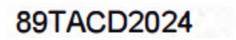
AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

89TACD2024 

Between

Appellants

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This is a consolidated 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 consolidated appeal is brought by [redacted] (hereinafter the "Appellant") against a Notice of Amended Assessment to Income Tax for the year 2007 raised by the Revenue Commissioners (hereinafter the "Respondent") on 27 April 2012 in the amount of €1,437,721 and against an alternative Notice of Amended Assessment to Capital Gains Tax (hereinafter "CGT") for the year 2007 raised by the Respondent on 25 April 2012 in the amount of €940,000.

3. This consolidated appeal is also brought by [redacted] (hereinafter the "[redacted]") against a Notice of Amended Assessment to Income Tax for the year 2007 raised by the Respondent on 27 April 2012 in the amount of €1,493,915 and against an alternative Notice of Amended Assessment to Capital Gains Tax for the year 2007 in the amount of €939,998 raised by the Respondent on 25 April 2012.

4. These consolidated appeals were originally heard by the previous Appeal Commissioners under the provisions of Part 40 of the TCA 1997 and determinations were issued in those appeals on [redacted]. All parties to those appeals initiated the appeal process. This process was compromised by the parties which included a term that the appeals would be reheard by the Tax Appeals Commission under the provisions of Part 40A of the TCA 1997. This then is a *de novo* hearing of the appeals of [redacted] and [redacted] pursuant to the provisions of Part 40A of the TCA 1997.

5. The amount of tax in dispute in this appeal is €4,811,634.

Background

6. The Appellant is a Director and, prior to a restructuring of [redacted] (hereinafter the "Group") which occurred in or around October / November 2006, he was a 50% ultimate beneficial owner of [redacted] (hereinafter the "Company"). [redacted] was also a Director of the Group and a 50% ultimate beneficial owner of the Company prior to the said restructuring.

7. The Appellant and [redacted] have a number of business interests separate and apart from the Group and the Company. Some of the business interests are held in the sole and joint names of the Appellant and [redacted]. In addition, some of those business interests, namely rental properties, are held in a partnership in the names of [redacted]

and (hereinafter the "Partnership") which owns a number of properties which generate significant rental income. Although no formal partnership agreement has been entered into between the Appellant and , annual accounts for the Partnership are prepared.

8. In January and March 2006, the Company entered into two conditional contracts for the purchase of which were at that time zoned as agricultural lands at (hereinafter the "") totalling €23,100,000 as follows:

8.1. On 31 January 2006 the Company entered into a conditional contract to purchase certain lands totalling from a third party (hereinafter "X") for an agreed purchase price of €16,000,000. The contract was conditional upon at least 36 acres of those lands being zoned for residential development under the by the Local Authority. If the lands were not zoned for residential purposes then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. As part of that contract a non-refundable deposit of €100,000 was paid by the Company to X.

8.2. On 16 March 2006 the Company entered into a contract to purchase certain adjoining lands totalling from another third party (hereinafter "Y") for an agreed purchase price of €7,100,000. The contract was conditional upon at least 17 acres of those lands being zoned for residential/commercial purposes by the Local Authority. If the lands were not zoned for residential / commercial purposes by 31 December 2007 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. As part of that contract a non-refundable deposit of €100,000 was paid by the Company.

9. In 2005 and 2006 the Company entered into option agreements and contracts in relation to (hereinafter the ""). Deposits totalling €102,911.10 were payable plus annual payments totalling €92,088.90 due on 1 March 2006, that is to say a total of €195,000 as follows:

9.1. On 29 November 2005 an Option Agreement between the Company and in respect of acres at €82,080 per acre conditional on the zoning of the lands for the development of . If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the option would be deemed to be

at an end. Interim payments were payable in the form of €30,696.30 on signature of the agreement and €61,392.60 annually on 1 March each year beginning on 1 March 2006.

9.2. On 5 December 2005 an option agreement between the Company and [redacted] in respect of [redacted] acres at €82,080 per acre conditional on the zoning of the lands for the development of [redacted]. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the option would be deemed to be at an end. Interim payments were payable in the form of €14,303.70 on signature of the agreement and €28,607.40 annually on 1 March each year beginning on 1 March 2006.

9.3. On 14 July 2006 a conditional contract between the Company and [redacted] in respect of [redacted] acres) at €92,000 per acre conditional on the zoning of the lands for the development of [redacted]. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. A non-refundable option fee of €60,000 was payable.

9.4. On 11 August 2006 a conditional contract between the Company and [redacted] in respect of [redacted] acres at €114,000 per acre conditional on the zoning of the lands for the development of [redacted]. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. No deposit was payable.

9.5. On 11 August 2006 a conditional contract between the Company and [redacted] for the purchase of three lots of land totalling [redacted] acres at €114,000 per acre conditional on the zoning of the lands for the development of [redacted]. No deposit was payable.

10. In or around October / November 2006 a corporate restructuring of the Group took place which involved the shareholding of the Appellant and [redacted] in the Group being reduced from 100% to 92% (split 51% to the Appellant and 41% to [redacted])

by the introduction of new shareholders. As part of the said restructuring, it is claimed by the Appellant that, it was agreed that the Appellant and [redacted]:

10.1. Would acquire the rights of the Company over the above two [redacted] [redacted] on payment to the Company of the €200,000 non-refundable deposits.

10.2. Would purchase [redacted], an [redacted] building which had been owned and used by the Company, from the Company for €1,300,000 with a deposit payable of €65,000.

10.3. Would acquire the rights of the Company over conditional contracts in respect of the purchase of the [redacted] where non-refundable deposits totalling €195,000 had been paid by the Company.

11. On 31 October 2006 €460,000 was transferred from a joint bank account held by the Appellant and [redacted] as part of their Partnership.

12. On 31 October 2006 €460,000 was lodged into a bank account held by the Company.

13. On [redacted] a [redacted] [redacted] Local Area Plan was passed by [redacted] in which the [redacted] the subject matter of this appeal were, as part of a larger tract of [redacted] hectares of land, zoned as residential lands subject to a Master Plan. The document published by [redacted] outlined the following in relation to the [redacted] hectare tract of land:

> "*It is the Planning Authorities [sic] objective to secure the development of in the region of [redacted] new dwellings on this site through a phased programme of development that will secure the timely provision of the necessary physical, social and economic infrastructure. So that the development of this land can be properly co-ordinated, it will only be in accordance with a master plan for the entire area to which this objective relates that has been approved by the Planning Authority. A comprehensive master plan may be prepared by a single developer or a landowner or by a group of developers or landowners acting jointly. The proposed master plan format should be prepared in co-ordination with the local authority, the public and relevant stakeholders.*
>
> *The master plan will include and pay particular attention to:*
>
> - [redacted]
> - [redacted]

14. On [redacted] 2007, the contracts for the [redacted] became unconditional on foot of the re-zoning of the lands by the Local Authority pursuant to the [redacted] Local Area Plan.

15. It is claimed by the Appellant and [redacted] that the contracts for the [redacted] were subsequently reassigned by them to the Company for a payment from the Company of €7,500,000 by way of the crediting the Appellant and [redacted] director's loan accounts in the Company.

16. The Company completed the purchase of the Y lands on 20 August 2007 and the X lands on 12 September 2007.

17. The credit of €7,500,000 represented a total valuation of the [redacted] of €30,600,000 being the contracts amount of €23,100,000 paid by the Company to X and Y along with the credit of €7,500,000 to the Appellant and [redacted]. In the Company accounts for the year ending 31 December 2007, a credit of €3,750,000 each was reflected in the director's loan accounts for the Appellant and for [redacted] representing a total of €7,500,000.

18. The re-zoning of the lands at [redacted] did not occur and the conditional contracts and options for [redacted] came to an end. The deposits and the annual amounts paid on those lands were forfeited.

19. The Appellant filed his 2007 tax return with the Respondent and paid the requisite CGT on a gain of €3,650,000, being the €3,750,000 received from the Company minus the €100,000 deposit paid. The [redacted] also filed his tax return with the Respondent and paid the requisite CGT on a gain of €3,650,000, being the €3,750,000 received from the Company minus the €100,000 deposit paid.

20. The Respondent formed the opinion that the crediting of the director's loan account of €3,750,000 by the Company in favour of the Appellant and [redacted] was not a capital payment. In circumstances where the Appellant and [redacted] were office holders, the Respondent considered that the credits fell within the scope of section 112 of the TCA 1997 and were chargeable to tax under Schedule E.

21. As a result, on 27 April 2012 the Respondent raised a Notice of Amended Assessment to income tax on the Appellant in the amount of €1,437,721. In addition, the Respondent raised a Notice of Amended Assessment to income tax on the [redacted] in the amount of €1,493,915.

22. On 25 April 2012 the Respondent also issued a Notice of Amended Assessment to CGT on the Appellant in the amount of €940,000 and a Notice of Amended Assessment to CGT on the [redacted] in the amount of €939,998.

23. The basis of the Notices of Amended Assessment to CGT is that, it is the Respondent's position that, if it is incorrect in having treated the credits to the director's loan accounts as Schedule E income, then the amount of €7,500,000 paid by the Company on foot of the reassignment of the contracts for the [redacted] lands from the Appellant and [redacted] back to the Company was at an under value. The Respondent maintains that the value of [redacted] held by the Appellant and [redacted] was €40,000,000, that is to say

the gain returned by the Appellant [redacted] should have been €16,900,000 or €8,450,000 each.

24. The Appellant and [redacted] have appealed the Notices of Amended Assessment to income tax raised by the Respondent on 27 April 2012 and the Notices of Amended Assessment to CGT raised by the Respondent on 25 April 2012.

25. The Respondent has made it clear in correspondence with the Appellant and [redacted] and to the Commissioner at the oral hearing that the Notices of Amended Assessment to income tax and to CGT as against the Appellant and [redacted] are in the alternative, that is to say that the Respondent only seeks to recover under one tax head.

26. The oral hearing of this appeal took place over four days commencing on 27 November 2023. By agreement between the parties, [redacted] was excused from attendance at the hearing.

Legislation and Guidelines

27. The following is the legislation relevant to this appeal:

Section 112(1) of the TCA 1997

> "*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.*"

Section 28 of the TCA 1997 (as in force from 3 December 1997 until 14 October 2008):

> "*(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 20 per cent, and any reference in those Acts to the rate specified in this section shall be construed accordingly.*"

Witness Evidence

28. At the outset of the oral hearing, Senior Counsel on behalf of the Respondent made an application to the Commissioner to have the Appellant's witnesses excluded from the oral hearing until such time as they were called to give evidence. The application was made on the basis that these appeals relate to matters which occurred in 2006 and 2007 and that the Respondent had concerns that the witnesses' recollections might change dependent on the evidence given by the Appellant. Having heard from both parties, the Commissioner refused the Respondent's application on the basis that:

    28.1. the transcript of the previous hearing was available to the Respondent who could challenge the Appellant on any changes between the evidence which he had given at the previous hearing and the evidence which he would give at the hearing of this appeal; and

    28.2. the witnesses would necessarily have had to refresh their memories as to the events of 2006 and 2007 in preparation for the oral hearing.

Witness 1 – [redacted]

29. The Commissioner heard direct evidence from the Appellant. He stated that he is Chairman and Managing Director of the Group and the Company, a position which he also held in 2006. He stated that he and [redacted] set up in business in [redacted] and that their business grew, expanding into [redacted] in 1985 at a time when the construction business in Ireland was experiencing a difficult period.

30. The Appellant outlined the structure of the Group in which he and [redacted] were each 50% shareholders as it existed prior to a Group restructure which took place in late 2006. The main purpose of the Group restructure, he stated, was to merge the Irish and [redacted] sides of their business under one umbrella. The restructure process was undertaken following extensive engagement with a business consultant and brought into the Group a significant element of rental income which was comprised in the [redacted] companies, along with [redacted] development projects. He stated that he had formed the view that there was great merit in joining the Irish and [redacted] structures, as long as the [redacted] shareholders were interested. He stated that, in merging the [redacted] structures with the Irish structures, it was necessary to deal with the [redacted] structures through a process of buying out investors and through a process of share valuation which involved an extensive asset valuation exercise over a period of months. The project undertaken in relation to the Group restructure was named [redacted].

31. The share outcome which resulted from was that two of the shareholders each received a 4% shareholding in the restructured group. In addition, the Appellant and each received a 43% shareholding in the restructured group with the balance of 6% shareholding held in a trust entity related to the Appellant.

32. The Appellant stated that, prior to and during 2006, the Company held and was developing existing lands in . On 31 January 2006 the Company entered into a conditional contract with X to purchase acres of for €16,000,000 which said lands were adjacent to the existing lands held by the Company. The contract, he stated, was conditional on the rezoning of the lands by the Local Authority as part of a Special Local Area Plan. The contract with X also contained a condition that a non-refundable deposit of €100,000 was payable and which the Company paid.

33. The Appellant also stated that the Company had entered into another conditional contract with Y for the purchase of acres of land for €7,100,000 which said lands were adjoining the lands the subject matter of the X contract. The contract was conditional on the rezoning of the lands. It was also a condition of the contract that a non-refundable deposit of €100,000 was payable and which the Company paid.

34. The Appellant stated that the Company had entered into a series of five conditional contracts and option agreements for the purchase of the lands. A total non-refundable amount of €195,000 in the form of deposits and annual payment had been paid by the Company to the landowners prior to the end of October 2006. Those contracts and option agreements were conditional on the lands being rezoned to allow for residential development. He stated that, unlike , the contracts contained a requirement for the consent of the landowners for the assignment of the contracts to a third party.

35. The Appellant stated that was an premises which the Company owned and occupied and which was located within which is owned by the Appellant and . He stated that, as he and owned all of the other buildings within , it made sense for them to purchase from the Company and to keep as one investment structure. As a result, he stated, in October 2006, he and had entered into a contract for the purchase of from the Company for €1,300,000. This contract provided for the payment of a deposit of €65,000.

36. He stated that, during the course of 2006, [redacted] was being progressed by the Company. In order to come to a value of the Group, a large series of valuations of properties and projects within the wider Group was carried out. During this process, consideration was given to the [redacted] and to the [redacted]. He stated that the Company formed the view that, in circumstances where the zoning status of the lands was not finalised, it was not possible to value the conditional contracts. In the event that rezoning was not achieved [redacted], the value of the contracts would change to become contracts on which the Company would incur a loss of up to €395,000, to include the annual payment commitments contained in the option agreements for the [redacted]. In the event that rezoning was achieved on the [redacted] this would give rise to an obligation on the Company to complete those contracts. In the event that rezoning was achieved on the [redacted], this would give rise to an obligation on the Company to complete those contracts. He stated that, as a result of the uncertainty surrounding the zoned status of the lands and the valuation of the contracts, it was decided that the Company would assign the [redacted] contracts and the [redacted] contracts to the Appellant and [redacted]. This, he stated, removed the uncertainty relating to the value of these lands which was preferable in the context of [redacted].

37. He stated that there was no requirement in the [redacted] contracts for the consent of the landowners to the assignment of those contracts. However, there was a requirement in the [redacted] contracts for the consent of the landowners for the assignment of those contracts. The Company acquired the consent of all of the [redacted] landowners to the assignment of the contracts on various dates between 25 October 2006 and 31 October 2006.

38. The Appellant stated that a final date of the beginning of November 2006 for the completion of [redacted] had been set by the Company. As a result of the assignment of the [redacted] contracts and the [redacted] contracts by the Company to him and [redacted], in addition to the contract for the purchase of [redacted] from the Company which he and [redacted] had entered into, an instruction was given by him on 31 October 2006 to the Bank [redacted] to transfer the amount of €460,000 from a joint account held in the joint names of the Appellant and [redacted], as part of their Partnership, to the Company. The transfer of €460,000 was made on 31 October 2006 and, the Appellant stated, this represented the payment by the Appellant and [redacted] to the Company of:

38.1. the non-refundable deposits of €100,000 each on the contracts totalling €200,000 as a result of the assignment of the contracts by the Company to the Appellant and ;

38.2. the non-refundable deposits and annual payments totalling €195,000 in relation to the lands as a result of the assignment of the contracts by the Company to the Appellant and ; and

38.3. the €65,000 deposit in relation to the contract for the purchase by the Appellant and of .

39. The Appellant referred to a copy of the Partnership's financial accounts for the year 2006 which contain a provision on the Balance Sheet for prepayments of €460,000.

40. The Appellant also referred to a copy of a letter dated 16 October 2007 from the Partnership's accountant which states the following at paragraph 5(d):

"*Prepayments of €460,000 at 31 December 2006 represent deposits paid on Property Transaction which were not finalised at that date as follows:*

	€
Land at	*200,000*
Property at	*195,000*
	65,000"

41. The Appellant further referred to a Company document entitled "*Site Costs*" which he described as a "*stock schedule*" which had been created by the Company as part of and which contained a notation of the Net Book Value of all of the properties held by the Company as at 1 January 2006, any additions or disposals relating to those properties during 2006 and the Net Book Value of those properties as at 31 December 2006. Within this list there is a reference to "" as having a value of €100,000 on 1 January 2006 with €100,000 being added to the value of "" during 2006. There is also reference to a disposal of "" to the value of €200,000 having occurred and the Net Book Value of "" on 31 December 2006 being €0.

42. The Appellant stated that, in 2007 the were rezoned under the Local Area Plan. He stated that, under the terms of the published Local Area Plan, there was a requirement for the development of

43. He stated that, as the Local Area Plan involved hectares of land, it was necessary for all of the landowners to group together and create a Master Plan for the Local Area Plan in order for planning permission to be granted for the development of the lands. This, he stated, would require a developer or developers driving the project forward. He stated that he believed the creation and agreement of a Master Plan would be very difficult as requirements for green areas and open spaces would mean that compensation would need to be negotiated to compensate the owners of lands which could not be developed. He stated that, at that time, the hope was that such a Master Plan might come to fruition within five years. In the circumstances to date, a Master Plan has never been agreed and planning permission has never been granted for the lands.

44. The Appellant stated that he and had made provision to complete the purchase of the in the event that rezoning occurred. He stated that, once the rezoning had occurred and contracts for the had become unconditional, he and gave consideration as to whether they would seek a further zoning of the lands with a view to getting standalone planning permission to allow them to develop the lands outside of the Local Area Plan or whether they would sell the lands. A discussion arose with the Company as to whether the Company wished to purchase the lands in circumstances where the Company already owned adjacent lands.

45. He stated that a decision was reached that he and would enter into negotiations with the Company to establish whether the Company wished to purchase the lands. In order to avoid any conflict of interest, the Operations Director of the Company, (hereafter the "Director"), was appointed as the negotiator on behalf of the Company.

46. The Appellant referred to a one page letter dated 30 July 2007 from which was sent to the Director which dealt with the two lots of . Having described the X lands, the letter goes on to state:

> "*The lands in question have extensive road frontage on the main Road and will not be difficult to connect to services. They are within easy walking distance of the town and in an area that is improving rapidly.*"

47. Having described the Y lands, the letter does on to state:

"*Given that they adjoin the lands [in X], they are imminently suitable for development and will connect to the services through the lands [in X]. Again they are within walking distance of the town centre.*"

48. The letter then goes on to state:

"*The total area of the lands in [X] and [Y] is approx. ■ acres with C.■ acres suitable for development. Given that the lands have been zoned in the recent ■ Local Area Plan and with medium density it should be possible to easily achieve 10 units per acre.*

Taking all of the above into account I would put the market value of the said lands with zoning at not less than €40,000,000.00 (forty million euro)."

49. The Appellant stated that he did not agree with the position as set out in the letter. He stated that the letter assumed a result in zoning terms which had not been achieved. He stated that it was highly unlikely that a result of 10 units per acre would have been achieved in that part of ■, unless a very high density scheme was sought. High density schemes, he stated, were not something which were envisaged in 2007. He stated that the letter was misconceived in that it did not take into consideration that the zoning related to a masterplan for a ■ Local Area Plan and the fact that provision needed to be made for green areas and other, non-housing related, development. Because of this, he stated, it was not possible to simply take the acreage and multiply it by 10 units per acre to come to a valuation.

50. The Appellant stated that he approached the negotiation with the Company trying to take into consideration what a fair price for the lands would be. He stated that he was aware that ■ had brought in two ■ shareholders into the Group and he wanted to make sure that a fair price for both parties was achieved. Given what had transpired with the lands, he stated, he and ■ felt that an uplift in the contract price of €23.1 million to €30.6 million was a fair price for both sides and that the ultimately Company agreed with this price.

51. He stated that the Company completed the contract in relation to the Y lands on 20 August 2007 and completed the contract in relation to the X lands on 12 September 2007.

52. The Appellant referred to a number of documents which, he stated, reflected the transactions relating to the lands for both the Company and the Partnership as follows:

53. A Company document entitled "*Site Costs*" which he described as a "stock schedule" which had been created by the Company and which contained a notation of the Net Book Value of all of the properties held by the Company as at 1 January 2007, any additions or disposals relating to those properties during 2007 and the Net Book Value of those properties as at 31 December 2007. This document noted an acquisition of the [redacted] [redacted] during 2007 to the value of €22,900,000 plus stamp duty of €2,079,000, legal fees of €112,783 and sundry fees of €1,670. The Net Book Value of the [redacted] at 31 December 2007 was noted as being €25,601,736. In addition, a second line on the document noted an acquisition of the [redacted] during 2007 to the value of €7,500,000 and the Net Book Value of the lands at 31 December 2007 as being €7,500,000. The document contained a total Net Book Value for the Company on 31 December as being €[redacted].

54. The Company's financial statement for 2007 which contained a note in relation to trading land and properties with a total value as at 31 December 2007 being €[redacted]. In addition, the financial statement notes a shareholder and related party transaction as follows:

> "*During the year the company paid €7.5m to [redacted] to purchase a land option that was subsequently exercised by the company.*"

55. The Partnership's accounts for the year ending 31 December 2007 which contained a provision for prepayments of €385,000, being a reduction from €460,000 in 2006.

56. A letter from the Partnership's accountant dated 11 November 2008 which stated at paragraph 5(c):

> "*Prepayments of €385,000 at 31 December 2007 represent deposits and options paid on Property Transactions which were not finalised at that date as follows:*

	€
[redacted]	*285,000*
[redacted]	*65,000*
[redacted]	*35,000.*"

57. A letter from the Partnership's accountant dated 11 November 2008 which stated at paragraph 5(j) which notes an amount of personal drawings totalling €200,000 for both

the Appellant and [redacted] which is related to "*Exercising of Option to Sell Land at* [redacted]".

58. The Appellant stated that the prepayment amount for the [redacted] had increased from €195,000 as at 31 December 2006 to €285,000 as at 31 December 2007 due to a provision for annual payments to the land owners contained in the contracts for those lands. The reference to [redacted] in the prepayments related, he stated, to another transaction related to a third Group company and which did not relate to the Company or the transactions the subject matter of this appeal.

59. The Appellant stated that he had been an employee of the Company in 2007 and that he had submitted his tax return to the Respondent for 2007 which returned, *inter alia*, the salary which he received from the Company and returned Chargeable Gains (excluding Foreign Life Policies) in the amount of €4,036,913 which included the amount received by him in relation to the [redacted] of €3,750,000 minus the €100,000 deposit which he had paid in 2006. A similar return was made to the Respondent for 2007 by [redacted].

60. The Appellant stated that the €3,750,000 which was credited to his director's loan account in the Company did not relate to his employment with the Company, nor did it relate to any performance by him of services for the Company.

Witness 2 – [redacted]

61. The Commissioner heard direct evidence from [redacted] (hereinafter "Witness 2") who is a Chartered Accountant and who was a junior partner in the accountancy firm [redacted] who were the Company auditors and who also prepared the Partnership accounts and tax returns for the Appellant and [redacted] during the period the subject matter of this appeal. Witness 2 has not been acting for the Appellant, [redacted] or the Partnership since 2010.

62. In relation to the Appellant and [redacted], Witness 2 stated that he was involved in preparing their rental accounts and personal taxation. He was not involved in the Company audit. He stated that Partnership accounts in relation to an unregistered partnership, such as the one between the Appellant and [redacted], are not required to be returned to a particular organisation in a manner as the financial statements of a limited company are required to be returned to the Companies Registration Office.

63. Witness 2 stated that, during the preparation and review of the Partnership's accounts for 2006, he had received a copy of the Partnership Bank [redacted] bank account statement which showed a debit of €460,000 from the account on 31 October 2006. He

stated that, following enquiries, most likely with [redacted] who worked for the Appellant, he had made a handwritten notation on the bottom of the statement which noted that the €460,000 debit related to payments of €200,000 in relation to the [redacted], €195,000 in relation to the [redacted] and €65,000 in relation to [redacted].

64. He stated that, in preparing the Partnership accounts for 2006, he recorded the €460,000 as "Prepayments" in order to distinguish it from normal debtors. He stated that he had written a report in the form of a letter to the Appellant and [redacted] on 16 October 2007 wherein he set out, *inter alia*, the basis of the prepayments of €460,000 being included in the 2006 Partnership accounts as being for the purposes of payments of €200,000 in relation to the [redacted], €195,000 in relation to the [redacted] and €65,000 in relation to [redacted].

65. He stated that he wrote a similar letter to the Appellant and [redacted] on 11 November 2008 wherein he set out, *inter alia*, the basis for a figure of €385,000 to be included as prepayments in the Partnership 2007 accounts. He stated that €285,000 was included for prepayments in relation to the [redacted] which was comprised of deposits totalling €195,000 and annual payments totalling €90,000 which were paid during 2007. In addition, a figure of €65,000 was included relating to [redacted] and €35,000 relating to [redacted]. He stated that the [redacted] amount of €200,000 had been removed from the prepayments figure for 2007.

66. He stated that personal drawings in the amount of €200,000, that is to say €100,000 for the Appellant and €100,000 for [redacted], were included in the Partnership accounts and this related to "*exercising of option to sell land at* [redacted]".

67. Witness 2 stated that he had completed the 2007 tax return for the Appellant which included a Company salary of €[redacted] and gains of €4,038,183. He stated that he had broken down the gains in a letter to the Respondent on 3 July 2009 wherein he stated:

"*During the year, our Client disposed of his share (50%) of a Right to acquire land at* [redacted]. *The right was initially acquired by our Client in October 2006 for a consideration of €100,000 (50%). The assignor of the Right was* [redacted]*…*

In late 2007, the land was rezoned as part of the development plan for [redacted]. *Subsequent to the re-zoning (in December 2007)* [redacted]. *agreed to pay our Client €3,750,000 for his interest in the Right.*

Accordingly, the net chargeable Capital Gain as follows:-

Sale proceeds (€7,500,000 @ 50%)	*€3,750,000*
Less: Right Cost (€200,000 @ 50%)	*€ (100,000)*
Taxable Gain	*€3,650,000.*"

68. He stated that he would have corresponded with an accountant in the Company in relation to the details which he provided to the Respondent and that he would not have had intimate knowledge of the details of the transactions or the dates of the rezoning of the lands. He stated that he is not sure why he referred to the rezoning of the lands being on December 2007 in the letter, surmising that it was possibly to emphasise that the rezoning had taken place during 2007.

69. Witness 2 stated that the prepayments were included in the Partnership accounts because the payment of €460,000 came from the Bank [redacted] account which was a Partnership bank account. He further stated that the payment of €7,500,000 received by the Appellant and [redacted] in relation to the [redacted] was not included in the Partnership account. This, he stated, was because a payment was never received by a Partnership bank account or any other account which related to the Partnership.

Witness 3 – [redacted]

70. The Commissioner heard direct evidence from [redacted] (hereinafter "Witness 3") on behalf of the Appellant who is a Chartered Surveyor and a [redacted] real estate agents having been in practice for over 35 years.

71. Witness 3 stated that she is familiar with [redacted] Local Area Plans in the [redacted] area along with the [redacted] Local Area Plan. She stated that the essence of a [redacted]l Local Area Plan is that it takes large swathes of land and requires the landowners to come together to develop a Master Plan to reflect what the Local Authority wants to achieve.

72. She stated that lands the subject matter of this appeal comprise part of [redacted] [redacted] Local Area Plan which, she stated, comprises of [redacted] hectares or [redacted] acres and is situated close to the centre of [redacted]. [redacted] has road frontage on two sides comprised of [redacted]. She stated that the [redacted] Local Area Plan relating to [redacted] is mainly for [redacted] [redacted] [redacted] [redacted] [redacted].
She stated that in this instance, as in all [redacted] Local Area Plans, a landowner's ability

to apply for planning permission is neutralised until such time as a Master Plan is developed. The lands the subject matter of this appeal, she stated, comprise almost 11% of ██████.

73. The access to ██████ is quite restricted and the question of access to the area would have to be dealt with by the landowners. The plan for the ███ roadway at that time in 2007 placed the road adjacent to the northern part of ██████. This she stated would have been beneficial to ██████ had it gone ahead.

74. Witness 3 stated that she and another Chartered Surveyor, ██████████ produced a report in relation to the lands the subject matter of this appeal dated 6 January 2014. The report was for the purposes of providing a valuation of the lands the subject matter of this appeal as at 31 August 2007. The report contains three comparator properties as follows:

    74.1. A 2005 sale of ████ acres at ████████████████████ which is described as a greenfield site north of ████ ██████, zoned medium density residential development subject to access and services. These lands were sold unconditionally for a price of €5,000,000 or €306,748 per acre. It was also noted that the planning permission for 143 houses was refused in 2006 due to infrastructural deficiencies and services, poor access with lack of services. The lands were not part of a Master Plan area.

    74.2. A 2005 sale of ██ acres at ████████████████ which is described as zoned residential and located north-west of ██████████, zoned medium density residential development subject to satisfactory access and servicing. These lands sold in 2005 for €19,500,000 or €650,000 per acre. The lands were not part of a Master Plan area and were half the size of the lands the subject matter of this appeal. No planning permission has been granted on these lands to date.

    74.3. A sale of ██ acres at ████████████████████ which is described as a greenfield site zoned ███ similar to the lands the subject matter of this appeal with ██ acres with road frontage having gone sale agreed in December 2006 conditional on zoning at €500,000 per acre and the remaining 44 acres being sold in 2005 for €150,000 per acre. These lands remain undeveloped.

75. Witness 3 stated that, in general, smaller land areas command higher prices as it is possible to make a faster return on a smaller lot of land. Larger sites, she stated, take a

longer time to develop and complete and, as a result, have a higher cost associated with holding and financing.

76. She stated that a number of factors influenced the value placed on the lands the subject matter of this appeal including:

    76.1. It being a single land holding of c. [redacted] acres).

    76.2. The fact that the lands are zoned as part of a strategic zoning and are identified in the [redacted] Local Area Plan as being a suitable local for the expansion of [redacted].

    76.3. The fact that the lands are within walking distance of [redacted].

    76.4. The proposed [redacted] being situated [redacted] to the east.

    76.5. The fact that the lands form part of a larger zoned land bank which restricts flexibility for any potential developer to develop the lands in their own right, independent of a larger Master Plan.

    76.6. The optimum development potential of the site had been premised on the [redacted] being delivered, which has to date has not occurred.

    76.7. The fact that a significant volume of zoned land existed in [redacted].

77. Witness 3 stated that she came of a value of €443,000 per acre or €30,000,000 for the lands as at 31 August 2007. This, she stated, was based on the price of €500,000 per acre achieved for the [redacted] acres of land sold in 2006 on [redacted]. She stated that those lands were sold in 2006 subject to zoning and that she had applied a 10% discount to that price when valuing the lands the subject matter of this appeal on the basis that the lands the subject matter of this appeal were [redacted] acres, almost twice the size of the lands at [redacted] sold in 2006.

78. Witness 3 referred to the letter of 30 July 2007 from [redacted] wherein he valued the [redacted] at €40,000,000. In particular she addressed the assertion made in the letter that

    "*Given that the lands have been zoned in the recent [redacted] Local Area Plan and with medium density it should be possible to easily achieve 10 units per acre.*"

79. She stated that medium density zoning and Master Plan zoning are not necessarily the same thing. By this she meant that, whilst the Master Plan zoning is predominantly residential there is an onus on the land owners of the Master Plan area to come together and create and agree a Master Plan in order to file an application for planning permission

with the Local Authority. This, she stated, reduces the amount of control a landowner holding only a portion of the land in the Master Plan area has over the development of the lands.

80. In addition, Witness 3 stated that, the zoning for the area specifically allowed for a maximum of ████ residential units within the Master Plan area. She stated that as the zoned area is ███ acres in total, achieving 10 residential units per acre as set out in ██ ██████████ letter of 30 July 2007 would have meant that it was possible to develop ████ residential units in the zoned area. This, she stated, was not envisaged or permitted by the zoning parameters. She stated other matters also had to be considered such as the provision requirements for ████████████████████████████████████ ██ █████████████████████████. As a result, it was not possible at that time in 2007 to establish that every acre within the Master Plan zone would be developed or how each acre would be developed.

81. Witness 3 stated that, had the lands the subject matter of this appeal been zoned for medium density development and not been part of a Master Plan, then he would have agreed with approach taken by ███████████ which arrived at a valuation of €40,000,000 or approximately €598,000 per acre.

Witness 4 – ███████████████

82. The Commissioner heard direct evidence from ████████████████ (hereinafter "the Director") who is a director of the Company having been so since the 1980's and who is also Operations Director of the Company.

83. He stated that he was aware of the Group restructure and was aware of the process which surrounded it. In particular, he stated, he was aware of the valuation process which occurred as part of the Group restructure. As part of this, the Director referred to a document entitled "██" which was dated 14 July 2006 and which was a schedule of the values of various properties held by the Group. The document dated 14 July 2006 is annotated as being version 11.

84. At the bottom of the document is an annotation which is headed "*Assets being taken out privately by* ███████████████████████████████████████" which includes a printed reference to the █████████████, the ██████████ and █████████ in addition to a handwritten reference to █████████████. The Director stated that he became aware of the intention to take these assets out of the Group structure during the course of the Group restructure stating that the rationale behind it was that these were assets on which

contracts were conditional based on zoning or outline planning permission being granted. He stated that because the zoning and/or planning status of these assets was unknown, they were difficult to value. In addition, he stated, that the Company no longer required the use of , and, as the Company no longer had a requirement for the use of , it was decided to sell it to the Appellant and at a value of €1.3 million and a deposit of €65,000 was contained in the contract for sale.

85. In relation to the lands the subject matter of this appeal, the Director stated that the contracts for the purchase of the lands from X and Y were negotiated by the Company and were conditional on the rezoning of the lands. Each contract contained a deposit requirement of €100,000 which the Company paid.

86. In a similar vein, the Director stated that the contracts for the purchase of the were conditional on rezoning, contained a total deposit requirement of €195,000 and contained a requirement for annual payments to the various landowners.

87. The Director stated that he was aware that the contracts for the had been assigned by the Company to the Appellant and . He stated that the were included as part of the Local Area Plan in 2007. He stated, once the zoning of the lands to residential had been confirmed, the Company formed a view that, in circumstances where the Appellant and might sell the lands, it made sense that the Company would purchase the lands from the Appellant and in order to continue with that development on the lands the subject matter of this appeal in due course. From the point of view of the Company, he stated, it would not be desirable if the Appellant and sold the lands to a third party, and discussions around this took place internally within the Company. He stated that he was appointed as the Company negotiator in relation to the purchase of the lands from the Appellant and and dealt with the Appellant in this process.

88. He stated that he engaged to get a third party view of the value of the lands and referred to the letter written to him by on 30 July 2007. He stated that he did not agree with view that it would be possible to achieve 10 units per acre on the site. This was in circumstances where the Master Plan had a provision for residential units along with various other requirements for the provision of .

89. He stated that he had wanted to achieve a fair price for the lands in circumstances where the total contract price for the lands was €23.1 million and in circumstances where any planning permission for the lands was subject to a Master Plan which required the five landowners of the total land area to liaise and agree a scheme. In addition, he was mindful that in 2004 the Company had bought ■ acres adjacent to the lands the subject matter of this appeal at a price of €380,000 per acre. To that end, and having discussed matters with the other Company directors, he negotiated a price of €30.6 million with the Appellant and ■■■■ which represented an uplift of €7.5 million from the original contract purchase price.

90. He stated that he was aware that the €7.5 million uplift was not an immediate cash payment to the Appellant and ■■■■ and, rather, a credit of €3.75 million was made to the Appellant and ■■■■ director's loan accounts in the Company. He stated that the movement of the stock and the crediting of the Company director's loan accounts are all recorded in the Company's financial statements for 2006 and 2007.

Witness 5 – ■■■■

91. The Commissioner heard direct evidence from ■■■■ (hereinafter "Witness 5") who is a Chartered Accountant and who, in 2006 and 2007, was a partner in ■■■■ ■■■■, the Company auditors. Witness 5 was the auditor for the Company along with preparing the Company tax returns and was, together with Witness 2, responsible for the completion of the Partnership accounts and personal tax filings for the Appellant and ■■■■. ■■■■, Witness 5 set up his own accountancy practice and the Partnership and personal business of the Appellant and ■■■■ transferred with him to the new practice. The audit function for the Company transferred to a third party accountancy firm at that time.

92. He stated that, in preparation for the audit and completion of the Company Financial Statement for 2006, he was given a copy of the document entitled "Site Costs" which set out the Net Book Value of the Company assets as at 1 January 2006, the stock transactions which occurred during 2006 and the Net Book Value of the assets as at 31 December 2006. He stated that this document fed into the Company's financial statement which noted the value of land stocks in the Company as being €■■■■ at 31 December 2006 which is the value reflected in the Site Costs document.

93. Witness 5 also referred to the Related Party Transaction note in the Company financial statement for 2006 which recorded the sale of ■■■■ to the Appellant and ■■■■ for €1.3 million but which did not record an assignment of the ■■■■ or the

[redacted] to the Appellant and [redacted]. Witness 5 stated that this was a mistake and that the Company financial statement should have contained a reference to the assignments in the Related Party Transaction note.

94. Witness 5 stated that he was given a copy of the document entitled "Site Costs" which set out the Net Book Value of the Company assets as at 1 January 2007, the stock transactions which occurred during 2007 and the Net Book Value of the assets as at 31 December 2007. He stated that this document fed into the Company's Financial Statement which noted the value of land stocks in the Company at 31 December 2007 as being €[redacted]. He stated that this document records the purchase of the [redacted] in line with the contract price in one line and in the following line records the uplift of €7.5 million paid to the Appellant and [redacted].

95. Witness 5 also referred to the Related Party Transaction note in the Company financial statement for 2007 which recorded that "During the year the company paid €7.5m to [redacted] to purchase a land option that was subsequently exercised by the company." He stated this transaction was recorded by journal entry into the director's loan accounts of the Appellant and [redacted]. He stated that, generally, journals are referred to as year-end journals and are completed at year end and not on an ongoing basis throughout the year. He gave the example of depreciation, which he stated occurs throughout the year but is only recorded as one year-end journal entry.

96. He stated that Witness 2 was responsible for the completion of the Partnership accounts in 2006 and 2007, although he had an input into their preparation. He stated that, in relation to the €460,000 transaction which came from the Partnership accounts on 31 October 2006, this represented the payment of deposits on three transactions with the Company, those being the [redacted], the [redacted] and [redacted].

97. He stated that the receipt in 2007 by the Appellant and [redacted] of €7.5 million from the Company in relation to the [redacted] was not recorded in the Partnership accounts for 2007 because the receipt was in the form of a director's loan credit and there was no cash movement within the Partnership accounts which would have necessitated it being recorded.

98. Witness 5 commented on the letter of 3 July 2009 written by Witness 2 to the Respondent and agreed that it contained some inaccuracies in relation to the dates of the zoning of the [redacted] and the timing of the assignment of the contracts by the Company to the Appellant and [redacted].

Submissions

Appellant's submissions

99. The Appellant submitted that the Company entered into the conditional contracts for the purchase of the [redacted] in January and March 2006 respectively. In addition, the Company entered into the conditional contracts for the purchase of the [redacted].

100. It was further submitted that as part of the Group restructure, [redacted], which occurred, the contracts for the [redacted] along with the contracts for the [redacted] were assigned to the Appellant and [redacted] by the Company. It was submitted that the Commissioner should have regard to the written documentation submitted, along with the oral evidence adduced, when considering the material facts.

101. In relation to the claimed assignment of the contracts by the Company to the Appellant and [redacted], it was submitted that the evidence which has been put before the Commissioner is sufficient to discharge the burden of proof to establish that, on the balance of probabilities, the assignment occurred. In that regard, the Appellant submitted that there is no obligation on the Appellant to establish satisfaction of the Statute of Frauds in this regard. Notwithstanding this, the Appellant submitted that the documentary evidence submitted in support of the assignment of the contracts is a sufficient note and memorandum of the assignment such that the requirement of the Statute of Frauds to memorialise the transaction has been met, particularly in circumstances where neither party to the assignments disputes that they took place.

102. The Appellant submitted that the re-assignment of the contracts for the purchase of the [redacted] by the Appellant and [redacted] to the Company took place at market value. It was submitted that the value of €30.6 million reassignment comprised of the contract values of €23.1 million which was paid to the landowners plus the uplift of €7.5 million paid to the Appellant and [redacted] through the crediting of their director's loan accounts in the Company. The Appellant relied on the written valuation from, and the oral evidence of, Witness 3 in support of this claim.

103. It was denied that the letter of 31 July 2007 from [redacted] which contained a valuation of €40 million for the lands was a correct valuation of the [redacted] on the basis that the opinion expressed in the letter was based on a misunderstanding of the [redacted] Local Area Plan and of the density of housing which was possible to achieve under the approved zoning for the lands.

104. The Appellant further submitted that, if they have not succeeded in discharging the burden of proof to establish that the assignments of the contracts by the Company to the Appellant and took place and that the correct market value of the lands in July 2007 was €30.6 million, then the Commissioner must consider whether the Respondent was correct to raise the alternative Notices of Amended Assessment to income tax which it had raised on the Appellant and .

105. The Appellant submitted that these Notices of Amended Assessment to income tax were raised on the basis that the €3.75 million credited to the Company director's loan accounts of the Appellant and were Schedule E income, that is to say that it was a payment to the Appellant and which falls under the provisions of section 112 of the TCA 1997 which provides that:

> "*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.*"

106. It was submitted that the crediting of the Company director's loan accounts of the Appellant and did not occur as a result of the exercise by the Appellant or by of their offices or employments of profit with the Company as:

106.1. there were several relationships between the Appellant and and the Company, those being:

106.1.1. an employee / employer relationship;

106.1.2. the contractual relationships which existed between the Appellant and and the Company relating to property transactions which took place around the time of the contested payment / credits to their director's loan accounts;

106.1.3. the fact that the Appellant and were ultimately the majority beneficial owners of the Company;

106.1.4. the salaries received by the Appellant and from the Company were, it was submitted, fractions of the payments / amounts credited to their director's loan accounts;

106.1.5. there was no contractual entitlement on the part of the Appellant or on the part of [redacted] to receive the payments / credit amounts credited to their director's loan accounts;

106.1.6. no evidence exists which establishes that the Company resolved to make the payments / credited the director's loan accounts in return for services rendered by the Appellant and [redacted] to the Company.

107. The Appellant went further and submitted that, if he has failed to discharge the burden of proof to establish that the payment of €7.5 million to him and [redacted] by the Company does fall under Schedule E, it was not a cash benefit received directly from the transaction, but rather it was a credit to the director's loan accounts which can only, it was submitted, be taxed as a perquisite:

107.1. when the director's loan accounts were credited; and

107.2. on the market value of the crediting of the director's loan accounts and not on the nominal amount of the credits.

Respondent's submissions

108. The Respondent submitted that the contested Notices of Amended Assessment to CGT and the Notices of Amended Assessment to income tax were raised in the alternative. It was submitted that the Respondent has at all times been clear that it seeks to recover under one tax head only.

109. The Respondent disputes that there was an assignment of the contracts for the purchase of the [redacted] [redacted] to the Appellant in 2006, or at all. This is on the basis that:

109.1. there is no written evidence agreement between the Appellant and the Company;

109.2. there was no notification of an assignment of the contracts by the Company to the original vendors; and

109.3. the only allegedly corroborative documentary evidence is the transfer of €460,000 from the Partnership bank account to the Company's bank account in October 2006, although the Respondent does not accept that this transfer is corroborative of the payment of €200,000 as a deposit in relation to the [redacted] contracts.

110. The Respondent submitted that the fact that the claimed assignment of the contracts for the [redacted] was not included in the Company financial statement for 2006 as a

related party transaction with a director is a serious omission in accounting terms and no satisfactory explanation as to the reason why it was not included has been forthcoming.

111. The Respondent also pointed to the fact that no Company Board minutes have been submitted which recorded a decision by the Company to assign the ████ contracts to the Appellant and ██████ in 2007, or which recorded a decision by the Company to accept a re-assignment of contracts from the Appellant and ██████ in 2007 with a €7.5 million uplift from the original contract price.

112. The Respondent submitted that, as a result of the above issues with the documentation, the Appellant has failed to comply with his obligation to retain appropriate documentation in relation to the claimed transactions.

113. The Respondent submitted that there is a difficulty in relation to the timing of the claimed re-assignment of the contracts by the Appellant and ██████ to the Company in 2007. In that regard, the Respondent particularly pointed the Commissioner to the Appellant's tax return for 2007 which states that the disposal of the lands took place in the period 1 October 2007 to 31 December 2007. This, the Respondent submitted, does not match with the evidence adduced by and on behalf of the Appellant which claims that the re-assignment of the contracts for the ███████ from the Appellant and ██████ to the Company took place sometime in July / August 2007 and that the Company the purchase of the Y lands on 20 August 2007 and the X lands on 12 September 2007. The Respondent submitted that this timing difficulty raises an issue for the Appellant in that there is a disconnect between the Appellant's tax return for 2007 and the date on which the Appellant claims the contracts for the ███████ were reassigned to the Company.

114. The Respondent submitted that the fact that the payment of €7.5 million from the Company was not recorded in the Partnership accounts is relevant and raises a question as to whether the withdrawal of €460,000 from the Partnership accounts was, in fact, related to the claimed assignment of the ███████ contracts by the Company to the Appellant and ██████.

115. In relation to the valuation of the ███████, the Respondent submitted that it had not plucked a €40 million valuation out of the air. Rather, the Respondent submitted, the €40 million valuation which the Respondent used was one which was received by the Company and provided to the Respondent by the Appellant. The Appellant, the Respondent submitted, had not at any time prior to the raising of the disputed Notices of Amended Assessments indicated that he did not agree with that valuation. As a result, it was submitted, the Respondent had a reasonable basis for relying on the €40 million valuation when raising the contested Notices of Amended Assessments.

116. In relation to the credibility of the oral evidence adduced at the hearing of this appeal, the Respondent submitted that it is for the Commissioner to decide whether the totality of the evidence adduced is credible having considered all of the relevant circumstances.

117. The Respondent submitted that, in circumstances where it does not accept that the claimed assignments and reassignments of the contracts relating to the [redacted] took place, the credit to the director's loan accounts by the Company in the amount of €3.75 million each to the Appellant and [redacted] are subject to income tax under Schedule E and fall within section 112 of the TCA 1997.

118. The Respondent submitted that the credits were profits arising from the positions held in the Company by the Appellant and [redacted] and would not have arisen but for their positions as directors of the Company and the main shareholders of the Group.

Material Facts

119. The following material facts are not at issue in this appeal and the Commissioner accepts same as material facts:

119.1. The Appellant is a Director of the Group and of the Company.

119.2. The [redacted] is a Director of the Group and of the Company.

119.3. The Appellant and [redacted] also have a Partnership which owns a number of properties which generate significant rental income. No formal partnership agreement has been entered into between the Appellant and [redacted].

119.4. In January and March 2006, the Company entered into two conditional contracts for the purchase of [redacted] acres of lands which were at that time zoned as agricultural lands at [redacted] totalling €23,100,000 as follows:

119.4.1. On 31 January 2006 the Company entered into a conditional contract to purchase certain lands totalling [redacted] acres at [redacted] from X for an agreed purchase price of €16,000,000. The contract was conditional upon at least [redacted] acres of those lands being zoned for residential development under the [redacted] Local Area Plan by the Local Authority. If the lands were not zoned for residential purposes then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. As part of that contract a non-refundable deposit of €100,000 was paid by the Company to X.

119.4.2. On 16 March 2006 the Company entered into a contract to purchase certain adjoining lands totalling ████ acres at ██████████ from Y for an agreed purchase price of €7,100,000. The contract was conditional upon at least ██ acres of those lands being zoned for residential/commercial purposes by the Local Authority. If the lands were not zoned for residential / commercial purposes by 31 December 2007 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. As part of that contract a non-refundable deposit of €100,000 was paid by the Company.

119.5. In 2005 and 2006 the Company entered into ██ option agreement and contracts in relation to lands at ████████████████. Deposits totalling €102,911.10 were payable plus annual payments totalling €92,088.90 due on 1 March 2006, that is to say a total of €195,000 as follows:

119.5.1. On 29 November 2005 an Option Agreement between the Company and ████████████████████████ in respect of █████ acres at €82,080 per acre conditional on the zoning of the lands for the development of ████ ██████. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the option would be deemed to be at an end. Interim payments were payable in the form of €30,696.30 on signature of the agreement and €61,392.60 annually on 1 March each year beginning on 1 March 2006.

119.5.2. On 5 December 2005 an option agreement between the Company and ██████████ in respect of █████ acres at €82,080 per acre conditional on the zoning of the lands for the development of ███████████. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the option would be deemed to be at an end. Interim payments were payable in the form of €14,303.70 on signature of the agreement and €28,607.40 annually on 1 March each year beginning on 1 March 2006.

119.5.3. On 14 July 2006 a conditional contract between the Company and ████████████████████████████████ in respect of ███████████ █████ acres) at €92,000 per acre conditional on the zoning of the lands for

the development of [redacted]. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. A non-refundable option fee of €60,000 was payable.

119.5.4. On 11 August 2006 a conditional contract between the Company and [redacted] in respect of [redacted] acres at €114,000 per acre conditional on the zoning of the lands for the development of [redacted]. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. No deposit was payable.

119.5.5. On 11 August 2006 a conditional contract between the Company and [redacted] for the purchase of three lots of land totalling [redacted] acres at €114,000 per acre conditional on the zoning of the lands for the development of [redacted]. No deposit was payable.

119.6. In or around October / November 2006 a corporate restructuring of the Group took place which involved the shareholding of the Appellant and [redacted] in the Group being reduced from 100% to 92% (split 51% to the Appellant and 41% to [redacted]) by the introduction of new shareholders.

119.7. On 31 October 2006 €460,000 was transferred from a joint bank account held by the Appellant and [redacted] as part of their Partnership.

119.8. On 31 October 2006 €460,000 was lodged in to a bank account held by the Company.

119.9. On [redacted] 2007 a [redacted] Local Area Plan was passed by [redacted]l in which the [redacted] subject matter of this appeal were, as part of a larger tract of [redacted] hectares of land, zoned as residential lands subject to a Master Plan. The document published by [redacted] outlined the following in relation to the [redacted] hectare tract of land:

> "*It is the Planning Authorities [sic] objective to secure the development of in the region of [redacted] new dwellings on this site through a phased programme of development that will secure the timely provision of the necessary physical, social and economic infrastructure. So that the development of this land can*

be properly co-ordinated, it will only be in accordance with a master plan for the entire area to which this objective relates that has been approved by the Planning Authority. A comprehensive master plan may be prepared by a single developer or a landowner or by a group of developers or landowners acting jointly. The proposed master plan format should be prepared in co-ordination with the local authority, the public and relevant stakeholders.

The master plan will include and pay particular attention to:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

119.10. On ██ 2007, the contracts for the ██ became unconditional on foot of the re-zoning of the lands by the Local Authority pursuant to the ██ Local Area Plan.

119.11. The Company completed the purchase of the Y lands on 20 August 2007 and the X lands on 12 September 2007.

119.12. In the Company accounts for the year ending 31 December 2007, a credit of €3,750,000 each was reflected in the director's loan accounts for the Appellant and for ██ representing a total of €7,500,000.

119.13. The re-zoning of the lands at ██ did not occur and the conditional contracts and options for the lands at ██ came to an end. The deposits and the annual amounts paid on those lands were forfeited.

119.14. The Appellant filed his 2007 tax return with the Respondent and paid the requisite CGT on a gain of €3,650,000, being the €3,750,000 received from the Company minus the €100,000 deposit paid.

119.15. The ██ also filed his tax return with the Respondent and paid the requisite CGT on a gain of €3,650,000, being the €3,750,000 received from the Company minus the €100,000 deposit paid.

120. The following material facts are at issue in this appeal:

120.1. Whether the Company assigned the contracts for the purchase of the ██ ██ to the Appellant and ██ in 2006;

120.2. What the market value of the ██ lands was in July / August 2007;

120.3. Whether the 2007 crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the [redacted] by the Appellant and [redacted] to the Company.

121. The Commissioner has examined the material facts at issue.

122. 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".*

123. More recently the High Court has confirmed the position as set out in *Menolly Homes* in the decision of Barr J. in *Thomas McNamara v The Revenue Commissioners* [2023] IEHC 15 (hereinafter "*McNamara*"), at paragraph 46 where he stated:

> "*In relation to the onus of proof at an appeal hearing before the TAC, case law makes it clear that the onus of proof rests on the taxpayer who is challenging the assessment. As noted above, in Menolly Homes Limited v. the Appeal Commissioners and the Revenue Commissioners [2010] IEHC 49, Charleton J. stated at para. 22, that the burden of proof in the appeal process, was, as in all taxation appeals, on the taxpayer. He stated that it was not a plenary civil hearing. It was an inquiry by the Appeal Commissioners as to whether the taxpayer had shown that the relevant tax was not payable. That dictum was adopted with approval by Twomey J. in Byrne v. The Revenue Commissioners. In the course of that judgment, he referred to the decision of Sanfey J. in O'Sullivan v. Revenue Commissioners [2021] IEHC 118, where the judge had stated as follows at para. 90: -*
>
> > *"…The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer's position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position..."*"

124. It is also appropriate for the Commissioner to indicate that, as agreed by the parties, this is a *de novo* hearing pursuant to the provisions of Part 40A of the TCA 1997. The Commissioner, therefore, has had no regard to the previous determinations issued in these appeals. Nor has she had any regard to the documentation submitted or the transcripts in the hearing which resulted in the issuing of the previous determinations, save and except where they were also submitted and relied on in this appeal.

Whether the Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in 2006:

125. The Appellant has submitted that the contracts for the purchase of the [redacted] were assigned to him and to [redacted] by the Company in October 2006. The Respondent does not accept that these assignments took place.

126. The Appellant gave evidence to the Commissioner that the Company assigned the contracts for the [redacted] which it had entered into in January 2006 and March 2006 to him and to [redacted]. The Appellant stated that this happened in October 2006 in the context of the completion of the Group restructuring as part of [redacted].

127. [redacted], he stated, involved the merger of [redacted] businesses, in which he and other shareholders were involved, with the Irish Group. This, he stated, required the valuation of all of the Group assets in order to value the Group shares to facilitate the merger of the Group with the [redacted] businesses. The deadline for the completion of [redacted] was the end of October 2006.

128. He stated that the thinking behind the assignment of the [redacted] contracts, along with the [redacted] contracts, was that these lands were difficult to value in circumstances where the zoning status of the lands was unclear. The Company, he stated, had entered into contracts for the purchase of the [redacted] which were conditional on the successful rezoning of the lands from agricultural to residential.

129. At the time of the Company entering into the contracts for the [redacted], in January and March 2006, it was known that a process had been commenced by the Local Authority in relation to a [redacted] Local Area Plan for [redacted], however it was not clear that the lands the subject matter of the contracts would be included in any rezoning which may have resulted. The Local Authority was undergoing a wider process where it was considering the zoning, not just of the lands the subject of this appeal, but the zoning of large tracts of land in [redacted] which might, in effect, grant residential zoning in order to create a new town / neighbourhood within the wider environs of [redacted].

130. The Appellant stated that, as the [redacted] Local Area Plan had not been finalised at the time of the completion of [redacted], it was very difficult to value the lands in order to include them in the Group assets when valuing the Group shares. As a result, he stated, it was decided that the contracts would not be included in the Group share valuation and would be removed from the Group assets prior to valuing the Group shares. It was further decided that the contracts for the [redacted] and [redacted] would be assigned to the Appellant and [redacted].

131. It was, he stated, also decided that the premises at [redacted] would be sold to the Appellant and [redacted] and that this premises would be removed from the Group assets prior to valuing the Group shares. The logic behind this purchase, he stated, was that [redacted] was the only building within [redacted] which the Appellant and [redacted] did not own and it made sense to the Appellant and [redacted] to bring the entirety [redacted] under their ownership.

132. The Appellant stated that a total amount of €460,000 had been transferred from the Partnership bank account on 31 October 2006 to the Company. This amount, he stated, was comprised of a payment of €200,000 which related to the deposits paid by the Company when entering into the contracts for [redacted], a payment of €195,000 which related to the deposits paid by the Company when entering into the contracts for [redacted] and €65,000 as a deposit for the purchase of [redacted] by the Partnership from the Company on foot of the contract entered into on 26 October 2006. The Appellant referred to a statement from the Partnership joint bank account which shows a withdrawal of €460,000 on 31 October 2006. The Appellant also referred to a statement from a Company bank account which shows a lodgement of €460,000 on 31 October 2006.

133. The Commissioner notes that the Appellant relied on the following documents in support of his claim that the Company assigned the contracts to him and to [redacted]:

133.1. The contracts relating to the purchase of the [redacted] dated 31 January 2006 and 16 March 2006.

133.2. The option agreements and contracts relating to the [redacted] dated between 29 November 2005 and 11 August 2006.

133.3. [redacted] timeline of events which contained a "pre-step" relating to the [redacted] and [redacted] which states "*Where necessary, ensure vendors are agreeable to assignment to* [redacted] *& documentation to effect this*". This document also contained a step for day 1 which states "*Execute assignments of*

options / contracts [redacted]. Pay assignment considerations [redacted]".

133.4. Letters consenting to the assignment of four of the five contracts for the [redacted] by the Company to the Appellant and [redacted] dated between 25 October 2006 and 31 October 2006.

133.5. A letter from the Appellant to the Bank [redacted] dated 31 October 2006 directing the transfer of €460,000 from the Partnership joint bank account to a Company Bank [redacted] account.

133.6. A Bank [redacted] statement showing a withdrawal of €460,000 from the Partnership joint bank account on 31 October 2006.

133.7. A Bank [redacted] statement showing a lodgement of €460,000 on 31 October 2006 in to a Company bank account.

133.8. The Company "Site Costs" document for 2006 which shows:

133.8.1. The movement of the [redacted] and [redacted] in to and out of the list of Company assets in 2006;

133.8.2. A Net Book Value of the Company land as at 1 January 2006 as being €[redacted]; and

133.8.3. A Net Book Value of the Company land as at 31 December 2006 as being €[redacted].

133.9. The Company financial statement for 31 December 2006 which shows:

133.9.1. opening land value on 1 January 2006 as being €[redacted];

133.9.2. closing land value on 31 December 2006 as being €[redacted]; and

133.9.3. a note in relation to shareholders and related party transactions which stated: "*During the year under review the company disposed of [redacted] to [redacted], Directors of the company for €1,300,000.*"

133.10. A letter to the Appellant and [redacted] from the Partnership's former accountant dated 16 October 2007 in relation to the completion of the Partnership's accounts for 2006 which outlines prepayments made by the Partnership as at 31 December 2006 of deposits paid in relation to property transactions which were not finalised on 31 December 2006 totalling €460,000, as being €200,000 relating to "[redacted]

", €195,000 relating to "" and €65,000 relating to "".

133.11. The Partnership accounts for 2006 which contain an amount of €460,000 as "prepayments".

133.12. The Company "Site Costs" document of 2007 which shows:

133.12.1. The movement of the in to the list of Company assets in 2007 at a cost of €22,900,000 plus €7,500,000; and

133.12.2. A Net Book Value of the Company land and property as at 31 December 2007 as being €.

133.13. The Company financial statement for 31 December 2007 which shows:

133.13.1. closing land and property value on 31 December 2007 as being €;

133.13.2. a note in relation to shareholders and related party transactions which stated: "*During the year the company paid €7.5m to to purchase a land option that was subsequently exercised by the company.*"

133.14. The sale contract for between the Company as vendor and the Appellant and as purchasers dated 26 October 2006.

133.15. A letter to the Appellant and from the Partnership's former accountant dated 11 November 2008 in relation to the completion of the Partnership's accounts for 2007 which outlines prepayments made by the Partnership of €385,000 at 31 December 2007 in relation to deposits and options paid on property transactions which were not finalised on 31 December 2007 relating as being €285,000 relating to "", €65,000 relating to "" and €35,000 relating to "".

133.16. The Partnership accounts for 2007 which contain an amount of €385,000 as "prepayments".

134. The Commissioner notes that the Partnership's former accountant, Witness 2, gave evidence confirming that he wrote the letters dated 16 October 2007 and 11 November 2008 to the Appellant and and confirming the information contained in those letters in relation to prepayments by the Partnership.

135. Witness 2 confirmed under cross examination that, in preparing the Partnership accounts for 2006, he had reviewed the trial balance received from his clients and the Bank ███ ███ Partnership joint bank account statement which recorded a withdrawal of €460,000 on 31 October 2006. Under cross examination when asked as to where he had obtained the information that the €460,000 withdrawal from the Partnership joint bank account on 31 October 2006 related to prepayments for the ███, the ███ and ███, Witness 2 stated that he had received that information from a third party employee of the Company on behalf of the Appellant and ███. He stated that he was "*99% certain*"[1] that he received this information from ███ and stated that the handwritten notes contained in the Bank ███ joint bank account statement for the Partnership are a note of the conversation with ███ ███ which he had sometime in October 2007. He stated under cross examination that he set out the details of the information received from ███ in relation to the €460,000 and the individual prepayment amounts and what they related to in his letter to the Appellant and ███ dated 16 October 2007. He also stated under cross examination that, as the Partnership accounts were for the benefit of the Appellant and ███, and as they were not statutory financial statements which would be lodged with an outside body, he had not felt the requirement to breakdown the prepayment figure of €460,000 in the Partnership accounts. He stated that his letter of 16 October 2007 was a report for the benefit of the Appellant and ███ which supported the Partnership accounts and which set out the details of the Partnership accounts and broke down the details of the prepayment amount of €460,000.

136. The Commissioner also heard evidence from the Director who is a director of the Company and has been a director of the Company since the 1980s. The Director stated that, in 2006, he was aware of ███ and the restructuring of the Group. Under cross examination he stated that he was also aware in 2006 that it had been decided by the Group shareholders and by the ███ shareholders that, as a result of the uncertainty surrounding zoning, the contracts for the ███ and ███ could not easily be valued and they would therefore be assigned to the Appellant and ███, thereby removing them from the Group assets.

137. The director also confirmed that in 2006 he had seen version 11 of the ███ ███ report which contained a section entitled "*Assets being taken out privately at cost by* ███ *in transaction* ███"

[1] Transcript, day 2, page 22 line 26.

and which included the [redacted] and [redacted] along with a handwritten notation relating to "[redacted]".

138. Finally, the Commissioner heard evidence from Witness 5 who was the Company auditor. He stated that, as part of the audit and preparation of the Company's financial statement for 2006, he had received a copy of the "Site Costs" document and confirmed that this document fed into the Company's financial statement which noted the value of land stocks in the Company as being €[redacted] at 31 December 2006 which is the value reflected in the Site Costs document.

139. He was asked under cross examination about the fact that the related party transaction note in the Company financial statement for 2006 did not contain any reference to the assignment by the Company of the contracts for the [redacted] and [redacted] to the Appellant and [redacted]. He stated that this was an error and that these transactions should have been recorded as related party transactions in the Company financial statement for 2006. He also stated that, from an audit point of view this was not material. He stated that there was an obligation on the Company directors to ensure that any related party transactions were recorded in the financial statement and this did not occur.

140. Under cross examination, Witness 5 stated that the stock transaction of the assignment of the [redacted] and [redacted] to the Appellant and [redacted] were reflected in the Company financial statement for 2006. He stated that he received information from the Company Chief Financial Officer.

141. Having considered all of the evidence, both oral and documentary, the Commissioner considers that the Appellant has discharged the burden of proof to establish that, on the balance of probabilities, the Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in October 2006. This is based on:

    141.1. The documentary evidence submitted as set out at paragraph 133 of this determination. The Commissioner is satisfied as to the provenance of the documentation based on the evidence received from the witnesses;

    141.2. The oral evidence of the Appellant in relation to the assignment of the contracts and the motivation behind the removal of the [redacted] and [redacted] from the assets of the Group in the context of [redacted];

    141.3. The oral evidence of the Director which tends to confirm the Appellant's evidence in relation to the assignment of the contracts and the motivation behind the removal of the [redacted] and [redacted] from the assets of the Group in the context of [redacted];

141.4. The bank statements recording the withdrawal of €460,000 from the Partnership joint bank account and the lodgement of €460,000 into a Company bank account on 31 October 2006, together with the letter sent by the Appellant to the Partnership bank dated 31 October 2006 directing that such a transaction be actioned;

141.5. The recording of prepayments of €460,000 in the Partnership accounts for 2006, together with the handwritten notation by Witness 2 on the Partnership joint bank account statement and the letter written by Witness 2 dated 16 October 2007.

142. While the Commissioner notes that the Company financial statement for 2006 did not contain a reference to the assignment of the contracts to the Appellant and [redacted], the Commissioner considers that the preponderance of the evidence tends to establish that the assignment of the contracts for the [redacted] by the Company to the Appellant and [redacted] did take place.

143. In addition, the Commissioner notes the disparity between the dates contained in the letter dated 3 July 2009 written by Witness 2 to the Respondent wherein it states that the rezoning of the [redacted] took place in December 2007. It is not disputed between the parties that the [redacted] Local Area Plan was published on [redacted] 2007. It is apparent to the Commissioner that an error was made in the letter and the Commissioner accepts the explanation from Witness 2 in relation to that error.

144. As a result of the above, **the Commissioner finds as a material fact that the Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in October 2006**.

What the market value of the [redacted] was in July / August 2007:

145. On the one hand, the Appellant submits that the appropriate valuation for the [redacted] as at July 2007 was €30,000,000. This is based on the expert report of Witness 3 along with her oral evidence, on the Appellant's evidence and on the evidence of the Director.

146. On the other hand, the Respondent submits that the appropriate valuation for the [redacted] as at July 2007 was €40,000,000. This is based on the letter of [redacted] to the Director dated 30 July 2007. The Respondent has not submitted any additional evidence to support its position.

147. The Commissioner has heard evidence from Witness 3, who is a professional land valuation expert, on behalf of the Appellant who stated that, in her opinion, the [redacted] [redacted] had a value of €30,000,000 in June / July 2007. This was on the basis that:

147.1. The lands are a single land holding of c. [redacted] acres).

147.2. The fact that the lands are zoned as part of a strategic zoning and are identified in the [redacted] Local Area Plan as being a suitable local for the expansion of [redacted].

147.3. The fact that the lands are within walking distance of [redacted].

147.4. The proposed [redacted] being situated [redacted] kilometres to the east of the site.

147.5. The fact that the lands form part of a larger zoned land bank which restricts flexibility for any potential developer to develop the lands in their own right, independent of a larger Master Plan.

147.6. The optimum development potential of the site had been premised on the [redacted] being delivered, which has to date has not occurred.

147.7. The fact that a significant volume of zoned land existed in [redacted].

147.8. The fact that the zoning for the Master Plan restricted development to [redacted] residential units.

147.9. Three comparator sales on lands in [redacted] which took place in 2004 and 2005 and in particular on the sale of adjacent greenfield lands in 2006 for €500,000 per acre.

148. The Respondent has not adduced any evidence in relation to the value of the [redacted] [redacted]. The Respondent relies on the letter of [redacted] dated 30 July 2007 to the Director which states:

> "*Further to our telephone conversation, I have looked at the maps and the zoning on the lands…*
>
> *Lot I: Lands being purchase from…*
>
> *These lands comprise of [redacted] acres or thereabouts statute measure and are for the most part level and sound. Some [redacted] acres are probably not suitable for development but would help to meet your green space requirement on the said lands.*

The lands in question have extensive frontage on the main ██████ and will not be difficult to connect to services. They are within easy walking distance of the town and in an area that is improving rapidly.

Lot II: Lands being purchased from …

These lands comprise c. ██ acres with little or no waste and have frontage onto ██ ██████. Given that they adjoin the lands in lot I, they are imminently [sic] suitable for development and will connect to the services through the lands in lot I. Again they are within walking distance of the town centre.

The total are of the lands in lots I & II is approx. 63 acres with c. 60 acres suitable for development. Given that the lands have been zones in the recent ██████ Local Area Plan and with medium density is [sic] should be possible to easily achieve 10 units per acre.

Taking all of the above into account I would put the market value of the said lands with zoning at not less than €40,000,000.00 (forty million euro)."

149. The Commissioner notes the decision of the Supreme Court in *Donegal Investment Group Plc v Danbywiske and Others* [2017] IESC 14 (hereinafter "*Donegal Investment Group*") wherein Clarke CJ stated:

 "*9.1 For the reasons set out in this judgment I am satisfied that it is open to a trial judge to adopt a methodology or approach which differs from each of the approaches advocated in the expert testimony tendered by the parties. However, where a trial judge is persuaded to adopt a different approach, it is necessary for the judge to structure the judgment in such a way that either expressly explains why the approach adopted is considered to be appropriate notwithstanding the expert evidence tendered or that, at a minimum, the reasoning of the trial judge in that regard can be inferred with some reasonable level of confidence.*"

150. The Commissioner notes the contents of the report produced by Witness 3 and the evidence received from her in relation to the value which she has places on the ██████ ████ of €30,000,000. The Commissioner notes that the valuation was carried out in January 2014 and related to a valuation as at 31 August 2007.

151. The Commissioner also notes the contents of the letter of 31 July 2007 from ██ ██████ which values the ██████ at not less than €40,000,000. Whilst there is no dispute between the parties that this letter was sent to the Director in July 2007 at a time which is contemporaneous to the claimed transaction, the Commissioner has not

had the benefit of evidence from [redacted], who has passed away in the period since his letter of 31 July 2007.

152. Witness 3 stated in her evidence that she has reservations in relation to the basis on which the July 2007 valuation was made. In particular, Witness 3 stated that given that the zoned area is [redacted] acres in total, achieving 10 residential units per acre as set out in [redacted] letter of 30 July 2007 would have meant that it was possible to develop [redacted] residential units in the zoned area. This, she stated, was not envisaged or permitted by the zoning parameters. She stated other matter also had to be considered such as the provision requirements for [redacted]. As a result, it was not possible at that time in 2007 to establish that every acre within the Master Plan zone would be developed or how each acre would be developed.

153. The Commissioner notes that it was open to the Respondent to submit an alternative valuation carried out by an independent valuation expert which would support its claim that the lands had a value of €40,000,000 in July 2007. No such valuation was submitted by the Respondent.

154. Taking all of the above into account and having regard to the judgment of Clarke CJ in *Donegal Investment Group*, the Commissioner prefers the evidence and valuation put forward by Witness 3 on behalf of the Appellant and accepts that the value of the [redacted] in July / August 2007 was €30,000,000.

155. As a result of the above, **the Commissioner finds as a material fact that the market value of the [redacted] in July / August 2007 was €30,000,000**.

Whether the 2007 crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the [redacted] by the Appellant and [redacted] to the Company:

156. The Commissioner has already found as a material fact that the Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in October 2006.

157. It is not in dispute between the parties, and the Commissioner has already found as a material fact, that the Company completed the two contracts for the purchase of the [redacted] in August and September 2007.

158. There is also no dispute between the parties that in 2007 credits of €3,750,000 were made to both the Appellant's and Company director's loan accounts.

159. The Appellant gave evidence to the Commissioner that, following the rezoning of the , a time imperative became live in that the contracts which had been assigned to him and contained clauses which required their closure within two months. The Appellant stated that he and began to consider what the best course of action would be in relation to the lands: when they would develop the lands themselves as part of a master plan, whether they would sell the lands to a third party or whether they would re-assign the contracts back to the Company to allow the Company develop the lands in circumstances where the Company was already developing adjacent lands.

160. The Appellant stated that negotiations took place between him and the Company as to whether the Company wished to purchase the and as to what the appropriate price for the lands would be. He stated that it was his wish that a fair price for both sides would be reached, particularly in circumstances where new partners had been brought into the Group by way of the Group restructuring project which had completed in October / November 2006. He stated that he had entered into negotiations with the Director who had been appointed to act on behalf of the Company during the negotiations and they had agreed that the contracts would be reassigned to the Company which would then complete the contracts for the purchase of the from the landowners. In addition, he stated that, following negotiations it was agreed that he and would receive an uplift of €7,500,000 in the form of credits to their Company director's loan accounts of €3,750,000 each.

161. The Director gave evidence to the Commissioner to the effect that from the Company point of view, it would not have been desirable for the to have been sold to a third party in circumstances where the Company was already developing adjacent lands. As a result, he stated, the Company came to a decision that, following the rezoning of the lands to residential in 2007, the Company should seek to purchase the and therefore seek the reassignment of the contracts from the Appellant and .

162. He stated that he had been appointed by the Company to negotiate the reassignment and the price with the Appellant. He stated that, in order to assist with this, he had engaged to seek his opinion on the value of the and that the letter of 30 July 2007 had produced a valuation of €40,000,000. He stated that he did not agree with the basis of the valuation in the letter in circumstances where the valuation

was based on, what he considered was, an incorrect assumption that it would be possible to build 10 units per acre on the land. He stated that this was not in keeping with the zoning conditions in the ██████ Local Area Plan and, as a result, he did not accept the valuation which had been received. He stated that he considered that, given the conditions set out in the ██████ Local Area Plan, a more correct valuation was €30,000,000 and eventually a price of €23,100,000 being the original contracts price plus an uplift of €7,500,000 to be paid to the Appellant and ████████ was agreed, resulting in a total price of €30,400,000. The Director stated that he was aware at the time that the payment of €7,500,000 would be in the form of a credit to the Company director's loan accounts.

163. The Commissioner notes that the Company financial statement for 2007 reflects the crediting of the director's loan accounts and also contained a note which states: "*During the year the company paid €7.5 to* ████████████████████ *to purchase a land option that was subsequently exercised by the* company".

164. The Commissioner also received evidence from the Appellant, which was not contested under cross examination, that in 2007 he received a salary from the Company of €██████. He also stated, and it was not contested by the Respondent, that in 2007 ██ ██████ had received a salary from the Company of €██████.

165. In addition, the Appellant gave direct evidence to the Commissioner that the credits of €3,750,000 to the Company director's loan account for him and ████████ related to the reassignment of the █████████ contracts to the Company and not to anything else. This was not contested by the Respondent and no questions in relation to the salaries received or the credits to the director's loan accounts were put to the Appellant under cross examination.

166. Having considered all of the evidence, both oral and documentary, the Commissioner accepts that the credits of €3,750,000 applied to the Company director's loan accounts in the names of the Appellant and ████████ in 2007 related to the reassignment of the contracts for the purchase of the ██████████ by the Appellant and ████████ to the Company.

167. Therefore, **the Commissioner finds as a material fact that the crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the ██████████ by the Appellant and █████████ to the Company**.

Commissioner's findings of material fact:

168. For the avoidance of doubt, the Commissioner makes the following findings of material fact in this appeal:

168.1. The Appellant is a Director of the Group and of the Company.

168.2. The [redacted] is a Director of the Group and of the Company.

168.3. The Appellant and [redacted] also have a Partnership which owns a number of properties which generate significant rental income. No formal partnership agreement has been entered into between the Appellant and [redacted].

168.4. In January and March 2006, the Company entered into two conditional contracts for the purchase of [redacted] lands which were at that time zoned as agricultural lands at [redacted] totalling €23,100,000 as follows:

168.4.1. On 31 January 2006 the Company entered into a conditional contract to purchase certain lands totalling [redacted] acres at [redacted] from X for an agreed purchase price of €16,000,000. The contract was conditional upon at least [redacted] acres of those lands being zoned for residential development under the [redacted] Local Area Plan by the Local Authority. If the lands were not zoned for residential purposes then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. As part of that contract a non-refundable deposit of €100,000 was paid by the Company to X.

168.4.2. On 16 March 2006 the Company entered into a contract to purchase certain adjoining lands totalling [redacted] acres at [redacted] from Y for an agreed purchase price of €7,100,000. The contract was conditional upon at least [redacted] acres of those lands being zoned for residential/commercial purposes by the Local Authority. If the lands were not zoned for residential / commercial purposes by 31 December 2007 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. As part of that contract a non-refundable deposit of €100,000 was paid by the Company.

168.5. In 2005 and 2006 the Company entered into [redacted] option agreement and contracts in relation to lands at [redacted]. Deposits totalling €102,911.10

were payable plus annual payments totalling €92,088.90 due on 1 March 2006, that is to say a total of €195,000 as follows:

168.5.1. On 29 November 2005 an Option Agreement between the Company and ████ in respect of ████ acres at €82,080 per acre conditional on the zoning of the lands for the development of ████ ████. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the option would be deemed to be at an end. Interim payments were payable in the form of €30,696.30 on signature of the agreement and €61,392.60 annually on 1 March each year beginning on 1 March 2006.

168.5.2. On 5 December 2005 an option agreement between the Company and ████ in respect of ████ acres at €82,080 per acre conditional on the zoning of the lands for the development of ████. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the option would be deemed to be at an end. Interim payments were payable in the form of €14,303.70 on signature of the agreement and €28,607.40 annually on 1 March each year beginning on 1 March 2006.

168.5.3. On 14 July 2006 a conditional contract between the Company and ████ in respect of ████ ████ acres) at €92,000 per acre conditional on the zoning of the lands for the development of ████. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. A non-refundable option fee of €60,000 was payable.

168.5.4. On 11 August 2006 a conditional contract between the Company and ████ in respect of ████ acres at €114,000 per acre conditional on the zoning of the lands for the development of ████. If the lands were not zoned for residential / commercial purposes by 28 February 2009 or such further date as be agreed between the parties then, subject to the option by the Company to waive the condition, the contract would be deemed to be at an end. No deposit was payable.

168.5.5. On 11 August 2006 a conditional contract between the Company and ██████████ for the purchase of three lots of land totalling ███ acres at €114,000 per acre conditional on the zoning of the lands for the development of ███ ███. No deposit was payable.

168.6. In or around October / November 2006 a corporate restructuring of the Group took place which involved the shareholding of the Appellant and ███ in the Group being reduced from 100% to 92% (split 51% to the Appellant and 41% to ███ ███) by the introduction of new shareholders.

168.7. On 31 October 2006 €460,000 was transferred from a joint bank account held by the Appellant and ███ as part of their Partnership.

168.8. On 31 October 2006 €460,000 was lodged in to a bank account held by the Company.

168.9. On ███ 2007 a ███ Local Area Plan was passed by ███ ███ in which the ███ the subject matter of this appeal were, as part of a larger tract of ███ hectares of land, zoned as residential lands subject to a Master Plan. The document published by ███ outlined the following in relation to the ███ hectare tract of land:

> "*It is the Planning Authorities [sic] objective to secure the development of in the region of ███ new dwellings on this site through a phased programme of development that will secure the timely provision of the necessary physical, social and economic infrastructure. So that the development of this land can be properly co-ordinated, it will only be in accordance with a master plan for the entire area to which this objective relates that has been approved by the Planning Authority. A comprehensive master plan may be prepared by a single developer or a landowner or by a group of developers or landowners acting jointly. The proposed master plan format should be prepared in co-ordination with the local authority, the public and relevant stakeholders.*
>
> *The master plan will include and pay particular attention to:*
>
> - ███

168.10.On 2007, the contracts for the became unconditional on foot of the re-zoning of the lands by the Local Authority pursuant to the Local Area Plan.

168.11. The Company completed the purchase of the Y lands on 20 August 2007 and the X lands on 12 September 2007.

168.12. In the Company accounts for the year ending 31 December 2007, a credit of €3,750,000 each was reflected in the director's loan accounts for the Appellant and for [redacted] representing a total of €7,500,000.

168.13. The re-zoning of the lands at [redacted] did not occur and the conditional contracts and options for the lands at [redacted] came to an end. The deposits and the annual amounts paid on those lands were forfeited.

168.14. The Appellant filed his 2007 tax return with the Respondent and paid the requisite CGT on a gain of €3,650,000, being the €3,750,000 received from the Company minus the €100,000 deposit paid.

168.15. The [redacted] also filed his tax return with the Respondent and paid the requisite CGT on a gain of €3,650,000, being the €3,750,000 received from the Company minus the €100,000 deposit paid.

168.16. The Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in 2006.

168.17. The market value of the [redacted] in July / August 2007 was €30,000,000.

168.18. The 2007 crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the [redacted] by the Appellant and [redacted] to the Company.

Analysis

169. The Commissioner must now consider the contested Notices of Amended Assessment to income tax and the contested Notices of Amended Assessment to CGT. As previously set out in this determination, the Respondent has indicated in correspondence with the Appellant and orally to the Commissioner during the course of the oral hearing, that the Notices of Amended Assessment to income tax are in the alternative to the Notices of Amended Assessment to CGT and that it seeks to recover under one tax head only.

Alternative assessments

170. The Appellant has questioned the validity of alternative assessments raised by the Respondent. The Commissioner has considered the submissions in relation to this matter

and notes that the issue of the ability of the Respondent to raise alternative assessments has not been the subject of a decision by the Irish Courts.

171. The decision of the Court of Appeal in *Bye (Inspector of Taxes) v Coren* [1986] STC 393 (hereinafter "*Coren*") wherein 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.*"[2]

172. 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 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 would attract capital gains tax. When the assessments came in they could have appealed against both.*"[3]

173. 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 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*

[2] At 394 to 395
[3] At 395

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."[4]

174. 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 2021* [IECA] 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.

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

"*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.*"[5]

176. Therefore, the role of the Commissioner is to focus on the assessment and the charge to tax. The question of the validity of assessments made by the Respondent, whether in the alternative or not, is therefore not a question which can properly be adjudicated upon by an Appeal Commissioner. As a result, the Commissioner can and must focus on what

[4] At 504 to 505.
[5] At paragraph 64

the correct charge to tax in this appeal is. The Commissioner has considered the contested Notices of Amended Assessment in date order.

Notices of Amended Assessment to CGT:

177. The Appellant and [redacted] both made Form 11 returns for 2007 each of which included capital gains of €3,7500,000 in relation to the disposal / assignment of the [redacted].

178. The Respondent raised the contested Notices of Amended Assessment to CGT on 25 April in relation to the year 2007 on 25 April 2012. These Notices of Amended Assessment to CGT were raised on the basis that the Respondent considered that the market value of the [redacted] as at July / August 2007 was €40,000,000 and that the correct capital gains were €8,450,000 each or €16,900,000 in total.

179. The Commissioner has already found as material facts that:

    179.1. The Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in 2006.

    179.2. The market value of the [redacted] in July / August 2007 was €30,000,000.

    179.3. The Company completed the purchase of the [redacted] in August and September 2007.

    179.4. The 2007 crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the [redacted] by the Appellant and [redacted] to the Company.

180. The Company assigned the contracts for the purchase of the [redacted] to the Appellant and [redacted] in 2006.

181. In addition, the Company completed the purchase of the [redacted] in August and September 2007.

182. During the course of 2007 the Company credited the director's loan accounts of the Appellant and [redacted] in the amounts of €3,750,000 each or €7,500,000 in total and the Commissioner has already found as a material fact that the 2007 crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the [redacted] by the Appellant and [redacted] to the Company.

183. The Commissioner has also found as a material fact that the market value of the [redacted] as at July / August 2007 was €30,000,000.

184. As a result of the material facts found, it follows that the Appellant and [redacted] each received a payment of €3,750,000 from the Company as a result of the disposal of the contracts for the [redacted] and that these payments were reflective of the market value of the [redacted] as at July / August 2007.

185. Section 28 of the TCA 1997 as in force from 3 December 1997 until 14 October 2008 provided that:

> "*(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 20 per cent, and any reference in those Acts to the rate specified in this section shall be construed accordingly.*"

186. There is no dispute between the parties that the Appellant filed a Form 11 tax return for 2007 with the Respondent and in the CGT section of that return included a capital gain of €3,750,000 in respect of the [redacted] contracts and that the requisite CGT was paid on that gain.

187. There is no dispute between the parties that [redacted] also filed a Form 11 tax return for 2007 with the Respondent and in the CGT section of that return included a capital gain of €3,750,000 in respect of the [redacted] contracts and that the requisite CGT was paid on that gain.

188. As a result of the above, the Commissioner finds that the CGT returned by the Appellant and [redacted] in 2007 in relation to disposal / reassignment of the [redacted] contracts by them to the Company was correct.

189. It therefore follows that the Notices of Amended Assessment to CGT in relation to the year 2007 which were raised by the Respondent on 25 April 2007 were not correct.

Notice of Amended Assessment to Income Tax:

190. The Respondent raised the contested Notices of Amended Assessment to income tax in relation to the year 2007 on 27 April 2012. These Notices of Amended Assessment to income tax were raised on the basis that the Respondent considered that the credits of

€3,750,000 each applied to the Company director's loan accounts held by the Appellant and ████ related to their having or exercising an office or employment of profit with the Company. As a result, the Respondent considered that the credits were subject to income tax under Schedule E of the TCA 1997 pursuant to the provisions of section 112 of the TCA 1997 which states:

> *"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."*

191. The Commissioner has already found that the crediting of the director's loan accounts by the Company related to the reassignment of the contracts for the purchase of the ████ ████ by the Appellant and ████ to the Company.

192. It therefore follows that the credits of €3,750,000 applied to the Company director's loan accounts held by the Appellant and ████ did not relate to their having or exercising an office or employment of profit with the Company.

193. It also follows that the credits were not subject to income tax under Schedule E of the TCA 1997 pursuant to the provisions of section 112 of the TCA 1997.

Determination

194. For the reasons set out above, the Commissioner determines that the Appellant and ████ ████ have succeeded in showing that the Respondent was incorrect to issue the Notices of Amended Assessment to Capital Gains Tax in respect of the year 2007.

195. The Commissioner further determines that the Appellant and ████ have succeeded in showing that the Respondent was incorrect to issue the Notices of Amended Assessment to income tax in respect of the year 2007.

196. The Commissioner determines that the Notice of Amended Assessment to Capital Gains Tax for the year 2007 raised on 25 April 2012 in relation to ████ shall be reduced to nil.

197. The Commissioner determines that the Notice of Amended Assessment to Capital Gains Tax for the year 2007 raised on 25 April 2012 in relation to ████ shall be reduced to nil.

198. The Commissioner determines that the Notice of Amended Assessment to income tax for the year 2007 raised on 27 April 2012 in relation to [redacted] shall be reduced to nil.

199. The Commissioner determines that the Notice of Amended Assessment to income tax for the year 2007 raised on 27 April 2012 in relation to [redacted] shall be reduced to nil.

200. This appeal is determined in accordance with Part 40A of the TCA 1997 and in particular, sections 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

201. 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

202. 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
21 May 2024