AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH

TAX APPEALS COMMISSION

95TACD2024

Between

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") in relation to a Notice of Amended Assessment to Income Tax raised by the Revenue Commissioners ("the Respondent"), in respect of the year of assessment 2017, in the sum of €299,587.00.

2. The liabilities arose in circumstances where the Respondent contended that consideration in excess of market value of the property at issue, was received by the Appellant. In accordance with the provisions of section 130(3) TCA 1997, the Respondent treated the excess value as a distribution by the company to the Appellant.

3. A hearing of the appeal took place over three days commencing on 9 April 2024. The Appellant and Respondent were represented by Junior Counsel. In addition to legal submissions, the Commissioner heard evidence, including expert evidence, from the following witnesses:

   3.1. [redacted] – the Appellant;

   3.2. [redacted] –for the Appellant;

   3.3. [redacted] – for the Appellant;

   3.4. [redacted] – for the Appellant;

   3.5. [redacted] – for the Appellant;

   3.6. [redacted] – for the Appellant;

   3.7. [redacted] – for the Appellant;

   3.8. [redacted] – for the Appellant;

   3.9. [redacted] – for the Respondent;

   3.10. [redacted] – for the Respondent.

Background

4. The Appellant is the 100% shareholder of a connected company, [redacted] ("the company") and is a Director thereof together with his spouse.

5. On 29 September 2005, the Appellant and his now spouse, purchased at auction, [redacted] land at [redacted] ("the land at issue") for the sum of €750,000.

6. In 2017, following receipt of financial advice, the Appellant took early retirement and established the company. In October 2017, the Appellant and his spouse sold the land at issue to the company, for the sum of €750,000. This disposal was included in the Appellant's Form 11 for the year 2017, as a Capital Gains Tax ("CGT") disposal.

7. In September 2017, prior to the said sale of the land at issue to the company, the Appellant obtained a valuation of the land at issue from [redacted] [redacted]. [redacted] valued the land at issue in the region of between €650,000 and €910,000.

8. The Contract for Sale between the Appellant and the company sets out that the consideration payable for the land at issue, will be discharged by a schedule of payments over a number of years and that the schedule of payments can be increased, decreased or suspended by agreement.

9. In 2020, the payments from the company to the Appellant were suspended in accordance with Special Condition 7 of the Contract for Sale. To date, the sum of €500,000 of the €750,000 purchase price has been paid by the company to the Appellant. The schedule of the payments from the company bank account records are listed below, as set out the Appellant's submissions entitled Outline of Arguments[1]:

Date	Amount	Date	Amount	Date	Amount
31 Oct 2017	€10,000	26 Feb 2019	€20,000	03 Oct 2019	€20,000
01 Nov 2017	€10,000	27 Feb 2019	€20,000	04 Oct 2019	€20,000
17 Dec 2017	€15,000	28 Feb 2019	€20,000	07 Oct 2019	€20,000
19 Dec 2017	€15,000	01 Mar 2019	€20,000	08 Oct 2019	€20,000
28 Aug 2018	€20,000	04 Mar 2019	€20,000	18 Aug 2020	€20,000
29 Aug 2018	€20,000	05 Mar 2019	€20,000	19 Aug 2020	€20,000
30 Aug 2018	€20,000	30 Sep 2019	€20,000	20 Aug 2020	€20,000

[1] Joint Book of Documents, page 129

31 Aug 2018	€10,000	01 Oct 2019	€20,000	21 Aug 2020	€20,000
25 Feb 2019	€20,000	02 Oct 2019	€20,000	24 Aug 2020	€20,000
				Total	**€500,000**

10. In 2021, the Appellant's spouse transferred approximately █ acre of adjoining land to the company for the sum of €5,000.

11. In 2022, the Respondent opened an intervention on both the Appellant and the company. The Respondent submitted that one of the primary issues was whether the land at issue was disposed of at market value, in circumstances where the transaction involved connected parties.

12. The Respondent submitted that it carried out its own research to verify the valuation of the land at issue and it was of the opinion that €200,000 was an appropriate valuation. Consequently, on 15 December 2022, the Respondent raised a Notice of Amended Assessment to Income Tax, with the excess consideration in the sum of €550,000, subject to Income Tax in accordance with section 130(3)(a) TCA 1997.

13. The Respondent informed the Appellant that the valuation it placed on the land at issue in the sum of €200,000, would be subject to an adjustment upon receipt of an independent valuation, which the Respondent would duly arrange for. The Respondent subsequently received an independent valuation dated 25 April 2023, from █████████, which valued the land at issue in the sum of €270,000.

14. On 10 January 2023, the Appellant duly appealed to the Commission.

Legislation and Guidelines

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

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

> *(a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the*

member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount").

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

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

    Schedule F

    1. In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 and sections 436, 436A, 437, 816(2)(b) and 817.

    2. Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.

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

    (1) Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market *value of the asset where—*

    (a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift),

    (b) the person acquires the asset by means of a distribution from a company in respect of shares in the company, or

    (c) the person acquires the asset wholly or partly—

    (i) for a consideration that cannot be valued

    (ii) in connection with the person's own or another person's loss of office or employment or diminution of emoluments, or

    (iii) otherwise in consideration for or in recognition of the person's or another person's services or past services in

any office or employment or of any other service rendered or to be rendered by the person or another person.

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

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

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

    (1) This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.

    (2) Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.

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

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

Evidence and Submissions

Appellant's evidence

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

    22.1. The witness testified that he has worked as a [redacted] in [redacted] [redacted], for over 30 years. The witness said that in 2017, he retired from his employment with his employer, in favour of [redacted] [redacted]

    22.2. The witness testified that [redacted] ("the village") [redacted] [redacted] [redacted]. The witness testified that the land at issue is a few minutes' walk from the village and has direct access onto the [redacted]. The

witness said that the land at issue is currently zoned for residential development and has all the services required at the front of the land at issue. The witness stated that in 2018, [redacted] County Council ("the county council") commenced a residential project across the road from the land at issue and engaged those services that are available.

22.3. The witness testified that the land at issue was purchased at auction in [redacted] from [redacted] for the sum of €750,000. The witness said that the purchase was financed through a mortgage loan. The witness testified that at that time it was his intention to move quickly to develop the land at issue. However, any plans were delayed for over two years due to the county council not producing a Local Authority Plan ("the 2007 LAP"). He said that in or around 2008, he was offered the sum of €850,000 from a developer for the purchase of the land at issue, but he refused the offer. The witness stated that in 2013, they engaged in fixing boundary issues with the folios in relation to the land at issue. The witness testified that moving the project to planning at that stage would have cost in excess of the sum of €100,000, but that he was considering a number of options in terms of development of the land at issue.

22.4. The witness testified that in or around 2017, he took financial advice. The witness said that he was advised that one of the options available to him was to cease employment and to establish an independent company which could start generating income. The witness stated that this involved the company purchasing the land at issue and any income being used to fund the development or pay down the debt. He said that this was presented as fairly low risk at the time, with respect to his employment opportunities and the risk of the land at issue passing to the company. The witness stated that what was central to this was the schedule of payments included in the Contract for Sale. The witness testified that he understood that this was a contractual arrangement to pay the consideration at a certain date. The witness said that in addition, the Special Conditions had a payment suspension clause, so that if the company wanted to retain money for development of the land at issue, the payment suspension clause could be activated and the debt paid at a later date. The witness said that "he followed the advice to a tee".

22.5. The witness testified that the company was incorporated in 2017 and that he is shareholder and Director of the company. The witness said that at the time of the sale of the land at issue to the company, he sought a valuation of the lands at

issue from [redacted]. He stated that the [redacted] valuation was within a range between €650,000 and €910,000 and that he chose the amount of €750,000 as this was the amount that he had paid for the land in 2007 and he thought that to be appropriate within the range. The witness said that the market was good in 2016 and had begun to recover after 2008.

22.6. The witness gave an overview of his dealings with the county council in relation to the LAP and how that plan had lapsed. The witness testified that in 2018, the county council was intending to build a number of houses and he wanted to see how planning permission went for that particular development which might inform his decisions. The witness stated that there was one other site in the village that had since 2010, planning permission for 12 houses, which was extended in 2015, and which he described as the [redacted] on the other side of the village. The witness testified that [redacted] and he understood from them that they had no intention of developing the 12 houses on their site, despite planning permission being granted on the site.

22.7. The witness stated that there has never been any flooding on the land at issue, so he would be very confident there would not be an issue with flooding. In relation to the issue of waste water treatment, the witness testified that it was previously an issue, but since in or around 2018 it has been resolved.

22.8. The witness testified that the sum of €500,000 has been received by him from the company. The witness stated that the reason the suspension notice was triggered was that during the COVID-19 pandemic, no income was generated in the company. The witness said that the financial accounts of the company have been submitted and show that the credit to the Director's loan account in his name was reducing up to that point when the payment suspension clause was triggered.

22.9. The witness testified that it was always his intention to develop the land at issue and he has continuously engaged with local Counsellors in relation to the land at issue. In addition, all options were considered in terms of development, be it phased development, service sites or complete development of the land at issue.

22.10. The witness testified in relation to his experience in terms of the assessment being raised on 15 December 2022, just before the Christmas period. [redacted] [redacted]. The witness stated that he received the initial correspondence from the Respondent on 9 August 2022 and that he was engaging with the Respondent. The witness said then on 15 December 2022, the Respondent issued a significant assessment

stating that there was 30 days to appeal, inclusive of the Christmas period. The witness gave evidence that he immediately engaged with a local Auctioneer to retain a valuation of the land at issue. The witness testified that he then engaged a planning expert as the Respondent based the assessment on agricultural land, when it is clearly development land. The witness stated that he only realised that the Respondent issued the assessment without an independent valuation being undertaken, after it furnished its submissions in the form of the Statement of Case in this appeal.

22.11. The witness testified that in addition to raising a significant assessment, the Respondent withdrew his Tax Clearance Certificate on 22 December 2022, which meant that he had no ability to earn an income. The witness stated that his valuation reports and his planner's report were submitted to the Respondent before it had obtained either its valuation report in April 2024 or its planning report. The witness stated that there was an audit of both himself and the company and no issues arose in relation to the company.

22.12. The witness was cross examined by counsel for the Respondent. It was put to the witness that there is a body of water on the east side of the land and the witness stated that there is a drainage ditch, but no body of water, or river or stream or anything of the like. The witness accepted that in 2005, when the land at issue was purchased, there was no zoning and then the 2007 LAP zoned the land at issue low density residential. It was put to the witness that the payments out of the company to the witness were used to pay down the witness’s debt namely, the loan. The witness stated that the reason for that was logical, as at that time in 2017/2018, he had intended to move with developing the land. However in 2018, the county council began developing the land across the road and he wanted to watch that development.

22.13. The Appellant agreed that there was a lot of waiting from the initial wait for the 2007 LAP, the market collapsing and then recovering in or about 2016/2017, the 2018 development, the COVID-19 pandemic, his personal circumstances in 2022 and then the assessment raised. It was put to the witness that at no time did he apply for planning permission in respect of the land at issue and the witness stated that he had many considerations around the future development of the land at issue, and that the lack of an application for planning permission was not indicative of having no intention to proceed with development of the land at issue.

The witness stated that the assessment and appeal have both also caused considerable delay.

22.14. It was put to the witness that there was very little requirement for development in the village. The witness stated that part of the reason that there has been very little development is that the county council held up the 2007 LAP, then the market crash happened in 2008. The witness confirmed that waste water treatment was not an issue that was brought to his attention and it was resolved in or around 2018. The witness was cross examined in relation to the financial statements of the company. The witness confirmed that the company owes him €250,000. It was put to the witness that the payments came to him tax free and the witness stated that he sold the land at issue to a company, such that the money coming back in was to pay back the loan. The witness confirmed he never took a salary from the company. The witness confirmed that corporation tax was paid on any profits of the company.

23. [redacted] ("the Appellant's planning witness"), for the Appellant, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

23.1. The witness confirmed that she holds a Bachelor of Surveying from Trinity College Dublin, a Masters of Regional and Urban Planning from University College Dublin and has twenty years post qualification experience. [redacted] The witness stated that her clients include companies such as [redacted] The witness said that in summary, it is generally dealing with large development and institutional clients. The witness adopted her report dated 18 January 2023.

23.2. The witness confirmed that the instruction from the Appellant was a very simple instruction, namely to determine whether the site had potential for development in principle. The witness said that it arose out of a query that the land at issue was designated as agricultural land and thus, had no residential development potential. The witness stated that her role was to determine whether the land at

issue was zoned or if there were policies in relevant plans that would allow the land at issue to be developed.

23.3. The witness testified that at the time of purchase it was the case that the land at issue was unzoned, but under the 2007 LAP the land at issue was zoned low density residential. The witness said that the 2007 LAP lapsed in 2013 and the next relevant document was the 2015 county development plan. The witness confirmed that this is the relevant document for the period 2017. The witness gave evidence that when the 2015 county development plan was adopted, the lands at issue were not zoned, but there was very specific policy in the 2015 county development plan about the expired 2007 LAP. The witness said that the 2015 county development plan stated that "*The expired plans will be used as a supplementary guidance document for planning purposes*." and the key line is: "*Housing development within the settlement boundary of these settlements will not be subject to the rural housing policy as outlined in section*."

23.4. The witness testified that in her opinion the effect of that is essentially as good as a residential zoning, as it states that development can take place on the land at issue, subject to all the normal criteria applicable to a planning application. The witness stated that she is in agreement with the Respondent’s planning expert, that the 2015 county development plan is the key document. The witness stated that in terms of the question that she was asked and the principle of whether development could proceed on the land at issue, the witness stated that it could, having regard to the 2015 county development plan. The witness said that the 2015 county development plan is clear that the principal guidance in the 2007 LAP was to be adhered to and this particular policy allowed residential development on the land at issue in 2017.

23.5. The witness stated that in addition, there was a specific number of units allocated for the village in the 2015 county development plan, reinforcing the point that the land at issue was intended and was planned to provide for residential development.

23.6. The witness made reference to the planning permission granted for 12 units in 2010, which was extended in 2015 to 2021. The witness stated that the permission was due to expire in 2021 and that if two years prior to that date no development had commenced, then the allocation would have been added back into the total units allocated for the village, being 17 under the 2015 county development plan.

23.7. The witness testified that in 2017, her advice would have been that there were 5 units left at that time, that there would be a waiting period to see what happened with the 12 units and that, if the Appellant knew that the 12 units were not proceeding to development, then a planning application could be ready to go in January 2019 for planning permission for up to 17 units, being the 5 plus the 12 that have not been developed.

23.8. In relation to flood risk, the witness said that a site specific flood risk assessment would determine if there was any portion of the land at issue that was susceptible to flood risk. The witness testified that in her experience, especially if the flood risk report in 2015 did not show anything on the site, it would have been very unusual for a developer, beyond seeking verification from an engineer, to do an actual in-depth study on it.

23.9. The witness testified that the effect of the 2022 county development plan is that the land at issue is the only land in the village now zoned residential.

23.10. The witness was cross examined on her evidence by counsel for the Respondent. The witness agreed that the allocation under the 2015 county development plan was 17 units, with 26 units being allocated under the 2007 LAP, but that the 2015 county development plan refined that. The witness said that she agreed that up to January 2019, when the allocation would have been freed up, no one scheme could have been larger than 4 -12 units in any event, but that a further application could have been made if more units became available in 2019 and the Appellant had that local knowledge.

24. [redacted] ("the Appellant's valuation witness 1"), for the Appellant, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

24.1. The witness gave evidence that he currently holds an Auctioneer's licence for sales and letting. He stated that he qualified in 2008 and holds a certificate from Tallaght Institute. The witness said that [redacted] provides services in relation to the letting and sales of residential and commercial properties and that occasionally he would also undertake property valuations.

24.2. The witness testified that the Appellant approached him and asked him to undertake what he considered a simple valuation. The witness stated that the Appellant furnished documentation to him in relation to the land at issue, including information in relation to the size of the land at issue, the zoning and that the land

at issue did not have planning permission at the time. The witness said that as this matter is going back seven years or so, he does not have his notes in relation to the services provided.

24.3. The witness stated that he valued the land at issue between €650,000 and €910,000. The witness said that he based the valuation range on comparables and his own knowledge of the market at that time. The witness was asked why he identified in his report that each individual site would be valued between €25,000 and €35,000. The witness said that a range is appropriate for valuations and that he used individual ranges, as it depended what the Appellant would do with the land at issue in terms of planning.

24.4. The witness was cross examined on his evidence by counsel for the Respondent. The witness confirmed that he visited the land at issue, but that he did not do a planning search as part of his valuation process. The witness said that the report is based on zoning and on the assumption that 26 houses can be built, which is in accordance with the 2007 LAP. It was put to the witness that there was no possibility of a development of 26 houses, having regard to the 2015 county development plan. The witness confirmed that he was standing over his valuation on the basis that planning is never clear cut.

25. [redacted] ("the Appellant's Solicitor"), for the Appellant, gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

25.1. The witness confirmed he is a qualified Solicitor and has been practising, since [redacted] The witness testified that he has known the Appellant for over 30 years.

25.2. The witness testified that the transfer involved in simple terms, selling the land at issue to the company and in return, the company agreeing to pay the sum of €750,000 to the Appellant. The witness agreed that the Special Conditions in the Contract for Sale set out that the payment of €750,000 was to occur by way of instalments, in accordance with a schedule of payments, commencing in October 2017 and concluding in October 2022. The witness agreed that the payments did not become due and owing, until such time as the company was contractually obliged to make payment and until then the payments were not legally enforceable.

25.3. The witness gave evidence that Special Condition 7 in the Contract for Sale was included on instruction, so that the parties could vary the payment schedule.

25.4. The witness testified that the charge was the land at issue itself that the company was taking possession of and the charge was deemed necessary to secure for the vendor, some security that the instalments would be discharged by the company. The witness stated that it was his understanding that, like any charge, it would become effective on default of payment by way of instalment, then it would be a matter for the owners of the charge to enforce it.

25.5. The witness testified that his notes reflect that he spoke with the Appellant in December 2020 and that he discussed suspending the agreement, due to the COVID-19 pandemic. The witness stated that the Appellant felt it necessary to have a document drawn up to give effect to the suspension and he prepared the document which was sent to the Appellant for signature. The witness gave evidence that the payments were suspended with effect from 1 February 2021.

25.6. The witness was cross examined on his evidence by counsel for the Respondent in relation to the charges and the clause entitled "Company Representations and Warranties". The witness said that the clause 1(ii) is a rogue clause and should not have been included.

26. [redacted] for the Appellant, gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

26.1. The witness testified that he was born in the village [redacted] and t[redacted] [redacted] The witness said that his businesses in the village are numerous namely, farming, publican and running a sand and gravel business.

26.2. The witness made reference to the planning permission granted on his site and the extension to same in 2015. The witness stated that he never had any intention of developing his site, but that his architect advised him to hold onto the planning on the site. The witness testified that he has three children and he thought that perhaps his children might have an interest in it, but that is not the case now.

26.3. The witness was cross examined on his evidence by counsel for the Respondent, with nothing material arising.

27. [redacted] ("the Appellant's valuation witness 2"), for the Appellant, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

27.1. The witness confirmed that he has been involved in auctioneering for the last 30 years. [redacted] . The witness gave evidence that as the industry was legislated for, he completed certain auctioneering qualifications and that he is now a member of the Institute of Professional Auctioneers and Valuers ("IPAV"). The witness confirmed that he deals with agricultural, residential and commercial land.

27.2. The witness testified that the Appellant approached him in December 2022 and asked him to complete a valuation of the land at issue. The witness stated that the Appellant most likely contacted him because of his local knowledge. The witness stated that he produced a valuation report for the Appellant.

27.3. The witness testified that in terms of the valuation process, he received the folio numbers and he walked the site. The witness gave evidence that it was public knowledge that there was no intention to develop the site that had planning permission for 12 units. The witness confirmed that it was a historical valuation with 2017 in mind and that he contacted other auctioneers and valuers about sales around that time. The witness said that in terms of comparators, he used a site in [redacted] and a site in [redacted]

27.4. The witness stated that it was his opinion that a developer would build on a phased basis on the land at issue, as that was how every developer in the country was operating at the time, as it was difficult to obtain planning permission for hundreds of houses at any one time. The witness stated that it was the density of the houses and the saleability of them that he was basing his valuation on.

27.5. The witness testified that he based his valuation on the land at issue being developed on a phased basis and that that there was going to be planning available for 17 units. The witness stated that he knew that there was planning permission for 12 units in existence, leaving a balance of 5, but that he also knew that there was no intention to use that planning permission, so he factored all of this into his valuation. The witness stated that he has considered the Respondent's valuation and rationale, but that it would not change his mind in terms of his valuation of the land at issue. The witness testified that it was his opinion, that once the first phase is built well and the next phase is up and running, it would sell automatically.

27.6. The witness was cross examined on his evidence by counsel for the Respondent. The witness agreed when it was put to him that the 2007 LAP allows 12 units per hectare in principle, but then the statutory document, the 2015 county

development plan, has individual requirements for various villages and 17 units was the maximum allocation for the period of 2015-2021. The witness said that he automatically assumed that the 17 units would have been available, as he knew that the 12 units were not going to be developed.

27.7. The witness confirmed that his valuation was based on 17 units. It was put to him that his valuation report states a valuation of €625,000 based on 26 units. In relation to a phased development, it was put to the witness that once the allocation of 17 units is taken, it is not possible to apply for another phased portion of development unless the planning lapses such that there is never going to be more than 17 units in the life of the development plan. The witness did not agree and stated that his vision for that site was that there would be more houses developed. It was put to the witness that this was not possible having regard to the 2015 county development plan.

27.8. The witness confirmed that the basis of his valuation, leaving aside the planning permission for 12 units, was that the permitted density is 26 units, so the 17 units could be sought under the 2015 county development plan, then there may be further development potential under any new county development plan, if a further application was made. Hence, the phased basis of development.

28. [redacted] ("the Appellant's valuation witness 3"), for the Appellant, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

28.1. The witness confirmed that she is a member of the Society of Chartered Surveyors Ireland and became a registered valuer in 2018, working with [redacted] for ten years. The witness said that since 2020, she has carried out valuations for a mix of lenders, [redacted] approved housing bodies, Home Building Finance Ireland and developers. Prior to that, the witness said that she worked in the investment department and the retail department of her current employer. The witness said that prior to joining her current employer, she worked for a property developer for eight years.

28.2. The witness testified that in February 2022, the Appellant contacted her requesting a valuation of the land at issue. The witness made reference to her valuation report. The witness gave evidence that the valuation was undertaken in accordance with the Royal Institution of Chartered Surveyors (RICS) Valuation – Global Standards ("a Red Book valuation"). The witness testified that a Red Book

valuation is the professional standard that a registered valuer must adhere to and it sets out how valuers should value property.

28.3. The witness stated that as this was a valuation looking back to 2017, the starting point was to go back and familiarise herself with that time, such as reviewing the development land reports that had been carried out and consulting with the research team who provided commentary on the economic situation and the statistics for investment sales and land development sales at that time. The witness testified that she familiarised herself with what was happening at that time in the property market and then began to look at the comparable evidence. The witness stated that no two sites are identical, such that when a valuer is considering comparable evidence, the valuer is looking for similar locations, similar site size, similar zoning and similar densities, but that the comparable evidence is never going to exactly match the site to be valued.

28.4. In terms of this valuation, the witness stated that the Appellant supplied her with the Land Registry map, the boundary map, the zoning map and the planning report. The witness testified that she then inspected the site and met with the Appellant at the site to discuss the 2007 LAP, the 2015 county development plan and the current 2022 county development plan. The witness said that the land at issue has very good access to the ███ and she observed the small stream.

28.5. The witness testified that every site will have issues, with no site being the perfect site. The witness stated that matters such as flooding, zoning, planning, road frontage, access services, village waste water, archaeology, the earth's makeup and contamination issues are considered. The witness said that she would have assumed any development would have been done on a phased basis.

28.6. The witness stated that when she valued the land at issue, it was on the basis of having no planning permission. The witness testified that in 2017, development was commencing again outside of Dublin and that whilst there was a restriction on the availability of finance, alternative providers were entering the market and a lot of smaller builders that would consider the land at issue, would have been cash purchasers at that time.

28.7. The witness stated that comparables for the land at issue would have been a small village with no planning, with density being the possibility of 26 houses, a relatively flat site and connections available. The witness testified and made reference to her report which deals with 11 comparators in total, ranging from 2014 to 2019, with a price per acre of between €80,000 and €520,000 per acre

and a price per site of €16,000 to €70,000 per acre. The witness stated that her report sets out that in her opinion three sites are the most appropriate comparators namely, [redacted].

28.8. The witness was asked about the valuation in relation to the [redacted] site in the [redacted] report. The witness testified that it is a suitable comparable as it is in a very similar small village. However, the difference with the [redacted] site is that only 0.4 acres is zoned suitable for development. Therefore, most of that site is unzoned and would equate to agricultural values, which the witness stated would have an estimated value of about €10,000 per acre, which means that the 0.4 acres equates to about €281,000 per acre. In relation to [redacted] report, the witness stated that the evidence points to most sites in and around €150,000 per acre and the witness has gone to the lower end of that. The witness testified that it is her opinion that €50,000 per acre is not a fair market value for a site with development potential.

28.9. The witness was cross examined on her evidence by counsel for the Respondent. The witness agreed that the 2007 LAP had lapsed and that the village did not have statutory zoning, but stated that the 2015 county development plan did have regard to any lapsed LAP. The witness agreed that the development plan took precedence over the 2007 LAP. In relation to phased development, the witness testified that in her experience, most developments are done in phases and it could be a phased planning permission or it could be that there is planning granted for 100 houses, but a developer builds 20, sells 20 and starts on the next phase then. The witness stated that as the land at issue did not have planning, she did not put much emphasis on phased development. The witness confirmed that she valued the land at issue on a per acre basis. The witness agreed in 2017, the availability for development was 5 units, but also stated that 14 months later there would be the potential for 12 more units, as it was known no development of the 12 units was to occur and during that time the planning application could be prepared and ready to go. It was put to the witness that there was a higher risk developing the village rather than Dublin. The witness stated that the rate per acre represents the level of risk and the opportunity of the land at issue in comparison to other sites.

28.10. In relation to the [redacted] site, the witness testified that it sold for €144,000 per acre with full planning permission, but that it had access issues, namely the only access was through an established estate, which was not resolved until 2021.

The witness testified that access was a big issue for that site as it took 4 years to develop, due to that issue. The witness confirmed that it sold at a cost of 31% more than the land at issue, but that it was not a more superior site than the land at issue. The witness said that if this was a perfect site with no access issues, it may have sold for in or around €300,000 plus per acre. The witness stated that you consider all of the issues and the discount is from the perfect site.

28.11. In relation to the [redacted] site, it was put to the witness that this is a far superior site, but the witness testified that the site is a kilometre outside of the town whereas the land at issue is closer to the village centre. In addition, the sales price of €154,000 per acre represents a 40% increase in the value than the land at issue, which is appropriate. The witness stated that it is also only a 10 minute shorter commute to [redacted] than the land at issue.

28.12. In relation to the [redacted] site, the witness testified that she has deducted the 0.4 from the three acres, 3.13 acres, which leaves 2.73 acres of unzoned land which is agricultural land. The witness stated that she has applied €10,000 per acre to the 2.73 acres, which leaves €112,700 per acre to apply to the 0.4 acres, and that equates to €281,000. It was put to the witness that this is an artificial exercise, but the witness did not agree.

28.13. In relation to the [redacted] site, with a sale price of €450,000 for 21.9 acres in 2017, the witness stated that she discovered why this sold for so little at €20,000 per acre, as there was a planning extension request for 52 units refused in 2013, in relation to the site and there was a moratorium on development in [redacted] at the time of purchase, because of waste water capacity issues.

28.14. It was put to the witness that the Respondent's valuation witness 1 valued the land at issue at €50,000 per acre which takes into consideration the risks associated with this particular land at issue, that the zoning was not clear cut, there was no planning permission on the site at the time and it was a vulnerable development, in terms of the stream running across the bottom. The witness confirmed that these three factors are risk factors associated with the valuation, but that she would stand over her valuation of €110,000 per acre and that €50,000 per acre is something you might achieve per stand/unit up to €80,000 per stand/unit, but not per acre.

28.15. The witness stated that there are 22 comparables between both witnesses and other than the [redacted] site and the [redacted] site, the value the Respondent's valuation witness 1 put on the land at issue is the lowest value and all the other

values per acre are higher than that. The witness stated that it was her opinion that these two are outliers. The witness confirmed she had regard to 26 units, but did not value the land at issue on that basis and that if there were only 17 units for development, she would stand over her valuation of the land at issue.

29. [redacted] ("the Appellant's accountant"), for the Appellant, gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

29.1. The witness confirmed that since 2004, he has been practising as a qualified accountant and is a fellow of the Association of Certified Chartered Accountants ("ACCA"). The witness stated that he commenced work in 2000, with the accountancy practice [redacted]. The witness said that he mainly deals with small companies, charities and he has a background in auditing.

29.2. The witness testified that initially the accounts of the company would have been prepared under the Financial Reporting Standard 102 ("FRS102"). However, as the company qualifies as a small company, the accounts were later prepared in accordance with FRS 105. The witness said FRS 105 is designed to try and cut the red tape, in terms of the burden of administration and filing accounts at the Companies Registration Office ("CRO") each year. The witness stated that the balance sheet is further truncated than a normal balance sheet and the notes are very small. The witness gave evidence that the Respondent would receive a more detailed CT1 for corporation tax purposes, where the figures are broken down further, but that the figures do not change.

29.3. The witness confirmed that he was aware of the schedule of payments and the suspension notice. The witness was cross examined on his evidence by counsel for the Respondent, with nothing material arising.

Appellant's submissions

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

30.1. The Respondent breached the Appellant's right to a defence under EU law and his constitutional rights to fair procedures, natural and/or constitutional justice and that the assessment should be vacated.

30.2. Section 949I TCA 1997, and in particular the phrase "*unless… the ground could not reasonably have been stated in the notice*", should be interpreted in a flexible

and pragmatic manner that allows an Appellant to advance a ground if there is reasonable explanation as to why the ground is not identified in the notice of appeal. In the alternative, the Appellant asks for leave to amend the Notice of Appeal.

30.3. The assessment and this appeal concern the application of EU Law and therefore the right to a defence applies. Section 130 TCA 1997 engages EU law as it gives effect to the anti-avoidance provisions and principles contained in Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast) (as amended) and/or Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (as amended). Although section 130 of the TCA 1997 was enacted before the above Directives, case law has confirmed that it can still be viewed as implementing EU law contained in a later directive (see Åklagaren v Hans ÅkerbergFransso(Case C-617/10)).

30.4. Reference was made to the Judgment in *Quigley v Revenue Commissioners & Another* [2023] IEHC 244 ("*Quigley*"). The Respondent's actions that breached the Appellant's right to a defence also breached his rights to fair procedure and/or constitutional/natural justice and this breach of his rights justifies setting aside the assessment. The Appellant's constitutional rights applied because the assessment arises from the application of anti-avoidance legislation and necessarily imputes that the Appellant engaged in wrongdoing when arranging the sale of the land at issue, in 2017.

30.5. Insofar as the Respondent contends that this ground is not identified in the Appellant's Notice of Appeal, the Appellant asks that he be allowed advance the ground and relies on the above identified facts, as well as the fact that the *Quigley* Judgment was only delivered on 10 May 2023, to explain why there was a good reason for the ground not being included. In the alternative, the Appellant asks for leave to amend the Notice of Appeal to include this ground.

30.6. Reference was made to section 548 TCA 1997. When valuing an asset, its market value is relevant and the question is whether that price is what it might reasonably be expected to fetch on a sale in the open market. Two points arise from this wording. The first is that in the absence of an actual process having been conducted at the time to ascertain the actual market value, all that a taxpayer is required to show is that they had a reasonable expectation that the asset might

fetch the actual price that it was acquired or disposed of at. This requires that the taxpayer provide evidence that shows a fair and sensible basis for the taxpayer's belief that the asset might have sold at that price.

30.7. In 2017, the Appellant reasonably expected that the land at issue might sell for €750,000 on the open market and this was a fair and sensible expectation based on the evidence available at the time. The second is that the market value should be assessed based on the information available or reasonably acquirable at the time of the sale and should not influenced by hindsight or how the market actually performed at the time of sale or thereafter.

30.8. In relation to the valuation report from the Appellant's valuation witness 1, it was provided to the Appellant in September 2017, before the Appellant entered into the contract to sell the land at issue to the company and recommended a market value of between €650,000 and €910,000.

30.9. In relation to the valuation report from the Appellant's valuation witness 2, the auctioneers are familiar with the area where the land at issue is located and arrived at the value of €625,000, by the use of comparators.

30.10. In relation to the valuation from the Appellant's valuation witness 3, it is a comprehensive report which includes a market commentary overview with reference to comparators. There is no basis for the Respondent to contend that the Appellant had no sensible or fair reason for believing that he would have received at least €600,000 if he sold the land at issue on the open market in 2017. The Appellant provided a planning opinion from the Appellant's planning witness, which supports the Appellant having a reasonable basis for valuing the land at issue as development land.

30.11. The Appellant has only received payment of the sum of €500,000 to date from the company. Therefore, based on the minimum average value of about €625,000 in the Appellant's valuations of the land at issue in October 2017, he has not received any relevant distribution.

30.12. The Appellant disputes the computation of the interest and penalties imposed by the Respondent. Reference was made to the UK decision in *Revenue and Customs Commissioners v Pickles & Another* [2022] STC 1782 ("*Pickles*") in relation to identifying the "benefit" that is to be deemed a distribution under section 130(3) TCA 1997, for valuing that benefit and for determining when that benefit is deemed to be received.

30.13. The Commissioner should not follow all findings made in the *Pickles* decision and should instead find that, although the existence of a benefit is determined and valued when the contract was entered into, the benefit/distribution is only received and therefore only taxable once the company actually pays the monies to the taxpayer.

30.14. The default is that distributions are taxable as income under Schedule F when they are made and that a deemed distribution pursuant to section 130(3) TCA 1997 is only made when the company pays the amounts due to the member. There is nothing in section 130(3) TCA 1997 to either cause this default rule to be departed from or to support a contention that the distribution should be deemed to be made immediately upon the contract being entered into.

30.15. In the alternative, the Appellant submits that the distribution should only be viewed as being made when the monies became due to the Appellant under the terms of the contract. As the contract records, the monies were not paid in a single lump sum in 2017, but were paid in increments over a period of time. Therefore, insofar as the amount due to the Appellant exceeds the value the land at issue had in 2017, the liability to pay income tax, and therefore interest and penalties, should only apply from when this excess amount became due to the Appellant.

Respondent's evidence

31. [redacted] ("the Respondent's planning witness"), for the Respondent, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

31.1. The witness testified that he holds a Diploma in Environmental Resource Management from TU Dublin, a BA Honours Degree in Town Planning from Oxford Brookes University, a Postgraduate Diploma in Town Planning from Oxford Brookes University and a Diploma in Environmental Assessment Management from the UCD. [redacted]
The witness adopted his report.

31.2. The witness gave evidence that he was instructed to undertake an independent town planning appraisal of the development potential of the land at issue and was provided with the Appellant's planning report and also the report from [redacted]

31.3. The witness testified that he visited the land at issue, considered the various documents referred to in his report, the national guidance, the regional guidance and then to the local guidance, which includes the 2015 county development plan and the Flood Risk Guidelines of 2009.

31.4. With reference to the planning permission for 12 units, the witness stated that on the order from the planning authority it specifies the date upon which the new permission will wither, namely 17 January 2021. In relation to the 2015 county development plan, 17 units were permitted, but the witness said that 12 units were unavailable due to permission being granted in 2012 and extended to 2021. Therefore, in 2017, the land at issue had development potential of 5 houses. The witness stated that in addition, there is further refinement, such that no one scheme can be larger than 4 to 12 dwellings and no one scheme can be greater than 8 dwellings in the lifetime of the Plan or 12.5% of the existing housing stock.

31.5. The witness stated that the argument that 12 units would become available in January 2019, two years from the expiry of the planning permission if not developed is not clear cut, as a new county development plan would commence a review process in or around 2019, whereby the process of re-establishing a new core strategy for the town would have commenced. The witness testified that whilst the land at issue was not zoned, the principle of development was clear based on the 2015 county development plan and the planning history of the area.

31.6. The witness was cross examined by counsel for the Appellant. The witness confirmed that he was instructed in or around February 2024 and that he consulted the Appellant's planning report, but not the [redacted] report as he felt there was no need. The witness stated that a determination from An Bord Pleanála in relation to the three houses built by the county council, acknowledges that notwithstanding there is no zoning because the 2007 LAP had withered, development was acceptable. The witness stated that it is significant that the land at issue is not subject to the rural housing policy.

31.7. The witness testified that density is a simple thing, which is how many units per hectare you can put on a parcel of land, but that the 2015 county development plan did not deal with density. The 2022 county development plan has capped the number of new units on the land at issue to 15 units. The witness stated that the land at issue has a body of water on it and that is a risk for any purchaser to consider.

32. [redacted] ("the Respondent's valuation witness 1"), for the Respondent, gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

32.1. The witness testified that she holds a Masters in Real Estate from the University College of Estate Management in Reading, is a Chartered Valuation Surveyor, a full member of the Society of Chartered Surveyors of Ireland, a full member of the Royal Institute of Chartered Surveyors and a registered valuer under the Valuer Registration Scheme. The witness said that in addition, she holds a BA honours degree in geography, sociology and political science and a Masters in rights and policy social. The witness confirmed that she is a valuer with [redacted] since 2017, and is responsible for carrying out valuations for a broad range of asset types, with experience in commercial and industrial valuations, residential valuations and more specialised valuations of properties [redacted]. [redacted].

32.2. The witness gave evidence that her instructions from the Respondent were to carry out a market valuation for the land at issue extending to 2.18 hectares or 5.39 acres, on the basis of market value as at the valuation date of October 2017.

32.3. The witness stated that it was her view that overall the land at issue was not zoned, but there was certainly precedent for residential development. The witness stated that she considered the 2015 county development plan as it was the prevailing and relevant plan at the time. The witness stated that she agreed that financing may have been an issue in relation to development property.

32.4. The witness testified that the factors affecting development value are location, zoning, planning, services, the size of the site and the timing of the transaction, bringing in all that macro-economic effects. The witness stated that in 2017, the economy was recovering and development was seeing increased activity in Dublin and in other cities like Cork, Galway, Limerick, but there were also difficulties accessing financing around that time, particularly for sites not within the commuter belt or sites without planning permission. The witness stated there is less risk when there is planning permission associated with a site. The witness said that the primary objective of any developer is profitability.

32.5. The witness testified that in terms of comparables, there is no one comparable and no two sites are identical. The witness said that the ideal comparable for the land at issue would be a site in the region of five acres in a village with a population of some sub 200, not zoned and without planning permission. The witness stated there were no precise comparables with those specific factors, so she had a broad regard to a variety of comparables either zoned residential or a combination of different zonings, with planning permission and without planning permission as the reality on the ground was that there were no comparables of an identical or even broadly similar nature. The witness stated that there were no comparables of this nature, because the transactions were not happening and the viability was not there in the market.

32.6. The witness gave detailed evidence in relation to the various comparables cited in her report. In relation to the [redacted] site, the witness testified that it is at the lower end of the market as there are a number of risks associated with it and the immediate development potential of it was uncertain. In relation to [redacted], she stated that there was a mix of zoning in respect of this site. In relation to [redacted] sold for the amount of €154,650 per acre, the witness testified that the zoning was clear as to residential and there was a scheme of full planning permission in place, so the risk was not quite there. The witness stated that she would regard it as a much better comparable and she would not be confident the land at issue would achieve this amount namely, €154,650 per acre. In relation to the [redacted] site sold for the amount of €144,000 per acre, the witness stated that she used it as a comparator to very much illustrate the upper value of land with planning permission. The witness stated that whilst the site had access issues it was eventually developed. The witness stated that with every site there is a level of risk, but to quantify that level of risk with the access on this site is very difficult. In relation to the [redacted] site sold for the amount of €103,773 per acre in 2015, the witness testified that this was a good comparator in terms of size. The witness stated that it appears that the site was resold in 2016 for €67,000 per acre, but had no definitive reason why, it may be that the site was re-traded.

32.7. The witness was cross examined on her evidence by counsel for the Appellant. The witness stated that prior to preparing her report, she was not provided with the valuation report from the Appellant's valuation witness 3 or the planning report from the Appellant's planning witness, despite those reports having been furnished to the Respondent. The witness also confirmed that she did not have the Respondent's planning report, as at the time it had not been prepared by the

Respondent's planning witness. The witness stated that she had a high level overview of the development plan that was relevant at the time. The witness said she had a brief analysis of the planning applications in the immediate vicinity of the land at issue for the purposes of determining viability.

32.8. It was put to the witness that given that the site at [redacted] was valued at €150,000 per acre and the witness's valuation of the land at issue was €50,000 per acre, to reach the [redacted] figure it would require a 200% increase on the value per acre, whereas the Appellant's witness has applied a 40% uplift, despite the land at issue being only 10 minutes further from [redacted]. The witness stated that the location must be factored in and it is more favourable and the zoning and planning would have been clear cut. It was put to the witness that zoning is being mentioned again and that clearly when arriving at values and the land at issue was being treated as a big uncertainty on zoning. The witness stated that it was her view that it was not clear cut. It was put to the witness that she applied a discount due to uncertainty as to zoning. The witness said zoning is one risk and cannot be viewed in isolation of all the other risks and that she would take an overall approach on risk. The witness agreed she was not an expert in planning.

32.9. In relation to the [redacted] site, it was put to the witness that if comparators are being used with unzoned sections, the unzoned sections need to be taken out in order to ascertain the correct value. The witness said that you cannot ordinarily apply agricultural land values to land that is zoned strategic reserve or amenity or open space, but the witness accepted that this value would be less than residential value. It was put to the witness that the [redacted] and [redacted] sites were not sites that particular emphasis was placed, as they are not identified in the valuation methodology section of her report and it was put to the witness that she has used the two lowest values (with the exception of [redacted] which is agricultural land). The witness stated that she has set out the methodology she used and that the other sites all had planning permission.

Respondent's submissions

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

33.1. Section 949I TCA 1997 sets out the provisions applicable to a notice of appeal. The word "shall" in section 949I(6) is mandatory and does not afford the Commissioner discretion in relation to the addition of grounds of appeal save in

circumstances where the ground cited could not have been reasonably stated in the notice. It is submitted that 31TACD2023 raises no novel point of law that would have barred the Appellant from raising this as an issue at the time the notice of appeal was filed in January 2023. In the circumstances, it is not a ground of appeal now open to the Appellant to rely upon.

33.2. It is clear from Article 51(1) that the Charter of Fundamental Rights of the European Union ("the Charter") only applies to Member States when they are implementing the law of the European Union ("EU"). It is clear from the facts of this appeal that there is no provision of EU law engaged. The appeal relates solely to domestic legislation being the provisions of the TCA 1997. As such, no principle of EU law has been breached and there is no scope for consideration of any argument arising from the Charter in this appeal. There is no principle of EU law engaged in this appeal and this appeal can be distinguished from 31TACD2023 and Case C-189/18 *Glencore Agriculture Hungary*, as both of those cases concerned the application and interpretation of Council Directive 2006/112/EC ("the VAT Directive"). In fact all of the cases referred to and considered in 31TACD2023, in relation to the issue of whether or not there had been a breach of Article 41 and/or Articles 47 or 48 of the Charter are either VAT cases engaging the VAT Directive or excise cases.

33.3. One of the primary issues for consideration is whether the land at issue was disposed of at market value, in accordance with section 547 given the transaction involved connected parties for the purposes of section 10 TCA 1997.

33.4. Section 130(3)(a) TCA 1997 imposes a charge to income tax as a distribution in this case between the company and the Appellant on excess consideration received in relation to a transaction. The Contract for Sale between the Appellant and the company dated 6 October 2017, made provision for the transfer of the land at issue from the Appellant to the company for a consideration of €750,000. The consideration comprised of a loan to a director (the Appellant) by the Company.

33.5. The assessment is based on the amount the parties agreed to pay at the time the contract was concluded rather than the amount subsequently received. It is not open to the Appellant to simply amend the consideration provided for in the Contract for Sale to facilitate or manoeuvre the distribution amount now claimed by the Respondent in this appeal.

33.6. Based on the Respondent's argument the distribution is the difference between the €750,000 as consideration and the valuation of the Respondent of €200,000 making the distribution in the amount of €550,000. This distribution is assessable to income tax under Schedule F TCA 1997 and the Notice of Amended Assessment dated 15 December 2022 is based on these figures.

33.7. Reference was made to the decision of the Upper Tax Tribunal ("the UTT") in *Pickles.* Section 1020 of the Corporation Tax Act ("CTA") 2010 (the UK provision) is broadly similar in its terms to section 130(3)(a) TCA 1997 as it refers to "the benefit received" by a member of the company.

33.8. Section 130(3)(a) TCA 1997 requires the Appeal Commissioner assess whether the consideration for the disposal of the land at issue is in excess of the asset's market value and in doing so has to ascertain the "benefit received" by the Appellant in the transaction. In applying the logic in *Pickles* to the within case it is clear that the benefit received has two elements, the cash already received on foot of the contract for sale dated 6 October 2017 and the balance of the debt due. The Commissioner must consider both elements and the value of that benefit received must be assessed at the date of the Contract for Sale namely, 6 October 2017, which also coincides with the date of the valuation.

33.9. An Appeal Commissioner's jurisdiction is limited to considering "*the assessment and the charge*", as stated by Murray J. at paragraph 68 of the Court of Appeal's decision in *Kenny Lee v Revenue Commissioners* [2021] IECA 18 ("*Lee*").

Material Facts

34. Having read the documentation submitted, and having listened to the oral submissions at the hearing, the Commissioner makes the following findings of material fact:

34.1. In 2005, the Appellant purchased at auction the land at issue for the sum of €750,000.

34.2. In 2007, the 2007 LAP commenced which zoned the land at issue low density residential, permitting the development of 26 units for the area. The LAP expired in 2013.

34.3. In 2015, the 2015 county development plan commenced which permitted the development of 17 units for the area the subject matter of that plan.

34.4. In 2012, planning permission was granted for 12 units in the village. An extension to that planning permission was granted in 2015.

34.5. On 17 January 2021, the planning permission for 12 units expired.

34.6. There has been no planning permission granted for the land at issue.

34.7. In 2017, following receipt of financial advice, the Appellant took early retirement from his employer and established the company.

34.8. The Appellant is the sole shareholder and a Director of the company.

34.9. In October 2017, the Appellant disposed of 2.18 hectares of the land at issue to the company for the sum of €750,000. This disposal was included in the Appellant's Form 11 for the year 2017, as a CGT disposal.

34.10. Prior to the said sale of the land at issue to the company, in September 2017 the Appellant obtained a valuation of the land at issue, in the region of between €650,000 and €910,000.

34.11. The Appellant placed a market value on the land at issue in October 2017, in the sum of €750,000.

34.12. The land at issue contains a body of water, a connection to services at the front of the site and road frontage to the [redacted].

34.13. On 7 October 2021, [redacted] disposed [redacted] adjacent to the land at issue to the company for the purchase price of €5,000.

Analysis

35. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, at paragraph 22, Charleton J. stated that:

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

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

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

37. It appears the statements regarding the evidential burden made by Charleton J. in *Menolly Homes* are premised on the information relating to the matter or matters which must be proved in a tax appeal, being within the particular knowledge of the Appellant. The passage at paragraph 22 as set out above by the Commissioner is much quoted before the Commission and means that in this appeal all factual issues arising should stand to be proved by the Appellant.

38. In the recent Judgment in *Hanrahan v the Revenue Commissioners* [2024] IECA 113, the Court of Appeal considered the burden of proof and stated that:

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

    98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation………."

39. The Appellant's appeal relates to two substantive issues, namely:

    (a) The appropriate market value of the land at issue; and

    (b) The application of section 130(3)(a) TCA 1997 and whether or not there was a distribution by the company to the Appellant on the disposal of the Property, and if so, the amount of that distribution.

40. There also arises for consideration a preliminary issue. The Appellant sought to extend his grounds of appeal to include a breach of the right to defence and fair procedures, relating to the manner in which the Respondent dealt with the Appellant in terms of the assessment. The Commissioner intends to deal with these preliminary matters at the outset. The Commissioner will then proceed to deal firstly with the arguments in relation to the valuation of the lands at issue, then the Commissioner will consider the arguments

in relation to the application of section 130 TCA 1997 and whether there was a distribution by the company to the Appellant and if so, in what amount.

41. The parties confirmed that no issue arises in respect of capital losses and it is agreed that the sum of €500,000 was paid by the company to the Appellant, with the sum of €250,000 outstanding to the Appellant by the company, as reflected in the Director's loan account of the company.

42. It is useful to set out the factual background to this appeal. The land at issue comprises 2.18 hectares/5.39 acres and is located at the edge of the village. The land at issue was purchased in 2005, at auction by the Appellant and his now spouse. In October 2017, no development had been undertaken and no planning permission attached to the land at issue. When the land at issue was purchased in 2005, it was unzoned. In 2007, the 2007 LAP commenced zoning the lands low density residential and providing the potential for development of 26 units in the area. The 2007 LAP expired in 2013. In 2015, the 2015 county development plan commenced and provided for 17 units. The 2015 county development plan expired in 2021 and is the key document in this appeal. In 2012, planning permission was granted for 12 units in the village. The expert planning evidence was that this left the potential for the development of 5 units on the land at issue in October 2017, when the company purchased the land at issue for the sum of €750,000.

43. The Special Conditions of the Contract for Sale between the Appellant and the company provided for payment to the Appellant by the company in the manner of payment instalments over a period of time, rather than a lump sum payment. Moreover, the Special Conditions provided that the instalments may be increased, decreased or suspended over the period. The Commissioner has set out the payments made by the company to the Appellant at paragraph 10 of this Determination. The instalments were suspended by way of the suspension notice in February 2021, as per the evidence of the Appellant's Solicitor.

44. In October 2017, prior to the sale of the land at issue by the Appellant to the company, the Appellant secured a valuation in the sum of between €650,000 and €910,000, based on an individual site value between €25,000 and €35,000. The Commissioner heard evidence from the Appellant's valuation witness 1 and will address the evidence in more detail hereunder. The Appellant stated that on 6 October 2017, the value of €750,000 was similar to that of the cost price and he considered that the land at issue had probably not increased or decreased, since 2005.

45. On 7 October 2021, the Appellant's spouse disposed of 0.404 hectares of land to the company for the purchase price of €5,000, which was land adjacent to the land at issue.

46. Following the assessment being raised by the Respondent, a second valuation dated 22 December 2022, was provided by the Appellant's valuation witness 2. The valuation is based on an inspection of the land at issue and provides a "*historical market value of €625,000*", as at September 2017. A third report was prepared on 24 February 2023 by the Appellant's valuation witness 3, which is a comprehensive report, including a market commentary overview with reference to comparators and provides a valuation of €600,000 for the land at issue as at 6 October 2017 . The Appellant also sought a planning opinion dated 18 January 2023, from the Appellant's planning witness, in respect of the development potential of the land at issue.

47. For the purposes of this appeal the Respondent engaged [redacted] to value the land at issue as of 6 October 2017. The Respondent's valuation witness 1 stated that it is her opinion that the land at issue as of 6 October 2017, was valued in the sum of €270,000. The assessment was raised by the Respondent in the absence of an expert valuation report.

48. By letter dated 15 December 2022, the Respondent wrote to the Appellant and indicated that based on research conducted, it was of the opinion that the valuation cited of €750,000 had not been sufficiently supported by the Appellant. The transaction between the Appellant and the company was one between connected persons for the purposes of section 10 TCA 1997, therefore the market value, in accordance with section 547 TCA 1997, must be established given that the disposal of the asset was one otherwise than by means of a bargain at arm's length.

49. In consideration of the market value of the land in 2017, the Respondent stated that it consulted central statistics office records of agricultural lands sold in 2017 and reviewed lands sold in in the area from 2018 to 2021 based on stamp duty returns. Having consulted with various comparators, the Respondent stated that it concluded that agricultural values would result in a price per acre of approximately €10,000 to €12,500 per acre, which would equate to €60,000 for the land at issue. The Respondent stated that "*Considering the Property was zoned partial residential [the Respondent] concluded that a more appropriate valuation would be €200,000 for the entire holding*". As a result of the difference in valuations between the Appellant and the Respondent, it is the Respondent's position that section 130(3)(a) TCA 1997 has application in respect of the transaction.

Preliminary issues

Additional ground of appeal, breach of the right to defence and fair procedures

50. The Commissioner clarified with counsel for the Appellant, the basis upon which arguments in relation to the absence of fair procedures on the part of the Respondent are made, in light of the Commissioner's jurisdiction. The well-established principles relating to the jurisdiction of an Appeal Commissioner are discussed in the Judgment in *Lee,* where the Court of Appeal considered the scope of the jurisdiction of the Commission.

51. More recently in the Judgment of Mr Justice Quinn in the High Court in *Colum Browne v The Revenue Commissioners* [2024] IEHC 258, which related to a case stated from a decision of an Appeal Commissioner, Quinn J. considered the jurisdiction of an Appeal Commissioner and at page 6 he stated that:

    "*In other words, this jurisprudence explains how the function of the Appeal Commissioners is essentially restricted to enquiring into and making findings as to issues of fact and law relevant to the statutory charge to tax and they do not have any quasi inherent powers to declare any aspect of the process or outcome of the Revenue Commissioners void or invalid, akin to the powers the High Court might have in a judicial review hearing*"

52. Counsel for the Appellant submitted that the Appellant was relying on breach of a right to defence and fair procedures arguments in the context of either disallowing evidence or considering the weight of the evidence adduced by the Respondent. Counsel said that he was applying for permission to rely on the additional ground of breach of a right to defence/fair procedures and if required, the Appellant was seeking to formally amend the Notice of Appeal to include this ground.

53. The Commissioner was directed to section 949I(6) TCA 1997 and section 949H TCA 1997. The Appellant submitted that it was not possible for the Appellant to include in his Notice of Appeal, arguments relating to fair procedures and the breach of a right to defence, having regard to the facts of this appeal and the manner in which the Respondent engaged with the Appellant. The Appellant took issue with the Notice of Amended Assessment being raised by the Respondent on 14 December 2022, with 30 days to appeal, inclusive of the Christmas period, the Notice of Amended Assessment being raised absent an expert valuation report from the Respondent which the Appellant stated is a core procedural failure, a notice of demand being issued to the Appellant thereafter and the revocation of the Appellant's Tax Clearance Certificate by

correspondence dated 23 December 2022, when he was engaging with the Respondent in relation to the value of the land at issue.

54. The Appellant argued that in accordance with the above referenced sections of the TCA, he should be permitted to rely on the additional ground of appeal, as the ground could not have been stated in the Notice of Appeal and that the Commissioner should conduct proceedings in a flexible way, avoiding undue formality. The Appellant submitted that this argument was made in the Appellant's Statement of Case dated 17 April 2023, and the Respondent had ample time to consider and respond to the Appellant's argument. The Appellant stated that the Respondent's valuation report was not received by the Appellant, until 19 May 2023. The Appellant contended, *inter alia*, that he was not afforded an opportunity to fully respond to the allegations made against him prior to the issuance of the assessment on 15 December 2022 and that his right to defence under EU law was breached by the Respondent when it required the Appellant to try to prepare a defence whilst, in effect, having to guess what the Respondent intended to rely on as a final case against him.

55. The Respondent argued that the test in accordance with section 949I TCA 1997 is one of reasonableness. Moreover it is argued that section 949H TCA 1997 only applies "*subject to the provisions of this Part*", therefore after the other provisions specified in the section, namely section 949I TCA 1997 is considered. In addition, it is submitted that there is no power prescribed to a Commissioner to amend a Notice of Appeal to include an additional ground of appeal. The Commissioner agrees that no provision exists permitting the Commissioner to formally amend a Notice of Appeal.

56. The Respondent submitted that the decisions in 31TCAD2023 and *Quigley,* which the Appellant relied on, raise no new point of law. Both decisions relate to VAT cases concerning "missing traders" which engage the VAT Directive and which legal test, facts and circumstances, bear no resemblance to those in the within appeal. The Respondent submitted that the right to defence emanates from the Charter which has been in existence since 2009. Therefore, this was not a sustainable argument.

57. The Commissioner is satisfied that in accordance with section 949I(6) TCA 1997, the test is one of reasonableness. The Commissioner has considered the relevant sections of the TCA in relation to the grounds of appeal as set out above. Section 949I(6) provides that the Appellant "*shall not be entitled to rely……on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.*" The Commissioner has also

considered section 949H TCA 1997 and the manner in which she must conduct proceedings.

58. The word "shall" in section 949I(6) TCA 1997 is mandatory and does not afford the Commissioner discretion in relation to the addition of grounds of appeal, save in circumstances where the ground cited could not have been reasonably stated in the Notice of Appeal. Having regard to the timeline of events prior to the lodging of the Notice of Appeal on 10 January 2023, the Commissioner is satisfied that all matters complained of by the Appellant, such as the Notice of Amended Assessment being raised on 22 December 2022, the revocation of the Appellant's Tax Clearance Certificate on 23 December 2022 and, with the exception of the notice of demand dated 16 January 2023, could have been cited in the Notice of Appeal. The Notice of Appeal is a critical document as it sets out the grounds upon which a taxpayer disagrees with a decision of the Respondent. The Commissioner is satisfied that any additional ground can only be pursued, where that ground could not have reasonably been stated in the Notice of Appeal.

59. The Commissioner is satisfied that the grounds namely, a breach of fair procedures/right to defence could have been included in the Appellant's Notice of Appeal. The Commissioner is satisfied that the decision in 31TACD2023 raises no novel point of law, such that the Appellant could not have raised it it in his Notice of Appeal. It is clear that the Appellant's arguments are based on the Charter and associated case law and which was established law prior to the Appellant lodging his Notice of Appeal in January 2023. Accordingly, the Commissioner is satisfied that this ground of appeal could have reasonably been cited in the Appellant's Notice of Appeal and the Appellant cannot therefore proceed to rely on this additional ground of appeal in his appeal.

The appropriate market value of the land at issue

60. In addition to the reports submitted as part of the documents in this appeal, the Commissioner heard evidence from a number of witnesses, including expert witnesses. The Commissioner was grateful to the expert witnesses as they assisted the Commissioner with her consideration of the issues in this appeal and her determination. Specifically, the Commissioner heard evidence from two planning experts which she will consider firstly hereunder. The parties agreed that the evidence between both planning experts was not dissimilar and the Commissioner is in agreement that the evidence was in the round, uncontroverted and uncontroversial. The expert evidence assisted the Commissioner with her understanding of the various planning matters related to not only the land at issue, but the wider village and county and the impact of that on the

development potential of the land at issue. The Commissioner also heard expert evidence from a number of valuers for the Appellant and one valuer for the Respondent which the Commissioner also deals with hereunder, consequent to her consideration of the planning evidence.

61. The duty of the expert witness is to assist the Commissioner by providing evidence based on their knowledge, experience, and qualifications. An expert witness should at all stages provide independent assistance to the court or tribunal, by way of objective unbiased opinion, in relation to matters within the expertise of the expert witness. The fundamental requirements of an expert witness are objectivity, impartiality and independence.

62. In terms of the approach the Commissioner must take in relation to her consideration of expert evidence in any appeal, the Commissioner is mindful of the dicta of Mr Justice Clarke in the Supreme Court in *Donegal Investment Group plc v Danbywiske and others* [2017] IESC 14, wherein Clarke J. set out the role of a trial judge in considering expert evidence as follows:

> *"5.1 A starting point has to be to identify the proper role of a trial judge in assessing expert evidence. Charleton J. explained that role in James Elliott Construction Limited v. Irish Asphalt Limited [2011] IEHC 269, (para. 12 of the judgment) in the following terms:-*
>
> > *"Every expert witness has to be evaluated on the basis of sound reasoning. An expert witness is, however, no different to any other witness simply because he or she is entitled to express technical opinions; all of us are subject to human frailty: exaggerated respect based solely on a witness having apparent mastery of arcane knowledge is not an appropriate approach by any court to the assessment of expert testimony. Every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability."*
>
> *5.2. In setting out the reasons why he preferred certain expert testimony over others in that case Charleton J. went on to say that:-*
>
> > *"Of these criteria, the most important reasons whereby I have chosen one expert over another have been the manner in which an opinion has been reasoned through and the extent to which opposing views have been genuinely and objectively considered on the basis of their merit. A judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained*

on behalf of a plaintiff or defendant may feel themselves to be part of that side's team. Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view. As with demeanour, this is not readily demonstrated on a transcript of evidence. Rather, to a trial judge, it can be possible to see the degree to which a witness is thinking through the potential for an opposing theory before giving a reasoned answer. Experience in other cases demonstrates that there is a danger that experts may erect a barrier of apparent learning in order to disguise what would be an answer awkward to their side were it to be expressed plainly. Apart from the attractions of logic and reasoning, therefore, assessing an answer based on what is seen and heard in the courtroom remains important."

5.3. It follows that the assessment of expert testimony does require a trial judge to assess the way in which that testimony is given. As Charleton J. pointed out, the way in which an expert responds to questioning or to the views of an expert witness tendered by the other side, can play an important role in the assessment by the trial judge of the extent to which the expert's views may truly be said to be uninfluenced by the case which his or her side is seeking to put forward. Furthermore, experience has shown that it is much easier to engage with the detail of evidence which is explored and explained (and, indeed, challenged) at an oral hearing by being present at that hearing rather than reading a transcript of what transpired.

…

5.5. However, as Charleton J. also pointed out in Elliott, an important part in the assessment of any evidence is the application by the trial judge of logic and common sense to the testimony heard. That approach is particularly relevant in the context of expert evidence. Where experts differ the position adopted by the other side will be put to each of the experts in cross-examination. Their reasons for maintaining their view can be examined in some detail. The trial judge can, therefore, assess whether the reasons given by one expert or the other stand up better to scrutiny.

5.6 While it is true, therefore, that the assessment of all evidence, whether expert or factual, requires both the application of logic and common sense, on the one hand, and an assessment of the reliability or credibility of the witness gleaned from having been in the courtroom, on the other, it may be fair to say that it is likely that a decision based on expert evidence will be significantly more amenable to analysis on the basis

of the logic of the positions adopted by the competing witnesses and the assessment of the trial judge of their evidence on that basis.

5.7 Precisely because a decision to prefer the evidence of one expert over another is likely to be influenced, to a much greater extent than might be the case in respect of factual evidence, by the rationale put forward by the competing witnesses, there may be somewhat greater scope for an appellate court to assess whether the reasons given by a trial judge for preferring one expert over another can stand up to scrutiny."

63. The Commissioner will now proceed to consider the evidence of the expert planners.

The expert planning evidence

64. The Commissioner heard evidence from expert witnesses from both the Appellant and the Respondent in relation to the planning status of the land at issue. The Appellant's planning witness was asked to prepare a planning opinion in respect of the historic development potential of land at issue for the year 2017. Likewise, the Respondent's planning witness was asked to consider the development potential of the land at issue, as of October 2017.

65. In terms of the planning history, it is clear from the evidence that the experts are in agreement that when the land at issue was purchased in 2005, the land at issue was unzoned. Thereafter in 2007, the [redacted] ("2007 LAP") zoned the land at issue as "Residential – Low Density", with minor elements of "Open Space and Recreational Amenity". In 2013, that plan lapsed without the preparation of a new plan.

66. In August 2015, the 2015 county development plan was adopted and there were no variations to this plan as of October 2017. Both witnesses pointed out that it is noted in the 2015 county development plan that the expired 2007 LAP for the village is no longer the statutory plan for their area and in that regard, both noted that "*Section 2.5.4 of the Written Statement clarifies that:-The expired LAP's for* [redacted] [redacted] [redacted] [redacted] *are no longer the statutory plans for their areas but do contain a significant amount of information on natural and built heritage and other planning issues. The expired plans will be used as supplementary guidance documents for planning purposes. Housing development within the settlement boundary of these settlements will **not** be subject to the rural housing policy as outlined in section 2.7*." Consequently, the assessment of any planning application for development in the village would be informed by the 2015 county development plan and supplemented by the lapsed 2007 LAP and whilst the lapsed 2007

LAP (the non-statutory plan) would be used as a guide for new developments, the over-riding requirement was to adhere to the requirements of the 2015 county development plan. The Respondent submits that the 2015 county development plan is the statutory plan and takes precedence over the 2007 LAP.

67. The Commissioner notes that both experts were in agreement that the 2015 county development plan stated that there is a requirement for **17 residential units**. As a result, the **12 units** for which that extension of duration of planning permission was granted in August 2015, and which expired on 17 January 2021, would have counted towards allocation for the village in the core strategy of 17 units in the period 2015-2021 and would have resulted in just **5 units** being available in October 2017, for the remainder of the village, not just the land at issue.

68. The Commissioner notes the evidence that there are further refining factors relevant to the development potential of the land at issue and which both witnesses agreed on. The Respondent's planning witness set out in his report that "*For villages where no LAP exists, no one proposal for residential development should increase the existing housing stock by more than 12.5% within the lifetime of the plan. For smaller villages of under 400 in population, any individual scheme for new housing should not be larger than about 4-12 units*."

69. Moreover, the Commissioner notes that both experts agreed the following matters as set out at paragraph 4.5.7 of the report of the Respondent's planning witness as follows:

"*As per section 4.6 below the maximum density according to the lapsed [redacted] LAP, for this site is noted as 12 dwellings per hectare. For a site of 2.18Ha, that could have equated to a total of 26 dwellings. However, as already noted, as the lapsed LAP is no longer the statutory development plan for development [redacted], it is critical to rely upon the relevant objectives of the County Development Plan that would have been the determining factors when considering the extent of development that could be allowed on the lands at any one time:-*

1. Only 17 dwellings allowed for between 2015-2021 under the Core Strategy – therefore 26 dwellings could not be accommodated in any event

2. Only 5 dwellings remain in the Core Strategy due to the Extension of Duration for the 12 houses referred to under Section 3.2.1 above taking up a large portion of the 17 unit allocation

3. No one scheme can be larger that 4-12 dwellings in any event

4. No one scheme can be greater than 8 dwellings in the lifetime of the Plan; or +12.5% of the existing housing stock."

70. In terms of the planning permission for 12 houses, the Commissioner notes the uncontroverted evidence of the Respondent's planning witness that in both the original grant and the extension of duration of planning permission there was a condition that no development could commence until the waste water treatment plant in the village was upgraded. Of note, the Appellant's evidence was that the issue of waste water treatment was resolved, in or around 2018.

71. Having regard to the evidence of both expert planning witnesses, the Commissioner is satisfied that in October 2017, when the land at issue was sold by the Appellant to the company it had residential development potential. Whilst the 2007 LAP had lapsed and the lands were technically unzoned, the 2015 county development plan was clear that residential development was permitted and it referenced the 2007 LAP. In terms of the number of residential units permitted, the 2015 county development plan was clear that 17 residential units were permitted in the village. The 2007 LAP had made reference to 26 units. However, the Commissioner is satisfied that 26 units was not in scope for development in October 2017. In fact, having regard to the evidence and facts of this appeal, the Commissioner is satisfied that taking into consideration the existing planning permission for 12 units, the balance of **5 units** would have been available for development in **October 2017**, subject to planning permission for the land at issue. Nevertheless, the Commissioner does note the evidence of the Appellant and the Appellant's witness that there was never an intention to develop the 12 units and thus, in January 2019 those units were back in scope for consideration. The Commissioner accepts that evidence, but only so far as the 17 units were back in scope for the village at that time, in accordance with the 2015 county development plan and that the 17 units was subject to further revision, having regard to points 3 and 4 at paragraph 4.5.7 of the report of the Respondent's planning witness, as set out above.

The expert valuation evidence

72. The Commissioner will now consider the evidence adduced in relation to the valuation of the land at issue. The difference between the parties on this issue is stark. The evidence of the Appellant's witness was that he sold the land at issue to the company for the sum of €750,000, just slightly less than the midpoint of the valuation from the Appellant's valuation witness 1, which valued the land at issue between **€650,000 and €901,000** based on an individual site value of €25,000 and €35,000. The Appellant testified that the

midpoint of the valuation was €780,000, but that the Appellant reduced it to coincide with the original purchase price of €750,000.

73. It is clear to the Commissioner that whilst this is a contemporaneous valuation, it is based on land at issue being "*zoned Low Density Residential which allows the development of up to 26 houses*". Moreover, due to the passage of time, there are no records of the comparables available and it was pointed out by the Respondent that the valuation was not a "Red Book valuation" which is the industry standard. Therefore, the Commissioner did not find the evidence adduced herein to be of assistance to her consideration of the correct market value of the land at issue, in October 2017.

74. The Commissioner also considered the evidence of the Appellant's valuation witness 2 who provided a historical valuation report, dated 22 December 2022. The Commissioner understands that this is the report that the Appellant procured following the Notice of Amended Assessment being raised by the Respondent, on 15 December 2022. The Commissioner notes that having inspected the land at issue, he valued the land at issue in the sum of €625,000, in September 2017. Again, the Commissioner observes in the report that under the heading "The Property" it states "*zoned suitable for planning in 2007 for 26 houses or 12 houses per hectare*" and no comparators or detailed analysis underpinning this valuation figure was provided with the report. It was put to the witness by counsel for the Respondent that the valuation report stated a valuation of **€625,000** based on 26 units and even taking phased development into consideration, the total number of units permitted during the life of the 2015 county development plan was 17 units. Of note, the witness confirmed that his valuation was based on 17 units and that his vision for the land at issue was that there would be more houses developed. Whilst the evidence adduced referred to comparators, the report does not detail the comparators used to come to the conclusion that the market value of the land at issue was €625,000 in September 2017.

75. The Commissioner observes that the Appellant procured a third valuation report dated 24 February 2023, from the Appellant's valuation witness 3. The Commissioner considers this was a comprehensive report which included a market commentary overview with reference to comparators and provided a valuation of **€600,000** for the land at issue, as of 6 October 2017. In addition, the Appellant's valuation witness 3 testified that she had regard to the Appellant's planning report to assist her with her valuation of the land at issue.

76. The Commissioner found the evidence of the expert witness to be credible and it was clear to the Commissioner that the witness has many years' experience valuing the

development potential of lands. Moreover and of vital importance when carrying out the role of expert witness, the witness was reasoned in her approach to the various comparators and opposing views have been genuinely and objectively considered on the basis of their merit. The witness stated that the [redacted] valuation represents a 64% reduction in values from the price paid on the open market, which she believed was not in line with the actual market value over these periods.

77. The Commissioner notes that in coming to her valuation, the witness had regard to the location, demographic, zoning and demand within the immediate area, in the existing market, as at the valuation date and that from "*a review of comparable evidence from the years 2014 to 2019, residential zoned lands have traded over this period ranging from €80,000 per acre to €520,000 per acre and for €16,000 to €70,000 per individual unit site*". The witness stated that it is her opinion that the market improved during the period of the comparable evidence, as the economy recovered. The Commissioner notes page 29 of the witness's expert report, wherein she sets out certain comparables that she had particular regard to and which she was of the view were the most relevant to the land at issue. The Commissioner sets out those comparables, hereunder, as follows:

- *"5.3 acre site at [redacted] which sold in 2015 for €550,000. This equates to a rate per acre of €103,773. The site was zoned residential and had a lapsed planning permission for 34 houses. Same size site as the subject property but slightly superior location closer to [redacted]. This comparable is dated in comparison to the valuation date of 2017 where the market was improving.*
- *9.03 acres at [redacted] sold close to the valuation date in Q3 2017. We are not aware of the exact sales price but the site sold excess the guide of €1m which equates to €110,741 per acre. The site is zoned residential but had not planning permission.*
- *Site with FPP 55 houses, [redacted] which sold post the valuation date in Q4 2018 for €1.5m. It was 9.7 acres which equates to €154,650 per acre and had full planning permission for 55 houses. We had regard to the per house site value of €27,272 per house site".*

78. The Commissioner notes that it was the opinion of the witness that valuations are not an exact science and there are risks with all development, as all sites will have issues, hence the discounts applied for the varying issues. The witness stated that her methodology is to take a price per acre of zoned land, find the most appropriate comparators and then adjust accordingly, for example; if one of the most appropriate comparators had planning

permission, the price per acre was adjusted down if no planning permission existed. The Commissioner notes the evidence adduced that phased development is a common approach for a developer to take. In addition, the Commissioner has considered the witness's detailed evidence as to the challenges associated with particular comparables referred to in both the witness's report and the [redacted] report of the Respondent.

79. The Commissioner heard expert evidence from the Respondent's valuation witness 1 and the Commissioner has considered the valuation report ("the [redacted] report") dated 23 April 2023, wherein the witness valued the land at issue in the sum of **€270,000** on 6 October 2017. The witness set out in her report that "*the opinion of value has regard to the market, location (small village), zoning status, planning (none), surrounding services such as retail (limited), flood risk (likely) and quantum (5.39 acres)*." The witness testified that it was her opinion that a rate per acre in the order of €50,000 is fair and reasonable, in the absence of any planning permission, for this particular location, which equates to €269,500 on the gross site area (including half the road to the north), which she rounded to €270,000.

80. Of note, the witness was not provided with the valuation report from the Appellant's valuation witness 3 or the planning report from the Appellant's planning witness, prior to her preparing her report, despite those reports having been furnished to the Respondent. The witness also confirmed that she did not have the Respondent's expert planning report at the time, as it had not been prepared. This is in stark contrast to the Appellant's valuation witness 3 who confirmed that she had the benefit of the planning report from the Appellant's planning witness.

81. The witness stated that she formed the opinion that the land at issue was development land, not agricultural land, but that it was not quite commuter zone and was without full planning permission and had other risk factors. Therefore, she said that she formed the opinion that €50,000 per acre was fair and reasonable in that context, having regard to all of the factors involved, including the 2015 county development plan.

82. The Commissioner has considered the witness's evidence in relation to the comparators as set out in her report. The witness stated that the value would be higher if the land at issue had a residential scheme of planning permission in place and that the important comparators are the sites that do not have planning permission, namely [redacted] and [redacted] and that is important in this context. The Commissioner notes that in cross examination it was put to the witness that those two sites have significant considerations that result in them being at a much lower value than the land at issue and are therefore, not appropriate comparators. The witness did not agree and stated that whilst they may

have issues, what was most important was that neither had planning permission and both were in better locations than the land at issue. The witness stated that as a result €50,000 was very much the upper end of the valuation she would place on the land at issue, given the risks associated with the land at issue.

83. The witness also testified in relation to the [redacted] site which she relied on in her report which was valued at €45,000 per acre. However, the Commissioner notes that only a small portion of this land namely, 0.4 acres was zoned residential leaving 2.73 acres of unzoned land. The Appellant's valuation witness 3 stated that she applied €10,000 an acre to the 2.73 acres of agricultural land, which left the amount of €112,700 to apply to the 0.4 acres, and which equated to €281,000 per acre.

84. The Respondent's valuation witness 1 stated that the sale of lands with full planning permission for residential schemes in 2017/2018 in [redacted] [redacted] all of which were in better locations than the land at issue, in commuter town locations, transacted for between €110,000 - €155,000 per acre and in this context €50,000 per acre was fair and reasonable, in the absence of any planning permission for the land at issue. In relation to the [redacted] site that sold in 2015 for the amount of €103,773, the witness testified that this was a good comparator in terms of size.

85. The Commissioner is mindful of the uncontroverted evidence of the Appellant's valuation witness 3, that the top level that might be achieved in [redacted] at that time would be in the sum of €300,000 to €350,000 per acre, the mid-level being in the sum of €130,000 to €150,000 per acre and that she had discounted that in terms of her valuation for the land at issue. Moreover, the Appellant's valuation witness 3 set out a comprehensive market analysis in her report, which assisted the Commissioner.

86. Having considered the totality of expert evidence adduced by the parties in relation to the valuation of the lands at issue, the Commissioner found the Appellant's valuation witness 3 to be the most persuasive, in terms of assisting the Commissioner to establish the correct valuation of the land at issue. During cross examination, it was put to the Appellant's valuation witness 3, that the Respondent's valuation witness 1 valued the site at €50,000 per acre, which she said takes into consideration the risks associated with the land at issue, namely that the zoning was not clear cut, there was no planning permission on the site at the time and it being a vulnerable development, in terms of the stream running across the bottom of the land at issue. The Appellant's valuation witness 3 confirmed that these three factors are risk factors associated with the land at issue, but

that she would stand over her valuation of €110,000 per acre as reflecting a discount for those risks, having regard to the comparables in her report.

87. Of note, the Appellant's valuation witness 3 stated that there are 22 comparables between both witnesses and other than the [redacted] site and the [redacted] site, the value placed on the land at issue by the Respondent's valuation witness 1 was the lowest value, and all the other values per acre are higher than that (with the exception of [redacted] which was agricultural land with no zoning). The Appellant's valuation witness 3 stated that is was her opinion that these two sites were outliers. The Appellant's valuation witness 3 testified that her research had discovered that the [redacted] site had mixed zoning and the [redacted] site had a planning extension for 52 units refused in 2013, in addition to there being a moratorium on development at that time, due to waste water capacity issues. The Commissioner is satisfied that the Appellant's valuation witness 3, properly considered the opposing view herein and put forward a credible rationale and reasoning for her opinion, that these two comparators were outliers.

88. Moreover, the Commissioner had concerns in relation to the methodology adopted by the Respondent's valuation witness 1, whereby she placed considerable reliance on the fact that no planning permission had been granted in relation to the land at issue, despite this being only one of many considerations and she repeatedly mentioned "unclear zoning" being a consideration. In addition, the Appellant's valuation witness 3 stated that the approach was to discount the risks from the comparators. It is not clear that this is the approach of the Respondent's valuation witness 1, having regard to the reliance on [redacted] and [redacted] and the risks associated with both, as described above. The Respondent's valuation witness 1 also relied on the [redacted] site as a comparator, of which only a small portion was zoned residential. The Commissioner notes the testimony of the Appellant's valuation witness 1 as to the appropriate adjustments made to come to the valuation per acre. The Commissioner is not satisfied that the valuation of the land at issue in the sum of €270,000, in October 2017, reflects the market value at that time.

89. There is no disputing that the evidence adduced herein suggests that the land at issue is located in a [redacted] village with direct access to the [redacted] and that the land at issue has development potential. Thus, the question that arises for the Commissioner is what was the market value of the land at issue in October 2017, when it was sold by the Appellant to the company. The expert witnesses assisted the Commissioner with her understanding of the manner in which a parcel of land is valued and the Commissioner is conscious of the evidence adduced that broadly, six things should be considered namely,

zoning, planning, services, size, location and timing and that in terms of development, these factors all go towards the profitability of developing the land in question.

90. Having regard to the comparables and expert evidence adduced herein, the Commissioner is satisfied that the correct market value of the land at issue as of October 2017 was €600,000 and that the valuation the Appellant relied on for the sale of the land at issue to the company in the sum of €750,000 was not market value, such that the market value placed on the land at issue by the Appellant in October 2017, was inflated by the sum of €150,000.

91. The Appellant directed the Commissioner to sections 547 to 549 TCA 1997 which address assessing a person's liability to CGT and the market value that should be applied to the acquisition or disposal of an asset. The Appellant argued that the aforementioned sections inform how the term market value is interpreted in accordance with section 130 TCA 1997 and that it is that price that the asset "*might reasonably be expected to fetch on a sale in the open market*". The Appellant contended that €750,000 was a reasonable market value assessment at the date and, therefore, it should be adopted. The Commissioner does not agree. The valuation received from the Appellant's valuation witness 1 provided for a significant range and the Commissioner notes thereafter that the valuations obtained are all in or around between the sum of €600,000 and €625,000. The Commissioner is satisfied having regard to the evidence adduced, that the appropriate market value as of **6 October 2017**, the date of the transfer of the land at issue from the Appellant to the company for a consideration of €750,000, was the sum of **€600,000**.

92. For completeness, counsel for the Respondent directed the Commissioner to the Appellant's CGT return, wherein it states that the land at issue is non-residential agricultural land. The Commissioner attached little weight to this point in light of the expert evidence adduced herein. In addition, the Respondent continually highlighted that there was no intention to develop this land. Again, having regard to the expert planning evidence and the expert valuation evidence adduced herein, the Appellant's intention or otherwise to develop the land was not a determining factor that the Commissioner considers relevant to the market value of the land at issue, as of October 2017. The evidence adduced established that the land at issue had development potential and was of a certain market value, as set out above.

93. The Commissioner heard expert evidence from the planners and valuers in relation to a potential flood risk associated with the land at issue. The Commissioner is satisfied that having considered the evidence adduced that the risk of flooding is a risk associated with the land at issue, given the body of water on the land, but a risk factored into the overall

valuation of the land at issue. However, the Commissioner is satisfied that there is no evidence to suggest that the existence of the body of water was something that precluded the potential for development on the land at issue. The Commissioner also notes the uncontroverted evidence of the Appellant that any issues relating to waste water treatment in the village were resolved in 2018.

Section 130 TCA 1997

Statutory interpretation

94. In relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point is generally accepted as being the Judgment of Kennedy CJ. in *Revenue Commissioners v Doorley* [1933] I.R. 750 at page 765 wherein he held that:

> "*The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament….*"

95. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 and the Judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

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

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

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

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

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

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

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

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express*

terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.""

96. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other Judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

97. Furthermore, the Commissioner is cognisant of the recent decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the dicta of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he states that:

    "It is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".

98. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly "*so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*".

99. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen

in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.

100. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of McKechnie J's dictum in *Dunnes Stores* at paragraph 66, wherein he states that:

> "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning*."

101. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

The application of section 130(3) TCA 1997

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

103. There are a number of requirements to be satisfied in order that a transaction is caught by the provisions of section 130(3)(a) TCA 1997. Section 130(3)(a) TCA 1997 provides that "*Where on a **transfer** of **assets** ……by a **company** to its **members or** to a **company** by its **members** the amount or value of the **benefit received** by a member……..**exceeds** the amount or value (so taken) of any **<u>new consideration</u> given** by the member, the company shall be treated as making a **<u>distribution</u>** to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount")*".

104. The Commissioner observes that the conditions identified in section 130(3)(a) TCA 1997 that, if met, deem a company as "making" a distribution are as follows: there is a transfer of assets/liabilities; the transfer occurs between a company and its member; and the

amount/value of the benefit "received" by the member, taken at its market value, exceeds the amount or value of any consideration given by the member.

105. Section 130(3)(a) TCA 1997 taxes as a distribution "the difference" between the value received by a member and the consideration paid by a member, in respect of the transfer of an asset to a company by its member. In other words, section 130(3)(a) TCA 1997 taxes a movement of assets between two taxable persons and provides that the amount of the difference between the value received and the consideration paid (referred to as 'the relevant amount') "*shall be treated as ….a distribution*", and thus, chargeable to income tax in the hands of the recipient. The Commissioner is satisfied that section 130(3)(a) TCA 1997 can only impose taxation on the difference between the amount of the benefit and the amount of any such consideration.

106. The Commissioner notes that the Contract for Sale between the Appellant and the company is dated 6 October 2017. It made provision for the transfer of the land at issue from the Appellant to the company for a consideration of €750,000. The payment of the consideration comprised a loan to a Director, the Appellant, by the company to be discharged in accordance with a schedule of repayments/instalments. The Commissioner heard evidence from the Appellant's accountant in relation to the manner in which the accounts were prepared in relation to the company.

107. Section 130(3)(a) TCA 1997 requires that the Commissioner assess whether the consideration for the disposal of the land at issue is in excess of the asset's market value and in doing so, the Commissioner must ascertain the "benefit received" by the Appellant in the transaction.

108. The Appellant posited that in circumstances where only €500,000 of the Director's loan had been drawn down, rather than the agreed consideration of €750,000, the assessment should be based on the difference between market value of the land at issue, which the Commissioner has herein determined to be the sum of €600,000 in October 2017 and the amount of €500,000 received by the Appellant from the company. The Commissioner heard evidence from the Appellant, the Appellant's accountant and the Appellant's Solicitor as to the right to suspend payments in accordance with Special Condition 7 of the Contract for Sale and that the right to suspend payments was utilised in 2021.

109. The Commissioner notes that Special Condition 7 of the Contact of Sale states that: "*The payments set out in the Payments schedule of the Heads of Agreement can be discharged can be increased, decreased or suspended by agreement between the parties hereto*".

110. The Appellant argued that he has to date received only €500,000 from the company and therefore, this is the relevant figure to be taken into consideration when calculating the distribution. The Appellant argued that having regard to the amount of €500,000 paid in consideration for the land at issue by the company to the Appellant, in circumstances where this was less than the market value of the land at issue, taking even the lowest valuation at €600,000, the effect is that the Appellant has not received a distribution for the purposes of section 130(3)(a) TCA 1997.

111. Moreover, the Appellant disputes the computation of the interest and penalties imposed by the Respondent, as the Respondent has calculated the interest and penalties running from October 2017. However, the Appellant was only entitled to receive the benefit in accordance with the schedule of payments annexed to the Contract for Sale, therefore the interest and penalties do not arise as contended for by the Respondent. The imposition of interest and penalties is not a matter that the Commissioner has jurisdiction to deal with, but it is within the jurisdiction of the Commissioner to consider the date upon which the Appellant received the benefit for the purposes of section 130(3)(a) TCA 1997.

112. The Commissioner has considered the schedule of payments received by the Appellant from the company in consideration of the transfer of the land at issue. The Commissioner notes the evidence that this was important to the Appellant in terms of the transaction and which now goes to the calculation of interest and penalties arising in respect of the Notice of Amended Assessment raised by the Respondent. The Appellant set out in his Outline of Arguments that the total amount of the payments received by way of instalments by the Appellant from the company per year were as follows: 2017 €50,000; 2018 €70,000; 2019 €280,000; and 2020 €100,000. The Appellant argued that the position that should be adopted is the date the payment or distribution was actually made to the Appellant by the company, meaning the date the payments were actually received by the Appellant and alternatively, if it is earlier, that the date the payments became due to the Appellant by the company.

113. However, it is Respondent's position that the Notice of Amended Assessment was based on the amount the parties to the Contract for Sale agreed to pay at the time the Contract for Sale was concluded, rather than the amount subsequently received by the Appellant from the company by way of instalment payments. Therefore, based on the Respondent’s argument the distribution for the purposes of section 130(3)(a) TCA 1997, is the difference between the amount of €750,000 as consideration and the valuation of the land at issue as of 6 October 2017 the date the Contract for Sale was executed. The Respondent argued that it is not correct that if a distribution arises between the company and the

Appellant, that distribution is only chargeable to tax when the payments due in accordance with the payment schedule are received by the Appellant. The Respondent submitted that "*Section 130(3)(a) is, in effect, a deeming provision which the Appellant appears to agree in paragraph 41 of his Supplemental Outline. A deeming provision effectively allows one set of facts to be treated as if they were a different set of facts and is often referred to as a statutory fiction*".

114. The Respondent argued that where consideration for the disposal of an asset is in excess of the asset's value, the provisions of section 130(3)(a) TCA 1997 apply and that the excess is treated as a distribution from the company to the member. The fact that the full amount of the distribution may or may not have been paid to the Appellant is not relevant, the company is treated as has having made a single distribution in full to the member and he is treating as having received the distribution in full. The contract price of €750,000 represented a debt due by the company to the Appellant, by way of director's loan.

115. The Respondent directed the Commissioner to Section 436(3)(a) TCA 1997 which provides that where a close company has incurred an expense in connection with the provision of "*benefits or facilities of whatever nature*" for any participator, the company will be treated as having made a distribution. The Respondent submitted that "*while the Appellant has minimised this fact by referring to this action as "an accounting treatment that does not reflect that the monies were immediately due" the fact remains that those funds would therefore have been available to the Appellant through the company from the time they were credited to the directors loan account*."

116. The Respondent directed the Commissioner to the decision in *Pickles*. In this case the taxpayers set up a company to incorporate a business they had carried on in partnership. The company purchased the business from the taxpayers for a consideration of approximately £1.2 million, the bulk of that consideration having been attributed to the goodwill in the company. The consideration was left on the loan account in the financial statements which the taxpayers were free to draw on. Following an investigation by Her Majesty's Revenue and Customs ("HMRC") into the taxpayers' affairs a lower valuation for goodwill of £450,000 was agreed upon which HMRC assessed the taxpayers to CGT. HMRC assessed the difference to income as a distribution under section 1020 CTA 2010 (the UK provisions). The company entered into administration with the taxpayers only ever withdrawing £770,000 from the loan account. The balance of the director's loan account being £427,180 at the date of administration was not repaid. The taxpayers appealed to the First Tier Tribunal ("FTT"). The FTT found that the amount of the taxable

distribution was the amount of cash "*actually received by the taxpayers less the value of the goodwill*".

117. Both parties appealed the FTT to the Upper Tier Tribunal ("UTT") disputing the assessment of the value of the benefit received by the taxpayers for the purposes of section 1020. HMRC contended that the FTT erred in a number of ways *inter alia*:-, that the FTT was wrong to conclude that the taxpayers only received a benefit when payments were made to them in satisfaction of the debt due and that the FTT erred in its approach to the valuation of the benefit received by reference to the amounts drawn down by the taxpayers. Rather, HMRC contended that the value of the benefit is simply equal to the monetary amount of the debt agreed by the parties. The UTT determined that the FTT had materially erred in law. On the interpretation of section 1020 and what constitutes the benefit received, the UTT held as follows:-

> *"[29] The FTT found at [9] of the supplementary decision that there were two forms to the benefit received by the taxpayers: the cash received and the benefit of a debt owing to them. In the case of the cash benefit, the FTT said that there was no issue as to when that was received. Regarding the debt, it found that the benefit was not received until payment was made.*
>
> *[30] The parties are agreed that this analysis was incorrect. It is common ground that the taxpayers received a benefit, for the purposes of s 1020, at the point when they became entitled to the debt, i.e. when their contractually enforceable rights came into existence. On that basis the parties agree that the benefit should be valued as at (or around) 1 May 2011 when the contract took effect.*
>
> *[31] We agree. The approach adopted by the FTT entails the use of hindsight, in this case over a period of years, to determine the value of the benefit received. The amount that would ultimately be paid out would have been outside the knowledge of HFPL and the taxpayers in 2011 when the sale agreement took effect and would have remained outside their knowledge when the taxpayers completed their 2011/12 tax returns in 2013. The FTT's analysis also separates the benefit into two distinct elements, before merging those benefits on each occasion that cash was received. The FTT erred in both identifying the nature of the benefit in this way and in its conclusions on the timing of the receipt of the benefit.*
>
> *[32] We consider (in agreement with the parties) that the benefit for the purpose of s 1020(1)(b) in this case is the benefit of the contractually enforceable right to the agreed sum of £1,199,043. That right had crystallised on 1 May 2011; the taxpayers*

had therefore received the benefit of that right, and the valuation of that benefit must be assessed as at, or around, the date on which it came into existence."

118. The Respondent submitted that applying the relevant principles in *Pickles* to the facts of this appeal, it is clear that the benefit received has two elements, the cash already received on foot of the contract for sale dated 6 October 2017 and the balance of the debt due. The Respondent submitted that section 1020 CTA 2010 (the UK provision) is broadly similar in its terms to section 130(3)(a) TCA 1997 and it also refers to "*the benefit received*" by a member of the company. The Commissioner does not disagree with the submission.

119. The Appellant submitted that the Commissioner should not follow the decision in *Pickles* and that its weight as an authority is undermined by a number of factors. It was submitted that, instead, the Commissioner should find that a distribution is taxable as income under Schedule F when it is made and that a deemed distribution pursuant to section 130(3)(a) TCA 1997 was only made when the company paid the amounts due to the Appellant. The Appellant submitted that there is nothing in section 130(3) TCA 1997 to either cause this default rule to be departed from or to support a contention that the distribution should be deemed to be made immediately upon the contract being entered into.

120. The Commissioner has considered the arguments proffered by both parties in relation to the preferred interpretation and application of section 130(3)(a) TCA 1997. There is no dispute that there was a transfer of an asset namely, the land at issue on 6 October 2017 as set out in the Contract for Sale between the company and the Appellant. The benefit given by the Appellant to the company was the land at issue and the benefit received in consideration of the transfer of the land at issue to the company, in accordance with the Contract for Sale, was €750,000.

121. The Commissioner heard evidence from the Appellant's accountant that as a result, the Director's loan account of the company had a credit of €750,000 reflecting the amount due and owing to the Appellant for the benefit given. Moreover, the Commissioner heard evidence from the Appellant's Solicitor as to the payment schedule which was annexed to the Contract for Sale and the reference to same in Special Condition 6 of the Contract for Sale, wherein it states that: "*The purchase price for the said property shall be discharged by instalments which are set out in the Schedule to the said Agreement. It is agreed that the Company take possession of the property immediately on execution hereof and a transfer of the title shall be executed shortly thereafter and any and all documents required for the registration of the Company. It is further agreed that no part of the property or documentation relating to same shall be held in escrow pending the*

payment of the said instalments. The discharge of the payment for the said instalment shall be secured by way of first charge that the Vendors shall have in respect to the property herein in sale"

122. The Commissioner also notes Special Condition 8 of the Contract for Sale wherein it states that "*It is strictly agreed herein that the Purchasers shall have the authority to sell the property pending discharge of the Instalments by the Purchasers and in this event the Purchasers shall account to the Vendors for any and all instalments outstanding without interest, costs or compensation*". The Commissioner is satisfied that this provides a right of sale to the Appellant should the company default on the payment of any or all instalments.

123. The Commissioner notes the Appellant's argument in relation to the interpretation of section 130(3)(a) TCA 1997 that the past tense "received", when referring to the benefit the member obtains, supports an interpretation of the section that the benefit arises at the time of the transaction and not when monies are actually received. However, the Appellant submitted that the use of the continuous present tense "making a distribution" supports an interpretation of the section as allowing for the benefit to have arisen, but the distribution i.e. the event that gives rise to the liability to pay income tax, not yet to have been made. The Appellant contended that "*if the section intended the distribution to be viewed as having been made when the benefit arose then it would have used the past tense, for example; "the company shall be treated as having made a distribution"*".

124. The Commissioner is mindful of the dicta of Mr Justice McKechnie in *Dunnes Stores* wherein he concluded that a "*provision should be construed in context having regard to the purpose and scheme of the Act as a whole, and in a manner which gives effect to what is intended"*. Moreover the Commissioner is cognisant of the dicta of Mr Justice O'Donnell in *Bookfinders* wherein he stated that "*It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible".* The Commissioner is satisfied that there is no ambiguity to section 130(3)(a) TCA 1997 and the words in the section are capable of being interpreted having regard to their plain and ordinary meaning, in context. Applying those principles of statutory interpretation, the Commissioner does not accept that the Appellant's argument in relation to the use of the continuous present tense "making a distribution", supports an interpretation of the section as allowing for the benefit to have arisen, but the distribution not yet to have been made.

125. The Commissioner is satisfied that the benefit is reflected in the Contract for Sale as the sum of €750,000 in consideration for the land at issue. Whilst the amounts payable may have been set forth in a schedule of payments, the reality is that the benefit of €750,000 was reflected in the Director's loan account of the company for the benefit of the Appellant and a debt was due to the Appellant from the date of the transaction. The Commissioner is satisfied that the benefit received by the member, was the sum of €750,000 reflected in the Director's loan account and which benefit was a contractually enforceable right to the agreed sum of €750,000. The Commissioner has had regard to Special Condition 8 of the Contract for Sale in this regard.

126. Moreover, the Commissioner is satisfied that whilst of persuasive authority only, the decision of the UTT in *Pickles* came to similar conclusions on a similar factual matrix. The Commissioner notes the decision of the UTT wherein it states that: "*The FTT's analysis also separates the benefit into two distinct elements, before merging those benefits on each occasion that cash was received. The FTT erred in both identifying the nature of the benefit in this way and in its conclusions on the timing of the receipt of the benefit…..[32] We consider (in agreement with the parties) that the benefit for the purpose of s 1020(1)(b) in this case is the benefit of the contractually enforceable right to the agreed sum of £1,199,043. That right had crystallised on 1 May 2011; the taxpayers had therefore received the benefit of that right, and the valuation of that benefit must be assessed as at, or around, the date on which it came into existence*".

127. The Commissioner is satisfied that the amount of the distribution should be taken to reflect the amount received by the Appellant, in accordance with the contract price as at 6 October 2017. There is no dispute that the consideration provided by the company to the Appellant of €750,000 was provided by way of director's loan and the full disposal price was subsequently credited to the director's loan account in 2017. The contract price of €750,000 represented a debt due by the company to the Appellant. The Appellant is entitled to pursue the company for any balance due on the Contract for Sale and the company is obliged to discharge its debt to the Appellant. The Commissioner is satisfied that those funds would have been available to the Appellant through the company from the time they were credited to the director's loan account, and which the Commissioner is satisfied is a benefit received by the Appellant for the purposes of section 130(3)(a) TCA 1997. In 2017, presumably it was contemplated that the full purchase price would be discharged by the company to the Appellant.

128. Accordingly, for the purpose of assessing what was the distribution for the purposes of section 130(3)(a) TCA 1997, the Commissioner finds that the value of the benefit received

must be assessed at the date of the Contract for Sale being 6 October 2017. Thus, the Commissioner is satisfied that the difference between the consideration received in the sum of €750,000 and the consideration given herein, in the sum of €600,000, the excess amount being in the sum of €150,000, is a deemed single distribution from the company to the Appellant in accordance with the provisions of section 130(3)(a) TCA 1997, and is fully chargeable to tax in accordance with the provisions of section 20 TCA 1997.

129. As the Commissioner has found that a distribution was made from the company to the Appellant at the date of the Contract for Sale, namely 6 October 2017, there is no requirement for the Commissioner to consider further the matter of the schedule of payments and any arguments of the Appellant in relation to the applicable date for the imposition of interest and penalties by the Respondent.

Determination

130. As such and for all the reasons set out above, the Commissioner determines that the Appellant has succeeded in his appeal and has shown that the tax as set out in the Notice of Amended Assessment to Income Tax for the year ending 31 December 2017, dated 15 December 2022, in the sum of €299,587.00 is not payable, having regard to the valuation placed on the land at issue by the Respondent.

131. Therefore, the Commissioner determines that the Notice of Amended Assessment to Income Tax for the year ending 31 December 2017, raised by the Respondent on 15 December 2022, in the sum of €299,587.00, **shall be reduced** to reflect a market value of the land at issue, in the sum of **€600,000,** as opposed to the Respondent's market valuation of €200,000 and the basis upon which the Notice of Amended Assessment is calculated herein.

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

Notification

133. This determination complies with the notification requirements set out in section 949AJ TCA 1997, in particular section 949AJ(5) and section 949AJ(6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ TCA 1997 and in particular the matters as required in section 949AJ(6) TCA 1997. This notification under section 949AJ TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and

communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

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

Claire Millrine
Appeal Commissioner
28 May 2024