

Table of Contents

Introduction	3
Background.....	4
Section 949AN TCA 1997.....	6
Documentation presented to the Commissioner	7
Legislation and Guidelines	8
Evidence and Submissions	11
Appellants' evidence.....	11
Appellant's submissions	21
Respondent's evidence	24
Respondent's submissions	29
Material Facts	32
Analysis	34
Statutory interpretation	34
The burden of proof	39
Substantive matter.....	42
Section 130(a) TCA 1997	42
An asset	43
The transactions and the benefit.....	45
The market value of the benefit	54
Duties of an expert witness.....	55
The valuation of shares – the statutory hypothesis	57
The market value of the shares	61
Conclusion	72
Determination	74
Notification	74
Appeal	74

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“TCA 1997”) brought on behalf of [REDACTED] (“the Appellant”) and [REDACTED] (“the Appellant company”)(“collectively “the Appellants”) in relation to a Notice of Amended Assessment to Income Tax dated 10 September 2019, in the amount of €65,843 and a Notice of Assessment to Dividend Withholding Tax (“DWT”) dated 18 September 2019, in the amount of €54,719.27 (“the assessments”). The assessments were raised in relation to the tax year 2019 (“the relevant year”).
2. The liabilities arose in circumstances where the Respondent treated an amount of €200,000 paid to the Appellant, by the Appellant company, in return for 20,000 class B redeemable non-voting preference shares in [REDACTED] (“company B”), as a distribution to the Appellant from the Appellant company, in accordance with section 130(3)(a) TCA 1997, and the Appellant company was obliged to deduct DWT in accordance with section 172B TCA 1997.
3. On 4 October 2019, the Appellants duly appealed the assessments to the Commission by submitting a Notice of Appeal in respect of each assessment. On 13 January 2020, in accordance with section 949Q TCA 1997, the Appellants submitted a Statement of Case which built on the Appellants’ Notices of Appeal and on 14 January 2020 the Respondent submitted its Statement of Case. Furthermore, on 8 March 2024, in accordance with section 949S TCA 1997, the Appellants submitted an Outline of Arguments. On 14 March 2021 the Respondent submitted an Outline of Arguments and on 14 May 2024, the Respondent submitted Supplemental Legal Submissions. In accordance with section 949E(2)(b) TCA 1997, the Commissioner consolidated the appeals in respect of the Appellant and the Appellant company (as defined as the Appellants as referred to above) which were heard together (“the appeal”).
4. On 4 February 2025, a two-day hearing took place in respect of the appeal. The parties chose a physical hearing and so it proceeded on that basis. Both parties had the benefit of legal advice and representation. The Appellants were represented by junior counsel and the Respondent was represented by senior counsel. A stenographer was present for the two days of the hearing and as such, a transcript was produced by the stenographer of the two-day hearing. The Commissioner has referenced applicable extracts from this transcript in this Determination. In addition to legal submissions, the Commissioner heard evidence, including expert evidence, from the following witnesses:

(1) The Appellant;

(2) [REDACTED], for the Appellant (“the Appellants’ expert witness);

(3) [REDACTED], for the Respondent (“the Respondent’s expert witness”).

Background

5. The Appellant is a Director of the Appellant company and the sole shareholder in the Appellant company,¹ which was incorporated in or about [REDACTED]. Over the years, the Appellant company had up to [REDACTED] employees.
6. The Appellant is a [REDACTED] and has always been involved in the business of [REDACTED]. The business of the Appellant company is to conduct those activities, namely [REDACTED].
7. In 2015, the Appellant contended that he had a director’s loan with the Appellant company of in or around the amount of €165,397, which was reduced in 2015, to reflect a credit balance in favour of the Appellant, in the amount of €34,603.
8. On 17 December 2015, the Appellant submitted that he received an offer from company B, an Isle of Man incorporated, UK tax resident company, to subscribe for 20,000 Class B redeemable non-voting preference shares of €0.01 in company B (“company B shares”), each to be issued at a premium of €9.99 per share i.e. a share subscription of €200,000.
9. On the same date, the Appellant contended that that he entered into a loan agreement with [REDACTED] (“company C”), an Irish incorporated and Irish tax resident company at that time, for a loan in the amount of €200,000 (“company C loan”). The company C loan was unsecured, and its terms were set out in a loan agreement dated 17 December 2015, between company C and the Appellant. The purported loan documentation stated that the purpose of the loan was for the purchase or subscription by the Appellant for certain share investments. As part of the terms of the company C loan, the Appellant was required to pay interest at a rate of one per cent per annum, with the interest payable quarterly in the amount of €500.00.
10. In a document entitled “side agreement”, dated 17 December 2015, between the Appellant and company C, it stated that the Appellant “...irrevocably instructs the lender to pay the Advance directly to the order of the Issuer in return for the issue of the Shares”.

¹ Transcript Day 1, page 25

11. The Appellants submitted that on 17 December 2015, the Appellant instructed company C to pay the proceeds directly to company B, as the Appellant's subscription for company B shares. Thus, it was the Appellant's contention that on that date, the Appellant subscribed for 20,000 Class B redeemable non-voting preference shares in company B, being a share subscription of €200,000.
12. Furthermore, it was submitted by the Appellant that on 17 December 2015, company B agreed to provide a loan in the amount of €200,000 to company C. The terms of this loan were set out in a document entitled "loan agreement" dated 17 December 2015, between company B and company C and which was submitted by the Appellants in support of the appeal.
13. The Appellants submitted that on 17 December 2015, "*as a consequence of the above, (a) [company B] owed [company C] €200,000 being the drawdown proceeds of the [company B] Loan and (b) [company C] owed [company B] €200,000 being its obligation, following the instruction from [the Appellant].....to pay the proceeds of the [company C] Loan directly to [company B] as [the Appellant's] subscription for the [company B] Shares. [company C] and [company B] satisfied / discharged these mutual obligations arising on 17 December 2015 by way of offset such that there was no net movement of funds between the parties*".
14. The Appellants submitted thereafter on 31 December 2015, the Appellant transferred his company B shares to the Appellant company and that the consideration for the transfer of the company B shares, was the amount of €200,000, which was discharged by the Appellant company by way of a reduction of the outstanding balance of the Appellant's director's loan with the Appellant company, in the amount of €165,397. This, the Appellant submitted, created a credit balance in favour of the Appellant with the Appellant company in the amount of €34,603.
15. It was contended that the consequence of the foregoing transactions, was that the value of the company B shares on 31 December 2015, was dependent on the recoverability of the company C loan, an unsecured loan made to the Appellant, in the amount of €200,000. Furthermore, the effect of the transactions was that the holder of the company B shares, on 31 December 2015, (purchaser of the company B shares, in this case the Appellant company) owned a debt due on demand from the Appellant in the amount of €200,000.
16. The Respondent submitted that following an enquiry it carried out into the Appellants, in accordance with the provisions of sections 956 and 957 TCA 1997, it became aware of the transactions that the Appellant had entered into and raised the assessments on the

basis that the amount of €200,000 falls to be treated as a distribution to the Appellant from the Appellant company in accordance with section 130(3)(a) TCA 1997, as the amount paid by the Appellant company does not represent the true market value of the company B shares that a third party would pay for the company B shares in an arm's length transaction on the open market. The Respondent posited that a third party could not reasonably obtain any value for the shares and thus, the open market value would be nil.

Section 949AN TCA 1997

17. Section 949AN TCA 1997 provides a mechanism for the Commissioner to consider adjudicating on and determining an appeal, having regard to a previous determination made by an Appeal Commissioner in respect of an appeal that raised common or related issues and if the Commissioner considers it appropriate, determine the new appeal without a hearing. The power to do so, is at the Commissioner's discretion. The wording in section 949AN TCA 1997 refers to the term "may". The word "may" denotes an expression of possibility, a permissive choice to act or not and a discretion on the decision maker.
18. In January 2024, the Appellants' previous representatives wrote to the Respondent to ask the Respondent if it was proceeding with the Appellants' appeals in light of the determination in *161TACD2023*.
19. On 24 January 2024, the Respondent wrote to the Appellant to state that its intention was to proceed with the appeals. In light of that correspondence, on 25 January 2024, the Appellants' previous representatives sought an extension of one month to file prehearing documentation and the Respondent thereafter sought an extension of that timeline to 8 March 2024, which was granted by the Commissioner.
20. On 29 February 2024, the Commission listed the appeals for hearing, commencing on 4 June 2024 for two days and on 7 March 2024, the Respondent filed its prehearing documentation.
21. Thereafter, on 8 March 2024, the Appellants' previous representatives wrote to the Commission enclosing the Appellants' pre-hearing submissions and requesting that the Commissioner consider determining the appeals in accordance with section 949AN TCA 1997. Specifically, the Appellants' previous representatives stated that: "*We would advise that the above case has exactly the same fact pattern and legal point at issue as the case in which a Determination.....reference 161TCD2023 and dated 4 October 2023 has been made....*" (sic)

22. On 8 March 2024, when the Appellants' previous representatives first raised the application of section 949AN TCA 1997 to these appeals, the appeals were assigned to an Appeal Commissioner that has since vacated office on 31 May 2024, and who had determined *161TACD2023*. Following the correspondence from the Appellants' previous representatives dated 8 March 2024, on 14 March 2024, the Appeal Commissioner who has since vacated office wrote to the Respondent in the following terms: "*The Appellant's request for the appeal to be determined in accordance with the provisions of Section 949AN TCA 1997 is noted. The Commissioner now directs the Respondent to confirm whether it is in agreement for the matter to be dealt with in this way, within 7 days of this email.*"
23. Thus, the stage of applying the mandatory provisions of section 949AN(2) TCA 1997 was not reached, as a copy of the previous determination in redacted form was not sent to the parties with 21 days provided to the parties to submit arguments why it would not be appropriate to have regard to the previous determination in determining the new appeal and to state whether the party wishes the Appeal Commissioners to hold a hearing and, where a party so wishes, that the party explain why such a hearing is considered to be necessary or desirable.
24. The correspondence dated 14 March 2024, in the form of a direction set a train in motion, whereby the parties engaged in correspondence in relation to the application of section 949AN TCA 1997, which the Commissioner herein considered, and which formed the basis of the Commissioner's decision dated 24 April 2024, that there was no requirement to consider further the application of section 949AN of the TCA 1997.
25. It was on the basis of the information in that correspondence and the dispute as to the agreed factual matrix in these appeals, in comparison to the determination in *161TACD2023*, that the Commissioner herein considered it inappropriate to pursue further the application of the provisions of section 949AN TCA 1997 and that was reflected in her decision dated 24 April 2025, wherein she stated that "*it is not appropriate for the Commissioner to act in accordance with section 949AN(1) TCA 1997 in relation to these appeals and the appeals should proceed to hearing...*". Hence, the appeal proceeded to hearing as set out in the "Introduction" section of this Determination.

Documentation presented to the Commissioner

26. The Commissioner has considered all the documentation submitted by both parties. Included within the transactional and financial documentation presented to the Commissioner in this appeal were the following:

- (i) A document entitled █████ Share Certificate in name of the Appellant company;
- (ii) A document entitled Stock Transfer Form for the company B shares;
- (iii) A Written Resolution by the Appellant company for the purchase of the company B shares;
- (iv) A document entitled █████ Share Certificate in name of the Appellant;
- (v) A document entitled Standing Order for Payments from the Appellant company to company C;
- (vi) A document entitled Loan Agreement between the Appellant and company C;
- (vii) A document entitled Side Agreement between the Appellant and company C;
- (viii) A document entitled Letter of Offer to Purchase Shares in company B;
- (ix) A document entitled Articles of Association of company B;
- (x) A document entitled company B Shareholder Proxy;
- (xi) A document entitled Loan Agreement between company B and company C;
- (xii) Forms CT1 for the Appellant company for 2013 – 2017 inclusive;
- (xiii) Financial Statements for the Appellant company for year ended 31/12/2013;
- (xiv) Financial Statements for the Appellant company for year ended 31/12/2014;
- (xv) Financial Statements for the Appellant company for year ended 31/12/2015;
- (xvi) Financial Statements for the Appellant company for year ended 31/12/2016;
- (xvii) Financial Statements for the Appellant company for year ended 31/12/2017;
- (xviii) Annual return of company C for the financial year 2015;
- (xix) Unaudited financial statements for company B for the year ended 31 December 2015;
- (xx) A letter from company B to the Appellant company dated 10 December 2024.

Legislation and Guidelines

27. The legislation relevant to this appeal is as follows:-

28. Section 130(3) TCA 1997, Matters to be treated as Distributions, *inter alia* provides that:

- (a) *Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount").*

29. Section 20 TCA 1997, Schedule F, *inter alia* provides that:

- (1) *The Schedule referred to as Schedule F is as follows:*

Schedule F

1. *In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 and sections 436, 436A, 437, 816(2)(b) and 817.*
2. *Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.*

30. Section 547 TCA 1997, Disposals on acquisitions treated as made at market value, provides *inter alia* that:

- (1) *Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—*
- (a) *the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift),*
 - (b) *the person acquires the asset by means of a distribution from a company in respect of shares in the company, or*
 - (c) *the person acquires the asset wholly or partly—*
 - (i) *for a consideration that cannot be valued*

- (ii) *in connection with the person's own or another person's loss of office or employment or diminution of emoluments, or*
- (iii) *otherwise in consideration for or in recognition of the person's or another person's services or past services in any office or employment or of any other service rendered or to be rendered by the person or another person.*

31. Section 548 TCA 1997, Valuation of assets, provides *inter alia* that:

- (1) *Subject to this section, in the Capital Gains Tax Acts, "market value", in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market.*

32. Section 549 TCA 1997, Transactions between connected persons, provides *inter alia* that:

- (1) *This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.*
- (2) *Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.*

33. Section 10 TCA 1997, Connected persons, provides *inter alia* that:

.....

- (7) *A company shall be connected with another person if that person has control of the company or if that person and persons connected with that person together have control of the company.*

34. Section 172B TCA 1997, Dividend withholding tax on relevant distributions, *inter alia* provides that:-

- (1) *Except where otherwise provided by this Chapter, where, on or after the 6th day of April, 1999, a company resident in the State makes a relevant distribution to a specified person –*

- (a) *the company shall deduct out of the amount of the relevant distribution dividend withholding tax in relation to the relevant distribution,*

(b) the specified person shall allow such deduction on the receipt of the residue of the relevant distribution, and

(c) the company shall be acquitted and discharged of so much money as is represented by the deduction as if that amount of money had actually been paid to the specified person.

35. Section 172K TCA 1997, Returns, payment and collection of dividend withholding tax, *inter alia* provides that:-

(1) *Any person (in this section referred to as “the accountable person”), being a company resident in the State which makes, or an authorised withholding agent who is treated under section 172H as making, any relevant distributions to specified persons in any month shall, within 14 days of the end of that month, make a return to the Collector-General which shall contain details of—*

.....

Evidence and Submissions

Appellants’ evidence

36. The Appellant gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder, a summary of the evidence given by the Appellant:-

36.1. The Appellant testified that the Appellant company was incorporated in or about 1 [REDACTED] and its business was that of [REDACTED]. The Appellant gave evidence that he was required to remain compliant with company law, in relation to his director’s loans with the Appellant company. The Appellant stated that he received a letter of offer to invest in preference shares in company B, following an introduction from his accountant. The Appellant said that he spoke with [REDACTED] (Director of company B) about the investment, and it progressed from there.

36.2. The Appellant testified that on 17 December 2015, he entered into a loan agreement with company B and he agreed that the purpose of the loan was as set out in the loan agreement at clause 2, namely that the loan was for the purchase of or subscription for certain share investments. The Appellant stated that the purpose of the borrowings was for company law requirements and when asked, the Appellant clarified that his accountant had advised him that he must have his affairs in order in relation to the director’s loans with the Appellant

company, therefore it was for commercial reasons. The Appellant testified that the purpose of the loan was to acquire the money to put into the Appellant company.² The Appellant said that the interest rate on the loan was one per cent, but he did not recall much else about the loan or the repayments, as at the time he was acting on the advice of his accountant.

- 36.3. When asked what happened after the money was borrowed, the Appellant testified that “*he got the shares and the share certificate and it went back around to company B*”, but that he was probably not qualified to answer that properly, insofar as he knew the structure at the time and was told by his accountant that it was bona fide, so he was quite happy to let this happen. The Appellant gave evidence that he was assured on both sides that this was for company law and commercial reasons, and he stated that he was fine with that.
- 36.4. The Appellant testified that he financed the cost of the 20,000 shares in company B, namely the amount of €200,000, with the loan he received from company C. The Appellant gave evidence that once he acquired the company B shares, they were transferred to the Appellant company for the amount of €200,000 which he confirmed went against his director’s loan account with the Appellant company, and the Appellant company carried on trading. The Appellant referred to the share certificate relating to the Appellant company and the stock transfer form.
- 36.5. Reference was made to the accounts of the Appellant company. The Appellant confirmed that the director’s loan as of 31 December 2015, are not referenced in the accounts of the Appellant company submitted in respect of the appeal. The Appellant gave evidence that he did not know the reason for this, as he left the preparation of the accounts to his accountant.
- 36.6. The Appellant testified that the transaction did not benefit him personally, it benefitted the Appellant company. He stated that “*it was done to keep the company correct*”. Counsel for the Appellant referred the Appellant to the Statement of Affairs contained in the report of the Appellants’ expert witness. The Appellant gave evidence in relation to the various assets and liabilities set out in the document. The Appellant testified that he had the ability to pay back the loan in the amount of €200,000 to company C, as his net asset position after the company C loan was included, was €567,435.

² Transcript Day 1, page 33

- 36.7. The witness referred to a document entitled “Side Agreement”³ and the Appellant testified that the purpose of this document was to clarify the structure that he was engaging in. The Appellant said that it was the procedure and the agreement between himself and the lender, such that he was borrowing funds at a one per cent interest rate, which he stated was to go towards his director’s loan account with the Appellant company. The Appellant stated that this was a circular transaction which was done to ensure that the director’s loans he had with the Appellant company were compliant with company law.
- 36.8. The Appellant was cross examined by counsel for the Respondent. The Appellant was asked, when he had borrowed the amount of €200,000 from company C, why was it that he did not simply pass the amount of €200,000 onto the Appellant company to resolve his issue with the balance of the director’s loan account. The Appellant stated that he was advised by his accountant in relation to the structure and the procedure that took place.
- 36.9. It was put to the Appellant that he stated in direct evidence that the money from the loan went into the Appellant company. The Appellant stated yes, directly, or indirectly, but clarified that it was indirectly as it followed the procedures of the structure.⁴ It was put to the Appellant that this was a circular transaction and that the money never rested in his account. The Appellant stated that it might have. Counsel for the Respondent asked the Appellant if it remained in his bank account and the Appellant stated yes. When counsel for the Respondent clarified that it was in his personal bank account, the Appellant stated yes.⁵
- 36.10. Counsel for the Respondent directed a number of questions to the Appellant in relation to his Statement of Affairs, as set out in the Appellants’ expert report. The Appellant stated that the US loan in the amount of €1,227,676 was in relation to apartments he had purchased in ██████ USA and which have since been sold in a “fire sale” when the financial institution called in the loan on the apartments. In addition, the Appellant stated that the loan, in the amount of €94,000, was in relation to a holiday home in Co. ██████ which was also sold in circumstances where the financial institution called in the loan. It was put to the Appellant by counsel for the Respondent that the Appellant had loans of nearly €1.31 million, which were not represented by assets, as the assets were gone. The Appellant

³ Book of Documents, Tab 19, page 132

⁴ Transcript Day 1, page 52

⁵ Transcript Day 1, page 54

confirmed that was the position.⁶ Counsel for the Respondent reminded the Appellant that he gave evidence that he was in a position to repay the loan in the amount of €200,000 if it was called in by company C. It was put to the Appellant that it appeared that the only way in which he would be in a position to repay the company C loan in the amount of €200,000, would be to sell the family home. The Appellant stated that he would not be required to sell the family home, as he would be in a position to reach out to clients and/or friends to borrow the amount required.⁷

36.11. The Appellant was cross examined in relation to the accounts of the Appellant company. It was put to the Appellant that there was nothing referenced in the 2015 or 2016 accounts in relation to the said director's loans, nor was there anything in relation to investments on the part of the Appellant company, namely the company B shares. The Appellant agreed. It was put to the Appellant that there was in addition, no reference to investments in the 2017 accounts, despite the contention that on 31 December 2015, the company B shares were purchased by the Appellant company, and which should have appeared under this heading.

36.12. In re-examination by counsel for the Appellants, the Appellant was asked after the amount of €200,000 was paid and all other liabilities were discharged, what the level of the Appellant's net assets was. The Appellant stated that it was in the amount of €567,435.⁸

37. ██████████ ("the Appellants' expert witness"), for the Appellant, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the Appellants' expert witness:-

37.1. The Appellants' expert witness gave a summary of his qualifications and expertise. The Appellants' expert witness stated that he is an accountant by trade and specialises in four areas, namely corporate recovery insolvency, personal insolvency, corporate violence, including business valuations and fraud and forensic accounting. The Appellants' expert witness further stated that he is a chartered accountant and a member of the Chartered Accountants of Ireland. The Appellants' expert witness stated that he is currently a partner with ██████████ and the managing director of ██████████.

⁶ Transcript Day 1, page 56

⁷ Transcript Day 1, page 57

⁸ Transcript Day 1, page 63

- 37.2. The Appellants' expert witness stated that he has relied on the information provided to him by the Appellants for the purposes of preparing his valuation report, dated 7 March 2024, prepared for the purposes of this appeal. The Appellants' expert witness set out his understanding of the structure, as was set out in his report. The witness testified that as part of the loan transaction, company C was open to being repaid the loan by taking the shares in company B, which meant that the Appellant was free to assign those shares or transfer those shares back to company B, such that the Appellant was entitled to repay the loan not just in cash, but by way of assigning the shares, which was very important. The Appellants' expert witness stated that due to the fact that they could be used to discharge that loan in full, he ascribed a value to them.
- 37.3. The Appellants' expert witness gave evidence that the shares carried a fixed dividend of five per cent, payable if declared by company B. So, there was a possibility, but no guarantee he said, that a dividend of five per cent could be paid on the shares. The shares carried no voting rights, he said. The witness gave evidence that if the Appellant company or any other owner of the shares wanted to redeem the shares, then the Appellant/owner could be paid in two distinct ways namely, a payment in cash or payment by the reassignment of the company C loan.
- 37.4. The witness testified that any lender, lending money to the Appellant, would have assessed the Appellant's capacity to repay a loan. The witness stated that ultimately it would have come down to the Appellant's Statement of Affairs. The witness stated that the value of the company B shares comes down on the ability to be repaid.⁹ The witness gave evidence that the Appellant was a person that, excluding the company C loan, had a net asset position of almost three quarters of a million, based on his Statement of Affairs. Therefore, on the redemption of the company B shares, in order to secure a repayment of the amount of €200,000, the owner of the shares could secure repayment from the Appellant's pool of assets.
- 37.5. The witness gave evidence that even excluding the Appellant's family home, the contention that the Appellant would not have been in a position to repay the loan "does not hold water", because it was not uncommon that a family home may have to be sold or downsized or different life choices made to deal with an asset position. The witness stated that he had significant experience of bankruptcy

⁹ Transcript Day 1, pages 74 & 75

proceedings and personal insolvency arrangements which involved the sale of the family home.

- 37.6. The witness was asked to explain the statement in his expert report that the Appellant was a "*high net worth individual and was solvent*". The witness testified that the Appellant had nearly three quarters of a million in assets, as set out in the Statement of Affairs, and including the company C loan, he had net assets of €567,435. Thus, he was a high net worth individual. On cross examination the witness stated that his rationale for that was that "*if you want to be a resident of Monaco 500 will do it*".¹⁰
- 37.7. The witness gave evidence that it was his opinion that if the company B shares were purchased, a purchaser could expect the possibility of a dividend of five per cent, but if that dividend was not forthcoming, then that person could have redeemed the company B shares either in full for cash or by the assignment of the company C loan, whereby the interest rate of one per cent would have been payable. The witness stated that in March 2016, the deposit rate in most financial institutions was only half a per cent.
- 37.8. The witness testified that if the holder of the company B shares sought to redeem the shares for cash, the holder of the shares would have had to issue a demand to the Appellant. If the Appellant was not in a position to pay the amount redeemable, then the holder of the shares would have the option to commence bankruptcy proceedings. The witness stated that to commence bankruptcy proceedings against the Appellant, that would have entailed a cost, but that cost would have been recoverable. The witness gave evidence that in order to engage in the bankruptcy process, significant fees may arise in the amount of €176,000 to €179,000, but that having carried out his calculations and deduced the costs of bankruptcy and the discharging of the company C loan, the Appellant would have been left with assets of in excess of €320,000, which would have been enough in 2016, he stated, to purchase an apartment on the grounds of the ██████, but certainly in ██████.
- 37.9. The witness gave evidence that the value of the company B shares was based on the assumption that the shares could ultimately realise the return of the amount

¹⁰ Transcript Day 1, page 143

of €200,000, plus a potential interest payment of one per cent or a potential dividend from company B, as the funds could be retraced back to the Appellant.

37.10. The witness stated that an open-market transaction was the way to truly ascertain the value of a share. The witness explained that based on the figures that were presented to him, in terms of the structure and the underlying value of the Appellant's Statement of Affairs, it was possible to recover the amount of €200,000. He further explained that this ignored the possibility that the Appellant, who he stated had a [REDACTED], could have accessed the money elsewhere to repay the amount.

37.11. In terms of the methodology of valuation, the witness testified that it must be assumed that there is a market, a sale is possible, there is a willing buyer and there is a willing seller, who are abreast of all the information that each other has, to make an informed decision as to the value of the asset. The witness explained that the hypothesis of valuation was that you must assume there is a willing buyer and a willing seller. He testified that having looked at the company B shares through the eyes of an independent hypothetical purchaser, in his view he said there was a value to the company B shares, and that valuation was tied directly to the ability to recover the money from the Appellant. His evidence therefore was that the valuation of the company B shares was the amount of €200,000.

37.12. The witness testified that if somebody was to purchase the company B shares for a value of less than €200,000, then the holder of the shares would be in a position to redeem the amount of €200,000 from the Appellant and to make a profit. The witness testified that in his view there was a market for the company B shares, but that it was complicated, in light of the number of steps back to the Appellant. Nevertheless, he explained, there was a clear and undeniable line from these shares back to the Appellant.¹¹

37.13. The witness was asked to comment on the report of the Respondent's expert witness. In relation to the opinion of the Respondent's expert witness that "*on the face of it the shares are worth €200,000. The value to him/[the Appellant company] is €200,000 but that is not the market value of the shares*", the witness stated that he disagreed with that opinion, as the company B shares can be redeemed and the amount of €200,000 can be achieved from the Appellant. Therefore, he explained, the company B shares have a value of €200,000. The

¹¹ Transcript Day 1, page 90

witness gave evidence that it was his opinion that the Appellant can be “*on the hook for €200,000*”¹² and which may require him to sell his home.

37.14. In relation to the opinion of the Respondent’s expert witness that “*the shares are effectively backed by a loan to [company C] which would have needed to redeem the loan to [the Appellant] to pay back [company B] which in turn could have redeemed the shares... therefore, in effect any purchaser of the shares was in effect buying a loan to [the Appellant] ...*”, the witness stated that was consistent with his view.

37.15. The witness was asked to comment on the opinion of the Respondent’s expert witness that “*they would have received their money back if the transaction was successfully unwound, but there would have been no reward for risk and no income return*”. The witness testified that the holder of the company B shares could have taken the loan to the Appellant and requested payment of the amount of one per cent per annum in interest. The witness was also asked to comment on the opinion of the Respondent’s expert witness that “*[the Appellant] would not have been willing to sell at a discount.*” The witness gave evidence that this was an assumption that he should not have made, on the basis that the statutory hypothesis required that it is assumed there is a willing buyer and a willing seller. He explained that was a fundamental flaw which ignored the basic tenet upon which valuers carry out an independent valuation. The witness stated that it was a flawed methodology or flawed assumption on the part of the Respondent’s expert witness.

37.16. The witness testified that the structure is convoluted and difficult to understand, but that professional investors, such as vulture funds would consider the company B shares if there was value to be achieved. The witness stated that it was fair to say that if someone who purchased the company B shares for €190,000, could achieve €200,000 then there was value.¹³ Ultimately, he said the purchaser could have redeemed the €200,000.

37.17. The witness was cross examined on his evidence by counsel for the Respondent. The witness accepted that what he carried out was a desktop valuation. The witness stated that he had the accounts of company B for the purposes of the valuation, and he agreed that company B had never traded. It was put to the witness that the five per cent dividend was thus irrelevant for the purposes of the

¹² Transcript Day 1, page 92

¹³ Transcript Day 1, page 101

valuation, where company B had never traded. The witness stated that it was relevant as the dividend was part of the characteristics of the share, but that it would be difficult for company B to pay a dividend on the basis that it did not have any retained earnings.¹⁴ The witness accepted that it was unlikely that a dividend would be paid.¹⁵

37.18. It was put to the witness that if an accountancy student was asked what the value of the company B shares was, in the knowledge that it was not trading, the answer would be €1.00. The witness stated that an accountancy student would agree, but a professional investor might think differently, as the trail could be mapped back to the Appellant to recover the money. The witness testified that it was his opinion that if the company B shares were purchased, then the purchaser could secure the amount of €200,000 from the Appellant, albeit with a number of hurdles, but not insurmountable hurdles. The witness gave evidence that the underlying Statement of Affairs, was “massively critical”.¹⁶

37.19. The witness was cross examined in relation to the document entitled Statement of Affairs in his expert report. The witness confirmed that his expert report did not contain a bibliography of the documents he considered for the purposes of preparing his report. The witness testified that the Statement of Affairs document was not prepared by him, but by the Appellants’ accountant. The witness stated that he did not speak to the Appellants’ accountant in respect of the document. The witness confirmed that he took the Statement of Affairs at face value.¹⁷

37.20. The witness agreed that in a valuation exercise, the valuer must stand in the shoes of a prudent hypothetical purchaser. The witness testified that the prudent hypothetical purchaser would have gone a lot further than a desktop valuation. The witness stated that on the information that he had to do a desktop valuation, he was very comfortable that a prudent purchaser would consider that the company B shares have a value and would see that the value was closer to €200,000 than nil. The witness was asked if anything he had listen to in relation to the accounts would change his valuation of €200,000 and he stated that the valuation of the Appellant company had little impact on his valuation of the company B shares.

¹⁴ Transcript Day 1, page 111

¹⁵ Transcript Day 1, page 113

¹⁶ Transcript Day 1, page 53

¹⁷ Transcript Day 1, page 113

- 37.21. The witness accepted that it was at the appeal hearing, that he had heard for the first time that the US loan and the house in Co. ██████████ were no longer backed by assets. The witness was asked whether he thought a prudent hypothetical purchaser would consider it relevant that the Appellant had been left with loans of in or about €1.32 million, in respect of two failed investments. It was put to the witness that a prudent hypothetical purchaser, would not pay €200,000, but would look for a significant discount on purchase price.
- 37.22. The witness was asked to explain his report where he stated that the Appellant was "*a high net worth individual*". The witness stated that it is someone who has €500,000 or more in assets. He stated that the reason for his conclusion was that if you want to become a resident of Monaco, €500,000 was required. It was put to the witness that the Respondent's expert witness was of the view that a "*high net worth individual*", was someone with €1,000,000 in liquid assets and that would exclude family homes, motor vehicles and personal items. The witness stated that he had an alternative view. In relation to the FICO score given to the Appellant, the witness was asked whether he would amend that score given the evidence of the Appellant in relation to demand letters having been issued for the investments in the US and Co. ██████████. The witness stated that he would consider the Appellant's FICO score a little differently, but that his Statement of Affairs was the critical document, and that the Appellant's FICO score did not change the fact that the Appellant had three quarters of a million in assets, before paying back the loan of €200,000.
- 37.23. The witness was asked what the reward for a purchaser of the company B shares was, having regard to the procedure to redeem the shares, such as bankruptcy. The witness stated that a purchaser may decide to keep the loan and charge the one per cent per year interest, as €200,000 was not a lot of money for a lot of people. It was put to the witness that the Appellant's Statement of Affairs was relevant to him having an ability to pay that interest rate as well. The witness stated that one per cent of €200,000 was the amount of €2,000 and that he believed that the Appellant could pay the amount of €2,000 per annum. The witness admitted that he had done nothing to establish that ability to pay. The witness stated that it was an immaterial amount of money in the context of the Appellant's business.

37.24. The witness testified that he did not believe it would be unreasonable to say that a purchaser of the company B shares would not take a risk at €200,000, because, in his view, the capital was not at risk.

Appellant's submissions

38. The Commissioner sets out hereunder a summary of the submissions made both at the hearing of the appeal and the documents submitted in support of this appeal:-

38.1. The sole issue in this appeal is whether a distribution arose in 2015, in accordance with section 130(3)(a) TCA 1997, on the transfer of the company B shares by the Appellant to the Appellant company, a company of which the Appellant was a director and a 100% shareholder at the time. A distribution did not arise in accordance with section 130(3)(a) TCA 1997 as there was no benefit to the Appellant from the transfer of the shares in company B to the Appellant company, as it had an equal and offsetting cost to Appellant.

38.2. It is a requirement of section 130(3)(a) TCA 1997 that in calculating a distribution, the benefit is taken as the market value at that time. As the market value of the company C loan was €200,000, then it follows that the market value of the company B shares, which were directly linked to the value of the company C loan, was €200,000. Therefore, the benefit of the distribution (elimination of an unsecured receivable from the Appellant) was exactly matched by the cost of the distribution (creation of identical unsecured receivable from the Appellant, being the company C loan, which is the source of value for the company B shares). The Appellant could not have received a benefit on the transfer of the company B shares, as the value of what he gave up, being the company B shares, had the same value of what he received (being the reduction of a demand receivable due at the time).

38.3. In circumstances where the company B shares derived value from the market value of a demand receivable from the Appellant, it does not matter what the market value of the receivable was or what the value of the company B shares was, as they will always equate. It is logically impossible to have a distribution under section 130(3)(a) TCA 1997 in the circumstances.

38.4. Nevertheless, if section 130 TCA 1997 is applicable to the transaction that took place on 31 December 2015, then it is necessary to ascertain what was the market value of the company B shares. The assertion by the Respondent that the market value of the company B shares was nil is incorrect. If the market value of an

unsecured demand receivable of €200,000 from the Appellant was €200,000, then the value of the company B shares was similarly €200,000.

- 38.5. The structure was of no benefit to the Appellant, rather it was created for the benefit of the Appellant company. Before and after the transaction, the Appellant had borrowings and what occurred was that it changed from one place to another or from one pocket to another, but no actual benefit accrued to the Appellant, as he was always liable for the amount of €200,000. The 2015 accounts do not reflect the director's loans, but the 2017 accounts are reflective of the situation in both 2015 and 2016.
- 38.6. The company C loan, rather than going into the Appellant's hands personally, was triangulated, which was confirmed by the side letter, dated 17 December 2015. There was no evidence that funds moved, but rather obligations moved. The structure was created for commercial reasons to resolve the Appellants' company law compliance issues. Whilst it may have been a circular type of structure, it was not done for tax avoidance purposes.
- 38.7. The market value test as determined by section 548 TCA 1997 is instructive. It means "*the price which those assets might reasonably be expected to fetch on a sale in the open market*". Furthermore, the principles used in the valuation of shares in a private company have been well established by extensive jurisprudence. This is known as the statutory hypothesis. Reference was made to the decision in *IRC v Gray* [1994] STC 360 ("*IRC v Gray*") which was an authoritative re-statement of the statutory hypothesis.
- 38.8. In terms of the market value of shares, reference was made to the following judgments: *AG v Jameson* [1905] 2IR 218 ("*AG v Jameson*"); *IRC v Clay* [1914] 3KB 466; *Findlay's Trustees v Inland Revenue* [1938] 22 ATC 437; *In re Holt, Decd. Holt v Inland Revenue Commissioners* [1953] 1 WLR 1488; *Re Crossman* ("*Crossman*") [House of Lords] [1937] AC 26; *Re Lynall CA* ("*Lynall*") [1969] 3 WLR 984; *IRC v Gray* [1994] STC 360 ("*IRC v Gray*"); and *Walton v Commissioners of Inland Revenue* [1996] STC 68.
- 38.9. In *AG v Jameson*, a valuation was required for estate duty purposes. Under the articles of association, if a member wished to dispose of their shares, the other members had a right of pre-emption at a fair value fixed at £100 per share. The executor in the Jameson estate claimed that the "open market value" under the Finance Act was limited to that figure. At page 230 of the decision, Fitzgibbon J. stated that:

“In my opinion section 7(5) (Finance Act 1894) turns value into price for the purpose of estimating its amount; that price is to be ascertained on a sale assumed to take place in the open market and that means the price which would be obtainable upon a sale where it is open to everyone who had the will and the money to offer the price which the property of Henry Jameson in the shares was worth as he held them. The price was to be that which a purchaser would pay for the right 'to stand in Henry Jameson's shoes' with good title to get into them and to remain in them and to receive all the profits subject to all the liabilities, of the position. The price was what the shares were 31 worth to Henry Jameson at his death, in other words it was what a man of means would be willing to pay for the transmigration to himself of the property which passed from H. Jameson when he died.”

38.10. The hypothetical seller is required to be anonymous and the accepted valuation principles to be applied, are set out in *Crossman*, where Lord Blanesburgh stated that:

“If the duty of the Commissioners is, as I think, to estimate the price which the “property” as at the time of the deceased’s death would fetch in the open market, if it were to be offered for sale, it is unnecessary to inquire by whom the property would hypothetically have to be offered.”

38.11. In accordance with established case law, when valuing an asset, it is necessary for a valuer to assume that (a) a sale happens and (b) the sale is made by a hypothetical seller, not the actual seller. Given those underlying principles, it was not appropriate, in arriving at the market value of the company B shares, to determine the valuation based on the personal circumstances or preferences of the actual seller.

38.12. The Respondent’s expert witness incorrectly took those factors into consideration in arriving at the nil valuation and the Commissioner should place no reliance on that valuation. Furthermore, it was incorrect for the Respondent’s expert witness to state that a hypothetical purchaser would not have an interest in acquiring the company B shares, as a hypothetical purchaser of those shares would be in a position to immediately call for redemption of the shares and the purchaser would be entitled to receive the full amount of €200,000.

38.13. The company B shares had a value of €200,000 or at least that value. The Appellant’s expert witness stated that there are assets available to meet the loan, in the amount of €767,000. Whilst the Appellant may have to sell his family home

or borrow funds through friends or clients, the Appellant could repay the loan in the amount of €200,000. It was not insurmountable.

38.14. The marketplace is anyone who has the will and the money. It is not a narrowly constructed marketplace as per the Respondent's expert witness. It was accepted by both experts that there was someone out there that would purchase the shares. Therefore, the only question that arises is, what the value of those shares was, €200,000 as per the Appellant or nil as per the Respondent. It was not a hugely complex matter.

38.15. Reference was made to the decision in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc and Others* [1987] STC 184 ("*Lotus*"). The Appellant gave evidence that there was no benefit to him, that it was a circular transaction. The Appellants' expert witness held a similar view. The Appellant gave cogent evidence that there was no benefit to him. The onus of proof is on the taxpayer in relation to these matters. However, once the taxpayer has given evidence and that evidence was cogent and clear, then there was a shift in the evidential burden to the Respondent, and in the absence of any countervailing hard evidence to nudge the evidential burden back to the Appellants, the Commissioner is compelled to find in the Appellants' favour.

38.16. There arises the question of whether there has been a disposal of an asset, pursuant to section 130(3)(a) TCA 1997. Taking the evidence of the Respondent's expert witness at its height, that the shares had no value, it was illogical to state that something that had no value was an asset. Whilst an asset was not defined, the decision of *O'Brien (Inspector of Taxes) v Benson's Hosiery Holdings Limited* [1980] AC 562 opined that an asset was anything that can be turned to account. Thus, if an asset had zero value, it cannot be turned to account and falls outside the provisions of section 130(3)(a) TCA 1997.

Respondent's evidence

39. ██████████ ("the Respondent's expert witness"), for the Respondent, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the Respondent's expert witness:

39.1. The Respondent's expert witness gave evidence in relation to his qualifications and experience. The Respondent's expert witness stated that he is a Chartered Accountant and trained with ██████████. The Respondent's expert witness confirmed that he has worked in the area of valuations for some time, and he has acted on

a number of occasions, as a valuer for both the taxpayer and the Respondent. The Respondent's expert witness stated that for the purposes of this appeal he prepared two valuation reports, the first dated 19 January 2021 and the second dated 22 February 2024. The Respondent's expert witness confirmed that he sought all relevant documentation for the purposes of his reports, and it was that documentation that was reflected in the booklets in this appeal.

- 39.2. The Respondent's expert witness confirmed that there appears no evidence of trading on the part of company B and that company B was valueless as a company. The Respondent's expert witness stated that the value of company B as an entity was nil, or one share and it was part of a structure. He said that the preference shares that are issued out of company B can have a paper value, but they are preference shares issued out of the company with no value. The Respondent's expert witness said that the transaction was purely a circular transaction, and there had been no suggestion that money or funds changed hands.
- 39.3. The Respondent's expert witness gave evidence that at the time of completing his initial report, he did not have sight of the Statement of Affairs of the Appellant and the purpose of his second report was to address that document. The Respondent's expert witness stated that company C was the most significant company in the structure, as it issued the loan to the Appellant who in turn then used the loan in the amount of €200,000 to purchase the preference shares in company B, not shares in the ownership of company B.
- 39.4. The Respondent's expert witness said that company B issued an instrument to the Appellant which he paid for, the money did not move, but the transaction moved through company B and then back to company C and this was where company C acquired the funds to lend to the Appellant. The Respondent's expert witness gave evidence that this was what was called a circular transaction, and no real value had been created. He said the challenge which was raised in his report with such a circular transaction was, where does it start. The Respondent's expert witness testified that if company C got the money from company B, but company B got the money from the Appellant, then how did company C give the money to the Appellant. The Respondent's expert witness stated that the structure cannot work with money.
- 39.5. The Respondent's expert witness gave evidence that this was a complex matter. He stated that he had no difficulty understanding why this structure was put in

place, but that it was a very personal structure set up to solve a very personal problem. So, the question that arises is what the shares worth are. The Respondent's expert witness testified that there are two relevant dates. On 17 December 2015, the structure was put in place, which was a paper transaction, and which did not involve funds, but it created a value. He explained that the so-called creation of value was the investment of the €200,000 by the Appellant. However, the relevant valuation that he was interested in was the moment in time when the Appellant sold the company B shares to the Appellant company. The value was created 8 days earlier.

39.6. The Respondent's expert witness stated that he was in agreement with the Appellant's expert witness that in terms of the methodology of a valuation, a willing buyer and a willing seller must be assumed. The Respondent's expert witness testified that this transaction was not as straightforward as considering; do we have a willing seller of preference shares, as there was complexity to it. The Respondent's expert witness explained that this transaction was significantly more complex because the Appellant, now the willing seller, is removed and replaced with the hypothetical seller, but the Appellant was not removed from the structure. He further testified that consideration must also be given to the willing hypothetical purchaser, so the Appellant company must be removed and replaced with a willing hypothetical purchaser, but the fact of the matter was that the Appellant remained connected to the company B shares. The Respondent's expert witness testified that they are the same individual, the first one being the hypothetical willing seller and the second one was going to stop the transaction, because it was a personal structure that required the purchase by the Appellant company to have any value. The ownership of the company B shares had no value to anyone else in the world.

39.7. The Respondent's expert witness gave evidence that there appeared no evidence that the five per cent dividend was paid and no prudent investor would look at that, given that company B was not trading. In addition, the one percent return would be hard to achieve. The Respondent's expert witness testified that there was a market for preference shares that are underpinned by a value, but usually that value can be identified, and it was attractive in the market with a good return. The Respondent's expert witness testified that it was his opinion that there was no market for the company B shares and what he was being asked to do, was to value the company B shares on a market valuation, rather than being asked, was there someone out there who might purchase these shares. The Respondent's

expert witness stated that when looking at the hypothetical person, it is the prudent investor that was crucial.

- 39.8. In relation to the question of the Appellant being a high net worth individual, the Respondent's expert witness testified that when considering whether someone was a high net worth individual, the crucial aspect was the persons access to surplus liquid assets. The Respondent's expert witness testified that there was no legal definition of "high net worth individual". However, he gave evidence that having regard to the Statement of Affairs, the farmland, the dwelling house and the motor vehicles were not liquid assets. He stated that perhaps personal items might be, but that the only liquid asset was the Appellant's bank account.
- 39.9. The Respondent's expert witness testified that the whole structure was of a personal nature, and it removed this concept of the hypothetical seller and purchaser that must be considered. The Respondent's expert witness gave evidence that the only way to achieve a reward would be to pay less than €200,000. The Respondent's expert witness testified that the reason he valued the company B shares at nil was due to the unmarketability of the structure. He stated that the question was what the return for a purchaser of the company B shares was, as it was going to cost a purchaser at every step of the way to redeem the company B shares.
- 39.10. The Respondent's expert witness was cross examined on his evidence by counsel for the Appellant. It was put to the Respondent's expert witness that the approach that must be taken to a valuation was that it must be assumed that the Appellant was willing to sell, and the Respondent's expert witness agreed that it must be assumed and cannot be questioned. It was put to the Respondent's expert witness that the only question that remained then was, what a third party would have paid for the shares and the witness agreed.
- 39.11. It was put to the Respondent's expert witness that the seller was of relevance here only and the Respondent's expert witness disagreed, because of the product that was being sold, the preference shares, remained preference shares. He said the fact that the Appellant was selling the shares must be disregarded, but the shares have a piece of the Appellant inside the shares, due to the structure that the Appellant created on 17 December 2015. He said therefore it was not possible to disconnect the Appellant from the company B shares. It was put to the Respondent's expert witness that he was confusing the structure with the shares. He disagreed and stated that every share holds a value and that no one buys a

share without value. So, to understand the value of a share he said, one must look behind the share. However, in this case the only value or no value comes from what was in that share, namely preference shares in company B that had no value, as it was created by the paperwork that was put in place through the Appellant.

39.12. The Respondent's expert witness stated that the Appellant's connection cannot be removed from the company B shares or his value from the shares as he was tied to the shares. The Respondent's expert witness testified that it had nothing to do with him owning the shares on the 31 December 2015, when that hypothetical sale happened, this was to do with the value inside in the structure, which was created on the 17 December 2015.

39.13. It was put to the Respondent's expert witness that he gave evidence that there are two people in the transaction, and that one of them would stop the transaction, the Appellant's alter ego or the second person. The Respondent's expert witness stated that the reason he gave that evidence was because it was not the Appellant, being the hypothetical seller, it was the real Appellant who had bought into the loan. He said these are not connected concepts and the hypothetical seller does not step into the shoes of the hypothetical seller who owes €200,000 to company C. The Respondent's expert witness was asked how he could say that the Appellant can stop the sale and not stop it at the same time. The Respondent's expert witness stated that the Appellant remained "on the hook" for €200,000 and it was important that he achieved €200,000 for the sale of the company B shares. This was not a freestanding asset. It was put to the Respondent's expert witness that he was trying to make the question more complex than it was and he responded to state that he did not understand where the simplicity was. It was put to the Respondent's expert witness that the simplicity was the words of Lord Blanesburgh in *Crossman* that there was a hypothetical seller, not the actual seller and all that was required was that the sale was assumed.

39.14. The Respondent's expert witness testified that it was a very unusual situation that the seller, being replaced by a hypothetical seller, was at the same time the same individual that was embedded in the value of the transaction. The Respondent's expert witness testified that we must in the hypothetical situation assume the sale can happen. But the Appellant will require €200,000 for the shares to satisfy the structure that was set up previously. He explained that this was not just market

value that was going up and down. It was put to the Respondent's expert witness that the only person to focus on was the hypothetical seller. The Respondent's expert witness agreed but said there must be a market for the shares which he did not believe there was, but that was not to say that someone, somewhere, might purchase the shares.

39.15. It was put to the Respondent's expert witness that he was inventing a new marketplace, but the Respondent's expert witness stated that there was no way to actively sell the company B shares. He said that he did accept that it was possible for a purchaser to exercise all the rights attaching to the shares, but that it was not something that he would advise investment in. The Respondent's expert witness testified that a share cannot be isolated from what underpins its value and that every share that ever trades was not just a share in isolation, it was backed by value of some sort, which must be understood.

39.16. The Respondent's expert witness testified that in this case, the company B shares are held by a valueless company. This fact was important because to access the value in the shares, a request must be made to company B to redeem them. As company B was valueless, with no assets, it cannot redeem the shares. The witness Respondent's expert stated that the shares are redeemable immediately but it must be via the Director of company B, which had no resources and then who calls on company C which he stated also had no resources and then which calls on the Appellant, and there was also reliance on the director of the companies acting in good faith, calling in the demand and also on the Appellant having the capacity to pay €200,000.

39.17. The Respondent's expert witness was asked whether he accepted that the marketplace was broader than the narrow position put forward by him. The Respondent's expert witness said that the marketplace was investors which would make up any number of types, but the problem herein was the product being put to the market, a preference share backed by a personal structure through the Isle of Man, backed by the Appellant. The Respondent's expert witness did not accept that vulture funds were a market for this type of product.

Respondent's submissions

40. The Commissioner sets out a summary hereunder of the submissions made both at the hearing of the appeal and in the documents submitted in support of this appeal:-

- 40.1. In a tax appeal, the onus of proof is on the Appellant. The evidence adduced was that the purpose of the borrowings was for company law requirements and the witness had limited understanding of the structure. There was no evidence adduced of any movement of funds or any bank statements to support same. Furthermore, it was only in the 2017 unabridged financial accounts of the Appellant company, that it appeared that the director's loan account had moved, as alleged.
- 40.2. There is no doubt that there was a personal benefit to the Appellant, his director's loan account with the Appellant company was reduced on foot of the alleged transaction. There was no evidence adduced of the loan from company C nor that the payment of the one per cent interest rate was ever made by the Appellant. It was open to the Commissioner to draw inferences from the failure to call evidence to support those matters and reference was made to the judgment of the superior courts in *Fyffes Plc (plaintiff) v DCC Plc, S&L Investments Ltd, James Flavin and Lotus Green Ltd* [1995] IEHC 477.
- 40.3. It was grossly inaccurate of the Appellant's expert witness to opine that the Statement of Affairs suggested that the Appellant had assets in the region of the amount of €750,000. It was not evidence that the Commissioner can accept that the Appellant could reach out to friends or family should he have required access to funds, as it was not corroborated.
- 40.4. The company B shares do not appear in the accounts of the Appellant company and no explanation was proffered as to why the company B shares do not appear in the tangible assets on the balance sheet of the Appellant company. Furthermore, there was no explanation why the director's loan account did not appear in the 2015 and 2016 unabridged financial accounts of the Appellant company. The only movement in the director's loan account was evidenced in the 2017 unabridged financial accounts of the Appellant company.
- 40.5. It was critical to the credibility of the Appellants' expert witness that he was not aware that the properties the subject of the Appellant's liabilities reflected in the Statement of Affairs under the heading US loan and Dwelling house loan were sold by the financial institutions, following demand letters having been issued to the Appellant. In addition, it was not open to the Appellants' expert witness to testify that, if the Appellant was made bankrupt and the family home sold, in 2016, he would have had sufficient funds remaining to purchase an apartment on the

grounds of the [REDACTED]. The Appellant was not going to sell his family home.

- 40.6. The Statement of Affairs was of limited evidential value in the absence of evidence from the author of the document, the Appellants' accountant. Moreover, the document was not verified or vouched. It was not possible for the Appellants' expert witness to credibly state that the Appellant was a "high net worth individual", in circumstances where the Appellant was at risk of losing his home or being made bankrupt as a result of a structure involving the amount of €200,000.
- 40.7. In terms of the five per cent dividend payable on the company B shares, there was no reality to that dividend ever being paid, where the evidence was that the company had never traded, nor was there any evidence that this company would ever trade.
- 40.8. The evidence of the Appellant was limited, and nothing was proven. The transaction was not properly proven, save for some entries in the accounts in relation to the director's loan. In addition, the evidence of the Appellant's expert witness was limited, where no verification work whatsoever was carried out on the Appellant's Statement of Affairs.
- 40.9. The authorities are of somewhat limited relevance to the structure of the company B shares herein and the structure that was put in place on 17 December 2015. However, the valuation was required to be based upon what a "reasonable" third-party would pay for the company B shares and reference was made to the judgment in *IRC v Gray* at pages 371 and 372 wherein the court stated that:

"...one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time."

- 40.10. Reference was made to extracts of the publication "Valuation of Shares in Unlisted Companies for Tax Purposes", in particular paragraphs 2.3 and 10.2. It

was the case that no reasonable purchaser, armed with knowledge of the company B shares, would have acquired those shares, thus there was no open market for the company B shares. Given this position, the value of the company B shares was nil and the entire amount of €200,000, paid by the Appellant company to the Appellant was a distribution. As such, the provisions of section 130(3)(a) TCA 1997 and section 172B TCA 1997 applied.

40.11. Section 130(3) TCA 1997 provides that where a transfer of assets or liabilities takes place by either - (a) a company to its members, or (b) a company by its members, and the amount or value of the benefit received by the member (taken accordingly to its market value) exceeds the amount or value (so taken), the company is to be treated as making a distribution to the member of an amount equal to the difference. In circumstances where the company B shares had no value and as the Appellant company had paid the Appellant the sum of €200,000 for the company B shares, then a distribution of that amount had been paid by the Appellant company to the Appellant.

40.12. The reduction of the Appellant's director's loan account was a benefit to the Appellant, whereby the Appellant's director's loan account with the Appellant company was reduced from the amount of €165,397 to a credit balance of €35,603 in favour of the Appellant. It was not the case that since the Appellant owed an amount of €200,000 to company C, no benefit arose herein. In terms of there being an asset with a value of nil, there exists the possibility of making negative claims on an asset, therefore, the argument of the Appellants in this regard, was not credible.

40.13. The decision in *Lotus* concerned an allegation of fraud. There was no allegation of fraud in this appeal. Therefore, this case was of limited value to the Appellants arguments. The Appellants' appeal was predicated on there being a legitimate loan from company C to the Appellant and that the Appellant was indebted to company C in the amount of €200,000. There was no evidence adduced to support that position and there was no evidence adduced that the one per cent interest rate on the loan was ever paid by the Appellant.

Material Facts

41. Having read the documentation submitted and having listened to the evidence and submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:-

- 41.1. The Appellant is a Director of the Appellant company and the sole shareholder in the Appellant company.
- 41.2. The Appellant company was incorporated in or about [REDACTED].
- 41.3. Over the years, the Appellant company had up to [REDACTED] employees.
- 41.4. The Appellant is a [REDACTED] and has always been involved in the business of [REDACTED]. The business of the Appellant company is to conduct those activities, namely [REDACTED].
- 41.5. On 17 December 2015, the Appellant entered into a loan agreement with company C for the amount of €200,000. The loan was unsecured, but repayable on demand.
- 41.6. The loan from company C required that the Appellant make interest payments in the amount of one per cent per annum on the loan.
- 41.7. In the document entitled "Side Agreement", dated 17 December 2015, between the Appellant and company C, the Appellant "*...irrevocably instructs the lender to pay the Advance directly to the order of the Issuer in return for the issue of the Shares*".
- 41.8. On 17 December 2015, the Appellant instructed company C to pay the proceeds directly to company B, as the Appellant's subscription for company B shares.
- 41.9. On 17 December 2015, the Appellant subscribed for 20,000 Class B redeemable non-voting preference shares in company B, being a share subscription of €200,000.
- 41.10. On 31 December 2015, the Appellant transferred the company B shares to the Appellant company for consideration in the amount of €200,000. A written resolution by the Appellant company for the purchase of the company B shares and share certificates were submitted in support of the transaction.
- 41.11. The US loan in the amount of €1,227,676 reflected in the Statement of Affairs was in relation to an apartment the Appellant had purchased in [REDACTED] USA and which had been sold following demands being issued by the financial institution. Therefore, the loan was no longer backed by an asset.
- 41.12. The loan in the amount of €94,000 reflected in the Statement of Affairs was in relation to a holiday home in Co. [REDACTED] which was sold following demands

being issued by the financial institution. Therefore, the loan was no longer backed by an asset.

- 41.13. The consequence of that was the Appellant had liabilities of in or about €1,310,000 million, which were not represented by assets, as the assets have been sold by the financial institutions.
- 41.14. The Statement of Affairs of the Appellant was “massively critical”¹⁸ to the valuation of the shares.¹⁹
- 41.15. The Statement of Affairs document indicated a net asset position of the Appellant in the amount of €567,435. This amount reflected the Appellant’s liabilities in the amount of €200,000, being the company C loan.
- 41.16. Removing that liability, the Statement of Affairs indicated a net asset position of the Appellant in the amount of €767,435.
- 41.17. The Appellant stated that he would not sell his family home should he be required to discharge the company C loan in the amount of €200,000, but rather he would seek the amount from family or friends.
- 41.18. The five per cent dividend was part of the characteristics of the company B shares, but the five per cent dividend was irrelevant for the purposes of the valuation of the share on the valuation date, as company B had not traded.
- 41.19. The 2017 unabridged financial accounts show the Appellant’s director’s loan account reduced to the amount of €34,603, at the commencement of the financial year 2016.
- 41.20. The relevant date for the purposes of the valuation of the asset, namely the company B shares, was 31 December 2015.
- 41.21. The transaction that occurred on 17 December 2015, was “a circular” transaction, such that no money or funds moved, only obligations.

Analysis

Statutory interpretation

42. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles

¹⁸ Transcript Day 1, page 53

¹⁹ Transcript Day 1, pages 74 and 75

emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders*, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (“Perrigo”) at paragraph 74:

“The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd. v The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: “... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that”;

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or

exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

“Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.””

43. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.
44. Furthermore, the Commissioner is mindful of the recent decision in *Heather Hill* and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he stated that:

“It is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders –

is that the literal and purposive approaches to statutory interpretation are not hermetically sealed”.

45. To a certain degree it might be said that these cases suggest that the “literal” and “purposive” approaches to statutory interpretation are no longer hermetically sealed. To the extent that the line between what is now permissible has become blurred, Murray J. in *Heather Hill* sets out “four basic propositions that must be borne in mind” from paragraphs 113 to 116 as follows: -

“113. First, ‘legislative intent’ as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.

114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276).

115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

116. *Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However - and in resolving this appeal this is the key and critical point - the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."*

46. The *dictum* of Murray J. in *Heather Hill* was considered and approved by the Court of Appeal in the recent decision in *Hanrahan v The Revenue Commissioners* [2024] IECA 113 ("*Hanrahan*"). The Court of Appeal noted that the trial judge had cited and relied on the approach to the interpretation of taxation legislation that Murray J. in the Court of Appeal identified in the decision of *Used Car Importers Ireland Ltd. v Minister for Finance* [2020] IECA 298. Murray J., when considering the provision at issue, at paragraph 162 of the judgment, he stated that:

"[it] falls to be construed in accordance with well-established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute."

47. Moreover, the Court of Appeal in *Hanrahan* at paragraph 83 held that:

"Thus, the High Court correctly held that in interpreting taxation statutes generally, context and purpose are relevant. Therefore, not only does s. 811 direct Revenue and the court to have regard to the purpose of the provisions at issue but even in a more general manner the context and purpose of the statute is relevant."

48. Of note, the Court of Appeal in *Hanrahan* at paragraphs 79 and 80, when referring to the *dictum* of Murray J. in *Heather Hill*, in relation to the analysis of context and purpose, stated that:

"Murray J. was very alive to the dangers of pushing the analysis of the context of the provision too far from the moorings of the language of the legislative section; the line between the permissible admission of "context" and identification of "purpose" may become blurred if too broad an approach to the interpretation of legislation is taken.....He said that "the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for

a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown...

49. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly "*so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*".
50. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.
51. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of the *dictum* of McKechnie J. in *Dunnes Stores* at paragraph 66, wherein he stated that:

"each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."
52. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general principles of statutory interpretation are tools used for clear understanding of a statutory provision.

The burden of proof

53. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example, in the High Court case of *Menolly Homes Ltd*

v Appeal Commissioners and another (“Menolly Homes”) [2010] IEHC 49, wherein at paragraph 22, Charleton J. states that:

“The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable”.

54. The Commissioner also considers it useful herein, to set out paragraph 12 of the judgment of Charleton J. in *Menolly Homes*, wherein he states that:

"Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute..."

55. The law regarding the burden of proof and the reasons for it has been reaffirmed in recent subsequent judgments, for example in *McNamara v Revenue Commissioners [2023] IEHC 15* and *Quigley v Revenue Commissioners [2023] IEHC 244*.

56. However, when an appeal relates to the interpretation of the law only, Donnelly J. and Butler J. clarified the approach to the burden of proof, in their joint judgment for the Court of Appeal in *Hanrahan*. At paragraphs 97-98, the Court of Appeal held that:

“97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake.....

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;....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.....”

57. The Appellant referred the Commissioner to the judgment of the court in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc and Others [1987] STC 184*. The Appellant argued that this decision was relevant to the question of the burden of proof in this appeal and directed the Commissioner to the following passage from the decision:

“As a matter of practical common sense, if the company's documents showed no receipt or entitlement to receipt and the commissioners accepted the oral evidence in the absence of further evidence it would be understandable that the commissioners would be likely to come to the conclusion that Lotus had discharged the burden of proof which was on them. This might be expressed technically as a shift in what to my mind unfortunately is frequently called the evidential burden of proof. The evidential burden of proof is not the same as the basic burden of proof. According to well known principles, the burden of proof lies normally on the person alleging the fact, but in the present case it is established on the person seeking to set aside the assessment. The burden of proof in technical terms stays throughout where it starts. If on the other hand evidence is given which in the absence of other evidence or other factors would be sufficient to discharge the burden, then as a matter of ordinary common sense and judicial method the tribunal will decide that the burden of proof has been discharged this is all that is meant by a shift in the evidential burden. In my experience every time the phrase evidential burden is used it leads to error, particularly when the tribunal in question consists of laymen; for myself I think it could well be done without.

.....

..... to cast real doubt on the books and executives of Lotus would I think have required hard evidence, not a mere miasma of suspicion.”

58. As stated, the Commissioner is satisfied that there is a long line of authority both here and in the United Kingdom to the effect that, on an appeal from a tax assessment, the burden of proof lies on the taxpayer. This was recently confirmed in the judgment of the Court of Appeal in *J.S.S., J.S.J., T.S., D.S. and P.S v A Tax Appeal Commissioner* [2025] IECA 96, where the court considered the question of where the burden of proof lies in relation to the issue of a taxpayer’s residency in the State for tax purposes. The Commissioner notes the *dictum* of Mr Justice McDonald at paragraphs 30, 44 and 45, wherein he held that:

“30. There is a long line of authority both here and in the various jurisdictions within the United Kingdom to the effect that, on an appeal from a tax assessment , the burden of proof lies on the taxpayer in respect of these issues. That was the view taken by Gilligan J. in T.J. v. Criminal Assets Bureau [2008] IEHC 168 at para. 50. In turn, that view was reiterated by Charleton J. (albeit in the context of a V.A.T. appeal) in Menolly Homes Ltd. v. The Appeal Commissioners [2010] IEHC 49 at para. 22.

.....

44. *The last sentence in that extract reflects what was said by Lord Brandon in the Rhesa Shipping case in the passage quoted by Chadwick L.J. in Wood v. Holden, at p. 1413 (replicated in para. 15 above) to the effect that a judge or tribunal is not bound to accept the evidence of the party who bears the legal burden of proof and is entitled to reject it where it is unsatisfactory.*

45. *In my view, none of the arguments made on behalf of the appellants withstands scrutiny. The appellants have failed to put forward any plausible basis to support their case that CAB bears the legal burden of proof in relation to the issue of residence. It will therefore be for the appellants to put forward sufficient evidence before the TAC to establish, on the balance of probabilities, that they were not resident in the State within the meaning of s. 819 of the 1997 Act during the relevant tax years in issue in their appeals. That is neither surprising nor illogical. To paraphrase Chadwick L.J. in Wood v. Holden, at p. 1413, the relevant facts relating to the appellants' movements are best known to the appellants. They should have no difficulty in giving evidence relevant to the test set out in s. 819 of the 1997 Act".*

59. The Commissioner will now proceed to consider the statutory provisions articulated in this appeal, namely the application of section 130 TCA 1997.

Substantive matter

60. The Commissioner is satisfied that the question that arises in this appeal is whether in accordance with section 130(3) TCA 1997, a distribution arose on the transfer of the company B shares, by the Appellant to the Appellant company on 31 December 2015, for an amount of consideration of €200,000. The amount of consideration was discharged by way of a reduction in the amount of the Appellant's director's loan account with the Appellant company. In considering that question, the Commissioner must consider whether there was a benefit to the Appellant and if so, the market value of that benefit, being the company B shares.

Section 130(a) TCA 1997

61. For the purposes of this appeal, the interpretation of section 130(3)(a) TCA 1997 is relevant. The TCA 1997 is a taxation statute. As was made clear in *Perrigo*, both the imposition and the exemption of liabilities must be done expressly and in clear and unambiguous terms.

62. There are a number of requirements to be satisfied in order that a transaction is caught by the provisions of section 130(3)(a) TCA 1997. Section 130(3)(a) TCA 1997 provides that "*Where on a **transfer of assets** to a **company** by its **members** the amount or*

value of the **benefit received** by a member.....**exceeds** the amount or value (so taken) of any **new consideration given** by the member, the company shall be treated as making a **distribution** to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount").

63. In approaching the analysis of the construction of section 130(3)(a) TCA 1997 and the requirements to be satisfied, the Commissioner is conscious of McKechnie J's *dictum* in *Dunnes Stores* at paragraph 66 wherein he stated that "each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."
64. Furthermore, the Commissioner notes that section 130(3) TCA 1997 contains a deeming provision by the use of the words "shall be treated". The Commissioner is satisfied that a deeming provision effectively allows one set of facts to be treated as if they were a different set of facts. It is often referred to as a statutory fiction. Section 130(3)(a) TCA 1997 applies by treating as a distribution, the transfer of assets or liabilities by a company to its members or vice versa. Where such a deemed distribution is made, a charge to income tax arises insofar as consideration has not been received in respect of the acquisition of the asset.
65. The Commissioner observes that the conditions identified in section 130(3)(a) TCA 1997, that, if met, deem a company as "making" a distribution, are as follows: (a) there is a transfer of assets/liabilities; (b) the transfer occurs between a company and its member; and (c) the amount/value of the benefit "received" by the member, taken at its market value, exceeds the amount or value of any consideration given by the member. There was no dispute between the parties that the transfer occurred between a company and its member, the Appellant being a director and shareholder of the Appellant company. Therefore, the issues to be determined in this appeal are (a) and (c).

An asset

66. At the outset the Commissioner will deal with the Appellants' assertions in respect of there being no transfer of an asset. Counsel for the Appellants argued that if the Commissioner accepts the Respondent's assertions, that the value of the company B shares was nil, then it cannot be, that an asset was transferred. It was argued by counsel for the Appellants that it was illogical to state that something that has no value, was an asset. The Commissioner was directed by counsel for the Appellants to the decision in *Benson's Hosiery*. Counsel for the Appellants submitted that it was authority for the proposition that an asset was anything that can be turned to account.

67. The decision in *Bensons Hosiery* concerned Capital Gains Tax (“CGT”) arising on the disposal of assets emanating from a service contract. The question for the court was whether a payment made to an employer by an employee to secure release from a service contract gave rise to a chargeable gain received by the employer on the disposal of assets, the question being were an employer's rights under a service contract an “asset”. The special commissioners allowed an appeal by the taxpayer company against the assessment, holding that no chargeable gain had accrued on the receipt of the £50,000, because it was not a sum derived from chargeable assets within the meaning of section 22 of the Finance Act 1965. It was contended for by the taxpayer company that the rights of an employer under a contract of service were not “property” nor an “asset” of the employer, because they cannot be turned to account by transfer or assignment to another. The House of Lords held, allowing the appeal, that the language of sections 19 and 22 of the 1965 Act was unrestricted and applied not merely to assignments but also to disposals; that the sum of £50,000 had been received by the taxpayer company in return for the surrender of its rights under the service agreement or for refraining from exercising those rights, and, accordingly, there had been a disposal of an asset notwithstanding that those rights had not been assignable and had no market value.
68. Counsel for the Appellants argued that if it was accepted that the company B shares were valued at nil, as per the Respondent’s expert witness, those shares cannot be turned to account and consequently, the company B shares were not an asset for the purposes of section 130(3) TCA 1997.
69. The Commissioner notes that section 532 TCA 1997 defines assets for the purposes of the Capital Gains Tax Acts as “*all forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not*”, and this includes a debt. The Commissioner is satisfied that this is a broad definition. There is no definition in section 130 TCA 1997 of an asset and accordingly, the Commissioner is satisfied that the plain and ordinary meaning of the word “asset” should be applied, as this was what the principles of statutory interpretation required (as per *Perrigo*). Furthermore, the Commissioner is satisfied that the word “asset” is not an ambiguous word. “Asset” is defined in the Cambridge English Dictionary as a noun meaning “*a useful or valuable quality, skill or person*” or in business meaning “*something valuable belonging to a person or organization that can be used for the payment of debts*”. The Oxford English Dictionary defines the word “asset” as a noun meaning “*an item of value owned*”.
70. The Commissioner is satisfied that a share is a bundle of rights. The decision in *Raymond Hughes v The Revenue Commissioners* [2019] IEHC 907 (“*Hughes*”) which was not

referred to by the parties, is authority for the proposition that a share is an asset consisting of a bundle of proprietary rights. The Commissioner is satisfied that the *dictum* of Allen J. in *Hughes* deals with the meaning of an asset for the purposes of section 130(3)(a) TCA 1997. Allen J. gave detailed consideration to whether share rights were “assets” within the meaning of section 130(3)(a) TCA 1997. He concluded that they were assets and Allen J. stated that:

“65. The appellant accepts (as Keane J. said in Re Sugar Distributors Limited [1995] 2 I.R. 194, 207) that a share in a company is a bundle of proprietary rights which can be sold or exchanged for money or other valuable consideration. The appellant accepts that the rights may be sold or exchanged by way of a shareholders’ agreement and that “the said rights constitute assets for the purpose of the Capital Gains Tax Acts”. It seems to me that the acceptance that the rights attached to shares can be bought and sold by a shareholders’ agreement is an acknowledgment that the bundle of rights is divisible. It is not suggested that there is any special definition of assets for the purposes of the Capital Gains Tax Acts: so if the rights are assets for the purposes of the Capital Gains Tax Acts, they must equally be assets for the purpose of the Income Tax Acts.

71. The Commissioner is satisfied that when a transfer of the company B shares took place on 31 December 2015, from the Appellant to the Appellant company, there was a transfer of an asset, being the transfer of the bundle of proprietary rights attaching to those shares, and that the market value of those rights or shares was irrelevant, as the market value was a matter distinct from the actual asset, being the bundle of share/proprietary rights. The asset is the share consisting of the bundle of proprietary rights as opposed to the value of that share which is not static and can change over time. In this context, the Appellant company received something of value when the transfer of share rights occurred, on 31 December 2015. Thus, the Commissioner is satisfied that even if the Commissioner makes a finding that the company B shares had a market value of nil, that does not undermine the fact that the company B shares were an asset. The Commissioner cannot accept the Appellants’ argument that where the market value of a share may be nil, the consequences are such, that it can no longer be described as an asset, and the Commissioner is satisfied that the case law does not support such an argument.

The transactions and the benefit

72. The Appellants’ first ground of appeal was that section 130(3)(a) TCA 1997 does not apply to the Appellants’ circumstances, as a distribution did not arise. It was argued that

a distribution did not arise, because any benefit to the Appellant arising from the transfer of the company B shares to the Appellant company, had an equal and offsetting cost to the Appellant. Consequently, a distribution could not arise, in accordance with section 130(3)(a) TCA 1997. Counsel for the Appellants argued that “[*the Appellant*] always had that loan to repay. It didn't solve that problem for [*the Appellant*]. All it did was move it from one place to another or from one pocket to another or from one form, notionally at least, to another.”²⁰

73. Counsel for the Appellants submitted that if the structure was unwound, the Appellant remained liable for the amount of €200,000. Therefore, all that had occurred was a change in liabilities from one entity to another. It was argued by counsel for the Appellants that the Appellant still owed the amount of €200,000, but that he owed the amount to another entity, namely company C and the consequences were such that “*any benefit to him would be entirely nebulous*”,²¹ as once the structure was unwound, he remained liable for the amount of €200,000. Thus, it was a circular structure with no benefit to him.
74. Counsel for the Appellants argued that if the Commissioner finds that there was a benefit to the Appellant, then the Commissioner must consider the value of that benefit being the market value of the company B shares. However, it was posited by counsel for the Appellants that it was the testimony of the Appellant that the transaction was of no benefit to him and that in the absence of any evidence from the Respondent to the contrary, his evidence should be accepted by the Commissioner, in accordance with the principles enunciated in the judgment in *Lotus*.
75. The Commissioner notes that it was the evidence of the Appellant that on a date prior to 17 December 2015, his accountant informed him of a structure that could deal with the Appellant’s director’s loans with the Appellant company and contact was made with the requisite person in terms of putting the structure in place. The Commissioner has considered the correspondence submitted by the Appellants dated 17 December 2015, which stated that “[*f*]urther to our recent discussions, we understand that you wish to make an investment in redeemable non-voting preference shares in [*company B*]. We have set out below the details of the proposed share issue as follows:”
76. The evidence of the Appellant was that on the same date, 17 December 2015, he entered into a loan agreement with company C, for a loan in the amount of €200,000 and reference was made to the loan agreement, dated 17 December 2015, enclosed within the documentation submitted in this appeal. The Appellant stated that the reason for the

²⁰ Transcript Day 2, page 75

²¹ Transcript Day 2, page 98

borrowings was for company law purposes and when asked what he understood that to mean, he clarified that his accountant had advised him that he was required to have his affairs in order in relation to the director's loans with the Appellant company. Therefore, the loan was for commercial reasons. The Appellant testified that the purpose of the loan was "*to get the money to put into the company*".²²

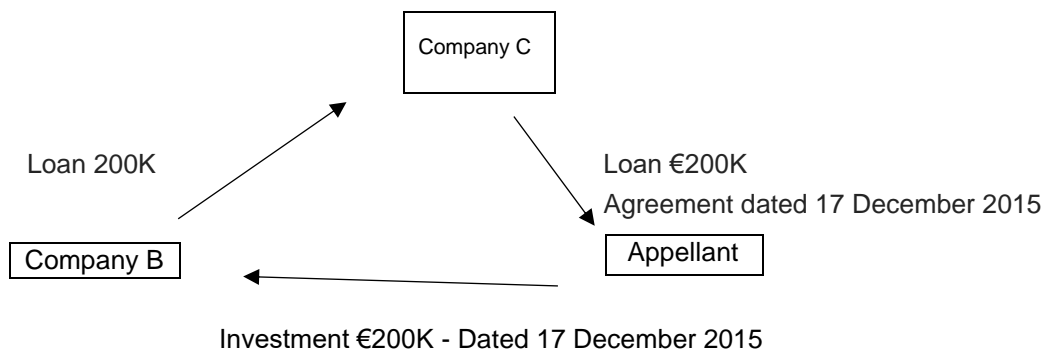
77. The Commissioner notes the document entitled "Side Agreement" between the Appellant and company C, which stated that the Appellant "*...irrevocably instructs the lender to pay the Advance directly to the order of the Issuer in return for the issue of the Shares*". Thus, it appears from the documentation submitted that the Appellant instructed company C to pay the loan proceeds in the amount of €200,000 directly to company B, as the Appellant's subscription of €200,000 for 20,000 company B shares. This was consistent with the Appellant's evidence in that regard. The Commissioner further notes that the Appellant stated that the interest rate on the loan was one percent.
78. Of note, when asked what happened after the money was borrowed, the Appellant testified that he received the company B shares and the share certificate and "*it went back around to [company B] was my understanding*", but that he was "*not qualified, probably, to answer properly, insofar as [the Appellant] knew the structure at the time and [the Appellant] was told it was bona fide by [the Appellant's] accountant, [the Appellant] was quite happy once that was the case to let this happen. And [the Appellant] was assured on both sides that this was perfectly the case for company law and commercial reasons and [the Appellant] was fine with that*".²³
79. It was contended by counsel for the Appellants that on 17 December 2015, company B agreed to provide a loan of €200,000 to company C. The terms of this loan were set out in a document entitled "Loan Agreement" dated 17 December 2015, between company B and company C and which was submitted by the Appellants in support of the appeal. Counsel for the Appellants submitted that on 17 December 2015, "*as a consequence of the above, (a) [company B] owed [company C] €200,000 being the drawdown proceeds of the [company B] Loan and (b) [company C] owed [company B] €200,000 being its obligation, following the instruction from [the Appellant].....to pay the proceeds of the [company C] Loan directly to [company B] as [the Appellant's] subscription for the [company B] Shares. [company C] and [company B] satisfied / discharged these mutual obligations arising on 17 December 2015 by way of offset such that there was no net movement of funds between the parties*".

²² Transcript Day 1, page 33

²³ Transcript Day 1, page 38

80. The Commissioner notes the Appellant’s evidence, that when asked by counsel for the Respondent if he would notice if €200,000 went into his bank account and if he thought it did, his response was that “*I don’t know....it might have...*”. Furthermore, when asked was the amount of €200,000 still in his bank account the Appellant’s testimony was “*yes it is...yes.*”²⁴ The Respondent submitted that this was a “strange” assertion, in circumstances where it did not appear in the Statement of Affairs, which the Appellant testified was prepared by the Appellants’ accountant, and which begged the question, if the Appellant had €200,000 in his bank account, why he did not use that amount to discharge the loan. The Commissioner notes that when asked by counsel for the Respondent why the Appellant did not use the borrowings from company C to discharge the director’s loans in the Appellant company, the Appellant’s response was that the provider of the loan “*had liaised with my accountant and the procedure he followed was the one that I adhered to.*” Counsel for the Respondent put it to the witness that there was no need to borrow €200,000, rather €165,000 could have been borrowed and transferred to the Appellant company to deal with the director’s loan account. The Commissioner notes the Appellant’s response again was one of reliance on his accountant, wherein he stated that “*this was presented to me by [the Director of company B] and I let my accountant do it. I spoke with him and it was the right thing to do, we felt, and we went ahead and did that.*” The Commissioner is of the view that the Appellant’s evidence in relation to the transaction was limited, but that at the time he understood the transaction. The Appellant in fact stated so, as set out at paragraph 79 of this Determination. The Commissioner did not hear evidence from the Appellants’ accountant. The Appellant was candid in his evidence that he followed the advice of his accountant, in terms of the transaction and procedure.

81. The evidence of the Respondent’s expert witness described the transaction as a circular transaction and the transaction was set out in his expert report as follows:



²⁴ Transcript Day 1, page 54

82. The Commissioner notes that the balance sheet of company B indicated that as of 31 December 2015, it had no cash reserves. If funds had been raised by company B to finance a loan to the Appellant, then that should have been reflected in the accounts. No profit and loss accounts were produced, and the Commissioner notes that the Appellant was one of nine subscribers for the company B shares as of 31 December 2015. An extract from the financial statements of company B for three years to 31 December 2016 shows that company B had no income and expenses, and its balance sheet was made up on the loans due from company C less preference shares, which accounts for as current liabilities. The Commissioner notes that the balance sheet total was therefore €1.00. The Commissioner notes the report of the Respondent's expert witness wherein he stated that *"[t]he documentation in respect of the transaction indicated that it was done by means of setting off liabilities against payments due."*
83. In respect of the transaction on 31 December 2015, the Appellant gave evidence that he transferred the company B shares to the Appellant company and that the consideration for the transfer of the company B shares was the amount of €200,000, which was discharged by the Appellant company to the Appellant by way of a reduction of the outstanding balance of the Appellant's director's loan account with the Appellant company in the amount of €165,397. This, the Appellant submitted, created a credit balance in the director's account in favour of the Appellant in the amount of €34,603. The Commissioner has considered the Share Certificate submitted in the bundle of documents in the name of the Appellant, the Stock Transfer Form dated 31 December 2015, and the Share Certificate in the name of the Appellant company. The Commissioner also notes the written resolution dated 31 December 2015, of the Appellant company by its members approving and authorising the acquisition of the 20,000 company B shares from the Appellant by the Appellant company for the amount of €200,000. The documents appear to support the testimony of the Appellant in respect of the transaction that took place on 31 December 2015. The Commissioner is satisfied that the Appellant gave credible evidence in respect of the documentation and him entering into the transactions, and that the evidence was uncontroverted.
84. However, the unaudited abridged financial statements of the Appellant company for 31 December 2014, show a balance owing on the directors' loan account in the amount of €247,083.²⁵ Yet, when the Commissioner considered the 2015 unaudited abridged financial statements for the financial year ended 31 December 2015, no reference was made to director's loans therein. It was a similar situation in respect of the year 2016.

²⁵ Booklet of Documents, page 199

Moreover, the abridged financial statements of the Appellant company for 2015 and 2016 did not identify the company B shares in the balance sheet of the Appellant company. The evidence was that the transfer of shares to the Appellant company took place on 31 December 2015 and was approved by the members of the company by way of written resolution. Nonetheless, the acquisition of those shares was not apparent from the financial statements of the Appellant company. In terms of evidence of the director's loan account, the abridged financial statements of the financial year ended 31 December 2017 shows at Note 9²⁶ that the director's current account had a balance in the amount of €19,068 on 31 December 2016 and €5,265 on 31 December 2017 in the comparative columns. The Commissioner also observes that Note 9 shows the amount of €34,603, being the amount at the commencement of the financial year 2016. But this was not shown in the 2016 abridged financial statements of the Appellant company. This amount appears only in the 2017 abridged financial statements of the Appellant company in the comparative column to 2017. The Commissioner had been furnished with the following accounts for the Appellant company:

- (a) The abridged financial statements for the financial year ended 31 December 2013. Under the heading "Transactions with directors"²⁷ in the notes section, it stated that "The following directors had interest free loans during the year. The movements on these loans are as follows" and sets out that the amount owing in 2013 was €123,292 and the amount owing in 2012, was €35,558.
- (b) The abridged financial statements for the financial year ended 31 December 2014. Under the heading "Transactions with directors"²⁸ in the notes section, it states that "The following directors had interest free loans during the year. The movements on these loans are as follows" and sets out that the amount owing in 2014 was €247,083 and in 2013, the amount was €123,292, consistent with the above at (a).
- (c) The unaudited abridged financial statements for the financial year ended 31 December 2015, which were approved on 30 September 2016. However, the financial statements for the year 2015 contain no notes in relation to the "transactions with directors" or any other information in relation to the director's loan account. Moreover, the accounts do not reflect in "current assets", or

²⁶ Book of Documents, page 231

²⁷ Book of Documents, page 187

²⁸ Book of Documents, page 199

anywhere else in the financial statements, the company B shares purchased by the company from the Appellant on 31 December 2015.

- (d) The unaudited abridged financial statements for the financial year ended 31 December 2016, approved on 30 September 2017. Again, the financial statements for the year 2016 contain no notes in relation to the “transactions with directors” or any other information in relation to the director’s loan account. Moreover, the accounts do not reflect in “current assets”, or anywhere else in the financial statements, the shares purchased by the company from the Appellant on 31 December 2015.
- (e) The unaudited abridged financial statements for the financial year ended 31 December 2017, approved on 30 September 2018. Under the heading “Director’s transactions”²⁹ in the notes section, it states *inter alia* “Directors current account” at the start of the financial year and it sets out that the amount in 2017 was (€19,068) and in 2016, the amount was (€34,603). Again, the financial statements do not reflect in “current assets”, or anywhere else in the financial statements, the company B shares purchased by the company from the Appellant on 31 December 2015.

85. Furthermore, the Commissioner has considered the Form CT1 of the Appellant company submitted within the documentation in this appeal for the periods 1 January 2013 to 31 December 2013 (“2013”), 1 January 2014 to 31 December 2014 (“2014”), 1 January 2015 to 31 December 2015 (“2015”), 1 January 2016 to 31 December 2016 (“2016”) and 1 January 2017 to 31 December 2017 (“2017”). The Commissioner notes that the Form CT1 for the years 2013, 2014, 2016 and 2017 contained a section on the first page entitled “Current and Loan Accounts of Directors and Participators”. However, no such section appears in the Form CT1 for the year 2015. The Commissioner notes the 2014 Form CT1 stated that the closing balance for 2014 was a debit amount of €297,358. Furthermore, the opening balance of the Form CT1 for 2016 stated the amount of €34,603. Each of the sections also reflect the debits and advances for the period. The Commissioner notes that no explanation was forthcoming, why the Form CT1 for 2015 did not contain a similar section nor any reason why such a section would be excluded. The Commissioner notes that no evidence was adduced from the Appellants’ accountant as to the preparation of the accounts despite the Appellant testifying that his accountant

²⁹ Book of Documents, page 231

who was his accountant at the time, despite now being 82, still prepared the Appellants' accounts.

86. Nevertheless, the Commissioner is mindful that she was furnished with a Stock Transfer form dated 31 December 2015, signed by the Appellant and a written resolution from the Appellant company signed by the Appellant and which stated that it was resolved that the Appellant company approve and authorise the acquisition by the Appellant company from the Appellant of "*20,000 Class B redeemable non-voting preference shares of €0.01 each in the capital of Company B*" for €200,000. The Appellant testified that once in receipt of the company B shares, on 31 December 2015 he transferred them to the Appellant company for the amount of €200,000 which was offset against his director's loan account with the Appellant company. The 2017 unabridged financial statements suggest that the director's loan account was reduced to a credit amount of €34,603, when the comparative columns are considered for the various years. It is clear to the Commissioner that the balance on the director's loan account at the commencement of 2016, was a credit amount of €34,603. This was consistent with the Appellant's evidence. In addition, the Commissioner notes the Loan Agreement between the Appellant and company C, signed by the Appellant and the Side Agreement between the Appellant and company C, also signed by the Appellant.
87. The Commissioner notes the submission by counsel for the Respondent that if the Appellant company purchased the company B shares for the amount of €200,000 there would be two sides to that transaction, namely the director's loan account would be in credit as contended, but that was not apparent from the 2015 or 2016 accounts and importantly, there was no evidence of any shares being held by the Appellant company in the 2016 accounts. Counsel for the Respondent queried "*where are the shares*".³⁰ The Commissioner notes that there appears no reference to the company B shares in the 2017 notes to the abridged financial statements.
88. However, it appears to the Commissioner that the Respondent has not sought to make the argument that a transfer of the company B shares did not take place on 31 December 2015. The Respondent has raised an assessment to tax pursuant to section 130(3)(a) TCA 1997, on the basis that there was a transfer of an asset for consideration. Section 130(3) TCA 1997 taxes as a distribution "the difference" between the value received by a member and the consideration paid by a member, in respect of the transfer of an asset to a company by its member. In other words, section 130(3)(a) TCA 1997 taxes a movement of assets between two taxable persons and provides that the amount of the

³⁰ Transcript Day 2, page 134

difference between the value received and the consideration paid (referred to as ‘the relevant amount’) “*shall be treated as.....a distribution*”, and thus, chargeable to income tax in the hands of the recipient. Therefore, in order for there to be a distribution, there must have been a transaction. The Appellant testified that on 31 December 2015, he transferred the company B preference shares to the Appellant company (despite the accounts of the Appellant company not reflecting same). In consideration for those shares, it was contended by counsel for the Appellants that the company paid the Appellant the amount of €200,000 by way of the reduction of his director’s loans, leaving a credit balance in the director’s loan account in favour of the Appellant, in the amount of €34,603.

89. In the absence of evidence to contradict the evidence of the Appellant, the Commissioner accepts the evidence of the Appellant that on 31 December 2015, the Appellant company acquired the company B shares for the amount of €200,000. The Commissioner is satisfied that taking the documentation referred to in the preceding paragraphs and the evidence of the Appellant together, the Appellant entered into the transaction as alleged on 17 December 2015 and thereafter on 31 December 2015, he transferred the company B shares to the Appellant company for the amount of €200,000. It is the case that the Appellants have satisfied the burden of proof in this regard. The Commissioner is satisfied that the transaction occurred, as stated.
90. To recap, the Appellant’s first ground of appeal was that section 130(3)(a) TCA 1997 does not apply to the Appellants’ circumstances, because no benefit to the Appellant arose from the transfer of the company B shares to the Appellant company, as it had an equal and offsetting cost to the Appellant.
91. Turning to the question of whether the Appellant received a “benefit” section 130(3) TCA 1997 provides that “*Where on a transfer of assets.....the amount or value of the benefit received by a member (taken according to its market value).....*” In interpreting the word “benefit” the Commissioner must consider the plain and ordinary meaning of the word in accordance with the principles of statutory interpretation. The word “benefit” is a noun and is defined in the Oxford English Dictionary as “*advantage, profit, good*”. The Commissioner is satisfied that this transaction, namely the transfer of the company B shares to the Appellant company and the receipt by the Appellant of consideration in the amount of €200,000, was of clear benefit to the Appellant. On 31 December 2015, the Appellant was in receipt of a benefit from the Appellant company in the amount of €200,000 in return for the company B shares, which the Appellant held and transferred to the Appellant company.

92. The Commissioner is satisfied that the Appellant's financial arrangements with another entity does not restrict section 130(3)(a) TCA 1997 in the manner contended for by the Appellants. A benefit was received by a member, namely a benefit was received by the Appellant from the Appellant company in the amount of €200,000 by way of a reduction in the Appellant's director's loan account with the Appellant company, the Appellant being a member. On 31 December 2015, the Appellant transferred the company B shares to the Appellant company for the amount of €200,000, which was used to reduce the Appellant's director's loans with the Appellant company. That, the Commissioner considers was the benefit received by the Appellant, namely €200,000 from the Appellant company. The Commissioner is satisfied that the evidence in this appeal was that the Appellant, having transferred company B shares to the Appellant company, the Appellant company in return reduced the Appellant's director's loan account by the amount of €200,000 to reflect a credit balance of €34,603. That, the Commissioner considers, was a benefit for the purposes of section 130(3) TCA 1997. The Commissioner does not accept the argument that all that had occurred was that the loan had moved from one creditor to another for the reasons set out heretofore.
93. Having established that a benefit was received by the Appellant from the Appellant company, this leads the Commissioner to the question of the market value of the benefit, on 31 December 2015. The Commissioner heard evidence from two expert witnesses in this appeal, one for the Appellant and one for the Respondent, both of whom valued the company B shares. It was the case that both experts were in stark disagreement not only as to the value of the company B shares, but the manner in which they both arrived at the valuation of the company B shares. The Commissioner will now proceed to consider the market value of the benefit.

The market value of the benefit

94. It is the case that where consideration for the disposal of an asset is in excess of the market value of the asset, the provisions of section 130(3)(a) TCA 1997 apply, and the excess is treated as a distribution from the company to the member.
95. In order to consider as a matter of law, if a distribution took place, the Commissioner is required to examine the market value of the asset, namely the company B shares, on 31 December 2015, which the Appellant transferred to the Appellant company in return for the amount of €200,000. As per the testimony of the Appellant, the amount of €200,000 was used to reduce the Appellant's director's loans with the Appellant company from the amount of €165,397 in 2015 to a credit amount of €34,603.

96. The parties were in agreement that the relevant date for the purposes of the valuation of the asset, namely, the company B shares was 31 December 2015, and the Commissioner finds that to be a material fact in this appeal.

Duties of an expert witness

97. Central to the Commissioner's findings is a requirement to consider the contents of the Appellants' and the Respondent's expert reports and a consideration of the expert evidence tendered by those experts. The jurisprudence in respect of the duties of an expert witness is well settled and the Commissioner is mindful of the *dictum* of Mr Justice Noonan in the Court of Appeal in *Patrick Duffy v Brendan McGee T/A McGee Insulation Services and GMS Insulations Limited* [2022] IECA 254, wherein Noonan J. set out the well settled principles relating to expert evidence and stated that:

"78. Expert witnesses enjoy a special position in the law of evidence. Unlike non-experts, experts are not confined to giving purely factual evidence but may give opinion evidence where certain criteria are satisfied....."

80. The expert is there to assist the court, not to decide the case and the court has no obligation to accept the evidence of any particular expert, even where it is uncontradicted - per Clarke J. in Donegal Investment Group plc v. Danbywiske [2017] IESC 14 at [7.1], [2019] 1 IR 150, at para 60.

89. The classic statement of the duties of experts, widely recognised in the common law world, is to be found in the judgment of Cresswell J. in National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd (The Ikarian Reefer) [1993] 2 Lloyds Rep. 68 at 81-82:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (per Lord Wilberforce, Whitehouse v. Jordans [1981] 1 WLR 246 at p.256).

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. (See Polivitte Limited v. Commercial Union Assurance Company [1987] 1 Lloyds Rep. 379 at 386 per Mr. Justice Garland and Re J, [1990] FCR193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. *An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J Sup.).*

4. *An expert witness should make it clear when a particular question or issue falls outside his expertise.*

5. *If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J Sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. & Ors. v. Weldon & Ors., The Times, November 9, 1990 per Lord Justice Staughton).*

6. *If after exchange of reports, an expert witness changes his view on a material matter having read the other side's experts report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*

7. *Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be proved to the opposite parties at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."*

90. *These principles were further refined in Anglo Group plc v. Winther Brown & Co. Ltd. [2000] All ER 294 following upon the introduction of the new Civil Procedure Rules in England and Wales.*

91. *The overriding duty of the expert is owed to the court and includes the duty to provide an objective opinion. Objectivity by definition requires that one has regard to both sides of the case. An essential component of the duty of the expert is to ascertain all relevant facts whether they support the client's case or not. This duty has been reiterated many times. In Fitzpatrick v. DPP (Unreported: 5 December 1997), McCracken J. said:*

"It is my strongly held view that where a witness purports to give evidence in a professional capacity as an expert witness, he owes a duty to ascertain all the surrounding facts and to give that evidence in the context of those facts, whether they support the proposition which he is being asked to put forward or not."

92. *An expert is not entitled to simply accept without question the instructions of his or her client and proceed to offer what must necessarily be a blinkered opinion. As O'Donnell J. (as he then was) observed in Emerald Meats Ltd. v. Minister for Agriculture [2020] IESC 48 at [28]:*

“It is important that experts, and particularly accountancy witnesses, do not simply accept their client's instructions as to certain matters and then construct calculations on the basis of those instructions. If that is all that is done, then the expert report is no more than the provision of a very expensive calculator. The court is entitled to expect that such experts will apply their critical faculties and their expertise to the case being made by their clients.”

93. *An expert should bring “an independent inquiring mind” to bear on the task at hand – per Kearns J in AW v. DPP [2001] IEHC 164 at [100]. In WL Construction Ltd. v. Chawke [2016] IEHC 539, an expert was strongly criticised for simply restating without question the claims made by the plaintiff without conducting any independent verification or analysis of those claims. This was held to amount to a failure in the expert's duty “to give an impartial and balanced view of the claim”.*

94. *Thus, where the facts are in dispute, the expert should make clear which version of events forms the basis for his or her opinion and what the consequences for that opinion are if an alternative version is accepted. In that analysis, however, it is no function of the expert to advocate for a particular resolution of factual controversies as that would be to usurp the function of the court. The duty of impartiality and independence necessarily imports a willingness on the part of the expert to remain open to alternative possibilities and if necessary, to change his or her mind when confronted with new information.*

95. *Where it is found that an expert has not complied with these duties, the question arises as to whether this should affect the admissibility of the expert's evidence or merely the weight to be attached to it.*

.....”

The valuation of shares – the statutory hypothesis

98. In relation to the approach to be taken to the valuation of an asset, the Commissioner notes that section 548 TCA 1997 provides that “*Subject to this section, in the Capital Gains Tax Acts, “market value”, in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market.*”

99. Both parties made submissions on the established jurisprudence in relation to the valuation of an asset, namely shares and the approach to be taken in this appeal. The Commissioner considers that it is useful to set out the requirements of the statutory hypothesis for valuations, as is established by a long line of jurisprudence. The Commissioner does not intend to set out the details of each judgment opened by the parties, as the jurisprudence dates back to over one hundred years, but rather she will set out pertinent *dicta* from the following decisions.

100. In *Lynall*, the appeal raised points of principle regarding the valuation of shares in a private company and whether unpublished information (accounts for the previous year) was relevant in arriving at the open market value. The House of Lords considered the statutory hypothesis and the open market. The House of Lords held that the judgment in *Crossman* was properly decided and stated that:

“My Lords, the first submission that was made on behalf of the Appellants was one that was not open to them in the Courts below. It was that we should depart from the decision of this House in Commissioners of Inland Revenue v Crossman [1937] A.C. 26 by preferring the opinions expressed by the minority in that case to those expressed by the majority. Even if we were persuaded that the minority opinions were to be preferred, the question would arise whether it would be right to depart from the decision. It was given as long ago as March 1936, and it must on numerous occasions have been acted upon. It was in accord with the decision of the Court of Appeal in Ireland in Attorney-General v Jameson [1905] 2 I.R. 218 and the reasoning in that case had guided practice in subsequent years: See also Salvesen’s Trustees v Commissioners of Inland Revenue [1930] S.L.T. 387. It has been open to Parliament at any time since 1936 to amend s. 7(5) of the Finance Act 1894 if it had been considered that that section (as interpreted in this House) ought to be amended or supplanted. But having considered the arguments attractively presented on behalf of the Appellants, I have not been persuaded that the decision in Crossman’s case was erroneous. Section 7(5) requires an estimate to be made of the price which the property would fetch if sold” in the open market. So a sale in the open market must be assumed, and this in some cases will involve an assumption of the satisfaction of such conditions as would have been satisfied to enable such a sale to take place.

On the basis of an acceptance of the Crossman decision it was for the learned Judge on the appeal from the decision of the Commissioners to decide what price the shares would have fetched if sold in the open market at the time of the death of the deceased. In his careful judgment the learned Judge summarised the evidence which he had

heard. It became common ground that the price to be decided upon was that which would have been paid (a) by a hypothetical willing purchaser (b) to a hypothetical wedding vendor (c) in the open market (d) on 21st May 1962."

....." [Emphasis added]

101. In *IRC v Gray*, the Court of Appeal (Hoffman LJ, Neill LJ, Waite LJ) also considered the statutory hypothesis. The case concerned the valuation of agricultural land for the purposes of what is now called inheritance tax. The question that arose for the Lands Tribunal was whether the freehold estate should be valued as if it had been let to strangers or whether the valuation should take into account Lady Fox's interest in the partnership which held the tenancy. Hoffman LJ restated the statutory hypothesis for valuing shares. Both parties in this appeal agreed that this was authoritative. At pages 371 and 372, Hoffman LJ stated that:

*"The only express guidance which S 38 offers on the circumstances in which the hypothetical sale must be supposed to have taken place is that it was 'in the open market'. But this deficiency has been amply remedied by the courts during the century since the provision first made its appearance for the purposes of estate duty in the Finance Act 1894. Certain things are necessarily entailed by the statutory hypothesis. The property must be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question is what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date (see *IRC v. Crossman* [1937] A.C. 26.) Furthermore, the hypothesis must be applied to the property as it actually existed and not to some other property, even if in real life a vendor would have been likely to make some changes or improvements before putting it on the market: *Duke of Buccleuch v. Inland Revenue Commissioners* [1967] 1 A.C. 506, 525. To this extent, but only to this extent, the express terms of the statute may introduce an element of artificiality into the hypothesis.*

102. Hoffman LJ in *IRC v Gray* went on to consider the characteristics of (a) the market; and (b) the assumed transaction, wherein, he stated that:

"In all other respects, the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous.

He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable. The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus upon what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.

It is often said that the hypothetical vendor and purchaser must be assumed to have been 'willing', but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or disappointed with the result; for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant.” [Emphasis added]

103. The Commissioner is satisfied, having regard to the jurisprudence, that the approach to the valuation of an asset or the “statutory hypothesis” as established by the cases, can be summarised as follows:

- (a) a sale of the shares is possible;*
- (b) the shares must be valued on the basis of hypothetical sale in a hypothetical open market;*
- (c) the parties are willing -the hypothetical buyer is not being forced to buy and the hypothetical seller is not being forced to sell;*

- (d) *the incoming hypothetical purchaser will stand in the shoes of the hypothetical seller and will be subject to the restrictions, degree of influence and risk that the seller is bound by in the real world;*
- (e) *there is available to any prospective purchaser all information in relation to the shares which a prudent purchaser might reasonably request; and*
- (f) *the market value is the highest price achievable based on the above.*³¹

The market value of the shares

104. Turning now to consider each of the expert witnesses' testimony. In short, having regard to the testimony of the expert witnesses, the testimony of the Appellant and the documentation submitted in this appeal in respect of the transactions, then applying the test as set out above, being the statutory hypothesis, the Commissioner is satisfied that the market value of the company B shares was €200,000, on 31 December 2015, being the amount contended for by the Appellants and not nil as contended for by the Respondent. The Commissioner will now set out her reasons for her finding.

105. The evidence adduced by the experts was uncontroversial in terms of the approach to valuation and each agreed that the approach was as the Commissioner has set out heretofore, namely the statutory hypothesis. Although, it appears that the Respondent's expert witness did not in fact apply those principles, namely he did not assume a sale was possible to arrive at his valuation, as the Commissioner will explain in due course. The difference in opinion of both experts was what the value of the company B shares was and the rationale for same. The Appellants' expert witness was of the opinion that the value of the company B shares was the amount of €200,000 on the basis of the Appellant's Statement of Affairs and the Respondent's expert witness was of the opinion that the value of the company B shares were nil, on the basis that there was no market for the sale of the company B shares, being preference shares, with no prospect of any dividend being paid and the complex structure that was required to be followed if the company B shares were to be redeemed.

106. The Commissioner firstly heard evidence from the Appellants' expert witness as to the valuation of the company B shares. The Appellants' expert witness had prepared an expert report for the purposes of the appeal and within that report was a document entitled "Statement of Affairs" which set out the following information:-

[the Appellant]

³¹ Book of Documents, page 82

Statement of Affairs as at 31 December 2015

Assets	€
<i>Farmland</i>	1,300,000
<i>Dwelling house</i>	800,000
<i>Motor vehicles</i>	30,000
<i>Personal items</i>	25,000
<i>[The Appellant company]</i>	34,603
<i>Bank account</i>	2,000
Total Assets	<hr/> 2,191,603 <hr/>
Liabilities	
<i>Us loan</i>	1,227,676
<i>Dwelling house loan</i>	102,314
<i>BTL loan</i>	94,178
<i>[Company C]</i>	200,000
Total liabilities	<hr/> 1,624,168 <hr/>
Net Assets	<hr/> 567,435 <hr/>

107. The Appellants' expert witness was of the opinion that the value of the company B shares was to be assessed having regard to the Appellant's Statement of Affairs. It is important to note that the document entitled Statement of Affairs was a document that was appended to the Appellants' expert report and the evidence was that the document had been prepared by the Appellants' accountant for the purposes of a desktop valuation conducted by the Appellants' expert witness. The document as set out above contained various assets and liabilities of the Appellant. However, no evidence was adduced from the author of this document. Nonetheless, the Commissioner notes that the Appellant was in a position to give evidence in respect of the document and the assets and liabilities therein. It was the evidence of the Appellant that disclosed that the references in the

document to “US loan” and “Dwelling house loan” were in fact liabilities that were not “asset backed”, such that the financial institutions had demanded that the properties were sold.³² It was not apparent from the document that this was the case in respect of those liabilities and that letters of demand had issued from financial institutions, prior to the sale of those properties.

108. The Commissioner notes that when cross examined by counsel for the Respondent, the Appellants’ expert witness testified in relation to the Statement of Affairs as follows:

“Q. So that's critical thing, is it, the Statement of Affairs?”

A. It's massively critical.”³³

109. Moreover, the Commissioner notes the following exchange:

“Q. You just said a while ago that the critical factor here is the statement of assets; isn't that right, the critical factor?”

A. I think I have to say that, ultimately, my report is based on the premises that ultimately the backstop is the individual and his Statement of Affairs, I think that is very fair.....

Q. And again, and I'm not saying you had to, but you accepted everything in terms of the documentation that came your way, for example, and the Statement of Affairs document, in your report, was not prepared by you; isn't that correct?”

A. No, it wasn't prepared by me

Q. Yes.

A. I think I have said that [on the first page of my report, that I have relied on the information that was provided to me].³⁴

.....”

110. The Commissioner notes that when asked by the Commissioner if the Appellants’ expert witness took the document at face value, the Appellants’ expert witness confirmed that he took the document “[a]s fact, yes. At face value, I think that's fair”.³⁵ The Commissioner considers that the fact of the matter is that the evidence of the Appellants’ expert witness was that the Statement of Affairs was a critical document. That was so, the Appellants’ expert witness testified, as it goes directly to the valuation of the company B shares and

³² Transcript Day 1, page 57

³³ Transcript Day 1, page 118

³⁴ Transcript Day 1, page 123

³⁵ Transcript Day 1, page 133

the Appellant's ability to repay the company C loan. The Commissioner notes that the Appellants' expert witness remained steadfast in his views respect of the Appellant's ability to repay the amount of €200,000 if the company B shares were redeemed and the structure was unwound, on the redemption of the company B shares.

111. Furthermore, the Commissioner notes that the Appellants' expert witness testified that the Appellant was a high-net-worth individual. The Appellants' expert witness remained of the view that the Appellant was a high net worth individual, despite the evidence that was adduced at this appeal in relation to the Appellant's liabilities under the headings "US loan" and the "Dwelling house loan". The Commissioner notes that the Appellants' expert witness stated in light of that fact, he would consider amendment to the FICO score he attributed to the Appellant, but could not say by what amount and that it would be wrong of him to speculate on an amount.³⁶ The Commissioner understands from open source information that a FICO score is a type of credit score based on information in a borrower's credit report that lenders use to assess credit risk and determine whether to extend credit. A FICO score ranges from 300 to 850.³⁷

112. On the other hand, the Respondent's expert witness gave evidence that he would not consider the Appellant a "high net worth individual". He testified that whilst there was no definition of a "high net worth individual", what was crucial was access to surplus liquid assets. The witness gave evidence that in terms of the Appellant's assets, the only liquid asset was his bank account and potentially the personal items, but all other assets were illiquid. Moreover, the Commissioner notes that whilst the Appellants' expert witness stated that €500,000 was the amount to be considered a "high net worth individual" for the reason that "*.....if you want to become a resident in Monaco, 500 will do it*", the Respondent's expert witness testified that he was of the view that this would be the minimum amount, but in reality "*if I wanted comfort and I was investing 200,000 backed by [the Appellant], I would probably want a million of excess, so that he is only having to give me €200,000 if I'm going to have to pursue him, because then he could write the cheque for it and there's no issue*".³⁸

113. Returning to the opinion of the Appellants' expert witness, it was his view, applying the valuation methodology, being the statutory hypothesis as established by case law, that the company B shares were valued at €200,000. His rationale for this was set out in his expert report, dated 7 March 2024, and which stated that:

³⁶ Transcript Day 1, page 150

³⁷ <https://www.investopedia.com/terms/f/ficoscore.asp>

³⁸ Transcript Day 1, page 192

“..... [the Appellant company] purchased the shares from the Appellant for €200,000 on 31st of December 2015. It is our view that €200,000 represents the value of the shares at that time as this is the amount that the [Appellant company] or any purchaser could realise from the shares at that time. This is on the basis that, if having purchased the shares, the [Appellant company] or any purchaser, were to immediately seek redemption of the shares, the following would have occurred:

[Company B] would, exercising its power of attorney, transfer the [company B] loan to the [Appellant company] and offset the price due to [company B] by the [Appellant company] against the redemption amount payable by [company B] to the [Appellant company] for the shares.

Having acquired the [company B] loan the [Appellant company] could demand [company C] to repay the [company B] loan. [Company C] would then repay the [company B loan] to the [Appellant company] by transferring the [company C] loan to the [Appellant company].

On receipt of the [company C] loan from [company C] the [Appellant company] could immediately demand repayment of the [company C] loan from the [Appellant]. It is our view based on the [Appellant's] statement of affairs as set out in Appendix 1, that [the Appellant] could have discharged the [company C] loan in full as at 31 December 2015. The statement of affairs sets out that the [Appellant] was solvent and had Net Assets of €767,435 available to discharge the €200,000 [company C] loan at that time.

The [Appellant company] would therefore realise €200,000 for the shares.

On the basis of the above, the price payable of €200,000 by the [Appellant company] should be regarded as the market value of the shares on 31 December 2015.”³⁹

114. In contrast, the Commissioner notes the evidence of the Respondent's witness was that his valuation of the company B shares was nil. This, he said, was that “*structures of this nature have no value except to those who put them in place, they have no market value*”.⁴⁰ Thus, the Respondent's expert witness placed a value of nil on the shares. The Commissioner notes that he was cross examined at length in relation to his approach to the valuation of the company B shares, the Appellants having submitted that the Respondent's expert witness erred in failing to apply the principles applicable to the valuation of shares, namely the statutory hypothesis. The Commissioner has considered the Respondent's expert witness report dated, 22 February 2024 (in addition to the

³⁹ Book of Documents, page 255

⁴⁰ Book of Documents, page 245

previous report dated 19 January 2021), under the heading “3.4 Hypothetical Buyer and Seller”, wherein it stated that:

“.....

Each case must be determined on its own merits, the skill of the expert witness is in interpreting the known details of the case and giving their independent and impartial opinion on those details. In doing so while cognisant of the relevant jurisprudence the expert cannot be constrained to a particular set of assumptions when forming their valuation opinion. The experts reasoned opinion sets out the particulars of the case and the basis of his valuation opinion.

Hypothetical buyer: any investor will perform appropriate due diligence and understand that the total value of the shares in this case is the issue price that this is the maximum that can ever be realised. However, to realise any value for the investment would involve costs and time in the unwind of the transaction. As no dividend had been paid to date the hypothetical buyer could not have assumed a dividend in the future. The hypothetical buyer could only be interested in purchasing the shares at a significant discount on the issue price.

Hypothetical Seller- we cannot detach the hypothetical seller from the related transactions in this case. In our view the appellant would only have been willing to sell the shares the premium on their issue price. The sale of the shares would have involved the transfer of the control of the unwind of the transaction to a third party and therefore a loss of the appellants control in respect of the loan. We cannot envisage a hypothetical sales price in these circumstances, the seller will only sell under duress. The expert cannot be forced to assume hypothetical seller would this ignores the information in relation to the shares which a prudent buyer might reasonably have requested. It is reasonable to ask how the concept of a hypothetical seller can exist in this case, considering the complex and personal structure in place.

The incoming hypothetical buyer will stand in the shoes of the hypothetical seller and will be subject to the restrictions, degree of influence and risk the seller is bound by in the real world. In all likelihood any hypothetical buyer wishing to acquire shares in [company B] would have entered into a similar set of transactions as the appellant rather than acquire shares from an existing shareholder. As outlined above we do not believe there is a market for the shares where the structure is ignored.”

115. The Appellants submitted that having regard to the jurisprudence and the established principles applicable to the valuation of shares, it was incorrect of the Respondent's

expert witness not to assume that a sale of the company B shares was possible. The Respondent's expert witness stated that he took the view that there was no market for the company B shares, because of the highly personal nature of the structure. Moreover, he gave evidence that it was not possible to separate the Appellant from the company B shares as the Appellant *"is separate, he is involved in the structure, it was set up for him on 17th December, it was set up for a real purpose, he would not have set that up and followed through with it because he was involved in it right up to the 31st when this moment of the hypothetical seller and purchaser comes in, if he couldn't realise the full 200,000. And that's the real deep complication that we get inside in this share valuation. So he can't stop it on the 31st because we have to stand back and imagine a hypothetical purchaser and seller are willing to sell. But the shares would come with the structure he established in the first place and with that structure... would require 200,000 of value to him. It creates a dramatic anomaly from the conversation we just completed, the hypothetical purchaser would definitely not pay the 200,000. So this is what I referred to where we have these market challenge because of the structure, the hypothetical seller challenge and the hypothetical purchaser challenge"*.⁴¹

116. Furthermore, in relation to matter of risk and reward for a purchaser of the company B shares, the Commissioner notes that it was the view of the Respondent's expert witness that:

"If the transaction were unwound in the years after the investment, the unwind would have been for the same amount as was initially borrowed and invested. There would have been no movement in the share value as there was no market for the shares. If there had been a market for the shares it would be reasonable to expect some movement in the share value.

*An Investor would expect to see a risk and reward relationship with an investment. More risk implies more reward than some element of potential 'upside' for an investor. Clearly structures like this would require exceptional levels of return to attract an investors willing to risk 'investing'. There is always a possibility finding somebody to participate in a transaction but as values, we are expected only to consider reasonable people."*⁴²

117. In relation to the market, the Respondent's expert witness was of the view that there was no market for the company B shares and furthermore, he did not accept that the company B shares were a product that vulture funds would consider as an investment. This was in

⁴¹ Transcript Day 2, page 38

⁴² Transcript Day 2, page 109

contrast to the evidence of the Appellants' expert witness who stated that vulture funds would be a potential market for the company B shares.

118. The Appellants submitted that what must be envisaged was that the sale was possible, the parties to it are willing, but not forced to sell and buy, and that an incoming purchaser would stand in the shoes of the seller and be subject to the restrictions, degree of influence and risk that the actual shareholder was bound by in the real world. Counsel for the Appellants criticised the evidence of the Respondent's expert witness on the basis that it was not open to the witness to conclude that it would not have been in the Appellants' interest to sell the company B shares and furthermore, that no market existed for the company B shares. This counsel said, having regard to the test to be applied, was incorrect as it must be assumed that the sale was possible, and the sale was made by a hypothetical seller, not the actual seller.

119. Counsel for the Appellants submitted that given those underlying principles, in arriving at the market value, it was not appropriate to determine the valuation based on the personal circumstances or preferences of the actual seller. Counsel for the Appellants submitted that in circumstances where the Respondent's expert witness incorrectly took those factors into consideration in arriving at a nil valuation, the Commissioner should place no reliance on that valuation.

120. On the other hand, the Respondent was also critical of the Appellants' expert witness and his reliance on the Statement of Affairs, an unvouched document and his evidence in relation to bankruptcy proceedings, should that be necessary for a repayment of the amount of €200,000 by the Appellant, if the company B shares were redeemed.

121. The Commissioner found elements of the evidence of both experts unhelpful. Both strayed into areas of opinion that were not relevant to the issues to be determined. The comments such as purchasing houses in "the K Club", "residency in Monaco" and "married well" were unnecessary. However, most notably the Commissioner considered the testimony of the Respondent's expert witness to be flawed in respect of his methodology and the application of the valuation principles, namely the statutory hypothesis, in circumstances where he appeared to be seeking to narrow the definition of "market" and was steadfast in his views that there was no market for the company B shares, despite the fact that the principles to be applied to the valuation of shares, required that it was assumed that a sale was possible. The evidence of the Respondent's expert witness was also contradictory, such that he stated that there was no market for the sale of the company B shares, yet accepted that he must assume a sale was possible and he said that there was always someone who might be out there that would purchase

the company B shares. The Commissioner notes the following exchanges between counsel for the Appellants and the Respondent's expert witness:

"A. It's not like he is not part of the land. So if you were selling land, you're saying it's like he is the grass or something because he's caught up in the structure. We can't ignore the fact that he -- you can't just say 'Aww', and this is what has been forced on me to some extent is, 'but sure [REDACTED] is ignoring the fact of the hypothetical purchaser and vendor'. We're not. We're saying it is unbelievably complex. And [REDACTED] [REDACTED] think of him as two people; one person that is selling his shares to [REDACTED] [REDACTED]."

Q. Yes.

A. *But the other one who is on the hook for the loan.*⁴³

.....

A. *....that is the absolute 100% premise of our valuation, that there is no market for that structure. There is a market for preference shares. There is a market for preference shares that are underpinned by a value.now, we didn't have the Statement of Affairs but we didn't even have to get to the Statement of Affairs to come to the opinion that there is no market for these shares. And that is what we're asked to do, we're asked to value these on a market valuation, not is there someone out there who might buy these. There's always someone out there to.*⁴⁴

.....

Q. *So again we have this issue here where you're saying two things at the same time, you have the sale/no sale and then you have this one, there's no market for these shares and at the same time you are saying there's always someone out there who will buy them?*

A. *Well, of course -- I mean we are asked to always think of the reasonable, prudent purchaser. And a market means, you know, a number of people who would look at it and create a price. That doesn't mean you don't have the possibility of someone, one individual to purchase.*

Q. *Isn't that inherently contradictory, that you are trying to say there's no market for something and at the same time there is a market for something?*

⁴³ Transcript Day 1, page 184

⁴⁴ Transcript Day 1, page 186

A. What I am saying is there is always the possibility that there is a purchaser for something, anything in the world. That doesn't mean they have purchased something smartly and it's a good buy, they may have other reasons for doing it, they could be special purchasers etc. But there isn't a market. We have to consider -- how can I go around and think I wonder is there somebody somewhere who might actually be interested in this. You have to imagine is there a market for it.⁴⁵

.....

A.....Market is different. In simple terms, you go down to the stones in Dublin and you go and trade, that's a market, like there's people buying and selling. So I would know where to take these shares and bring them to sell them. The obvious place, the only place you could take these shares to try and sell them is through the professional offices. They are not on a market, so you would have to take them around to places. What I am saying is you would not be received, never mind well received, you would not be received in that market. That is the market for preference shares. That doesn't mean that you wouldn't be down the road in Hartigan's at the bar and meet someone who says 'I'll give you the money'.....".⁴⁶

122. Despite the divergence of views in respect of the value of the company B shares, in relation to the structure, both experts were in agreement that in order to redeem the company B shares, the purchaser would have to unwind the transaction and that was where the value of the company B shares arose. It was the connection to the Appellant being the individual who would be required to discharge the amount of €200,000 to a purchaser of the company B shares, if that purchaser was to redeem the company B shares and the transaction was unwound.

123. The Commissioner, having considered all of the jurisprudence opened to her by the parties in respect of the valuation of shares, which the Commissioner considers is established through a long line of jurisprudence over one hundred years, is satisfied that the statutory hypothesis for valuing shares questions: what was the market value of an asset which a hypothetical purchaser would be prepared to pay a hypothetical seller on the valuation date. It was the price that would be paid by a willing purchaser and a willing seller. The Commissioner considers that this was where the Respondent's expert witness fell into error in his application of the test to be applied to the valuation of the company B shares, such that he did not assume a sale and that there was a willing seller, on the basis of his view that the Appellant cannot be removed from the structure. Whilst the

⁴⁵ Transcript Day 1, page 218

⁴⁶ Transcript Day 1, page 219

Commissioner noted the evidence of the Respondent's expert witness that the Appellant was part of the structure of the shares, in terms of a share being a bundle of rights, and the Appellant being the person linked to the value of the shares having regard to the underlying structure, the Commissioner does not accept that this precluded the Respondent's expert witness from applying the principles of the valuation of shares when valuing the company B shares. The Commissioner is satisfied therefore that the valuation ascribed to the shares by the Respondent's expert witness was flawed.

124. In respect of the evidence of the Appellants' expert witness in relation to the structure and the valuation of the shares, the Commissioner notes that whilst it may be an arduous task to unwind the structure, if that structure was unwound there would be what he described as "*three quarters of a million, there is clear water.*"⁴⁷ The Commissioner is satisfied that the Appellants' expert witness applied the statutory hypothesis to the valuation of the company B shares by assuming a sale and that there was a hypothetical prudent willing purchaser and a hypothetical willing seller of the company B shares to come to his valuation of €200,000, on the basis that if the company B shares were redeemed, €200,000 would be available from the Appellant to meet that demand, in view of the Statement of Affairs. Hence, the Commissioner is satisfied that the company B shares had a market value of €200,000.

125. Accordingly, having regard to the foregoing, the Commissioner is satisfied that on 31 December 2015, on the transfer of company B shares by the Appellant to the Appellant company for the amount of €200,000 a benefit accrued to the Appellant in the amount of €200,000, discharged by way of a reduction of the Appellant's director's loans with the Appellant company. As stated, the Respondent's expert witness opined that he did not have a difficulty with the documentation and that "*it does add up*".⁴⁸

126. Furthermore, having regard to the evidence adduced in this appeal, the Commissioner is satisfied that the benefit to the Appellant did not exceed the value of the company B shares, in circumstances where the Commissioner has found that the company B shares should be valued in the amount of €200,000. The Commissioner has reached her conclusion on the basis of the Appellant's evidence, the documentation submitted in this appeal and with the assistance of the expert evidence, in particular the agreement of both experts that the amount of €200,000 was capable of being achieved if the transaction was unwound. The Commissioner is satisfied that this valuation is based on an assumption that on 31 December 2015, the sale was possible and there was a

⁴⁷ Transcript Day 1, page 138

⁴⁸ Transcript Day 1, page 181

hypothetical willing seller and a hypothetical willing purchaser of the company B shares. In addition, the statutory hypothesis to be applied to the valuation of shares, assumes that everyone is included in the hypothetical open market for the purposes of determining market value.

127. Thus, as to the question, what was the highest price a hypothetical purchaser would pay a hypothetical seller for the company B shares, such that the purchaser would be subject to the benefits, restrictions, degree of influence and risk that the seller was bound by in the real world, the Commissioner is satisfied that the Appellants have demonstrated that a hypothetical purchaser of the company B shares would be in a position to immediately call for redemption of the company B shares and that having regard to the Appellant's Statement of Affairs there was sufficient assets available to meet that demand.

Conclusion

128. In an appeal before the Commission, the burden of proof is on the Appellant in accordance with the well established principles, which have been confirmed recently in the judgment of the Court of Appeal in *J.S.S., J.S.J., T.S., D.S. and P.S v A Tax Appeal Commissioner* [2025] IECA 96, where McDonald J. at paragraph 31 of his judgment stated that:

"31. There is a long line of authority both here and in the various jurisdictions within the United Kingdom to the effect that, on an appeal from a tax assessment, the burden of proof lies on the taxpayer in respect of these issues. That was the view taken by Gilligan J. in T.J. v. Criminal Assets Bureau [2008] IEHC 168 at para. 50. In turn, that view was reiterated by Charleton J. (albeit in the context of a V.A.T. appeal) in Menolly Homes Ltd. v. The Appeal Commissioners [2010] IEHC 49 at para. 22."

129. Thus, it falls to the Appellants to adduce evidence sufficient to prove on the balance of probabilities, facts that might allow the Commissioner to conclude that the assessments under appeal by the Appellant are not payable. The Commissioner is satisfied that the Appellants have met the burden in this appeal to demonstrate that the assessments raised by the Respondent should be reduced to nil.

130. The Commissioner is satisfied that what was apparent from the evidence was that applying the principles of the valuation of shares, as per the decision in *IRC v Gray*, which the parties agreed was authoritative, and assuming a sale can take place, the company B shares are valued at €200,000. This is in circumstances where if the shares were redeemed, it was possible for a purchaser to achieve the amount of €200,000 on redemption. The Respondent's expert witness gave evidence that it was "*horrible talk...*

*it's horrible to have to think about it*⁴⁹, when opining about the bankruptcy process, but he nevertheless was in agreement that the amount of €200,000 could be achieved if the shares were redeemed, which was consistent with the evidence of the Appellants' expert witness. Both experts were in agreement that in order to secure the value of the company B shares, the transaction must be unwound, but once unwound the amount of €200,000 was achievable.

131. The Commissioner is satisfied that she must assume there was a market for the company B shares and as stated, she is of the view that the Respondent's expert witness fell into error in this regard. The Commissioner must assume a sale was possible and that the market was the whole world (as per *IRC v Gray*). Whilst it may be that it is an arduous process to secure the amount of €200,000 from the Appellant, having regard to his net asset value in the amount of €567,435 (taking account of the liability of the amount of €200,000), on redemption of the company B shares the amount of €200,000 was achievable. The Appellants' expert witness testified that there was "*three quarters of a million there is clear water.*" Moreover, the Appellant's evidence was that he would be in a position to secure a loan from family or friends, if required. This evidence was uncontroverted.

132. It is in that light that the Commissioner must find that the Appellants have shown that the amended assessments the subject matter of this appeal should be reduced to nil. The Commissioner is satisfied that the Appellants have shown on balance that the Respondent was incorrect in its application of the statutory provisions, namely section 130(3) TCA 1997, to treat the payment of €200,000 to the Appellant from the Appellant company as a distribution. The Commissioner is satisfied that the Appellants have shown on balance that section 130(3)(a) TCA 1997 was not applicable to the facts of the appeal, as no distribution arose on 31 December 2015, when the Appellant transferred the company B shares valued at €200,000, to the Appellant company for the amount of €200,000.

133. For the reasons set out in this Determination, the Commissioner finds that the value of the company B shares was not nil, but rather were valued in the amount of €200,000. As section 130(3)(a) TCA 1997 seeks to tax assets transferred at undervalue and as the Commissioner finds that this did not occur, it follows that the Notice of Amended Assessment to Income Tax which issued to the Appellant and the Notice of Assessment to DWT which issued to the Appellant company should be reduced to nil.

⁴⁹ Transcript Day 1, page 192

Determination

134. As such and for the reasons set out above, the Commissioner determines that the Appellants have succeeded in showing that the tax is not payable. Therefore, the Notice of Amended Assessment to Income Tax dated 10 September 2019, in the amount of €65,843 and the Notice of Assessment to Dividend Withholding Tax (“DWT”) dated 18 September 2019, in the amount of €54,719.27, shall both be reduced to nil.

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

Notification

136. This determination complies with the notification requirements set out in section 949AJ TCA 1997, in particular section 949AJ(5) and section 949AJ(6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ TCA 1997 and in particular the matters as required in section 949AJ(6) TCA 1997. This notification under section 949AJ TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

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



Claire Millrine
Appeal Commissioner
17 June 2025