AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

48TACD2023

Between

[redacted]

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission ("the Commission") of an assessment of the Revenue Commissioners ("the Respondent") of 20 October 2018. The assessment arose from the disposal of shares in a close company on or about 17 April 2014 by [redacted] to another close company wholly owned by her husband, [redacted].

2. The question for determination in this appeal is whether the money received by [redacted] from the disposal at issue should be charged to Capital Gains Tax ("CGT") or be deemed, pursuant to section 817 of the Taxes Consolidation Act 1997 ("the TCA 1997"), as a distribution chargeable to income tax.

3. By way of introductory explanation, Section 817 of the TCA 1997 is an anti-avoidance provision that seeks to counteract a "scheme or arrangement" involving a close company, the purpose of which is to enable a shareholder to extract money from that company, by means other than the payment of a dividend or distribution and the consequent payment of income tax under Schedule F. This provision is explained in greater detail in subsequent parts of this Determination.

4. As is apparent from the title of this Determination, the person named as appellant in this appeal is [redacted]. This is so because [redacted] and [redacted], who are husband and wife, were assessed jointly for the year in question in the name of the former under section 1017 of the TCA 1997. It would appear that this was in accordance with an election made by them under section 1018 of the TCA 1997. Notwithstanding their joint assessment and status as the appellants in this appeal, for the purposes of the clarity of this Determination it is [redacted] who is referred to throughout as "the Appellant". [redacted] is referred to as "the Appellant's husband" or "her husband".

5. This appeal was heard remotely. At its outset, the Appellant's agent indicated that the Appellant would not be in attendance and would not be giving evidence. There being no other witnesses to be called by either party, the Commissioner excused the Appellant's non-attendance under section 949AA of the TCA 1997 and proceeded to hear submissions from both sides.

**Background**

6. Prior to the disposal at issue in this appeal, the Appellant was the owner of 90 of 100 ordinary shares in [redacted] Limited ("the Company"). The Appellant's husband was the owner of the 10 remaining ordinary shares.

7. Section 1 of the Company's abridged financial statement for the year ended 31 December 2013 indicates that at the beginning of that year all of the shares of the Company were held by the Appellant's husband. It further indicates that by the end of the year the Appellant had come to be its majority shareholder, holding 90 of the Company's 100 ordinary shares. The ten remaining ordinary shares continued to be held by her husband.

8. Page 5 of the Company's abridged financial statement for the year ended 31 December 2013 states that for that year, the Company had cash at bank in hand of €1,261,020. For the preceding year it had €1,311,689.

9. The estimated value of the Company on or about April 2014, based on its net asset value as at 31 December 2013, was approximately €1.3 million.

10. On 7 April 2014, the Appellant's 90 ordinary shares were converted into A ordinary shares and their value was capped at €1,100,000.

11. On 17 April 2014, the Appellant agreed to sell her 90 A ordinary shares for consideration of €1,100,00 to [redacted] Limited ("[redacted] Ltd"), a company with only one shareholder; her husband.

12. Also on 17 April 2014 the Company resolved to provide:-

"[…] *financial assistance by way of a loan in the amount of €1,111,000 to* [redacted] *Limited for the purpose of placing* [redacted] *Limited in funds to enable* [redacted] *Limited to acquire 90 "A" Ordinary Shares in the share capital of the Company held by* [redacted] *in the amount of €1,111,000 being market value including stamp duty thereon".*

13. Arising from this transaction, the Appellant's husband filed a CGT return for 2014 on 5 November 2015 which disclosed a gain of €1,099,886 from the disposal of the Appellant's shareholding and a charge to CGT of €362,543. This sum was duly paid.

14. The notes to the abridged financial statement of the Company for the year ending 2014 state at point 5 under the heading "*Related party transcations*":-

"*During the year ended the 31st December 2014* [redacted] *Ltd acquired shares in* [redacted] *Limited.* [redacted] *is a director and shareholder in both entities. At year ended 31st December 2014* [redacted] *Limited owed* [redacted] *Limited €718,099.96."*

15. Page 3 of the abridged financial statement of [redacted] Limited for the year ending 2014 states the company's financial assets for that year to be €1,111,000. By contrast, the column on the same page for the year 2013 specifies no financial assets. Note 3.1, headed "*Investment details",* describes this financial asset as a "*subsidiary undertaking".*

16. Page 3 of the same abridged financial statement of [redacted] Limited also lists the sum of €1,111,400 next to the entry "*Creditors: amounts falling due within one year".* While the entry refers the reader to a note 8, the notes in question only run up to number 6.

17. It is notable that the abridged financial statement of [redacted] Limited for the year 2019 lists, at page 3 therein, the figure of €1,101,512 next to the words "*Creditors: amounts falling due within one year".* Note 4 applicable to this entry describes €1,100,492 to be attributable to "*Amounts owed to group undertakings".*

18. There exists an unexplained discrepancy between the financial statements of [redacted] Limited and the Company regarding the amount outstanding in respect of the loan provided to purchase the shares as at the end of the year 2014. However, what the accounting information available appears to disclose overall is that, despite the reference in [redacted] Limited's 2014 financial statement that the loan was repayable within one year, by the close of 2019 it had not satisfied the debt to the Company.

19. On 6 February 2018, the Respondent delivered a notification of an audit for 2014 to the Appellant's husband. This audit was said by the Respondent to concern the taxation of

"*the disposal of* [the Company's shares] *in light of section 817 of the Taxes Consolidation Act 1997"*.

20. In subsequent correspondence of 9 October 2018 the tax agent for the Appellant denied the application of section 817 of the TCA 1997 on the grounds that "*Apart from anything else, following the disposal* [the Appellant] *held no shares in* [the Company]".

21. On 19 October 2018 the Respondent wrote to the Appellant's tax agent stating that it:-

> "[…] *was not willing to accept that the share transaction was for bona fide commercial reasons on the basis that no evidence has been provided to indicate that the transaction was for bona fide commercial reasons."*

22. On 20 October 2018 the Respondent issued an amended assessment for 2014. This charged income tax under Schedule F on the sum of €1,099,886 received by the Appellant. The amount of income tax assessed was €605,488.331. This was €242,945.37 more than the CGT previously charged and paid.

23. On 19 November 2018 the Appellant's husband delivered a Notice of Appeal to the Commission in respect of the amended assessment. The grounds specified therein were:-

    (a) there was no "*scheme or arrangement"* as required by section 817 of the TCA 1997;

    (b) the disposal was made for bona fide commercial reasons and not for the purpose of the avoidance of tax; and

    (c) the Appellant's interest in the Company was significantly reduced after the disposal.

24. The bona fide commercial reason referred to was explained for the first time in the Appellant's Outline of Arguments, dated 30 March 2020. Therein it was stated that:-

> "[The Appellant] *wished to encash the value inherent in her shares so as to provide funds to deal with a personal borrowing position. A sum of €1,100,000, less the CGT arising thereon, was considered sufficient to deal with this borrowing position."*

**Legislation and Guidelines**

25. Under section 20 of the TCA 1997 a "*distribution"* by a company is chargeable to income tax under Schedule F.

26. Section 130(2) of the TCA 1997 defines a distribution as:-

> *"(a) any dividend paid by the company, including a capital dividend;*

*(b) any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except, subject to section 132, so much of the distribution, if any, as represents a repayment of capital on the shares or is, when it is made, equal in amount or value to any new consideration received by the company for the distribution"*

27. Section 817 of the TCA 1997 is entitled *"Schemes to avoid liability to tax under schedule F".* Subsection (2) therein sets out the purpose of the provision as follows:-

*"(2) This section shall apply for the purposes of counteracting any scheme or arrangement undertaken or arranged by a close company, or to which the close company is a party, being a scheme or arrangement the purpose of which, or one of the purposes of which, is to secure that any shareholder in the close company avoids or reduces a charge or assessment to income tax under Schedule F by directly or indirectly extracting, or enabling such extracting of, either or both money and money's worth from the close company, for the benefit of the shareholder, without the close company paying a dividend, or (apart from subsection (4)) making a distribution, chargeable to tax under Schedule F."*

28. Section 430 of the TCA 1997 defines a "*close company"* as one which has 5 participators or fewer. It was not in dispute that the Company constituted a close company.

29. Section 817(4) of the TCA 1997, which is the charging provision, provides:-

*"Subject to subsection (5) and notwithstanding section 130(1) or any provision of the Capital Gains Tax Acts, the amount of—*

*(a) the proceeds in either or both money and money's worth received by a shareholder in respect of a disposal of shares in a close company to which this section applies, or*

*(b) if it is less than those proceeds, the excess of those proceeds over any consideration, being consideration which—*

*(i) is new consideration received by the close company for the issue of those shares, and*

*(ii) has not previously been taken into account for the purposes of this subsection,*

*shall be treated for the purposes of the Tax Acts as a distribution (within the meaning of the Corporation Tax Acts) made at the time of the disposal by the close company to the shareholder."*

30. Section 817(3) of TCA 1997 provides:-

> "*Subject to subsection (7), this section shall apply to a disposal of shares in a close company by a shareholder if, following the disposal or the carrying out of a scheme or arrangement of which the disposal is a part, the interest of the shareholder in any trade or business (in this section referred to as* "*the specified business*"*) which was carried on by the close company at the time of the disposal, whether or not the specified business continues to be carried on by the close company after the disposal, is not significantly reduced."*

31. Section 817(1)(ca) of the TCA 1997 provides:-

> *"For the purposes of this section, following a disposal of shares in a close company by a shareholder or the carrying out of a scheme or arrangement of which the disposal is a part, the interest of the shareholder in any trade or business which was carried on by the close company shall be deemed—*
>
> > *(i) to include the interest, or interests as the case may be, in that trade or business of one or more persons connected with the shareholder, if increasing that interest of the shareholder by such interest, or interests as the case may be, would result in the interest of the shareholder in the trade or business not having been significantly reduced,*
> >
> > *[…]*
> >
> > *(iii) notwithstanding paragraph (c), not to have been significantly reduced where the gain realised, or the proceeds in either or both money or money's worth received, by the shareholder on that disposal is or are wholly or mainly attributable to payments or other transfers of value from another company or companies, which is or are controlled (within the meaning of section 432) by that shareholder or by that shareholder and persons connected with him or her, to the close company"*

32. As regards the term "*connected person",* Section 10(3) of the TCA 1997 provides:-

> "*A person shall be connected with an individual if that person is the individual's husband, wife or civil partner, or is a relative, or the husband, wife or civil partner of a relative, of the individual or of the individual's husband, wife or civil partner."*

33. Furthermore, section 10(7) of the TCA 1997 provides:-

"*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 432 of the TCA 1997 is entitled *"Meaning of 'associated company' and 'control'".* Subsection (2) therein provides:-

*"For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire—*

*(a) the greater part of the share capital or issued share capital of the company or of the voting power in the company,*

*(b) such part of the issued share capital of the company as would, if the whole of the income of the company were distributed among the participators (without regard to any rights which such person or any other person has as a loan creditor), entitle such person to receive the greater part of the amount so distributed, or*

*(c) such rights as would, in the event of the winding up of the company or in any other circumstances, entitle such person to receive the greater part of the assets of the company which would then be available for distribution among the participators."*

35. Section 432(6) of the TCA 1997 further provides in relation to the legal concept of control that:-

*"For the purposes of subsections (2) and (3), there may also be attributed to any person all the rights and powers of—*

*(a) any company of which such person has, or such person and associates of such person have, control,*

*(b) any 2 or more companies of which such person has, or such person and associates of such person have, control,*

*(c) any associate of such person, or*

*(d) any 2 or more associates of such person,*

*including the rights and powers attributed to a company or associate under subsection (5), but excluding those attributed to an associate under this subsection, and such*

*attributions shall be made under this subsection as will result in the company being treated as under the control of 5 or fewer participators if it can be so treated."*

36. Under section 433(3)(b)(i) of the TCA 1997, an "*associate"* is in relation to a participator "*any relative or partner of the participator".*

37. A *"participator"* is defined by section 433(1) of the TCA 1997 as being in relation to any company:-

> *"…person having a share or interest in the capital or income of the company and, without prejudice to the generality of the foregoing, includes—*
>
> *(a) any person who possesses, or is entitled to acquire, share capital or voting rights in the company,*
>
> *(b) any loan creditor of the company,*
>
> *(c) any person who possesses, or is entitled to acquire, a right to receive or participate in distributions of the company (construing "*distributions*" without regard to section 436 or 437) or any amounts payable by the company (in cash or in kind) to loan creditors by means of premium on redemption, and*
>
> *(d) any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for such person's benefit."*

**Submissions**

*Submissions of behalf of the Appellant*

38. It was submitted on behalf of the Appellant, firstly, that the usual principles in relation to the interpretation of taxation statutes should apply. In this regard the Appellant's agent emphasised the statement of the Kennedy CJ in *Revenue Commissioners v Doorley,* [1933] IR 750 at page 765 that:-

> *"The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, ie, within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to*

*Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred*."

39. The agent for the Appellant also pointed to the Supreme Court's judgment in *McGrath v McDermott,* [1988] IR 258, which concerned the taxpayer's entitlement to deductions against CGT payable arising from a series of transactions that were designed to create losses. In this case, the Revenue Commissioners argued that authorities emanating from England and Wales, which held that the "real" as opposed to the "artificial" nature of the transactions could determine its correct tax treatment, should be applied in this jurisdiction. In finding that this approach should not be followed, the Supreme Court (McCarthy J) quoted the following passage from the judgment of Lord Cairns in *Partington v Attorney General,* [1869] LR 4 HL 100 at page 278:-

> *"I am not at all sure that, in a case of this kind - a fiscal case - form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."*

40. Applying similar reasoning to that evident from the above passage, Finlay CJ held at page 276 of *McCarthy v McDermott*:-

> *"It is clear that successful tax avoidance schemes can result in unfair burdens on other taxpayers and that unfairness is something against which courts naturally lean.*
>
> *The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective. What is urged upon the court by the Revenue in this case is no more and no less than the implication into the provisions of either s 12 or s 33 of the Act of 1975 of a new subclause or sub-section providing that*

*a condition precedent to the computing of an allowable loss pursuant to the provisions of s 33, sub-s 5, is the proof by the taxpayer of an actual loss, presumably at least coextensive with the artificial loss to be computed in accordance with the sub-section.*

*In the course of the submissions such a necessity was denied but instead it was contended that the real, as distinct from what is described as the artificial, nature of the transactions should be looked at by the court, and that if they were, the section could not apply to them.*

*I must reject this contention. Having regard to the finding in the case stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.*

*In those circumstances, for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers."*

41. It was submitted that the foregoing passage was of particular relevance in light of the facts of the instant appeal.

42. The Appellant also pointed to the following passage in *CIR v Wesleyan and General Assurance Society,* [1946] 2 ALL ER 749, which was held in this jurisdiction by Kenny J in *O'Sullivan (Inspector of Taxes) v P Ltd,* II ITR 464 to encapsulate the effect of the judgment of the House of Lords in *Inland Revenue Commissioners v Westminster (Duke),* [1936] AC 1:-

*"In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not.*

*There have been cases in the past where what has been called "the substance of the transaction" has been thought to enable the court to construe a document in such a way as to attract tax. That doctrine was, I hope, finally exploded by the decision of the House of Lords in Inland Revenue Comrs v Westminister (Duke)."*

43. The agent for the Appellant emphasised in submission that the aim in taxation matters is to interpret the relevant statute by reference, in the first case, to the natural and ordinary meaning of its wording. If this was not clear other interpretive tools were available, however if, after their use, the meaning of the provision imposing a tax burden remained unclear, the benefit of the doubt had to be afforded to the taxpayer. The reason for this was because, as Henchy J held in *Inspector of Taxes v Kiernan,* [1981] IR 117, there should not be a liability arising from the use of oblique or slack language in legislation. Put slightly differently, where two interpretations were reasonably open, the relevant statute should be interpreted in favour of the taxpayer.

44. The agent for the Appellant submitted that the application of the above principles to section 817 of the TCA 1997 had the effect that income tax should not be charged to the sum received in respect of the Appellant's shares in the Company. This was so, firstly, because there was no "scheme or arrangement" on the Appellant's part, the object of which was the avoidance of income tax on money extracted from the Company. The existence of such a scheme was a mandatory requirement of the legislation. In aid of this argument, the agent for the Appellant referred to the dictionary definitions of the aforementioned words. "Scheme" meant a "systematic plan or arrangement for achieving a particular object or effect". "Arrangement" meant a "structure or combination of things for a purpose". All that occurred, argued the Appellant's agent, was a straightforward, disposal of shares. There was no "wider" plan behind the transaction.

45. The second reason why section 817 of the TCA 1997 had no application was that the Appellant had, in the submission of her agent, not just reduced her interest in the Company "significantly", she had terminated it altogether by the share disposal. While section 817(1)(ca) of the TCA 1997 prescribes circumstances in which a person might be deemed not to have reduced their interest significantly following a disposal of shares, none of these were present in the Appellant's case.

46. In this regard, the Appellant's agent submitted that section 817(1)(ca)(i) of the TCA 1997 provides that the "interest of the shareholder" is deemed to include the interest of a "connected person" if doing so would mean that the shareholder's interest was not significantly reduced. The agent for the Appellant submitted that for this provision to be relevant, the person disposing of shares must retain *some* interest or shareholding in the

trade or business in question after the disposal. If, as in the case of the Appellant, the shareholding had been disposed of altogether such that no interest was retained, the provision could not apply. The interest of a connected person could be added to that of a person who continued to be a shareholder, but could not be attributed to that of a person who was an ex-shareholder.

47. The agent for the Appellant also addressed section 817(1)(ca)(iii) of the TCA 1997, which he argued did not apply either to the facts of the case. In his submission, this section required that there be a payment or payments of value from the [redacted] Ltd in respect of the shares held by the Appellant to the Company. No such payment or payments had been made.

48. Lastly, the agent for the Appellant sought to address the question of the purpose of the transaction, though he did so without any evidence having been proffered by the Appellant.

49. The agent for the Appellant submitted that the sum received by the Appellant for her shares was €1.1 million. This was somewhat less than she could have received given that the value of the company at the time of the sale was approximately €1.3 million. The agent posed the question as to why, if the aim of the sale was to extract money without paying income tax, the Appellant would have agreed to receive less than full value for her shareholding. The inference that should be drawn, it was submitted, was that the transaction was for a purpose other than the avoidance of income tax under Schedule F.

50. The agent for the Appellant also cited the following passage in the judgment of Lord Upjohn in *Inland Revenue Commissioners v Brebner,* [1967] 1 ALL ER 779 at page 784 in support of the appeal:-

> "*My lords, I would conclude my judgment by saying only that, when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out,—one by paying the maximum amount of tax, the other by paying no, or much less, tax—it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide on a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence."*

51. Drawing in part on this passage, the Appellant submitted the following:-

*"The provision of section 817 talks about a purpose* […] *which was the avoidance of tax in relation to any arrangement entered into. I would have to say that in the circumstances of this case the question arises as to what tax is being avoided?* [The Appellant] *disposed of all of her shares in* [the Company] *and paid CGT on the gain on that disposal. She paid the tax due on the disposal, she did not avoid it. The Respondent is suggesting that she avoided tax on another transaction that did not occur, that she avoided paying income tax on a dividend that she did not receive. Furthermore, the sale of shares in a company where the purchaser used the funds or assets in the company where the purchaser used the funds or assets in the company purchased to pay the purchase consideration is a common commercial occurrence."*

52. The foregoing is a summation of the main arguments raised on behalf of the Appellant.

*Submissions of the Respondent*

53. The Respondent submitted, firstly, that a distribution or dividends paid by a company to a shareholder from its funds are, under section 20 of the TCA 1997, chargeable to income tax. The sale by a shareholder of shares in a company is, by contrast, chargeable to CGT at 33%.

54. Section 817 applies to close companies only and its purpose is to ensure that a shareholder in such a company does not 'engineer' a transaction such that money is extracted from that company in a way that makes the shareholder liable to CGT when they should, in truth, be liable to income tax on the receipt of a dividend under Schedule F of the TCA 1997.

55. The Respondent submitted that, it having decided that the transaction at issue was in reality the payment of a dividend and not the disposal of shares, the burden rested on the Appellant to prove on the balance of probabilities that the anti-avoidance measure set out in section 817 of the TCA 1997 did not apply. It was submitted that the Appellant, having declined to give any evidence regarding the purpose of the transaction at issue, could not satisfy this burden resting with her. For this reason the appeal must fail and the assessment to income tax should stand.

56. The Respondent submitted that, in any event, it was clear on the facts that there was a scheme or arrangement put in place by the Appellant, the purpose of which was to avoid the payment of income tax on money that was extracted from the company. In this respect the Respondent pointed, firstly, to the fact that Company had, at all times, sufficient funds to purchase the Appellant's 90% shareholding. Counsel for the Respondent posed the question why, if the Appellant's desire was to raise funds, did the Company not purchase

them from her directly? Why instead did [redacted] Ltd, a company lacking the necessary financial resources, purchase the shares using funds borrowed from the very entity that it was acquiring control over?

57. The true reason for this, submitted the counsel for the Respondent, was apparent when one looked at the facts in conjunction with section 130 of the TCA 1997, entitled "*Matters to be treated as distributions*". Subsection (2)(b) therein, defines distribution as meaning, among other things, *"any* […] *distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company".* Thus, were the Appellant to have sold her shareholding directly to the Company, the consideration paid to her in return by the Company would plainly have been deemed a "distribution" and, therefore, chargeable to income tax rather than CGT.

58. The Respondent submitted that, so as to avoid the effect of section 130(2)(b) of the TCA 1997, the Appellant had arranged matters so that it was another close company controlled by her husband, [redacted] Ltd, that bought the shareholding. This, however, could not avail the Appellant as it brought the transaction squarely within the parameters of section 817 of the TCA 1997. This was so because subsection (3) provides that the section is to apply where the disposal of shares in a close company does not in result in the interest of the disposer in the trade or business of the company being "significantly reduced." The Respondent submitted that there was no significant reduction in circumstances where the shareholding acquired by [redacted] Ltd could be attributed to the Appellant because it was a company "connected" to her. In this regard, section 817(1)(ca)(i) of the TCA 1997 provides that the interest of a shareholder must, when calculating whether a significant reduction has occurred, include that of any connected person.

59. The Respondent submitted that it was relevant also to the question of whether the transaction was bona fine that the sum purportedly advanced to [redacted] Limited by the Company as a loan did not appear, from the accounting information available, to have been repaid as of the end of 2019.

60. In oral submission, counsel for the Respondent explained at some length why [redacted] must be viewed as connected to the Appellant. Section 10(7) of the TCA 1997 makes clear that a company will be connected to a person where that person has "control" over that company. Section 432(2) of the TCA 1997 defines a person who has control over a company as being, amongst others, one who possesses the greater part of the share capital or issued share capital of the company.

61. The Respondent accepted that the Appellant could not, on the wording of section 432(2) alone, be said to have had control over [redacted] Ltd as she held no share capital, still

less the greater part of it. Her husband, however, did. This was relevant because section 432(6) of the TCA 1997 provides that for the purposes of section 432(2) there may also be attributed to a person all the rights and powers possessed by "*any associate*".

62. The word "associate" is given its meaning by section 433 of the TCA 1997. At subsection (3)(b) therein it is defined as including "*any relative or partner of the participator".* It should be noted that "*participator"* is itself defined as any person who possesses share capital in a company, which plainly includes the husband of the Appellant.

63. The consequence of the foregoing, according the Respondent, was that in determining whether the Appellant's shareholding was significantly reduced, it was necessary to attribute the 90% shareholding of [redacted] Ltd to her. This was so because [redacted] Ltd was a company connected to her on the grounds that it was controlled by her husband, a person with whom she was an associate. Once so attributed, it could not be said that the Appellant's interest was reduced significantly, or indeed reduced at all, on the grounds that a 90% shareholding was precisely what she possessed prior to the disposal of her shares. As a result, the sum received by Appellant had to be held to fall within the circumstances described in section 817(3) of the TCA 1997, such that income tax, rather than CGT, had to be charged.

64. The Respondent pointed in argument to various tax authorities in which the purpose of transactions were considered. This was prefaced however by a repetition of the submission that there was no evidence given by the Appellant regarding her own purpose in disposing of her shareholding.

65. In relation to the agent for the Appellant's reliance on *Inland Revenue Commissioners v Brebner*, the Respondent opened the more recent judgment of *Inland Revenue Commissioners v Willoughby,* [1997] 4 ALL ER 65, in which the House of Lords drew a distinction between "tax avoidance" and "tax mitigation". The former arose where a taxpayer sought to reduce their liability "*without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability*". "Tax mitigation", by contrast, involved a taxpayer taking advantage of a fiscally attractive option afforded to them by the legislature. In *Willoughby,* it was held that where a taxpayer had engaged in a transaction giving rise to avoidance, it had to be taken that in so doing avoidance was one of the purposes of the transaction *"whether or not the taxpayer* [had] *formed the subjective motive of avoiding tax".*

66. In relation to the authorities cited by the Appellant relating to the *Duke of Westminster* case (*O'Sullivan (Inspector of Taxes) v P Ltd* and *CIR v Wesleyan and General Assurance Society,* [1946] 2 ALL ER 749), the Respondent submitted that these were cases involving

"judge made law" on anti-avoidance. They were not of especial assistance in circumstances where there was specific anti-avoidance legislation that had been passed by the Oireachtas focused on the type of transaction effected by the Appellant. The Appellant's arguments in this respect, the Respondent submitted, ignored the very existence of section 817 of the TCA 1997.

**Material Facts**

67. The facts material to this appeal which were agreed by the parties were as follows:-

- prior to 17 April 2014 the Appellant was the owner of 90 of 100 ordinary shares in the Company;
- on or about 17 April 2014 the Appellant's 90 ordinary shares were converted into A ordinary shares, with their value capped at €1,100,000 and sold to the [redacted] Ltd for consideration of €1,100,000;
- the estimated market value of the Company in April 2014 was approximately €1,300,000, based on its net asset value as at 31 December 2013;
- [redacted] Ltd was a company whose sole shareholder was the Appellant's husband;
- the funds used for the purchase of the Appellant's shares in the Company were provided to [redacted] Ltd by the Company itself by way of a loan. The loan amount was €1,111,000;
- arising from her sale of the shares, the Appellant filed a Form 11 Return for 2014 which disclosed a gain of €1,099.886. CGT of €362,543 was paid in respect of this gain;
- on 6 February 2018 the Respondent issued notification of an audit to the husband of the Appellant;
- on 20 October 2018 the Respondent issued an amended income tax assessment for the year 2014 assessing the sum of €1,099,886 to income tax under Schedule F of the TCA 1997. This gave rise to a balance payable of €605,488.31;
- on 19 November 2018 the Appellant appealed the assessment by way of notice of appeal delivered to the Commission.

68. In addition, documentary evidence in the form of abridged financial statements of the Company and [redacted] Limited, furnished prior to the hearing, cause the Commissioner to find as material facts that:-

    - the Appellant acquired her shareholding in the Company from her husband at some point in 2013; and
    - as of the end of 2019, [redacted] Ltd had not repaid in full the sum lent to it by the Company in respect of the purchase of the Appellant's shareholding in the Company.

**Analysis**

69. It is appropriate to begin this part of the determination by quoting from the judgment of the High Court in *Menolly Homes v Revenue [2010] IEHC 49* where, at para 22, Charleton J held:-

    *"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".*

70. It is thus incumbent on the Appellant to prove in this case that the Respondent's income tax assessment was in error.

71. Section 817 of the TCA 1997 is an anti-avoidance provision. Its particular focus is to prevent the extraction by a shareholder of funds from a close company for their own benefit, without income tax being charged on the amount extracted.

72. In this instance the Respondent decided following an audit procedure that the Appellant's sale of her shares in the Company did not constitute a true disposal of her interest in its trade. Rather, it concluded that the sum received was a "distribution" within the meaning of section 130 of the TCA 1997 and thus chargeable to income tax. Correspondence emanating from the Respondent during the audit process indicated that it did not consider the sale of the shares to be a "bona fide commercial transaction".

73. At the hearing of this appeal, the agent for the Appellant contended, firstly, that the assessment was in error because the legislation requires that there must be a "scheme or arrangement" undertaken, the purpose of which was to ensure that a shareholder avoided income tax on funds extracted. He contended that there was no such scheme or arrangement, referring in particular for the necessity of a "wider scheme".

74. The Commissioner, however, is satisfied that there was in this instance a scheme or arrangement put in place of the kind targeted by section 817.

75. Section 817(3) of the TCA 1997 is mandatory in its terms. It provides that the section *shall* apply to a disposal of shares where the interest of the disposing shareholder in the trade or business is not "*significantly reduced*" following the disposal.

76. While the Appellant sold all of her shares in the Company, the purchaser was a company whose sole shareholder was her own husband. Section 817(1)(ca)(i) of the TCA 1997 provides that the interest of the disposing shareholder shall, following disposal, be deemed to include the interest of any connected person if "*increasing that interest of the shareholder by such interest* […] *would result in the interest of the shareholder in the trade or business not having been significantly reduced".*

77. The agent for the Appellant submitted that the above wording of section 817(3) of the TCA 1997 must be read as meaning that if a person disposes of *all* of their shareholding, as opposed to a portion of it, then the anti-avoidance provision cannot apply.

78. Before analysing the merit of this submission it is apposite to cite McDonald J's recent summation of principles of statutory interpretation in *Perrigo Pharma International Activity Company v McNamara & Ors* [2020] IEHC 152 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. 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"."*

79. As noted already in this Determination, the Appellant's agent opened a variety of authorities concerning the principles applicable to the interpretation of taxation. The Commissioner considers the foregoing passage in *Perrigo Pharma v McNamara* to be a succinct summation of these principles, which bind the Commissioner.

80. The Commissioner also considers the following passage at paragraph 54 of the judgment of O'Donnell J (as he was then) in *Bookfinders v Revenue [2020] IESC 60* to be worthy of note in the instant case:-

> "[…] *it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, 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 is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."*

81. Returning to the scope of section 817 of the TCA 1997, when one examines the wording of subsections (2), (3) and (1)(ca)(i) therein it is clear that the share disposal transaction at issue falls within it. The plain, natural and ordinary meaning of the wording of section 817(3) of the TCA 1997 is that the section applies where, following a disposal, the shareholder in the close company retains an interest that is not "significantly reduced". As observed already, subsection (1)(ca)(i) deems that the interest of the shareholder shall be taken to include that of a connected person. Nothing in the wording of the provision suggests to the Commissioner that this interest can only be added to some shareholding actually retained by the disposing shareholder for it to be taken into account for the purpose of establishing whether there should be a charge to income tax.

82. The Commissioner finds there to be no ambiguity in the wording of section 817 leading to doubt about its scope. Even if, however, this is wrong and there were some ambiguity, the Commissioner finds that the reading suggested by the agent for the Appellant would, in light of the purpose enumerated in subsection (2) therein, give rise to an absurdity of the kind referred to by McDonald J in *Perrigo Pharma v McNamara* at point (f) of paragraph 74.

83. The intention of the Oireachtas in making this legislation could not be clearer. It was intended to prevent the extraction of money from close companies by means of a transaction where there was an ostensible divestment of an interest, but where, in reality, that interest was maintained in some indirect fashion. Among the methods of the maintenance of the interest envisaged by the provision was its transfer to a connected person or connected persons, including family members such as husbands and wives. The reading proposed by the Appellant's agent would mean that the maintenance of a

shareholding by a shareholder, however small this might be, would bring a transaction within section 817 of the TCA 1997. Entire divestment to a connected person would, by stark contrast, cause it to fall outside its scope, even though control within the meaning of section 432 of the TCA 1997 was preserved.

84. What could explain such a difference in treatment given the purpose of the provision as espoused in section 817(2) of the TCA 1997? The Commissioner cannot identify a plausible answer to this question and finds that, were it necessary to have regard to the purpose of the legislation to establish the true meaning, section 817(3) of the TCA 1997 must be understood as permitting the addition of a connected person's interest even where the disposing shareholder has sold all of their interest. Such is the clarity of the provision when this interpretive tool is applied to the actual wording used, that there is no question of the imposition of a tax liability by the use of oblique or slack language.

85. The issue that arises, therefore, is whether or not the disposal of the Appellant's shares to [redacted] Ltd constituted a significant reduction of her interest in the trade of the Company.

86. The Appellant's shareholding in the Company was sold to [redacted] Ltd, a company whose only shareholder was her husband.

87. Under section 10(7) of the TCA 1997, a company is connected with a person where that person has control of that company.

88. "Control over a company" is defined under section 432(2) of the TCA 1997 as occurring, in among other circumstances, where a person possesses or has an entitlement to acquire the greater part of the share capital of that company.

89. While it could not be said that the Appellant herself had possession or the entitlement to acquire such share capital in the Company, her husband did. This is crucial because section 432(6) of the TCA 1997 provides that there may also be attributed to any person all the rights and powers of "any associate of such person".

90. The question then is whether the Appellant can be construed to be an "associate" of her husband. Section 433 of the TCA 1997 provides the answer to this.

91. Section 433(1) of the TCA 1997 defines a "participator" in relation to any company as a person having a share or interest in the capital or income of the company, including any person who possesses "share capital or voting rights in the company". Clearly, the Appellant's husband falls into this category of person.

92. Section 433(3)(b) of the TCA 1997 then defines what is meant by an "associate, in relation to a participator" as "any relative or partner of the participator".

93. Working backwards, this means that the Appellant is an associate of her husband, which means that she is, under section 432 of the TCA 1997, said to have control over the Company by virtue of her husband's possession of the whole of the share capital of [redacted] Ltd. The consequence of this is that [redacted] Ltd is, under 10(7) of the TCA 1997, deemed to be connected to her.

94. This connection to the Appellant means that, in determining whether her interest in the trade or business of the Company has been reduced significantly, it is necessary under section 817(1)(ca)(i) of the TCA 1997 to take into account the interest of [redacted] Ltd, which was acquired from her. As this is 90% of the share capital, precisely the interest of the Appellant prior to the disposal to [redacted] Ltd, it must be held that it was not reduced significantly. Consequently, subject to subsection (7), the provision must be deemed by virtue of subsection (3) to apply to the proceeds received by the Appellant arising from the disposal at issue.

95. Section 817(7) of the TCA 1997 provides that the section shall not apply as regards the disposals of shares in close companies which were for carried out for bona fide commercial reasons and were not part of a scheme or arrangement the purpose of which was to avoid income tax.

96. As noted at the outset of this part of the Determination, the onus is on the Appellant to prove that the Respondent's assessment was in error. The Appellant asserted in the Notice of Appeal and Statement of Case that the share disposal was for bona fide commercial reasons. This was elaborated on in the Outline of Arguments when it was stated that the bona fide reason for the transaction was that she had borrowings with a third party that necessitated the raising of funds in the same amount as the consideration she received from [redacted] Ltd, sourced by way of a loan from the Company itself.

97. Whether the foregoing explanation for the transaction could constitute a "bona fide commercial reason" bringing it outside the scope of the section, such that the funds received by the Appellant were properly chargeable to CGT rather than income tax, is a question that the Commissioner does not need to decide. This is because the Commissioner heard no evidence whatever about the Appellant's reasons for selling her shares. Whether it was because she had debts that needed to be paid or was for some other reason cannot be ascertained in the absence of evidence. A bald statement in written argument does not constitute evidence.

98. This being so, the Commissioner finds there to be no basis upon which to conclude that the disposal of the Appellant's shares was for a bona fide commercial reason. Consequently, the sum she received upon disposal must, under section 817(4) of the TCA 1997, be deemed to be a distribution from the company chargeable to income tax under Schedule F. Accordingly, it is held that the Appellant's appeal must fail and the assessment of the Respondent of 20 October 2018 must stand.

**Determination**

99. The assessment of 20 October 2018, whereby the Appellant and her husband were assessed as having an income tax liability of €605,488.331 must stand.

100. In accordance with the Respondent's own submission at the hearing of the appeal, this leaves a tax liability of €242,945.37, being the difference between the amount of income tax chargeable and the CGT already paid by them.

101. This appeal is determined under section 949AK of the TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Conor O'Higgins
Appeal Commissioner
26 January 2023