *Accenture Global Solutions Ltd v The Revenue Commissioners [2026] IEHC 305*. The facts in *Accenture* were different from here in that no Schedule 24 claim had been made at all, whereas in the within case there had been a small Schedule 24 claim and after that claim was closed out, a s.81 claim was made. However, that, if anything, strengthens the applicability of the principles developed in *Accenture* to what happened here, i.e. that a Schedule 24 claim is a stand- alone claim and not something that can sit alongside a s.81 claim.

22. I adopt the reasoning set out in *Accenture* and apply it to this case on the very similar legal issues that arise, in particular the following:

- At para. 29; "*If a double taxation treaty is in place, then section 826(1) applies. Otherwise, unilateral relief from double taxation, pursuant to section 826A, applies. That is the entirety of the statutory regime for double taxation between Ireland and a foreign jurisdiction.*"
- At para. 33; "*A move from Schedule 24 to a section 81 claim is not permitted by the wording of the Act, having regard to the context of those words and the purpose of the Act.”*
- At para. 34; “*The wording in Schedule 24 referring to "shall apply " supports this being a stand-alone regime for double taxation relief and not something that may or may not apply alongside or as an alternative to a section 81 deduction claim.”*
- At para. 36; *“The intention of the Oireachtas was to enact a specific and limited arrangement to prevent the same income being taxed in Ireland and in the foreign jurisdiction whereby an Irish taxpayer could be relieved of their Irish tax obligations by reference to foreign tax that had been incurred. It was not intended, nor were these provisions enacted, to compensate a taxpayer for having suffered a tax liability abroad. To allow Accenture to move from a Schedule 24 claim for relief, where the calculation produced a zero amount of relief, to a claim for a section 81 deduction in respect of a trading loss, would move impermissibly beyond that clear legislative intent.”*
- At para. 37; *"The double taxation statutory regime here was disregarded by the Commissioner in allowing Accenture to move from a Schedule 24 calculation that resulted in zero relief, to claim a section 81 deduction.”*
- At para. 39;*"Revenue’s guidance which is exactly what it says, guidance from Revenue. It is not binding on this court (and Accenture did not suggest it was) and cannot influence the task of this court in determining*

the meaning and effect of the statutory provisions having regard to the wording, context and purposes of the Act."

- At para. 40; *"The Commissioner erred in finding that Accenture were entitled to seek a section 81 deduction where no credit was available to them under Schedule 24. The general regime of section 81 is expressed to be subject to the Tax Acts."*
- At para. 41; "*The Act makes clear and specific provision for relief from double taxation, thereby rendering section 81 inapplicable in circumstances where Accenture's Schedule 24 calculation yielded no relief."*
- At para. 42; "*The cost incurred by a taxpayer in suffering a deduction for FWHT abroad, can only be addressed by way of an application for relief from the double taxation regime. If a claim for double taxation is available but yields no relief, that is the end of the relief that the TCA allow from double taxation. The Oireachtas has put that statutory regime in place for relief from double taxation and a move from an application for that relief towards a claim for a deduction pursuant to section 81 is prohibited. The Commissioner fell into an error of law in permitting Accenture to progress making a section 81 claim for a deduction where its loss-making status prevented it obtaining double taxation relief. The Commissioner erred in stating at paragraph 164 (i) that Accenture could not avail of credit. The credit was to be allowed but it worked out at zero. The Commissioner was wrong in saying that the credit was not to be allowed for the same reason. The Commissioner also erred in saying at paragraph 164 (iii) because paragraph 10 does not permit a taxpayer to step outside the double taxation regime entirely; it merely permits an election as to the manner in which relief within that regime is computed. The election simply means that a taxpayer within Schedule 24 i.e. seeking relief from double taxation, can elect to be dealt with differently under section 77 (6B) and 9B of Schedule 24 as if it were unilateral relief."*

Applying those principles to the material facts as found by the Commissioner and to the Commissioner's legal analysis and conclusions thereon, I find the Commissioner erred at para. 123 of her determination in proceeding on the basis that Avaya *"is not in* *a position to avail of any relief for foreign RWHT either under Schedule 24 or section 77(6B) of the TCA1997*" and therefore proceeding to consider Avaya's s. 81 claim that FWHT was a deductible expense. As a matter of law, the statutory regime in place for relief from double taxation does not include s. 81 and so the Commissioner erred in considering s.81 as part of Avaya's claim for a deduction in relation to FWHT incurred abroad in jurisdictions where Avaya did not have a permanent establishment (as found at para. 12.7 of the material facts) and where Avaya was not in a position to derive any benefit from Schedule 24 double taxation relief.

(ii) FWHT as a deductible expense pursuant to section 81

23. I adopt the same analysis in relation to the case law as was adopted by this Court in *Accenture* in relation to the decisions in *Strong v. Woodifield [1906] AC 448 Smith 's Potatoes Estate Ltd v. Boland (Inspector of Taxes) (1947) 30 T.C. 267; Harrods (Buenos Aires) Ltd v Taylor- Goodby (HM Inspector of Taxes) [1963] 41 T.C 450; Hong Kong Inland Revenue Board (Decision Case No. D43/91), Ashton Gas Company v AG [1906] AC 10; Inland Revenue Commissioners v. Dowdall O'Mahoney and Co Ltd [1952] A 401; and Yates (Inspector of Taxes) v GCA International Ltd [1991] STC 157***.** I adopt the reasoning in *Accenture* to how those precedents apply to a situation such as applies here where FWHT was suffered on gross receipts/gross royalties (subject to my findings in relation to the Commissioner's conclusions from the evidence as set out below).

24. The relevant law as summarised at paras. 62-64 of *Accenture*, all of which applies equally here to the facts and submissions made including in relation to the deductibility of a charge imposed on a business where payment is made by credit card, and the fact that Avaya did not have a permanent establishment for corporation tax purposes in any of the overseas territories where the Licensees who withhold FWHT are tax resident, as found by the Commissioner at para. 12.7 of the Material Facts. In *Accenture* the Court held, at para. 62-64:

> *"62. The Commissioner's emphasis on the calculation of FWHT on gross income as a basis for her conclusion that FWHT must be incurred by Accenture to earn or profit from the trade, is misplaced and wrong in law. The test is whether the money was expended for the purpose of earning the profit and as developed in the decision in Smiths Potato, requires consideration of whether the 'expenses' are incurred to earn profit or were an application of the profit. The fact that FWHT was imposed on*

income rather than profit does not determine whether FWHT was expended for the purpose of earning profit. Neither is that determined by the FWHT having been imposed whether Accenture made a profit or not, another point on which the Commissioner placed heavy emphasis. For the Commissioner to conclude, as she did at para. 164 of her determination, that Accenture suffered FWHT for the purpose of enabling it to carry on and earn profit in its trade, put the cart before the horse. The proper test was not applied.

63. The Commissioner found FWHT was a tax on income and is therefore applied after the earnings are made. Counsel for Accenture sought to draw an analogy between FWHT and the charge imposed on a business which permits payment by credit card where, she said, no one would dispute the deductibility of such a charge simply because it is suffered at or just after the point of payment. However, in my view, a credit card charge is part of what is expended for the purpose of earning profit, thereby rendering it properly deductible under section 81.The analogy cannot be applied to the FWHT which the Commissioner found to be a tax on income because FWHT is not expended to secure the royalty payment but is charged after those payments have been earned. It therefore comes within what Lord Selbourne discussed in Mersey Docks and Harbour Board v. Lucas [1883] 8 App. Gs. 891 at page 905 (2 TC 25, page 29),

> *"it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purpose it is used. What your Lordships have to determine is whether the expenses incurred in order to earn gain, or is the application or distribution of that gain when earned"*

64. A tax on income cannot also be an expense incurred to earn gain. It cannot be rendered into that which is not and never was, simply because it was charged by a foreign jurisdiction. The fact of an Irish taxpayer having suffered a foreign tax allows them to apply for relief pursuant to the regime established by section 826 and Schedule 24 but does not render what is a non-deductible tax into a deductible expense."

(iii) Deductible taxes, rates and charges

25. This issue was addressed, at paras. 65 to 67 of *Accenture* as follows,

"65. There are undoubtedly taxes that are deductible such as rates, stamp duty and employers PRSI, as founded by the Commissioner at para. 33.19 of her determination, as well as the type of compulsory tax that was at issue in Harrods (which I have found to be entirely different from the tax on income at issue here). Those deductible taxes are all fundamentally different to a tax on income as the FWHT here was found to be, as they are incurred before any income is earned whereas FWHT is imposed on income that has been earned. The Commissioner erred (at para. 146 of her determination) in relying on the fact that the State imposes many such compulsory deductions that are permissible section 81 deductions, without properly distinguishing what is a tax on income from those deductible taxes.

66. The Commissioner further erred in finding support for her view that a tax on income should be deductible under section 81 from what she observed was the deductibility of digital services tax, which she said was a tax on income Digital services tax is not an Irish tax. It is governed not by Irish law but by the rules of whatever foreign jurisdiction has charged it to an Irish taxpayer. I fail to see how the Commissioner could have properly made the broad and generalised observation that digital services tax is a tax on income and therefore comparable to the FWHT at issue here, despite having heard no evidence or even submissions about how this relatively new tax operates in the jurisdiction in which it may arise. The Revenue guidance which the Commissioner referred to does not constitute evidence that would have supported the Commissioner's observations as it is, as it says, simply guidance.

67. There was no evidence before the Commissioner that allowed her to make an observation that digital services tax charged in some foreign jurisdictions are somehow in the nature of a tax on income. The Commissioner erred in making that observation or allowing it to influence or support her conclusions that FWHT was a section 81 deductible expense."

26. Similar points are raised at para. 146 of the Commissioner's determination from which she concluded that FWHT, being in the nature of a tax on income, does not automatically preclude it from consideration as a deduction under s. 81. For the same reasons that this reasoning was rejected as an error of law in *Accenture*, I reject it as an error of law here.

<u>(iv) Errors of fact/inferences drawn from the evidence</u>

27. Evidence was given to TAC by Avaya's witness, Mr John Hynes, a qualified chartered accountant and financial manager with Avaya about how the FWHT was treated in Avaya's accounts. He described it as;

> "*Ultimately as a cost or an expense of doing business in those locations. We don't really have any choice but to suffer that cost. And therefore, it is ultimately a cost to do business in those jurisdictions."* (at Transcript, Day 1, p. 138).

On cross-examination, Mr Hynes accepted he was not familiar with the withholding tax regimes in any of the jurisdictions in which FWHT had been incurred by of Avaya. He spoke about not being familiar with the rates but set out his "*understanding*" how Avaya's customers withheld the tax they would need to pay locally. He also referred to his "*understanding is, when we invoice gross and if they pay us, they pay us net and they will withhold the tax that they need to pay locally*" (Transcript, Day 1, p. 152). He said;

> *"As far as I understand – again I am not familiar with all of the rates – I think some of them go up to maybe 30%. But there are different rates in different jurisdictions. I am not familiar with all the transactional details…My understanding from what we do when we invoice there is a percentage applied on what's on that invoice which would be of the gross"* (at p. 154).

28. Mr Hynes fairly accepted he did not have actual knowledge of the detail in relation to withholding tax or the rates thereof that were charged to Avaya's customers abroad. The evidence he was able to give was limited to his "*understanding*" of the situation, which is not especially helpful to a decision-maker tasked with making a determination on facts and applying the facts to the law. Mr Hynes' evidence was addressed by counsel for Revenue in his submissions to the Commissioner as follows**,**

> "*Mr. Hynes was called to represent the company, they would have been aware coming into this hearing what's agreed, what is not agreed. This wasn't agreed. It was up to Mr. Hynes or someone suitable to come in here and tell you, well it's like this, there is seven countries in Argentina, it is percentage of the gross in the other countries we looked at in that tax comp. You haven't got that evidence."*

Commissioner O'Driscoll replied by saying, "*No, I haven't*".

Counsel for Revenue went on to say,

> "*You absolutely haven't got that evidence. And in my respectful submission, there is just no way in which any finding of fact can be made, given that lack of evidence, that we're dealing with a percentage of the gross at all times. You just don't have that*."

Commissioner O'Driscoll then responded by saying, *"No, I don't, I agree with you".*

29. The burden of proof before TAC rested on Avaya. It was not for Revenue to adduce evidence to dispute that Avaya discharged that evidential burden by their witness' evidence of his understanding rather than concrete evidence of how the various foreign jurisdictions charged withholding tax to Avaya's customers. Counsel for Avaya sought to distinguish the evidence given to TAC by Revenue's expert here from the evidence that had been given in Accenture and therefore to distinguish the findings made by this Court in Accenture as inapplicable to the evidence before TAC here. I do not think any difference in the evidence given by Revenue's expert here allows this Court to reach a different finding than it did in Accenture. The issue here, on which I rely in reaching my conclusions, is about the evidence given (or not given) by Avaya to TAC to discharge the burden of proof that rested on them. The evidence given by Avaya to TAC about Avaya's witness's understanding was not sufficient to allow the Commissioner to reach the conclusions that she did.

30. As occurred in *Accenture*, Avaya made a choice to conduct its business without having a branch or permanent establishment for corporation tax purposes in any of the overseas territories where their customers who were charged FWHT are tax resident. Counsel for Avaya contended that they were entitled to choose how they would do business in a manner that would minimise tax and that the correct test is whether, given their chosen method of doing business, the WHT was incurred wholly and exclusively to earn a profit. I do not accept that. Of course, Avaya can choose how to run their business but the choice they made to operate by licence rather than by setting up a permanent establishment resulted in the imposition of FWHT on their customers which was then passed on to Avaya. That FWHT, incurred by Avaya, was an application of Avaya's income from which profit would eventually be calculated. It cannot be said to have been part and parcel of Avaya's business activity or that it was not possible for Avaya to trade in those jurisdictions without incurring the imposition of FWHT.

31. The Commissioner failed to consider that providers of licensed IP, such as Avaya, who operate through a branch or permanent establishment in the relevant country do not incur FWHT but instead are subject to corporation tax or income tax in the foreign jurisdiction in the normal way.

32. I am not satisfied that the Commissioner had evidence before her from which the conclusion set out therein could be reached.

Conclusions

33. I find that the Commissioner fell into errors of law in relation to each of the points of law that have been stated to this Court.

34. I will put the matter in for mention before me at 10.00am on 7 July 2026 for the purpose of making final orders. Any submissions which the parties wish to make should be filed with the court at least 48 hours before the matter is back before me.

Counsel for the Revenue Commissioners: Eoin Clifford SC, Rosemary Healy-Rae BL

Counsel for Avaya: Michael M. Collins SC, Shelley Horan SC