



**AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH**  
**TAX APPEALS COMMISSION**

76TACD2024

Between

██████████

**Appellants**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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## **Introduction**

1. This is an appeal to the Tax Appeals Commission (hereinafter the "Commission") pursuant to and in accordance with the provisions of the Taxes Consolidation Act 1997 (hereinafter the "TCA 1997").
2. This appeal is brought by [REDACTED] (hereinafter the "Appellant") against a Notice of Assessment to Capital Gains Tax (hereinafter "CGT") for the year 2017 raised by the Revenue Commissioners (hereinafter the "Respondent") on 13 December 2022 and against an alternative Notice of Amended Assessment to Income Tax for the year 2017 raised by the Respondent on 14 December 2022.
3. The amount of tax in dispute in this appeal is €49,544.06.
4. The determination in this appeal should be read in conjunction with a related determination has been issued in a related appeal [REDACTED] (hereinafter the "Company") 57/23.

## **Background**

5. The Appellant is a businessman who, during 2017, was a director and 90% shareholder of [REDACTED] (hereinafter the "Company"). The Company was incorporated in 1995 and provides [REDACTED] services to various customers, both individual and corporate. The Appellant has been director of the Company since 2006. The Company's Secretary was [REDACTED] who was also a 10% shareholder in the Company.
6. During 2017, the Appellant was also a director, company Secretary and 50% shareholder in [REDACTED] (hereinafter the "Restaurant"). The Restaurant was incorporated in 2015 and had a primary business of the operation of an [REDACTED]. [REDACTED] (hereinafter the "Mr X") was also a director and 50% shareholder in the Restaurant during 2017. The Restaurant had 100 fully paid up and issued shares with the Appellant owning 50 shares and Mr X owning 50 shares.
7. On start-up, the Appellant and Mr X invested €40,000 in the Restaurant and, in addition, both provided personal guarantees to a bank lender in respect of a loan taken out by the Restaurant.
8. The Restaurant took up occupation in a premises in [REDACTED] and commenced trading from that premises in or around December 2015. The occupation of that premises was on the basis of a Care Takers Agreement and, up to the period ending 29 June 2017, no lease had been entered into by the Restaurant in relation to its occupation of the premises.

9. In addition, in 2017 the Appellant was a director and shareholder in two separate companies which are not relevant to this appeal.
10. A dispute arose between the Appellant and Mr X in relation to the Restaurant and on 20 June 2017, the Appellant and Mr X entered into a mediated agreement entitled "Compromise Agreement" which provided as follows:

*"WHEREAS:*

*The Parties have been in dispute in relation to [REDACTED] (the Dispute).*

*The Dispute has been the subject of a mediation conducted under an agreement to mediate dated 1st June 2017 between the Parties and the Mediator.*

*The Parties have agreed to settle the Dispute on terms set out below (the Settlement Agreement).*

*THE PARTIES HAVE AGREED as follows:*

- (1) [REDACTED] will sell and [REDACTED] will acquire [REDACTED] entire shareholding and interest in [REDACTED] [REDACTED] [REDACTED] in consideration of the following:
  - a. [REDACTED] companies will submit two invoices to [REDACTED] [REDACTED] totalling €60,000 in respect of management services charges to [REDACTED] provided over the past two years;
  - b. [REDACTED] will pay both invoices referred to in 1(a) above, on or before 29 June 2017, subject to Bank releasing [REDACTED] [REDACTED] from his personal guarantee for the borrowings of [REDACTED] [REDACTED];
  - c. If the Bank does not release [REDACTED] from his personal guarantee until after 29 June 2017, [REDACTED] shall withhold payments of both invoices until such later date provided that such release shall be provided no later than 7 July 2017.
  - d. [REDACTED] shall in addition repay the balance of [REDACTED] Director's Loan in full at the same time as the invoices are paid.

e. [REDACTED] shall execute a Stock Transfer form in favour of [REDACTED] [REDACTED] on the same date as the Bank shall release him from his personal guarantee.

f. [REDACTED] shall not compete for or treat with the landlord's Receiver in any respect whatsoever in respect of a lease of [REDACTED] [REDACTED], from where [REDACTED] currently trades and has been in possession since November 2015, in respect of the superior interest or otherwise howsoever.

(2) On or before 29 June 2017, [REDACTED] will write to [REDACTED] [REDACTED], signed by the Parties, to confirm the terms of his remuneration including his right to receive 10% of the profits of [REDACTED] [REDACTED].

(3) The Parties have had the opportunity to take legal advice on the effect and import of this Settlement Agreement before signing the Settlement Agreement.

(4) This Settlement Agreement is governed by the laws of Ireland and the Courts of Ireland shall have jurisdiction to determine any dispute or difference arising.

(5) This Settlement Agreement is made in full and final settlement of all disputes arising between the Parties from their shareholding in [REDACTED] [REDACTED] or otherwise howsoever.

(6) The Parties agree to keep the terms of this Settlement Agreement confidential.

(7) [REDACTED] shall, upon executing Stock Transfer form, relinquish all Bank account and other payment authority and shall return all records and property of the company to [REDACTED]."

11. The Compromise Agreement submitted to the Commissioner was not signed by either party, but did contain the parties names typed where a signature would be expected.

12. On 29 June 2017, the Appellant as Vendor and Mr X as Purchaser entered into an agreement entitled "Share Purchase Agreement" which provided as follows:

*"THIS AGREEMENT is made on 29th June 2017*

*BETWEEN*

(1) [REDACTED] OF [REDACTED] (hereinafter referred to as the "Vendor")

(2) [REDACTED] [REDACTED] OF (the "Purchaser") [REDACTED] [REDACTED] [REDACTED],

WHEREAS

(A) [REDACTED] (CRO Number [REDACTED] is a private limited company incorporated in Ireland with its registered office at [REDACTED] [REDACTED] (the "Company").

(B) The Company has an authorised share capital of €100,000.00 divided into 100,000 Ordinary Shares of €1.00 each which 100 Ordinary Shares are issued, credited as fully paid up.

(C) The Vendor is the beneficial owner of 50 Ordinary Shares in the capital of the Company which he has agreed to sell and which the Purchaser has agreed to purchase on the terms and subject to the conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:

#### 1. DEFINITIONS

"Encumbrances" means:-

- (i) Any adverse claim or right or third party right or other right or interest;
- (ii) any equity;
- (iii) any option or right of pre-emption or right to acquire or right to restrict;
- (iv) any mortgage, charge, assignment, hypothecation, pledge, lien, encumbrance or security interest or arrangement of whatsoever nature;
- (v) any reservation-of-title; or
- (vi) any hire purchase, lease or instalment purchase agreement;

The "Shares" means the 50 Ordinary Shares of €1.00 each in the capital of the Company beneficially owned by the Vendor.

#### SALE AND PURCHASE OF THE SHARES

2.1 On the terms and subject to the conditions of this Agreement, the Vendor as beneficial owner, hereby agrees to sell and the Purchaser hereby

*agrees to purchase the Shares free from all Encumbrances and with the benefit of all rights whatsoever nature attaching or accruing to the Shares including all rights of any dividends and distributions declared, paid or made in respect of the Shares on the date of this Agreement.*

*2.2 The Purchaser shall not be obliged to complete the purchase of any Shares unless the purchase of all the Shares is completed simultaneously in accordance with the provisions of this Agreement.*

### **3. PURCHASE CONSIDERATION**

*The purchase consideration payable by the Purchaser for the purchase of the Shares shall be the sum of fifty payable [on completion] [as set out below].*

### **4. COMPLETION**

*Completion shall take place on the date of this Agreement and at completion, the Vendor and Purchaser shall:-*

- i. Deliver to the Purchaser a duly executed share transfer in respect of the Shares together with the relevant certificate in respect thereof;*
- ii. Resign as director of the Company and Secretary of the Company;*
- iii. Procure that a meeting of the board of directors of the Company is held at which the share transfers referred to at (i) above are approved for registration (subject only to stamping); and*
- iv. The Purchaser shall pay Fifty Euro cash to the Vendor as consideration for the transfer of the Shares;*
- v. The Company shall pay in full the Vendor's directors loan account, that amount being thirty thousand and eighty one euros;*
- vi. The Company shall pay to [REDACTED] the sum of sixty thousand euros plus VAT at 23% as management fees for the period from the 1st November 2015 to the 28th of June 2017.*

### **5. WARRANTIES**

*i. The Vendor Shall not compete for or treat with the Landlord's Receiver in any respect whatsoever in respect of a lease of [REDACTED] from where [REDACTED] currently trades.*

ii. *The Vendor shall not be held liable in any regard if the Purchaser fails in whatever respect to guarantee his tenure of [REDACTED], from where [REDACTED] currently trades.*

iii. *The Purchaser acknowledges that [REDACTED] is currently occupying [REDACTED] on the grounds of a Care Takers Agreement and there is currently no lease granted in favour of [REDACTED]*

iv. *The Purchaser shall not hold [REDACTED] responsible or liable for any if its part in the management of [REDACTED]*

#### 6. CONFIDENTIALITY

*(i) Each party agrees to hold strictly confidential the existence and contents of these terms unless that information is generally known or the disclosure of that information is required by law.*

#### 7. GOVERNING LAW AND JURISDICTION

*This Agreement shall in all respects be governed by and construed in accordance with the laws of Ireland and the parties hereto hereby submit to the exclusive jurisdiction of the courts of Ireland."*

13. The Share Purchase Agreement submitted to the Commissioner at the oral hearing was signed by the Appellant and by Mr X. Neither signature was witnessed.
14. On 30 May 2017 the Company raised an invoice on the Restaurant in the amount of €40,000 plus Value Added Tax (hereinafter "VAT") of €9,200 totalling €49,200. In addition, on 29 June 2017 the Company raised an invoice on the Restaurant in the amount of €20,000 plus VAT of €4,600 totalling €24,600. On 29 June 2017 €73,800 was lodged into the Company's bank account by the Restaurant in respect of the two invoices.
15. Between 30 June 2017 and 7 July 2017, the Company transferred six payments of €10,000 each to the Appellant's joint bank account with [REDACTED] totalling €60,000. The six payments were recorded in the Appellant's director's loan account in the Company.
16. The Restaurant submitted a claim for a refund of VAT in relation to the invoices raised by the Company. On foot of this, the Respondent investigated the claim and, during the course of the investigation, Mr X supplied the Respondent with the Compromise Agreement and the Share Purchase Agreement.



17. On 15 March 2019 the Respondent commenced an audit into the Appellant's and the Company's tax affairs. Following completion of the audit, on 13 December 2022 the Respondent raised a Notice of Assessment to CGT on the Appellant for the year 2017 on in the amount of €19,364.00 on the basis that the payment of €60,000 from the Company to the Appellant represented payment for the Appellant's shares in the Restaurant.
18. On 14 December 2022 the Respondent raised an alternative Notice of Amended Assessment to Income Tax on the Appellant for the year 2017 in the amount of €30,180.06 on the Appellant. The basis of the alternative Notice of Amended Assessment to Income Tax was that, during the course of the audit, the Appellant had suggested that the payment of €60,000 may have been remuneration to him for services rendered by him to the Restaurant.
19. The Respondent issued correspondence to the Appellant on 5 December 2022 and on 15 December 2022 indicating that it seeks to rely on one head of tax only in this appeal.
20. On 10 January 2023 the Appellant submitted a Notice of Appeal to the Commission appealing both the Notice of Assessment to CGT and the Notice of Amended Assessment to Income Tax. The parties are in agreement that the notices under appeal in this appeal are in the alternative and that the Respondent seeks to recover tax under one notice only.
21. In addition, the Respondent issued an alternative Notice of Amended Assessment to Pay As You Earn / Pay Related Social Insurance / Universal Social Charge (hereinafter "PAYE / PRSI / USC") on the Company on the basis that, should it be found that the €60,000 payment was not a payment made to the Appellant for the purchase of his shareholding and interest in the Restaurant, then it must be untaxed wages paid by the Company to the Appellant and is therefore subject to PAYE / PRSI / USC.
22. The Respondent also issued a Notice of Amended Assessment to Corporation Tax which reflected the omission of the €60,000 payment as Company income on the basis that it was a payment received by the Company on behalf of the Appellant.
23. The Respondent has submitted that it does not seek to recover tax under all of the tax heads to which the Notices of Assessment and Notices of Amended Assessment were issued to the Appellant and the Company. The Respondent submitted that it seeks to recover the tax assessed under the Notice of Assessment to CGT issued to the Appellant.
24. The Respondent has submitted that the Notice of Amended Assessment to income tax issued to the Appellant and the Notice of Amended Assessment to PAYE / PRSI / USC issued to the Company were raised by the Respondent on the basis that, during the course of the audit, the Appellant had suggested that the payment of €60,000 may have

been remuneration to him for services rendered by him to the Restaurant. These notices, the Respondent submitted, are in the alternative. The Respondent does not seek to recover under these notices if the Appellant is unsuccessful in his appeal against the Notice of Assessment to CGT.

25. Both the Notice of Amended Assessment to PAYE / PRSI / USC and Notice of Amended Assessment to Corporation Tax issued by the Respondent to the Company are the subject of the determination in appeal 57/23.
26. The parties are in agreement that, should either of the notices under appeal in this appeal be upheld, the Notice of Amended Assessment to PAYE / PRSI / USC shall not be pursued by the Respondent.
27. Both the Notice of Assessment to Amended Assessment to PAYE / PRSI / USC and the Notice of Amended Assessment to Corporation Tax issued by the Respondent to the Director are the subject of the determination in appeal 57/23.

#### **Legislation and Guidelines**

28. The legislation relevant to the appeal is as follows:

##### Section 19 of the TCA 1997

###### *"Schedule E*

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

###### **SCHEDULE E**

- i. In this Schedule, "annuity" and "pension" include respectively an annuity which is paid voluntarily or is capable of being discontinued and a pension which is so paid or is so capable.*
- ii. Tax under this Schedule shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable out of the public revenue of the State, other than annuities charged under Schedule C, for every one euro of the annual amount thereof.*
- iii. Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for paragraph 2 of that Schedule.*

- iv. *Paragraphs 1 to 3 are without prejudice to any other provision of the Income Tax Acts directing tax to be charged under this Schedule, and tax so directed to be charged shall be charged accordingly.*
- v. *Subsection (2) and sections 114, 115 and 925 shall apply in relation to the tax to be charged under this Schedule.*

*(2) Tax under Schedule E shall be paid in respect of all public offices and employments of profit in the State or by the officers respectively described below-*

- (a) offices belonging to either House of the Oireachtas;*
- (b) offices belonging to any court in the State;*
- (c) public offices under the State;*
- (d) officers of the Defence Forces;*
- (e) offices or employments of profit under any ecclesiastical body;*
- (f) offices or employments of profit under any company or society, whether corporate or not corporate;*
- (g) offices or employments of profit under any public institution, or on any public foundation of whatever nature, or for whatever purpose established;*
- (h) offices or employments of profit under any public corporation or local authority, or under any trustees or guardians of any public funds, tolls or duties;*
- (i) all other public offices or employments of profit of a public nature."*

*Section 28 of the TCA 1997*

*“(1) Capital gains tax shall be charged in accordance with the Capital Gains Tax Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets.*

*(2) Capital gains tax shall be assessed and charged for years of assessment in respect of chargeable gains accruing in those years.*

*(3) Except where otherwise provided by the Capital Gains Tax Acts, the rate of capital gains tax in respect of a chargeable gain accruing to a person on the disposal of an asset shall be 33 per cent, and any reference in those Acts to the rate specified in this section shall be construed accordingly.”*

Section 112 of the TCA 1997 (in force from 6 April 2011 to 31 December 2017)

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

(2)(a) *In this subsection, "emoluments" means anything assessable to income tax under Schedule E.*

(b) *Where apart from this subsection emoluments from an office or employment would be for a year of assessment in which a person does not hold the office or employment, the following provisions shall apply for the purposes of subsection (1):*

*(i)if in the year concerned the office or employment has never been held, the emoluments shall be treated as emoluments for the first year of assessment in which the office or employment is held, and*

*(ii)if in the year concerned the office or employment is no longer held, the emoluments shall be treated as emoluments for the last year of assessment in which the office or employment was held."*

Section 532 of the TCA 1997 (as in force from 1 January 2013 onwards)

*"Assets*

*All forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not, including -*

- (a) options, debts and incorporeal property generally,*
- (b) any currency other than the currency of the State, and*
- (c) any form of property created by the person disposing of it, or otherwise becoming owned without being acquired."*

Section 959AA of the TCA 1997 (as in force from 21 March 2016 to 18 December 2018)

*"Chargeable persons: time limit on assessment made or amended by Revenue officer*

(1) *Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period -*

(a) *an assessment for that period, or*

(b) *an amendment of an assessment for that period,*

*shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and -*

(i) *no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*

(ii) *no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*

*by reason of any matter contained in the return.*

(2) *Nothing in this section prevents a Revenue officer from, at any time, amending an assessment for a chargeable period -*

(a) *where the return for the period does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period,*

(b) *to give effect to -*

(i) *a determination of an appeal against an assessment,*

(ii) *a determination of an appeal, other than one made against an assessment, that affects the amount of tax charged by the assessment, or*

(iii) *an agreement within the meaning of section 949V.*

(c) *to take account of any fact or matter arising by reason of an event occurring after the return is delivered,*

(d) *to correct an error in calculation in the assessment, or*

(e) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid (notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made) where appropriate in accordance with any such amendment.

(3) Nothing in this section affects the operation of section 804(3), 811, 811A, 811C, 811D or 1048.”

Section 959AB of the TCA 1997 (as in force from 23 October 2014 to 31 December 2023)

*“Persons other than chargeable persons: time limit on Revenue assessment and amended assessment*

(1) Subject to the other provisions of this section, a Revenue assessment on a person other than a chargeable person may be made or amended by a Revenue officer at any time not later than 4 years after the end of the chargeable period to which the assessment relates.

(2) In a case in which emoluments to which subsection (3) applies are received in a year of assessment subsequent to that for which they are assessable, a Revenue assessment on a person other than a chargeable person may be made or amended by a Revenue officer for the year of assessment for which the emoluments are assessable at any time not later than 4 years after the end of the year of assessment in which the emoluments were received.

(3) The emoluments to which this subsection applies are emoluments within the meaning of section 112(2), including any payments chargeable to tax by virtue of section 123 and any sums which by virtue of Chapter 3 of Part 5 are to be treated as perquisites of a person's office or employment, being emoluments, payments or sums other than those taken into account in an assessment to income tax for the year of assessment in which they are received and, for the purposes of subsection (2) -

(a) any such payment shall, notwithstanding anything in section 123(4), be treated as having been received at the time it was actually received, and

(b) any such sums which are not actually paid to that person shall be treated as having been received at the time when the relevant expenses were incurred or are treated for the purposes of Chapter 3 of Part 5 as having been incurred.

(4) Nothing in this section affects the operation of section 811, 811A, 811C or 811D.”

### **Witness Evidence**

29. The following is a summary of the witness evidence adduced to the Commissioner.

#### Witness Evidence - [REDACTED]

30. The following is a summary of the direct evidence adduced to the Commissioner by the Appellant.
31. The Appellant stated that in 2015 he started the Restaurant business together with Mr X. He stated that Mr X was paid a salary for his work at the Restaurant as he had the necessary skills to run the business. The Appellant stated that he did not take any salary from the Restaurant.
32. He stated that the Company provided [REDACTED] services to the Restaurant in compliance with health and safety rules which require [REDACTED]. The Company was the only one providing [REDACTED] services to the Restaurant.
33. The Appellant stated that, in 2015 when the Restaurant was formed, he and Mr X injected €40,000 into it and that they also provided a personal guarantee for a €60,000 bank loan which the Restaurant drew down.
34. He stated that in 2017, due to various circumstances, he and Mr X entered into a mediated agreement whereby it was negotiated that the Appellant would be released from the personal guarantee, his directors loan would be repaid and that €60,000 plus VAT would be paid to the Company on the production of two invoices from the Company to the Restaurant.
35. The Appellant stated that the payment of €60,000 did not relate to the purchase of his shares in the Restaurant. Rather, the Appellant stated that, in circumstances where there had not been an agreement in place between the Company and the Restaurant for the [REDACTED] services rendered by the Company between 2015 and 2017, he had calculated the value of the work which the Company had performed for the Restaurant as being €60,000 plus VAT.

36. The Appellant stated that the work which had been carried out by the Company for the Restaurant had not been tracked through the till system which the Company operates and, instead, the work had been documented in docket books which would have been updated when deliveries were made by the Company to the Restaurant. He stated that the Company had not invoiced the Restaurant for the services provided on an ongoing basis.
37. The Appellant stated that the Company also had other corporate customers to whom it provided [REDACTED] services. He stated that the Company invoiced those corporate customers at the end of each month and that the payment terms for corporate customers were within 30 days, however many corporate customers did not pay within those terms and were late with their payments. Payments from corporate customers were made by card transactions and / or by direct lodgement into the Company bank account.
38. He stated that the till tracking system in use by the Company reflected walk-in retail customers who required personal [REDACTED] services and some, but not all, corporate customer work. Other corporate customers, he stated, operated by way of docket books and were not recorded on the till tracking system. The till tracking system, he stated, was not a cash receipt or sales tracking system as customers paid when they collected their [REDACTED] and not when they delivered the [REDACTED] for processing. The till tracking system did, however, allocate pricing against individual items. He stated that the till tracking system was a dynamic system which could be changed, if necessary, as [REDACTED] was processed.
39. The Appellant stated that, in 2017, the Restaurant had a turnover of in or around €451,529 and that there was a profit of in or around €39,000. He also stated that, as best he could recall, the balance on the loan on which he had provided a personal guarantee for the Restaurant stood at in or around €50,000.
40. The Appellant agreed with an analysis of the till tracking system for 2017 which had been carried out on behalf of the Company and with an analysis of the Company bank account for 2017 which had been carried out by the Respondent which showed:
  41. Sales recorded on Company till tracking system of €219,477.08;
  42. Total sales lodgements to Company bank account of €297,846.10; and
  43. Direct customer lodgements to the Company bank account of €108,324.37.



44. The Appellant denied that there had been any suppression of sales in the Company and denied that there has been suppression of sales by the Company in 2017 in the amount of €29,935 as alleged by the Respondent.
45. He stated that, in his opinion, any difference between the till tracking system receipt amount and the lodgement amount to the bank account for 2017 can only be explained by delayed payments from corporate customers.
46. The Appellant stated that he had become aware that the Restaurant had encountered some difficulties in relation to a repayment claim it had made relating to the VAT payment it had made to the Company on foot of the mediated agreement. He stated that the Restaurant's accountant had sent him correspondence from the Respondent which had deemed the €60,000 payment from the Restaurant to the Company as a payment to him personally and that the Respondent had deemed that taxes were owed by the Restaurant on foot of that payment. He stated that nothing had ever been put to him by the Respondent during the course of the audit which suggested that any wrongdoing had been carried out by him.

## **Submissions**

### *Appellant's submissions*

47. The following is a summary of the submissions made to the Commissioner on behalf of the Appellant.
48. The Appellant raised a preliminary objection to the contested assessments such that it was submitted that the Respondent Officer did not approach the raising of the contested assessments with an open mind and that, prior to engaging with the Appellant and raising the assessments, he had closed his mind to the explanation which the Appellant gave in relation to the disputed payments. Therefore, the Appellant submitted, the contested assessments were not valid on the basis that the Respondent Officer had fettered his discretion by disregarding matters that he was bound in law to consider before adjudging that an assessment arose in his reasonable and / or best belief.
49. The Appellant submitted that, during 2017, he was a director of the Restaurant and of the Company along with two other unrelated companies. He submitted that the Company had a trading relationship with the Restaurant such that it provided [REDACTED] services to the Restaurant which were not contemporaneously invoiced to the Restaurant. The [REDACTED] services provided by the Company to the Restaurant were, it was submitted, recorded in a docket book and were not recorded through the till tracking system which

the Company also operated. The docket book which recorded the [REDACTED] services from the Company to the Restaurant was not available for submission to the Commissioner.

50. The Appellant submitted that his relationship with Mr X broke down to such an extent that the mediated Compromise Agreement and Share Purchase Agreement were entered into. This, it was submitted, was to give effect to the Appellant's exit from the Restaurant.
51. Part of the agreement reached was such that a reconciliation of debits and credits between the Company and the Restaurant was undertaken for the [REDACTED] services provided. As a result, it was submitted, the Company issued invoices in the amount of €60,000 plus VAT at 23% of €13,800 to the Restaurant. The Appellant submitted that the Company treated the amounts received from the Restaurant in the correct manner and returned VAT and Corporation Tax to the Respondent. In oral submissions to the Commissioner during the oral hearing, Counsel on behalf of the Appellant confirmed to the Commissioner, and agreed with the Respondent, that at no point was the Restaurant recorded as a debtor in the Company financial statements.
52. The Appellant submitted that in June 2017 the value of the Restaurant had not risen above the value of the issued, paid-up shares, that is to say €100 and that the Appellant 50% shareholding in the Restaurant had a value of €50 in June 2017.
53. It was submitted that, at the time of the Compromise Agreement and the Share Purchase Agreement in June 2017, the Restaurant had no fixed assets and had no security of tenure in relation to its trading premises. In addition, it was submitted that, at that time, the Restaurant had a debt owing to the bank of €50,000 on which the Appellant had given a personal guarantee. Further, it was submitted that, at that time, the Appellant's director's loan account with the Restaurant had a balance of €30,081 owing to the Appellant. It was also submitted that there is no evidence to suggest that the Restaurant was a profit making business. In those circumstances, it was submitted that, the Appellant's valuation of €50 on the shares which he held in the Restaurant was correct and reasonable.
54. The Appellant denied that the monies paid by the Restaurant to the Company were for the purpose of purchasing the Appellant's shares in the Restaurant. The Appellant submitted that Mr X purchased the Appellant's shares in the Restaurant by way of a payment of €50 in cash.
55. In pre-hearing submissions, the Appellant submitted that the raising of alternative assessments by the Respondent raised an issue in relation to time limits for the

Respondent to raise the contested assessments, however this ground of appeal was withdrawn at the oral hearing.

*Respondent's submissions*

56. The following is a summary of the submissions made to the Commissioner on behalf of the Respondent.
57. The Respondent submitted that the Commissioner does not have jurisdiction to determine the validity of the contested assessments and that the Commissioner's jurisdiction is limited to determining the correct amount of tax, if any, relating to the contested assessments.
58. The Respondent submitted that both the Compromise Agreement and the Share Purchase Agreement establish that the invoices issued by the Company were part of the consideration for the purchase of the Appellant's shares in the Restaurant.
59. The Respondent submitted that during the course of the audit carried out on the Appellant and the Company, it had been put to the Appellant that the payment of €60,000 plus VAT at 23% from the Restaurant to the Company was consideration received by the Appellant for the sale of his shares in the Restaurant to Mr X. The Respondent submitted that the Appellant surmised that the payment could fall within the scope of Pay As You Earn (hereinafter "PAYE") income and that the Restaurant could be liable for any tax due.
60. The Respondent submitted that it raised the disputed Notice of Assessment to CGT on the basis that the €60,000 payment was consideration received by the Appellant for the sale of his shares in the Restaurant to Mr X. In addition, the Respondent submitted that it raised the alternative Notice of Amended Assessment to Income Tax on the basis of the Appellant's suggestion during the audit that the €60,000 payment could fall within the scope of PAYE. The Respondent submitted that these are alternative assessments and that it seeks to recover tax under one tax head in respect of the €60,000 payment.

**Material Facts**

*Uncontested material facts*

61. The following material facts are not at issue in the within appeal and the Commissioner accepts same as material facts:
62. The Appellant is a businessman who, during 2017, was a director and 90% shareholder of the Company.

63. The Company was incorporated in 1995 and provides [REDACTED] services to various customers, both individual and corporate.
64. The Appellant has been director of the Company since 2006. The Company's Secretary was [REDACTED] who was also a 10% shareholder in the Company.
65. During 2017, the Appellant was also a director, company Secretary and 50% shareholder in the Restaurant.
66. The Restaurant was incorporated in 2012 and had a primary business of the operation of [REDACTED] restaurant. Mr X was also a director and 50% shareholder in the Restaurant during 2017.
67. The Restaurant had 100 fully paid up and issued shares with the Appellant owning 50 shares and Mr X owning 50 shares.
68. On start-up, the Appellant and Mr X invested €40,000 in the Restaurant and in addition both provided personal guarantees to a bank lender in respect of a loan taken out by the Restaurant.
69. The Restaurant took up occupation in a premises in [REDACTED] and commenced trading from that premises [REDACTED]. The occupation of that premises was on the basis of a Care Takers Agreement and, up to the period ending 29 June 2017, no lease had been entered into by the Restaurant in relation to its occupation of the premises.
70. In 2017 the Appellant was a director and shareholder in two separate companies which are not relevant to this appeal.
71. A dispute arose between the Appellant and Mr X in relation to the Restaurant and on 20 June 2017, the Appellant and Mr X entered into a mediated agreement entitled "Compromise Agreement" which provided as follows:

*"WHEREAS:*

*The Parties have been in dispute in relation to [REDACTED] (the Dispute).*

*The Dispute has been the subject of a mediation conducted under an agreement to mediate dated 1st June 2017 between the Parties and the Mediator.*

*The Parties have agreed to settle the Dispute on terms set out below (the Settlement Agreement).*

THE PARTIES HAVE AGREED as follows:

(1) [REDACTED] will sell and [REDACTED] will acquire [REDACTED] entire shareholding and interest in [REDACTED] [REDACTED] in consideration of the following:

a. [REDACTED] companies will submit two invoices to [REDACTED] totalling €60,000 in respect of management services charges to [REDACTED] provided over the past two years;

b. [REDACTED] [REDACTED] [REDACTED] will pay both invoices referred to in 1(a) above, on or before 29 June 2017, subject to Bank releasing [REDACTED] from his personal guarantee for the borrowings of [REDACTED].

c. If the Bank does not release [REDACTED] from his personal guarantee until after 29 June 2017, [REDACTED] [REDACTED] shall withhold payments of both invoices until such later date provided that such release shall be provided no later than 7 July 2017.

d. [REDACTED] shall in addition repay the balance of [REDACTED] Director's Loan in full at the same time as the invoices are paid.

e. [REDACTED] shall execute a Stock Transfer form in favour of [REDACTED] on the same date as the Bank shall release him from his personal guarantee.

f. [REDACTED] shall not compete for or treat with the landlord's Receiver in any respect whatsoever in respect of a lease of [REDACTED], from where [REDACTED] [REDACTED] [REDACTED] currently trades and has been in possession since November 2015, in respect of the superior interest or otherwise howsoever.

(2) On or before 29 June 2017, [REDACTED] will write to [REDACTED], signed by the Parties, to confirm the terms of his remuneration including his right to receive 10% of the profits of [REDACTED].

(3) *The Parties have had the opportunity to take legal advice on the effect and import of this Settlement Agreement before signing the Settlement Agreement.*

(4) *This Settlement Agreement is governed by the laws of Ireland and the Courts of Ireland shall have jurisdiction to determine any dispute or difference arising.*

(5) *This Settlement Agreement is made in full and final settlement of all disputes arising between the Parties from their shareholding in [REDACTED] or otherwise howsoever.*

(6) *The Parties agree to keep the terms of this Settlement Agreement confidential.*

(7) [REDACTED] shall, upon executing Stock Transfer form, relinquish all Bank account and other payment authority and shall return all records and property of the company to [REDACTED]."

72. The Compromise Agreement submitted to the Commissioner was not signed by either party, but did contain the parties names typed where a signature would be expected.

73. On 29 June 2017, the Appellant as Vendor and Mr X as Purchaser entered into an agreement entitled "Share Purchase Agreement" which provided as follows:

*"THIS AGREEMENT is made on 29th June 2017*

*BETWEEN*

(1) [REDACTED] OF [REDACTED] (hereinafter referred to as the "Vendor")

(2) [REDACTED] OF (the "Purchaser") [REDACTED],

*WHEREAS*

(A) [REDACTED] (CRO Number [REDACTED]) is a private limited company incorporated in Ireland with its registered office at [REDACTED] [REDACTED] (the "Company").

*(B) The Company has an authorised share capital of €100000.00 divided into 100,000 Ordinary Shares of €1.00 each which 100 Ordinary Shares are issued, credited as fully paid up.*

*(C) The Vendor is the beneficial owner of 50 Ordinary Shares in the capital of the Company which he has agreed to sell and which the Purchaser has agreed to purchase on the terms and subject to the conditions of this Agreement.*

*NOW IT IS HEREBY AGREED as follows:*

### *1. DEFINITIONS*

*"Encumbrances" means:-*

- (i) Any adverse claim or right or third party right or other right or interest;*
- (ii) any equity;*
- (iii) any option or right of pre-emption or right to acquire or right to restrict;*
- (iv) any mortgage, charge, assignment, hypothecation, pledge, lien, encumbrance or security interest or arrangement of whatsoever nature;*
- (v) any reservation-of-title; or*
- (vi) any hire purchase, lease or instalment purchase agreement;*

*The "Shares" means the 50 Ordinary Shares of €1.00 each in the capital of the Company beneficially owned by the Vendor.*

### *2. SALE AND PURCHASE OF THE SHARES*

*2.1 On the terms and subject to the conditions of this Agreement, the Vendor as beneficial owner, hereby agrees to sell and the Purchaser hereby agrees to purchase the Shares free from all Encumbrances and with the benefit of all rights whatsoever nature attaching or accruing to the Shares including all rights of any dividends and distributions declared, paid or made in respect of the Shares on the date of this Agreement.*

*2.2 The Purchaser shall not be obliged to complete the purchase of any Shares unless the purchase of all the Shares is completed simultaneously in accordance with the provisions of this Agreement.*

### *3. PURCHASE CONSIDERATION*

*The purchase consideration payable by the Purchaser for the purchase of the Shares shall be the sum of fifty payable [on completion] [as set out below].*

#### **4. COMPLETION**

*Completion shall take place on the date of this Agreement and at completion, the Vendor and Purchaser shall:-*

- i. Deliver to the Purchaser a duly executed share transfer in respect of the Shares together with the relevant certificate in respect thereof;*
- ii. Resign as director of the Company and Secretary of the Company;*
- iii. Procure that a meeting of the board of directors of the Company is held at which the share transfers referred to at (i) above are approved for registration (subject only to stamping); and*
- iv. The Purchaser shall pay Fifty Euro cash to the Vendor as consideration for the transfer of the Shares;*
- v. The Company shall pay in full the Vendor's directors loan account, that amount being thirty thousand and eighty one euros;*
- vi. The Company shall pay to [REDACTED] the sum of sixty thousand euros plus VAT at 23% as management fees for the period from the 1st November 2015 to the 28th of June 2017.*

#### **5. WARRANTIES**

- i. The Vendor Shall not compete for or treat with the Landlord's Receiver in any respect whatsoever in respect of a lease of [REDACTED] [REDACTED], from where [REDACTED] currently trades.*
- ii. The Vendor shall not be held liable in any regard if the Purchaser fails in whatever respect to guarantee his tenure of [REDACTED], from where [REDACTED] currently trades.*
- iii. The Purchaser acknowledges that [REDACTED] is currently occupying [REDACTED] on the grounds of a Care Takers Agreement and there is currently no lease granted in favour of [REDACTED].*
- iv. The Purchaser shall not hold [REDACTED] responsible or liable for any if its part in the management of [REDACTED]*



6. CONFIDENTIALITY

(i) Each party agrees to hold strictly confidential the existence and contents of these terms unless that information is generally known or the disclosure of that information is required by law.

7. GOVERNING LAW AND JURISDICTION

*This Agreement shall in all respects be governed by and construed in accordance with the laws of Ireland and the parties hereto hereby submit to the exclusive jurisdiction of the courts of Ireland."*

74. The Share Purchase Agreement submitted to the Commissioner at the oral hearing was signed by the Appellant and by Mr X. Neither signature was witnessed despite there being a space for a witness signature in the document.
75. On 30 May 2017 the Company raised an invoice on the Restaurant in the amount of €40,000 plus Value Added Tax (hereinafter "VAT") of €9,200 totalling €49,200. In addition, on 29 June 2017 the Company raised an invoice on the Restaurant in the amount of €20,000 plus VAT of €4,600 totalling €24,600. On 29 June 2017 €73,800 was lodged into the Company's bank account.
76. Between 30 June 2017 and 7 July 2017, the Company transferred six payments of €10,000 each to the Appellant's joint bank account with [REDACTED] totalling €60,000. The six payments were recorded in the Appellant's director's loan account in the Company.
77. The Restaurant submitted a claim for a refund of VAT in relation to the invoices raised by the Company. On foot of this, the Respondent investigated the claim and, during the course of the investigation, Mr X supplied the Respondent with the Compromise Agreement and the Share Purchase Agreement.
78. On 15 March 2019 the Respondent commenced an audit into the Appellant's tax affairs. Following completion of the audit the Respondent raised a Notice of Assessment to CGT on the Appellant for the year 2017 on 13 December 2022 in the amount of €19,364.00 on the basis that the payment of €60,000 from the Company to the Appellant represented payment for the Appellant's shares in the Restaurant.
79. On 14 December 2022 the Respondent raised an alternative Notice of Amended Assessment to Income Tax on the Appellant for the year 2017 in the amount of €30,180.06 on the Appellant. The basis of this alternative Notice of Amended Assessment to Income Tax was that the Appellant had suggested during the course of

the audit that the payment of €60,000 may have been remuneration to him for services rendered by him to the Restaurant.

80. The Respondent issued correspondence on 5 December 2022 and on 15 December 2022 indicating that it seeks to rely on one head of tax only in this appeal.
81. On 10 January 2023 the Appellant submitted a Notice of Appeal to the Commission appealing both the Notice of Assessment to CGT and the Notice of Amended Assessment to Income Tax.

*Disputed material facts*

82. The following material facts are at issue in the within appeal:
83. Whether the Appellant provided services to the Restaurant;
84. Whether the Company provided management and consultancy services to the Restaurant;
85. Whether the Company provided ██████ services to the Restaurant;
86. Whether the 2017 invoices related to ██████ services provided by the Company to the Restaurant.
87. The appropriate starting point for the examination of material facts is to confirm that in an appeal before the Commissioner, 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*, [2010] IEHC 49 (hereinafter "*Menolly Homes*"), at paragraph 22, Charleton J. stated:

*"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".*

88. The standard of proof applicable in an appeal to an Appeal Commissioner is the balance of probabilities.

*Whether the Appellant provided services to the Restaurant:*

89. In considering this material fact, the Commissioner notes that the Respondent has submitted that it raised the Notice of Amended Assessment to income tax on the basis

that, during the course of the audit, the Appellant had suggested that the payment of €60,000 may have been remuneration to him for services rendered by him to the Restaurant.

90. During the course of this appeal, the Appellant has not submitted any evidence, oral or documentary, that he personally provided services to the Restaurant. All of the submissions given by the Appellant sought to establish that the Company provided services to the Restaurant, however nothing was submitted in relation to the provision of services by the Appellant to the Restaurant.
91. As a result, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that the Appellant provided services to the Restaurant.
92. Therefore, the Commissioner finds as a material fact that the Appellant did not provide services to the Restaurant,

*Whether the Company provided management and consultancy services to the Restaurant:*

93. In direct evidence to the Commissioner, the Appellant stated that the Company provided [REDACTED] services to the Restaurant. He described the nature of the services provided as being to ensure compliance with health and safety rules [REDACTED]  
[REDACTED]  
[REDACTED].

94. On cross examination, when asked about whether the Company provided management and consultancy services to the Restaurant, the Appellant stated:

*"It was - maybe it was just an error that we put down "management fees" on it instead but the VAT was paid and it would have been claimed, there would have been no loss to the - there was no loss to anyone in a sense."<sup>1</sup>*

95. The Appellant has not provided any evidence, whether oral or documentary which tends to establish that the Company provided management and consultancy services to the Restaurant. In addition, the Commissioner notes that Counsel on behalf of the Appellant submitted, and agreed with the Respondent, that at no point was the Restaurant recorded as a debtor in the Company financial statements.

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<sup>1</sup> Transcript, page 87, lines 2 to 6.

96. As a result of the above, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that the Company provided management and consultancy services to the Restaurant.

97. The Commissioner therefore finds as a material fact that the Company did not provide management and consultancy services to the Restaurant.

Whether the Company provided [REDACTED] services to the Restaurant:

98. The Appellant has given direct evidence to the Commissioner that the Company provided [REDACTED] services to the Restaurant. He described the nature of the services provided as being to ensure compliance with health and safety rules [REDACTED]  
[REDACTED]  
[REDACTED].

99. The Appellant also stated that the provision of the [REDACTED] services by the Company to the Restaurant was recorded in docket books and was not recorded through the Company's till tracking system. The Appellant has not submitted the docket books which he claims the [REDACTED] services were recorded in, nor has the Appellant submitted any other documentary evidence in relation to the [REDACTED] services which he claims were provided by the Company to the Restaurant in the period from late 2015 when the Restaurant was first registered with the Companies Registration Office until June 2017.

100. The Commissioner notes that the Appellant is an experienced business man who is aware of the obligations of companies to retain records.

101. The invoices raised by the Company were raised with a VAT rate of 23%. The Commissioner notes that [REDACTED] services are charged at the reduced rate of VAT as categorised in Schedule 3 paragraph 20(1)(a) of the Value Added Tax Consolidation Act 2010, the relevant rate being 13.5%. The Appellant, in cross examination, opined that the VAT rate charged in the invoices was an error.

102. In addition, the Commissioner notes that it was accepted on behalf of the Appellant that there was no provision in the Company financial statements which recorded the Restaurant as a debtor.

103. As a result of the above, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that the Company provided [REDACTED] services to the Restaurant.

104. As a result of the above, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that the Company provided ██████ services to the Restaurant. This is on the basis that:

105. The Appellant has not provided any documentary evidence relating to the claimed ██████ services from the Company to the Restaurant;

106. The VAT rate charged on the invoices raised by the Company to the Restaurant does not relate to ██████ services;

107. There was no provision in the Company financial statements which recorded the Restaurant as a debtor.

108. The Commissioner therefore finds as a material fact that the Company did not provide ██████ services to the Restaurant.

Whether the 2017 invoices related to ██████ services provided by the Company to the Restaurant.

109. The Company raised two invoices on the Restaurant totalling €60,000 plus VAT at 23% of €13,800 totalling €73,800. The first invoice was dated 30 May 2017 in the amount of €40,000 plus VAT at 23% of €9,200 totalling €49,200. The details of the invoice state that it was for "Management and Consulting fees due for the period 10th November 2015 to 31st December 2016".

110. The second invoice was dated 29 June 2017 in the amount of €20,000 plus VAT at 23% of €4,600 totalling €24,600. The details of the invoice state that it was for "Management and Consulting fees due for the period 1st January 2017 to the 29th of June 2017".

111. In direct evidence to the Commissioner, the Appellant stated that the invoices were raised in relation to ██████ services which the Company had provided to the Restaurant. The Commissioner has already found as material facts that the Company did not provide management and consultancy services to the Restaurant and that the Company did not provide ██████ services to the Restaurant.

112. In considering this material fact, the Commissioner has had regard to the Compromise Agreement and to the Share Purchase Agreement entered into by the Appellant.

113. The Compromise Agreement provides that the Appellant would sell his entire shareholding and interest in the Restaurant in consideration of the following:

114. The Appellant's companies would submit two invoices to the Restaurant totalling €60,000 in respect of management services charges to the Restaurant provided over the previous two years;
115. The Restaurant would pay both invoices on or before 29 June 2017, subject to the bank releasing the Appellant from his personal guarantee for the borrowings of the Restaurant;
116. If the Bank did not release the Appellant from his personal guarantee until after 29 June 2017, the Restaurant would withhold payments of both invoices until such later date provided that such release shall be provided no later than 7 July 2017;
117. Mr X would in addition repay the balance of the Appellant's Director's Loan at the restaurant in full at the same time as the invoices are paid;
118. The Appellant would execute a stock transfer form in favour of Mr X on the same date as the Bank released him from his personal guarantee;
119. The Appellant would not compete for or treat with the Restaurant premises landlord's Receiver in respect of a lease from where the Restaurant traded;
120. On or before 29 June 2017, the Restaurant would write to a third party, signed by the Parties, to confirm the terms of his remuneration including his right to receive 10% of the profits of the Restaurant.
121. The Share Purchase Agreement provides that Mr X would purchase the Appellant's 50 shares in the Restaurant for the purchase consideration of €50.00 which would be payable following the completion of the following:
  122. The Appellant to deliver to Mr X an executed share transfer and certificate;
  123. The Appellant's resignation as director of the Restaurant and as Secretary of the Company;
  124. A board meeting being held at which the share transfer was approved for registration;
  125. Mr X would pay the Appellant €50.00 as consideration for the transfer of the shares;
  126. The Restaurant would pay in full the Appellant's director's loan account of €30,081;
  127. The Restaurant to pay to the Company the sum of €60,000 plus VAT at 23% as management fees for the period from 1 November 2015 to 28 June 2017.
128. The provisions of the Compromise Agreement provide that the Appellant would sell his shareholding and interest in the Restaurant to Mr X in consideration of, *inter alia*, the

payment by the Restaurant of two invoices in the total amount of €60,000 submitted by the Appellant companies.

129. On the other hand, the provisions of the Share Purchase Agreement provide that the Appellant would sell his shares in the Restaurant to Mr X in consideration of, *inter alia*, the payment to the Company by the Restaurant of the sum of €60,000 plus VAT at 23% as management fees for the period from 1 November 2015 to 28 June 2017.

130. The Commissioner notes that neither the Compromise Agreement nor the Share Purchase Agreement make reference to the payment of the €60,000 payment by the Restaurant being for [REDACTED] services. The Compromise Agreement does not specify what the payment relates to or to what entity the payment would be made. The Share Purchase Agreement states that the €60,000 payment would include a VAT element and would relate to management fees.

131. Having already found as material facts that the Company did not provide management consultancy or [REDACTED] services to the Restaurant and taking into consideration the provisions of the Compromise Agreement and the Share Purchase Agreement, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that the 2017 invoices related to [REDACTED] services provided by the Company to the Restaurant.

132. As a result of the above, the Commissioner finds as a material fact that the 2017 invoices did not relate to [REDACTED] services provided by the Company to the Restaurant.

#### **Commissioners findings of material fact**

133. For the avoidance of doubt, the Commissioner makes the following findings of material fact:

134. The Appellant is a businessman who, during 2017, was a director and 90% shareholder of the Company.

135. The Company was incorporated in 1995 and provides [REDACTED] services to various customers, both individual and corporate.

136. The Appellant has been director of the Company since 2006. The Company's Secretary was [REDACTED] who was also a 10% shareholder in the Company.

137. During 2017, the Appellant was also a director, company Secretary and 50% shareholder in the Restaurant.

138. The Restaurant was incorporated in 2012 and had a primary business of the operation of an [REDACTED] restaurant. Mr X was also a director and 50% shareholder in the Restaurant during 2017.
139. The Restaurant had 100 fully paid up and issued shares with the Appellant owning 50 shares and Mr X owning 50 shares.
140. On start-up, the Appellant and Mr X invested €40,000 in the Restaurant and in addition both provided personal guarantees to a bank lender in respect of a loan taken out by the Restaurant.
141. The Restaurant took up occupation in a premises in [REDACTED] and commenced trading from that premises in or around December 2015. The occupation of that premises was on the basis of a Care Takers Agreement and, up to the period ending 29 June 2017, no lease had been entered into by the Restaurant in relation to its occupation of the premises.
142. In 2017 the Appellant was a director and shareholder in two separate companies which are not relevant to this appeal.
143. A dispute arose between the Appellant and Mr X in relation to the Restaurant and on 20 June 2017, the Appellant and Mr X entered into a mediated agreement entitled "Compromise Agreement" which provided as follows:

*"WHEREAS:*

*The Parties have been in dispute in relation to [REDACTED] (the Dispute).*

*The Dispute has been the subject of a mediation conducted under an agreement to mediate dated 1st June 2017 between the Parties and the Mediator.*

*The Parties have agreed to settle the Dispute on terms set out below (the Settlement Agreement).*

*THE PARTIES HAVE AGREED as follows:*

*(1) [REDACTED] will sell and [REDACTED] will acquire [REDACTED] [REDACTED] entire shareholding and interest in [REDACTED] in consideration of the following:*

*(a) [REDACTED] companies will submit two invoices to [REDACTED] [REDACTED] totalling €60,000 in respect of management*



services charges to [REDACTED] provided over the past two years;

(b) [REDACTED] will pay both invoices referred to in 1(a) above, on or before 29 June 2017, subject to Bank releasing [REDACTED] from his personal guarantee for the borrowings of [REDACTED]

(c) If the Bank does not release [REDACTED] from his personal guarantee until after 29 June 2017, [REDACTED] shall withhold payments of both invoices until such later date provided that such release shall be provided no later than 7 July 2017.

(d) [REDACTED] shall in addition repay the balance of [REDACTED] Director's Loan in full at the same time as the invoices are paid.

(e) [REDACTED] shall execute a Stock Transfer form in favour of [REDACTED] on the same date as the Bank shall release him from his personal guarantee.

(f) [REDACTED] shall not compete for or treat with the landlord's Receiver in any respect whatsoever in respect of a lease of [REDACTED], from where [REDACTED] currently trades and has been in possession since November 2015, in respect of the superior interest or otherwise howsoever.

(2) On or before 29 June 2017, [REDACTED] will write to [REDACTED] signed by the Parties, to confirm the terms of his remuneration including his right to receive 10% of the profits of [REDACTED].

(3) The Parties have had the opportunity to take legal advice on the effect and import of this Settlement Agreement before signing the Settlement Agreement.

(4) This Settlement Agreement is governed by the laws of Ireland and the Courts of Ireland shall have jurisdiction to determine any dispute or difference arising.

(5) This Settlement Agreement is made in full and final settlement of all disputes arising between the Parties from their shareholding in [REDACTED] or otherwise howsoever.

(6) *The Parties agree to keep the terms of this Settlement Agreement confidential.*

(7) [REDACTED] shall, upon executing Stock Transfer form, relinquish all Bank account and other payment authority and shall return all records and property of the company to [REDACTED]."

144. The Compromise Agreement submitted to the Commissioner was not signed by either party, but did contain the parties names typed where a signature would be expected.

145. On 29 June 2017, the Appellant as Vendor and Mr X as Purchaser entered into an agreement entitled "Share Purchase Agreement" which provided as follows:

*"THIS AGREEMENT is made on 29th June 2017*

*BETWEEN*

(1) [REDACTED] OF [REDACTED] (hereinafter referred to as the "Vendor")

(2) [REDACTED] [REDACTED] OF (the "Purchaser") [REDACTED] [REDACTED] [REDACTED],

*WHEREAS*

(A) [REDACTED] (CRO Number [REDACTED]) is a private limited company incorporated in Ireland with its registered office at [REDACTED] [REDACTED] (the "Company").

(B) The Company has an authorised share capital of €100000.00 divided into 100,000 Ordinary Shares of €1.00 each which 100 Ordinary Shares are issued, credited as fully paid up.

(C) The Vendor is the beneficial owner of 50 Ordinary Shares in the capital of the Company which he has agreed to sell and which the Purchaser has agreed to purchase on the terms and subject to the conditions of this Agreement.

*NOW IT IS HEREBY AGREED as follows:*

**1. DEFINITIONS**

*"Encumbrances" means:-*

- (i) Any adverse claim or right or third party right or other right or interest;
- (ii) any equity;

- (iii) *any option or right of pre-emption or right to acquire or right to restrict;*
- (iv) *any mortgage, charge, assignment, hypothecation, pledge, lien, encumbrance or security interest or arrangement of whatsoever nature;*
- (v) *any reservation-of-title; or*
- (vi) *any hire purchase, lease or instalment purchase agreement;*

*The "Shares" means the 50 Ordinary Shares of €1.00 each in the capital of the Company beneficially owned by the Vendor.*

## **2. SALE AND PURCHASE OF THE SHARES**

*2.1 On the terms and subject to the conditions of this Agreement, the Vendor as beneficial owner, hereby agrees to sell and the Purchaser hereby agrees to purchase the Shares free from all Encumbrances and with the benefit of all rights whatsoever nature attaching or accruing to the Shares including all rights of any dividends and distributions declared, paid or made in respect of the Shares on the date of this Agreement.*

*2.2 The Purchaser shall not be obliged to complete the purchase of any Shares unless the purchase of all the Shares is completed simultaneously in accordance with the provisions of this Agreement.*

## **3. PURCHASE CONSIDERATION**

*The purchase consideration payable by the Purchaser for the purchase of the Shares shall be the sum of fifty payable [on completion] [as set out below].*

## **4. COMPLETION**

*Completion shall take place on the date of this Agreement and at completion, the Vendor and Purchaser shall:-*

- i. Deliver to the Purchaser a duly executed share transfer in respect of the Shares together with the relevant certificate in respect thereof;*
- ii. Resign as director of the Company and Secretary of the Company;*
- iii. Procure that a meeting of the board of directors of the Company is held at which the share transfers referred to at (i) above are approved for registration (subject only to stamping); and*

iv. The Purchaser shall pay Fifty Euro cash to the Vendor as consideration for the transfer of the Shares;

v. The Company shall pay in full the Vendor's directors loan account, that amount being thirty thousand and eighty one euros;

vi. The Company shall pay to [REDACTED] the sum of sixty thousand euros plus VAT at 23% as management fees for the period from the 1st November 2015 to the 28th of June 2017.

5. WARRANTIES

i. The Vendor Shall not compete for or treat with the Landlord's Receiver in any respect whatsoever in respect of a lease of [REDACTED], from where [REDACTED] currently trades.

ii. The Vendor shall not be held liable in any regard if the Purchaser fails in whatever respect to guarantee his tenure of [REDACTED], from where [REDACTED] currently trades.

iii. The Purchaser acknowledges that [REDACTED] is currently occupying [REDACTED] on the grounds of a Care Takers Agreement and there is currently no lease granted in favour of [REDACTED].

iv. The Purchaser shall not hold [REDACTED] responsible or liable for any of its part in the management of [REDACTED].

6. CONFIDENTIALITY

(i) Each party agrees to hold strictly confidential the existence and contents of these terms unless that information is generally known or the disclosure of that information is required by law.

7. GOVERNING LAW AND JURISDICTION

*This Agreement shall in all respects be governed by and construed in accordance with the laws of Ireland and the parties hereto hereby submit to the exclusive jurisdiction of the courts of Ireland."*

146. The Share Purchase Agreement submitted to the Commissioner at the oral hearing was signed by the Appellant and by Mr X. Neither signature was witnessed despite there being a space for a witness signature in the document.

147. On 30 May 2017 the Company raised an invoice on the Restaurant in the amount of €40,000 plus Value Added Tax (hereinafter "VAT") of €9,200 totalling €49,200. In addition, on 29 June 2017 the Company raised an invoice on the Restaurant in the amount of €20,000 plus VAT of €4,600 totalling €24,600. On 29 June 2017 €73,800 was lodged into the Company's bank account.
148. Between 30 June 2017 and 7 July 2017, the Company transferred six payments of €10,000 each to the Appellant's joint bank account with [REDACTED] totalling €60,000. The six payments were recorded in the Appellant's director's loan account in the Company.
149. The Restaurant submitted a claim for a refund of VAT in relation to the invoices raised by the Company. On foot of this, the Respondent investigated the claim and, during the course of the investigation, Mr X supplied the Respondent with the Compromise Agreement and the Share Purchase Agreement.
150. On 15 March 2019 the Respondent commenced an audit into the Appellant's tax affairs. Following completion of the audit the Respondent raised a Notice of Assessment to CGT on the Appellant for the year 2017 on 13 December 2022 in the amount of €19,364.00 on the basis that the payment of €60,000 from the Company to the Appellant represented payment for the Appellant's shares in the Restaurant.
151. On 14 December 2022 the Respondent raised an alternative Notice of Amended Assessment to Income Tax on the Appellant for the year 2017 in the amount of €30,180.06. The basis of this alternative Notice of Amended Assessment to Income Tax was that the Appellant had suggested during the course of the audit that the payment of €60,000 may have been remuneration to him for services rendered by him to the Restaurant.
152. The Respondent issued correspondence on 5 December 2022 and on 15 December 2022 indicating that it seeks to rely on one head of tax only in this appeal.
153. On 10 January 2023 the Appellant submitted a Notice of Appeal to the Commission appealing both the Notice of Assessment to CGT and the Notice of Amended Assessment to Income Tax.
154. The Appellant did not provide services to the Restaurant.
155. The Company did not provide management and consultancy services to the Restaurant.
156. The Company did not provide [REDACTED] services to the Restaurant.

157. The 2017 invoices did not relate to [REDACTED] services provided by the Company to the Restaurant.

Preliminary Objection

158. The Appellant has submitted a preliminary objection to the Commissioner which is set out in detail the grounds of appeal contained in the Notice of Appeal. The Appellant has challenged the Respondent's power to issue alternative assessments and has also challenged the validity of the disputed assessments.

159. The issue of the ability of the Respondent to raise alternative assessments has not been the subject of a decision by the Irish Courts. However, the Commissioner notes that in the decision in *Bye (Inspector of Taxes) v Coren* [1986] STC 393 (hereinafter "*Coren*") Lawton LJ described the making of alternative assessments to income tax in the following terms:

*"He [the inspector of taxes] was following a practice which, so far as income tax is concerned, has long been accepted as being a sensible and proper way of dealing with difficult cases. The propriety of doing so was approved by this court in R v General Comrs of Income Tax for Freshwell, ex p Clarke [1974] QB 220, 47 TC 691."*<sup>2</sup>

160. Lawton LJ dismissed the taxpayer's submission that the alternative assessments were unfair and held:

*"I can see no unfairness. The alternative assessments were properly put forward and the taxpayers had a variety of routes by which they could avoid any problems of unfairness to them. They would have appreciated when they got the assessments that they were in alternative in form. They would have appreciated when the assessments came in that what they had to do was to leave the position open so that after proper inquiry there could be a decision by the appropriate body, namely the General Commissioners, whether they had been trading in metal or they had made gains which could attract capital gains tax. When the assessments came in they would have appealed against both."*<sup>3</sup>

161. The decision in *Coren* was cited with approval by the Court of Appeal in *Bird v IRC* [1989] A.C. 300 at page 325 where the validity of alternative assessments was upheld. In *University Court of the University of Glasgow v Customs & Excise Commissioners* [2003] STC 495, the Scottish Court of Session held the use of distinct but alternative

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<sup>2</sup> At 394 to 395

<sup>3</sup> At 395

assessments to VAT was competent, relying on the income tax authorities. Hamilton LJ observed:

*"It is unnecessary in these circumstances to rely on authority concerned with the use of alternative assessments in the context of direct taxes. It is, however, of interest to note that, in a series of cases, the courts have found no difficulty in recognising the validity in appropriate circumstances of alternative assessments without there being any express statutory provision sanctioning such procedure. In Bird v IRC [1988] STC 312 at 323, [1989] AC 300 at 325 Lord Keith observed that there was no objection to the Revenue pursuing as alternatives two incompatible claims to tax. He cited, with approval, the approach adopted by Bye (Inspector of Taxes) v Coren [1986] STC 393 (where Lawton LJ (at 394-395) described the like practice in income tax cases as being one which 'has long been accepted as being a sensible and proper way of dealing with difficult cases'). The practical justification for the practice was explained in the Outer House by Lord Coulsfield in Lord Advocate v McKenna 1988 SLT 523 at 527, 61 TC 688 at 694; the competency of making separate assessments on an alternative basis was confirmed in the Inner House. In all these cases the primary ground of judgment did not depend on any specialty in the tax collection regime governing the taxes there in question... As with direct taxes, alternative assessments for VAT provide in appropriate cases a practical and workable machinery for the ultimate recovery of the tax properly due."*<sup>4</sup>

162. The Commissioner was also referred to the determination made by former Commissioner O'Mahony in his determination 28TACD2022.

163. As a result of the above, the Commissioner is satisfied that the Respondent has the power to raise alternative assessments.

164. Counsel on behalf of the Appellant also made submissions at the oral hearing in relation to an assertion that the Respondent's officer had approached the raising of the disputed assessments with a closed mind and had therefore acted *ultra vires* his powers.

165. The scope of the jurisdiction of an Appeal Commissioner has been set out in a number of cases decided by the Courts, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (hereinafter "*Lee*"), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners III* ITR 577.

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<sup>4</sup> At 504 to 505

166. Most recently Murray J. in *Lee* held as follows:

*"The issue is, first and foremost, one of statutory construction. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation."*<sup>5</sup>

167. He went on to state:

*"...From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The 'incidental questions' which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment."*<sup>6</sup>

168. In his conclusion, Murray J stated:

*"The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings and relevant to this appeal (ss. 933,934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes..."*<sup>7</sup>

169. Therefore, The Commissioner has no jurisdiction to determine the validity of assessments raised by the Respondent or whether an officer of the Respondent has acted *ultra vires* his powers. The role of the Commissioner is restricted to focusing on the assessments

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<sup>5</sup> At paragraph 20

<sup>6</sup> At paragraph 64

<sup>7</sup> At paragraph 76



and the charge to tax. As a result, the Commissioner can and must focus on what the correct charge to tax in this appeal is.

170. In his Notice of Appeal the Appellant had claimed that the Respondent was out of time to raise the disputed assessments. The Commissioner notes that, at the oral hearing, Counsel on behalf of the Appellant confirmed that this element of the Appellant's claim was not being pursued. As a result, the Commissioner makes no comment on this matter.

#### Substantive appeal

171. The Commissioner has already found as a material fact that the Appellant did not provide services to the Restaurant. In addition, the Commissioner has found as material facts that the Company did not provide management and consultancy services to the Restaurant and that the 2017 invoices did not relate to the provision of [REDACTED] services.

172. As noted earlier in this determination, the provisions of the Compromise Agreement provide that the Appellant would sell his shareholding and interest in the Restaurant to Mr X in consideration of, *inter alia*, the payment by the Restaurant of two invoices in the total amount of €60,000 submitted by the Appellant companies.

173. The provisions of the Share Purchase Agreement also provide that the Appellant would sell his shares in the Restaurant to Mr X in consideration of, *inter alia*, the payment to the Company by the Restaurant of the sum of €60,000 plus VAT at 23% as management fees for the period from 1 November 2015 to 28 June 2017.

174. The Appellant has not provided any alternative explanation for the payment of €60,000 by the Restaurant to the Company which tends to establish that the payment was other than suggested by the Compromise Agreement and the Share Purchase Agreement both of which link the payment with the sale of the Appellant's shares in the Restaurant to Mr X.

175. The Commissioner must now move to consider the fact that alternative assessments have been raised by the Respondent.

176. In this appeal, the Respondent has submitted that, in the event that the Appellant is unsuccessful in this appeal, it does not seek to recover tax from the Appellant under both assessments which were raised. The Respondent has submitted that it seeks to recover under the Notice of Assessment to CGT. The Notice of Amended Assessment to income tax was raised by the Respondent on the basis that, during the course of the audit, the Appellant had suggested that the payment of €60,000 may have been remuneration to him for services rendered by him to the Restaurant.

177. As the Appellant has not provided any alternative explanation for the payment of €60,000 by the Restaurant to the Company which tends to establish that the payment was other than suggested by the Compromise Agreement and the Share Purchase Agreement both of which link the payment with the sale of the Appellant's shares in the Restaurant to Mr X. The Company, in turn, transferred the €60,000 to the Appellant in six individual payments of €10,000 between 30 June 2017 and 7 July 2017 as part of his sale of the shares in the Restaurant to Mr X.

178. The Company was first registered with the Companies Registration Office in October 2015 and the Appellant was the owner of 50 fully paid up shares in the Company which were issued at a value of €1 each. As the Appellant has failed to provide any evidence that the €60,000 received by him was other than related to the sale by him to Mr X of the shares in the Restaurant, the Commissioner must determine that the Appellant has not succeeded in establishing that the Respondent was incorrect in assessing the €60,000 received by the Appellant to CGT pursuant to the provisions of section 28 of the TCA 1997. As a result, the Commissioner must find that the Notice of Assessment to CGT raised by the Respondent on 13 December 2022 was correct and shall stand.

179. As the Commissioner has found as a material fact that the Appellant did not provide services to the Restaurant, it therefore follows that the Notice of Amended Assessment to income tax raised by the Respondent on 14 December 2022 was not correct and shall be reduced to nil.

### **Determination**

180. For the reasons set out above, the Commissioner determines the following:

181. The Commissioner determines that the Notice of Assessment to CGT in the amount of €19,364.00 raised by the Respondent on 13 December 2022 shall stand.

182. The Commissioner further determines that the Notice of Amended Assessment to income tax in the amount of €30,180.06 raised by the Respondent on 14 December 2022 shall not stand and shall be reduced to nil.

183. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

### **Notification**

184. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For

the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the 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**

185. 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 of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Clare O'Driscoll  
Appeal Commissioner  
25 April 2024