AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

58TACD2025

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") brought by [redacted] ("the Appellant") against an amended assessment to capital gains tax ("CGT") raised against him by the Revenue Commissioners ("the Respondent") for the [redacted] tax year in the amount of €351,545.

2. The amended assessment arose on foot of a share for share exchange, and subsequent sale of shares. The Appellant had claimed relief from CGT on the exchange pursuant to section 586 of the Taxes Consolidation Act 1997 as amended ("TCA 1997"). The Respondent raised the amended assessment on the basis that the exchange was not carried out for bona fide commercial reasons but was part of a scheme or arrangement of which the main purpose, or one of the main purposes, was avoidance of liability to tax.

Background

3. The Appellant [redacted] owns a farm [redacted]. In [redacted] he became a shareholder in [redacted]; he invested €100,000 for an allocation of [redacted] A Ordinary shares. [redacted] was established by [redacted].

4. In June [redacted] the Appellant incorporated a holding company, [redacted]. On 2 July [redacted], the Appellant transferred his [redacted] A Ordinary shares in [redacted] to [redacted] and in return on the same date [redacted] ordinary shares in [redacted] were issued to him. He claimed an exemption from CGT pursuant to section 586 of the TCA 1997.

5. On 19 July [redacted] was sold to a third party purchaser, [redacted]. As part of the sale agreement, [redacted] agreed to sell its [redacted] A Ordinary shares to [redacted] for [redacted]. [redacted] paid no corporation tax ("CT") on the disposal of its shares in [redacted] to [redacted] on the basis that it had a market value base cost on the [redacted] shares of [redacted] which it put against the subsequent disposal of the shares to [redacted]

6. The Appellant claimed that he only became aware of the pending sale of [redacted] on 6 July [redacted] after the share for share exchange between [redacted] and [redacted] had taken place. The Respondent subsequently concluded that the exchange was not effected for bona fide commercial reasons, and formed part of an arrangement or scheme of which the main purpose or one of the main purposes was the avoidance of a liability to tax. On 13 December 2023 it raised a notice of amended assessment to CGT against the Appellant.

7. On 10 January 2024, the Appellant appealed against the amended assessment to the Commission. The appeal proceeded by way of a hearing held in private on 20 and 21 January 2025. The Appellant was represented by senior counsel, and the Respondent was represented by senior and junior counsel.

Legislation

8. Section 584(3) of the TCA 1997 states that

> *"Subject to subsections (4) to (10), a reorganisation or reduction of a company's share capital shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it; but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired."*

9. Section 586 of the TCA 1997 states *inter alia* that

> "*(1) Subject to section 587, where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, section 584 shall apply with any necessary modifications as if the 2 companies were the same company and the exchange were a reorganisation of its share capital.*
>
> *(2) This section shall apply only where –*
>
> *(a) the company issuing the shares or debentures has, or in consequence of the exchange will have, control of the other company, or*
>
> *(b) the first-mentioned company issues the shares or debentures in exchange for shares as the result of a general offer made to members of the other company or any class of them (with or without exceptions for persons connected with the first-mentioned company), the offer being made in the first instance on a condition such that if it were satisfied the first-mentioned company would have control of the other company.*
>
> *(3) (a) In this subsection, "shares" includes stock, debentures and any interests to which section 587(3) applies and also includes any option in relation to such shares.*
>
> *(b) This section shall not apply to the issue by a company of shares in the company by means of an exchange referred to in subsection (1) unless it is shown that the exchange is effected for bona fide commercial reasons and does not form part of any arrangement or scheme of which the main purpose or one of the main purposes is avoidance of liability to tax*…"

Evidence

[redacted] – *The Appellant*

10. The Appellant stated that he [redacted].

11. The Appellant gave an outline of his family's business history. [redacted] The company grew and became very successful. However, [redacted], the company's bank, [redacted], called in its outstanding loans, and the family ended up losing the company in or around [redacted]. [redacted]

12. [redacted]. He stated that "*The ambition was to try and put everything back together again.*"

13. In [redacted]. In late [redacted] approached the Appellant to invest in [redacted] and he invested €100,000 for [redacted] A Ordinary shares. He stated that [redacted] expected it would take [redacted] years for the company to grow to a size where it would be suitable for a sale, and he (the Appellant) was comfortable with this timeframe.

14. He stated that he had no day-to-day involvement in [redacted] His main role was to bring [redacted] to operational meetings on a Saturday morning at the company premises. The directors of [redacted] were [redacted]. When asked about his understanding of the significance of his A Ordinary shares, he stated that

> "*The only concern I had when the company was being set up, that under no circumstance was I going to sell back to any of those who purchased* [redacted]. *So I believed the purpose of the section A shares were that I had no control with the day to day but that if* [redacted] *was, or whoever had the company at this stage,* [redacted] *made a decision to sell to* [redacted] *I could veto that.*"

15. He stated that he attended two directors' meetings in [redacted] which concerned [redacted] seeking to purchase a site and drawing down a loan. Afterwards he only attended

operational meetings. He stated that these were originally monthly but became less frequent over time.

16. The Appellant stated that he acquired [redacted] house and farm in [redacted]. It was purchased through a mixture of borrowings and savings. He stated that his plan was to [redacted] create a base for his family. [redacted]

17. On 13 January [redacted] informed the Appellant that an offer had been made to purchase [redacted] The Appellant stated that he was told at an operational meeting, and that the interested party was [redacted]. He stated that [redacted] told [redacted] not to sell to [redacted] but instead to go back with a counter offer to buy [redacted] He stated that [redacted] "*had no intention of selling to them*", and he did not find out at the time what was the proposed offer. That operational meeting was the last the Appellant attended. He stated that the purpose of the meetings was mainly to keep [redacted]

18. The Appellant stated that, following having been informed about the offer, he attended his accountants, [redacted], to give them his accounts for the previous year. They discussed him setting up a holding company to create an investment vehicle. He stated that he had intended to set up such a company for a number of years:

> "*A holding company would have been discussed as an efficient way to manage my aims.* [redacted] *I was focussing on getting a farm. In* [redacted] *I was focussing on getting a farm. By* [redacted] *in October, when we did the accounts, we would have discussed setting up a holding company. We would have done the same again in* [redacted] *in October, but we just never got around to it. In* [redacted] *when I went in I would have requested that we set up a holding company.*"

19. He stated that the offer for [redacted] focussed his mind. His accountants provided him with oral advice. He stated that he wanted to establish the company for succession planning purposes. He also wanted to separate his house and lands and limit his liability, because he did not want to risk losing his house and farm. He also understood that banks would be more likely to lend to a company than to him personally for development purposes. The Appellant discussed his development plans. [redacted]

[redacted]

20. The application to incorporate his holding company [redacted] was made on 15 June [redacted] He was secretary of the company and a director together with [redacted]. He was the sole shareholder. He stated that the reason for the delay in incorporation was that his accountant had personal difficulties. He stated that he was not aware when he applied to incorporate [redacted] that there had been further inquiries about purchasing [redacted]

21. The Appellant stated that [redacted] made an offer pursuant to section 586 of the TCA 1997 to the members of [redacted] on 2 July [redacted] Letters issued to himself, [redacted]. His replying letter to [redacted] was not dated but he believed it was written and sent on the day the other letter was received, i.e. 2 July [redacted] His letter agreed to the share for share exchange with [redacted] replied to state that they did not wish to accept the invitation to subscribe for the shares.

22. A share allotment form was received by the Companies Registration Office ("CRO") on 11 July [redacted] confirming that the Appellant had received [redacted] ordinary shares in [redacted] in exchange for [redacted] A Ordinary shares in [redacted] The shareholding was given a value of [redacted] The Appellant believed that this valuation was based on the offer made by [redacted] in [redacted], and that this was given to his accountants by [redacted]. He stated that the share allotment happened on 2 July [redacted] He stated that he was unaware at this stage of the possible takeover of [redacted] by [redacted]

23. The Appellant stated that [redacted] informed him on 6 July [redacted] that there was an offer for [redacted] and that he [redacted] was interested in selling. He was told that the offer was in or around [redacted] He stated that he was very surprised, but that "*I was happy once* [redacted] *was happy and once it wasn't* [redacted]." He received a letter dated 6 July [redacted] from [redacted] Solicitors regarding the proposed sale. On 14 July [redacted] the Board of Directors of [redacted] (the Appellant [redacted]) met to approve the sale of its shares in [redacted]

24. On 19 July [redacted] a Share Purchase Agreement ("SPA") regarding the sale of [redacted] was signed. The Appellant personally as well as [redacted] was listed as a vendor. The Appellant stated that he believed this was because he was still the legal owner of the shares in [redacted] at that date. He stated that his involvement in [redacted] concluded then. He stated that costs of €59,530 arising from the sale were deducted from the monies received by [redacted] He stated that no funds were transferred to him personally.

25. The Appellant stated that [redacted] purchased additional lands around his farm in [redacted] He stated that an independent valuer gave a valuation on the lands, [redacted]

26. [redacted] For these reasons, he had not been in a position to further his investment aims through [redacted]

27. On [redacted] a rectification form B42A was filed with the CRO, which stated that the valuation of the share allotment on 2 July [redacted] had been incorrectly stated to have been [redacted] which was replaced by a valuation of [redacted] The Appellant stated that the original valuation had been based on the offer made in [redacted] and did not correctly reflect the valuation on foot of the sale of the shares to [redacted]

28. On cross examination, the Appellant stated that in [redacted] he was [redacted] and [redacted]. He stated that when he was younger he had been a sales rep in [redacted] business for 18 months, but he did not have much knowledge of the business. He was working as [redacted] and stated that €100,000 was a significant amount of money for him at the time. He accepted that he was given one third of the shareholding in [redacted]

29. He was asked about the conditions attached to his A Ordinary shareholding:

> "*That the holders of any of the "A" shares shall be entitled to receive notice of and attend all general meetings of the Company but not to vote on any resolution proposed thereat save with regard to proposal* [sic] *to sell or dispose of part or all of the business of the company or to incur capital expenditure of over €250,000.00 in any one project*."

30. He stated that the wording was proposed by [redacted] Solicitors, and agreed that it was inserted at his request so that he would have a say in any possible disposal of the company. He agreed that he attended two meetings in [redacted] which involved the company considering relatively significant steps (the purchase of a site and the drawing down of a

loan). He agreed that the decision whether to sell the company to a third party was also a considerable step.

31. He did not agree that he had had more engagement in [redacted] company, [redacted], than [redacted]. He agreed that there were no minutes of the operational meeting of [redacted] that he attended in January [redacted] at which he was informed of the approach regarding the potential sale of [redacted] to [redacted] He agreed that he never received dividend payments from [redacted] and that his intention was to receive capital appreciation.

32. He stated that when he invested in [redacted] he had expected it would take [redacted] years to recoup his investment. When it was suggested to him that it would be preferable to achieve a return sooner than that, he stated that "*It would be preferable but it was not the priority.*" He stated that he was not in a rush to get his investment back. He accepted that he had availed of section 604A relief, but was unaware of the relevant deadline for disposal. He agreed that he had availed of the relief in respect of the purchase of lands which he sold to [redacted] in [redacted].

33. The Appellant stated that he received tax advice, but that "*we do not have anything on paper.*" Regarding the meeting in [redacted] at which he stated he was told about the offer from [redacted] he said he had no recollection of the figure being mentioned. He stated that he did not want to know the amount of the offer because "*It was not my business.*"

34. When it was put to him that he had sought the right to have a say over the sale of the company, he stated that

> "*I did not wish to sell the company. I can say that again. As I said, the insertion of that clause was for one purpose and one purpose only, and that was that under no circumstances was the company to be sold to* [redacted]."

When counsel suggested that this was not what the clause stated, he replied that he was not a lawyer.

35. He stated that his accountants, [redacted], had been [redacted] accountants. He did not believe that they acted for [redacted]. He stated that he contacted them in February [redacted] to give them his accounts for [redacted] and that they had a discussion with regards to setting up a holding company. He stated that they had previously had discussions on the topic in October [redacted] and October [redacted] When he was asked why he had not previously said this to the Respondent, he stated that he answered every question he was asked.

36. He said that his request in October [redacted] to establish a holding company was not pursued because he had other things to deal with. When asked what the difference was in [redacted] he replied, "*At that stage* [redacted] *had had enough…At that stage there had been an offer which helped focussed my mind.*"

37. It was put to him that the transfer of [redacted] his farmland to [redacted] did not tally with his claim that he wanted to keep his development lands separate from his house and farm. He did not accept that the transfer was done to enable him to extract monies within [redacted] tax free. He stated that [redacted] charged him for use of the lands, with annual rent of [redacted] It was suggested that this was a poor return for an investment of [redacted]. He accepted that he did not pay rent in [redacted] or [redacted] which he stated was an oversight on his part, but that the land had increased in value since [redacted] purchased it.

38. The Appellant was asked about the deductions claimed by [redacted] in respect of the sale of [redacted] He stated that he could not say with certainty what was the involvement of [redacted] although he thought they may have been [redacted] accountant. [redacted] had discharged one third of [redacted] fee of €49,200. He stated that he could not say what the invoices from [redacted] as well as [redacted] and [redacted], related to. He stated that he did not receive written advices from his accountants, [redacted], and when asked whether he had specifically instructed this, he stated that he had not.

39. The Appellant was asked why [redacted] claimed a trading expense for the costs incurred in the sale of [redacted] as well as a cost on disposal. He stated that he had acted on advices received. He stated that he had not received a fee note from his accountants, because "*I ask what I owe and I pay my cheque*." The fee from his accountants for work carried out on the sale of [redacted] and the establishment of [redacted] was €30,750. When it was put to him that the fee seemed very high for the establishment of a holding company, he stated that "*I would have no idea was to what is an appropriate level of professional fees.*" He did not agree that the fee was for tax planning services.

40. He was asked why [redacted] accounts stated that the share for share exchange took place on 19 July [redacted] He stated that he did not know and had not prepared the accounts. The [redacted] accounts showed net current assets of [redacted], and he agreed that this would not leave much scope for development. It was put to him that if [redacted] was genuinely an investment company, one would expect to see some level of investment activity. The Appellant agreed "*under normal circumstances*" but explained again the reasons why he stated that there had not been much investment activity carried on by the company. He was asked why there was no written documentation regarding the alleged attempt to

purchase [redacted] and he stated that there was no such documentation, and that the offer had been made orally.

41. The return of allotment Form B5 was undated, but the Appellant stated that he signed it on 2 July [redacted] He stated that he could not remember who was present when he signed it. He stated that he travelled to his accountants' offices. When asked again who was present, he replied:

> "*At that time, as you are well aware – as you may be aware, sorry, quite a lot was going on with regards to the sale of* [redacted]*. The only meeting I can say with certainty as to where everyone was, was at* [redacted]*, where* [redacted] *sat at the head of the table, I was to his right,* [redacted] *was to my right, and* [redacted] *was opposite. That, I remember who was present at that meeting.*
>
> *The other meetings, you have already told me I must say with certainty. I'm merely saying that I cannot say with certainty who was there. I cannot say with the certainty that you require*."

42. It was put to him that [redacted] also retained [redacted] as his tax agent, and the Appellant stated that he was unaware of that. He stated that he had no interaction with [redacted] on 2 July. He stated that he was not present when [redacted] met [redacted] on 20 June [redacted] and did not know about it at the time. He stated that he thought he had not been invited because [redacted] was concerned he would tell [redacted]. When it was put to him that [redacted] was told about the proposed sale a fortnight before it closed, he said he was not sure when [redacted] was told.

43. He stated that he was told about the proposed sale on 6 July. It was put to him that this made a nonsense of the reason provided by him for not having been told earlier, but the Appellant stated that [redacted] did not want any sale to happen. He was asked why he was advised by his accountants to put a valuation of €[redacted] on the Form B5 on 2 July, when his accountants knew how much the offer was from [redacted] at that time. The Appellant stated that the valuation was based on the earlier offer from [redacted] He rejected the suggestion that it was done to create a narrative that he was unaware of the approach from [redacted]

44. He was asked about the letters sent to members of [redacted] pursuant to section 586. He confirmed that the letters were dated 2 July and said that he went to his accountants' office that day to sign his. He stated that he was told to sign it by his accountant. It was put to him that the wording of the letter did not comply with the requirements of section 586(2)(b). He stated that he did not draft the letter. He could not explain why the date for

return of the letter was left blank. The response from him to the letter was also undated, but he said that he signed it on 2 July. He was asked how he knew this and he said: "*Because I would have had to drive to the offices of* [redacted]."

45. The Appellant was asked when and where [redacted] signed the letters, and he stated that "*They would have signed it, I believe, at the site of – the* [redacted] *… I would have brought the letters to* [redacted]." When it was put to him that he had earlier said he had not met [redacted] on 2 July, he replied:

> "*A. I didn't meet* [redacted] *on 2nd July. At that time you were questioning whether I was at the accountants' office and I did not met him at the accountants' office.*
>
> *Q. No, no, no, no, no, I'm talking about separate and aside from that.*
>
> *A. Oh, well then I am incorrect.*
>
> *Q. Because your evidence has been, always, that you only met him on the 6th July. So that's not true, you met him and discussed matters on 2nd July; isn't that right?*
>
> *A. Again we're asking for dates during a time of chaos, I cannot say with a degree of certainty.*"

He subsequently stated that he had no recollection of whether he gave the letter to [redacted].

46. He agreed that the letter of 6 July from [redacted] Solicitors was addressed to himself, [redacted]. He agreed that it stated that they had agreed to sell [redacted] He also stated that he only heard about the sale on 6 July, and he was not sure how the letter stated that the sale was agreed. It was suggested that the solicitors would not have issued the letter "*in a vacuum*", to which the Appellant agreed, and he stated that "[redacted] *would have instructed* [redacted]." He did not accept that the use of his Christian name on the letter suggested prior engagement on the matter. He stated that he signed the letter on 6 July [redacted] but could not say with certainty where.

47. He confirmed that he was personally named as a vendor on the SPA. He stated that this was on the advice of his accountants. He stated that he did not know why the stock transfer form was not completed on 2 July. He agreed that he understood that if there was a subsale within 44 days he would avoid stamp duty. When it was put to him that this explained why the form was not completed on 2 July, he stated that he did not know. He agreed that the form was signed on 19 July, the same date as the SPA. He denied that

when he set up [redacted] and carried out the share exchange he knew the next stage was the sale of [redacted] to [redacted]

48. He agreed that the SPA provided that he was subject to its covenants, including personal covenants in respect of any amount that might have arisen under the contract. He stated that he did not believe this exposed him to risk: "*Due diligence was done by the solicitor acting for* [redacted] *the accountants would have looked at all of the details*." He stated that he did not believe [redacted] would have put him at risk. He agreed that there was a financial cap of [redacted] and that the obligations of the covenanters were joint and several.

49. On re-examination, he could not give a reason why [redacted] CT1 return for [redacted] stated that the company acquired shares in [redacted] on 19 July [redacted] rather than 2 July. When it was suggested by his counsel that it could have been a mistake, he agreed that this was possible. He stated that he did not have any communication with [redacted] after [redacted] meeting with [redacted] on 20 June [redacted] He believed his first contact with the solicitor [redacted] regarding the sale was 6 July, and he did not have any contact with him beforehand. When asked by the Commissioner why the solicitors' letter of 6 July stated that it confirmed a previous verbal quotation, he stated that [redacted] had all the discussions with the solicitors.

[redacted] – *Solicitor for vendors of* [redacted]

50. [redacted] stated that he knew the [redacted] family over many years. He was the solicitor for [redacted] He had little dealings with the Appellant through the business, but knew him. Regarding the sale of [redacted] he stated the first contact he had was a meeting with [redacted] on 20 June [redacted] The Appellant was not present at the meeting. The detailed preparatory work for the sale was conducted by his associate. He stated that it was a "*smooth transaction.*" He stated that his associate prepared the letter of 6 July:

> "*I mean, the importance of it obviously is you want to have clear instructions to be engaged by the vendors of the shares, you want to know who your clients are, you want to be clear about that, and also to able to give an outline of the work to be done, the letter speaks for itself.*"

51. He stated that he had no contact with the Appellant prior to 6 July. When asked if he had made an attempt to find out the Appellant's views, he stated that

> "*No. Well* [redacted] *was the one who was running the business day to day, he was very familiar with it. He was the one who was giving the instructions, if you like, on behalf of the vendors. But obviously we wanted to be very clear that we had instructions from*

the vendors to sell. This letter, if you like, a letter of engagement setting out what is being done is addressed to all parties. Because we had been taking [redacted] *instructions, but we wanted to be clear that we were on the same page with who our clients were.*"

52. He stated that he gave a verbal quotation of costs to [redacted] on 20 June, which was confirmed in the 6 July letter. He did not believe the verbal quotation was given to the Appellant or [redacted]. His next involvement was attending the closing of the transaction on 19 July. He did not have any recollection of the Appellant being present at that meeting.

53. On cross examination, the witness stated that he was aware of the Appellant's shareholding in [redacted] When it was put to him that there would have been discussion on 20 June regarding the intentions of the other two shareholders in [redacted] (i.e. the Appellant and [redacted]), he stated:

"*A. Well, yeah. The way it was put to me was 'we're selling the company.'*

Q. Yes.

A. And [redacted] *was the one giving those instructions but on behalf of his – saying to our shareholder we have decided to sell.*"

54. The witness stated that he had no involvement in tax planning for the transaction. He stated that the Appellant was named as a vendor on the SPA because the purchaser wanted to be sure it got title to the shares. When asked if he advised the Appellant that he was potentially open to a risk of [redacted] under the SPA, he stated that he did not believe he met with the Appellant during the course of the transaction, and that "*My assistant dealt with the minutiae of it.*"

[redacted] – [redacted]

55. [redacted]

56. He stated that he approached the Appellant to invest in [redacted] "*There was back and forth and trying to get the structure right and bits and pieces, but yes, ultimately he agreed.*" He stated that the Appellant originally wanted to have involvement in the company, but

that he (the witness) did not want that. '[redacted] *then listed out his number of items, specifically that he was able to veto a sale to* [redacted] *or the owners of* [redacted]. *So we came up with a shareholding structure and class of shares and a shareholders' agreement to ensure he could vote on certain aspects that were deemed fundamental to the business, but not get involved in the day to day*."

57. He stated that the Appellant had no day-to-day involvement in [redacted] He brought [redacted] to the operational meetings, which the Appellant stated were originally held weekly, on Saturdays. As time went on, the frequency reduced. He stated that the Appellant attended two directors' meetings in [redacted] including one when the company decided to purchase a site in [redacted], which became the main base for the company.

58. The witness stated that if the Appellant asked him a question about the business he would answer it, but "[redacted]." In late [redacted] approached him regarding purchasing the business: "*At the time I did not believe the value was right, the price was right, the time was right*." He stated that he was offered around [redacted]. He stated that it was an informal approach and he took a number of days to think about it, but he knew it was not enough.

59. He stated that he did not discuss the offer with the Appellant or [redacted] before rejecting it, but he did discuss it with [redacted]. He told the Appellant and [redacted] about it in January [redacted] and the Appellant's view was "*whatever you think, if you're happy, if you think it's the right move, okay. But* [redacted] *point of view it was very much you're not selling, don't sell*." He stated that he did not tell the Appellant the price that was offered.

60. He stated that he had been aware [redacted] of the Appellant's intention to incorporate a holding company. He stated that the Appellant told him in early [redacted] that he had taken steps to do so, and he asked the witness to become a director, which he agreed to do as long as he was not required to have any day-to-day involvement.

61. The witness stated that he was approached by [redacted] on the June bank holiday in [redacted] He did not discuss that approach with anyone. Some days later he met with representatives of [redacted] and told them that he wanted [redacted] for the business. A few days after that [redacted] confirmed that it wanted to do a deal. The witness stated that he told [redacted] after the meeting where he stated the price he wanted, but he did not tell the Appellant.

62. He signed the documents in mid-June to incorporate [redacted] but stated that he did not tell the Appellant about the offer. He stated that reason for not telling the Appellant was that

"*there is no deal until there is a contract signed, until there is something substantial there to be signed, otherwise it is hearsay and it is hopes and dreams. We had been through a scenario where with* [redacted] *we believed on a number of occasions we had a deal done and the business was going to be saved. Fell through every single time… So there is no, in my mind there is no deal, there is nothing worth talking about until I am very satisfied that it is substantial*."

63. He also stated that he believed that the Appellant "*would probably have gone* [redacted] which would have caused difficulties for the proposed deal, and also "*I wasn't sure how* [redacted] *would react but I knew if he bit into it and was happy I knew that he would be hounding me and plaguing me probably every day asking how's it going, what's the update, and that was not the time*."

64. A meeting was arranged for 20 June [redacted] in the offices of [redacted]. The witness stated that he did not tell the Appellant that the meeting would take place. He stated that the meeting went well, but he did not tell the Appellant about the potential deal after the meeting either: "*There was not a sale at that point. There was not a deal. I had a good feeling but there was formal due diligence had not taken place. There was not a draft of a contract in place at that point*."

65. Regarding the letter dated 2 July [redacted] from [redacted] the witness stated that he could not recall how he received the letter. He could not recall when he signed the letter, as his signature was not dated, but he believed it would have been within 48 hours of receiving it. He stated that he did not tell the Appellant at that stage about the proposed sale of [redacted] "*Because at that stage they were not sold, there was not a contract*."

66. The witness stated that he told the Appellant about the proposed sale on 6 July [redacted] "*No, I did not meet him personally, called him. It would have been a call and the statement would have been 'the business is being sold'… He was obviously taken by surprise and the immediate answer was how much, to who*."

67. On 14 July [redacted] there was a board meeting of [redacted] to approve the sale of its shareholding in [redacted] On 19 July [redacted] there was a board meeting of [redacted] to approve the sale to [redacted] The SPA was also dated 19 July [redacted] Copy invoices for professional fees arising from the sale were put before the witness and handed in to the Commissioner. The witness stated he engaged [redacted] to provide advisory services on the sale of the business. [redacted] fee of €49,200 was borne in three equal parts by the three vendors. [redacted] were retained to provide legal advice and draw up paperwork. [redacted] were the accountants for [redacted]

68. The witness stated that [redacted] filed his personal tax returns. They did not do work for [redacted] He stated that he did not inform them about the impending sale to [redacted] He stated that they asked him at "*some stage*" for the valuation of [redacted] and "*at that point I would have stated what the region of the* [redacted] *offer was.*" He stated that he could not recall when they approached him and that he did not tell them at that stage about the offer from [redacted]

69. On cross examination, the witness stated that the Appellant agreed in [redacted] to invest in [redacted] "*Over a period of time…Negotiations.*" He confirmed that this resulted in a split of [redacted] shares with [redacted] held by the Appellant, [redacted] held by him and [redacted] held by [redacted]. Regarding the sale of [redacted] he stated that he did not receive tax advice.

70. He confirmed that, as of 2 July [redacted] the split of the shareholding was as above, but that prior to the sale of [redacted] it was changed so that his shareholding reduced and [redacted] increased. He said that it was due to a personal agreement he had with [redacted] He stated that he could not recall the details, but that [redacted] had been dissatisfied that the Appellant held a third of the business when he [redacted] was involved on an ongoing basis. So the witness stated that he agreed with [redacted] that if the business was sold, he would give him some of his shares. He could not explain why he and [redacted] received less per share (€[redacted] than the Appellant (€[redacted] He denied that the changes were made for tax purposes, in order to bring the value of his holding below the limit for shareholder relief on CGT. He stated that he was unaware that he had not made a return to the Respondent for capital acquisitions tax in respect of his gift of shares to [redacted].

71. Regarding the [redacted] operational meetings with the Appellant and [redacted], the witness stated that their frequency greatly reduced over the period up to January [redacted] "*it was not that it was weekly to the point of January* [redacted] The witness agreed that he was conscious that the Appellant would have to be happy with any proposed sale. He stated that he informed [redacted] about the meeting on 20 June [redacted] because he "*was fully involved in the business on a day-to-day basis.*" He stated that he did not tell the Appellant because he did not want him potentially telling [redacted].

72. He agreed that, on his own account, he told the Appellant about the proposed sale 13 days before it closed, and he accepted that the Appellant did not tell [redacted] at that stage. He said that he had not trusted the Appellant not to say it to [redacted], but he was able to tell him on 6 July because "*It was agreed at that point.*" When it was put to him that it was inconceivable that he could have committed the Appellant to the deal at the meeting on 20 June if he had not spoken to him about it, he stated that "*At that point there was no commitment.*"

73. He stated that he told the Appellant about the sale on 6 July by way of a phone call. He did not know if the Appellant was present in the room for the signing of the SPA. He could not remember whether the Appellant was present at any meetings relating to the sale. He did not know why the Appellant had stated in evidence that there was "*quite a lot going on with regards the sale of* [redacted] on 2 July.

74. He agreed that the Appellant could have refused to agree to the sale when he informed him on 6 July, and stated that if he had done so "*there would have been an element of fees incurred*." He did not recall whether the Appellant called out to him on 2 July to hand him the letter from [redacted] regarding the share for share exchange. He denied that there was a discussion at that stage regarding the potential sale of [redacted]

[redacted] – *Solicitor for* [redacted]

75. The witness confirmed that he acted on behalf of [redacted] in respect of its purchase of [redacted] He stated that he became aware of its intention to purchase [redacted] on 15 June [redacted] He attended the meeting on 20 July [redacted] in the offices of [redacted]. He did not recall the Appellant being present at that meeting, and stated that he had not met him prior to attending the hearing. He stated that he had no contact with the Appellant in [redacted]

76. He stated that the reason the Appellant was listed personally as a vendor of the shares, together with [redacted] was that he understood the Appellant had sold his beneficial interest in the shares to [redacted] but was still the registered owner. He stated that he insisted that the Appellant was personally a party to the SPA in order to capture both the legal and beneficial interest. He could not recall if the Appellant was present at the signing of the SPA on 19 July, as his colleague was handling the meeting and he could not remember the meeting. He stated that he recalled being informed by the vendors' solicitors that the Appellant had attended with them just before the sale, so he (the Appellant) was probably not at the closing meeting.

77. On cross examination, the witness stated that a stock transfer form was similar to a conveyance and transferred the legal interest. He agreed that the stock transfer form for [redacted] was dated 19 July [redacted] which was the day the sale closed. He stated that he did not have any sight of the stock transfer form for the transfer of the Appellant's shares in [redacted] to [redacted]

[redacted] – *Director of* [redacted]

78. The witness confirmed that he was the financial director of [redacted] He stated that he negotiated the sale of [redacted] with [redacted], and that he had no engagement with

the Appellant. He stated that the first time he met the Appellant was that day, outside the hearing room. He was present at the meeting in [redacted] Solicitors[1], and stated that [redacted] was present but that the Appellant was not. There were no questions for the witness on cross-examination.

Submissions

Appellant

79. In written submissions, the Appellant contended that the amended assessment raised by the Respondent was incorrect, and furthermore was excessive, insofar as it was based on a purported chargeable gain arising to the Appellant on the disposal of shares by him on 2 July [redacted] It was submitted that the amended assessment should be reduced to nil.

80. On 2 July [redacted] issued shares to the Appellant in exchange for the transfer by the Appellant of his [redacted] Ordinary A shares in [redacted] to [redacted] The provisions of section 584 of the TCA 1997 applied and therefore the transaction was deemed to be a reorganisation of its shares by one single company. The combined effect of sections 586 and 584 was that the share for share transaction was deemed not to constitute a disposal for the purpose of capital gains tax.

81. It was submitted by the Appellant that the share for share exchange was made for bona fide commercial reasons and in particular was made in the context of his ongoing attempt to consolidate various assets and investments in one single holding vehicle and to facilitate succession planning. It was made prior to the execution of a contract for the sale of [redacted] to a third party. Furthermore, it was not made in contemplation of the impending sale of [redacted] to a third party since the Appellant had no knowledge of the sale until after the share for share exchange had been concluded. Finally, it was not made in the course of any tax planning exercise on the part of the Appellant and therefore, it was not a transaction that was part of any type of scheme or arrangement that was precluded by section 586(3)(b) of the TCA 1997. The Respondent had failed to provide any evidence to support its view that the transaction did not come within the scope of section 586.

82. In oral submissions, senior counsel for the Appellant submitted that the appeal fell to be decided primarily on the facts of the transaction. Counsel opened *IRC v Brebner* [1967] 2 AC 18 ("*Brebner*"), and noted that Lord Upjohn stated that it was not permissible to work

[1] The question to the witness stated that the meeting was on 1 June [redacted] but the Commissioner is satisfied that this was an error, as it did not seem to be in dispute that the meeting was held on 20 June [redacted]

backwards, by identifying a tax advantage and therefore concluding that it must have been a main purpose of the transaction.

83. No evidence had been advanced by the Respondent to challenge what had been adduced by the Appellant. It was not sufficient for the Respondent to conjure up a fog of insinuation and conjecture, and contend that it outweighed the direct evidence given by the Appellant and the other witnesses called on his behalf. All the evidence pointed one way. This was in contrast to the Commission's determination in 127TACD2022, where direct evidence was provided by an officer of the Respondent in that matter.

84. Counsel submitted that the evidence of the Appellant and the other witnesses was clear, coherent and consistent. If the Commissioner was happy with the evidence, it was not open to him to embark on an exploration of various conjectures to see whether or not the "golden thread" alleged by the Respondent could be ascertained. The Appellant bore the burden of proof, but the standard of proof was the balance of probabilities. The Appellant was not obliged to prove his case beyond a reasonable doubt.

85. Counsel noted that, during the cross examination of the Appellant, it was suggested to him that the letters of 2 July [redacted] issued by [redacted] for the purposes of the share for share exchange, did not comply with the requirements of section 586(2)(b). Counsel submitted that there was no requirement in the provision for the general offer to be made in any particular format. It was not required that the conditionality of the last part of subsection (2)(b) be set out expressly in the letter. In any event, the letter stated that the general offer was made "*pursuant to section 586 of TCA 1997.*" Anyone reading the letter who wanted to find out the basis on which the general offer was being made need only look to section 586. It was notable that the Respondent had not previously raised a concern about the wording of the letter, which suggested that it was not particularly perturbed by the apparent omission.

86. The evidence showed that the requirements of section 586(2)(b) had been met. The second requirement, set out in section 586(3)(b), was two-fold. In regards the first part, the bona fide commercial reasons test, counsel referred to *Snell v HMRC* [2006] EWHC 3350 (Ch) ("*Snell*") which showed that there was no general test for what constitutes a bona fide commercial reason.

87. The Appellant had set out a number of reasons for why he proceeded with the share for share exchange. Firstly, he was keen to avoid what had happened in the past, so he wanted to establish an investment vehicle in order to keep its assets segregated from his own personal assets. Secondly, he believed that it would be easier to borrow through a holding company than personally, given his age. Thirdly, he believed that it would assist

with succession planning for [redacted]. The Respondent had criticised the alleged lack of activity by the company after its incorporation, but the Appellant had explained why this was the case. The holding company was never intended to be an active trading company. It was not necessary to evaluate how successful the holding company subsequently was in order to determine whether the share for share exchange was done for a bona fide commercial reason.

88. The second test was that the share for share exchange did not form part of any arrangement or scheme of which the main purpose or one of the main purposes was the avoidance of liability to tax. The Appellant's evidence was that when he carried out the exchange, he was unaware of the impending sale of [redacted] to [redacted] If he was unaware of the sale, it had to follow that he was unaware of any potential tax liability that he would suffer if he was personally holding the shares when they were sold. This again was a matter to be determined on the factual evidence.

89. Counsel stated that it was obvious that the share transfer form was not executed on 2 July, because four days later the Appellant became aware of the impending sale to [redacted] so it would have been pointless to execute it before that had completed. There were also brief submissions made about whether [redacted] claimed the expenses arising from the sale of [redacted] as both a trading loss and a capital loss, and about the transfer of shares between [redacted] and [redacted] just prior to the sale of [redacted]

Respondent

90. In written submissions, the Respondent stated that it believed the share for share exchange was designed to avoid a liability to CGT by the creation of an unnecessary step by the Appellant in the disposal of his shares in [redacted] The circumstances and timing of the setting up of [redacted] and the exchange of shares with it led the Respondent to conclude that the exchange of shares was not for bona fide commercial reasons but rather was part of a scheme or arrangement, of which the main purpose or one of the main purposes was the avoidance of tax. Consequently, the Respondent withdrew the relief claimed by the Appellant pursuant to section 586 of the TCA 1997, giving rise to the assessment under appeal herein.

91. In considering whether the transaction was effected for bona fide commercial reasons, the Commissioner was required to consider the facts surrounding the case and was entitled to draw inferences from these surrounding circumstances in ascertaining the intention of the taxpayer. In *Brebner*, Lord Upjohn stated that the question whether one of the main objects was to obtain a tax advantage was subjective. In *Snell*, the English

High Court stated that "*The ordinary meaning of the word 'scheme' is 'a plan of action devised in order to attain some end'. Similarly an arrangement is 'a structure or combination of things for a purpose'*".

92. In this matter, the sole transaction effected by [redacted] was the purchase of land from the Appellant in [redacted] Furthermore, the Appellant reacted to being notified in early [redacted] about the offer to buy [redacted] by instructing his agent to set up a holding company. There did not appear to be any commercial or business basis for this step. The Commissioner was entitled to infer from the factual matrix that the main and overriding objective of the exchange of shares was to avoid tax.

93. Even if it was accepted that it was a bona fide commercial transaction, the Appellant had to satisfy the "main purpose" test. However, the Appellant devised a plan to sell his shares in [redacted] with a view to avoiding tax. Significantly, meetings with [redacted] occurred prior to the incorporation of [redacted] There was a golden thread which weaved through all the steps whereby the Appellant devised an arrangement or scheme with the sole objective of avoiding the tax liability.

94. In conclusion, the use of section 586 by the Appellant gave [redacted] a market value base cost on the [redacted] shares of [redacted] (via section 547) for the purpose of onward disposal of those shares. [redacted] paid no CT on the disposal of the [redacted] A Ordinary shares in [redacted] to [redacted] and in fact returned a loss due to costs incurred. [redacted] received consideration of [redacted] without suffering any tax on the disposal of the shares. These funds were subsequently used by [redacted] to purchase [redacted] hectares of agricultural land in [redacted] – a transaction that was the subject of a claim for relief under section 604A TCA by the Appellant. In all the circumstances, the assessment should be affirmed.

95. In oral submissions, senior counsel for the Respondent stated that the purpose of section 586 was for share reconstructions and reorganisations. One had to look at what had occurred in this instance to determine if it was a genuine commercial decision to take advantage of section 586 for the purpose envisaged by the legislature.

96. Section 586(2)(b) provided that the general letter of offer had to have particular wording. This could not be disregarded; *Revenue Commissioners v Doorley* [1933] IR 750 provided that any relief or abatement of tax had to be strictly construed as against the taxpayer. In this instance, there had been a failure by the Appellant to comply with that provision. That in itself was fatal to the Appellant's case.

97. It was surprising that counsel for the Appellant had suggested the Commissioner should have any regard to the decision by the Respondent not to call evidence. The burden of proof rested on the Appellant. The Respondent had called evidence in 127TACD2022, because in that case the evidence of that appellant differed from what he had told the Respondent's inspector during the course of its audit. In this appeal, the Appellant had always maintained that he was unaware of the sale of [redacted] until 6 July [redacted]

98. In considering the requirements of section 586(3)(b), the judgment in *Snell* was useful. Regarding whether the bona fide commercial reason test was met, counsel stated that only [redacted] acres of the lands transferred by the Appellant to [redacted] had been valued on the basis of development potential, whereas almost [redacted] acres were valued as agricultural. This did not tally with the Appellant's suggestion that he wanted to keep development lands separate from his farm. There had been no steps taken since [redacted] to develop any of the lands.

99. There was no evidence to support the Appellant's contention that it would be easier to borrow money through the holding company than personally, and counsel suggested that it seemed more likely that the opposite would be the case. Furthermore, there was no evidence to support the suggestion that the Appellant was concerned about succession planning, and a letter from his agent to the Respondent in [redacted] noted that he had not yet made a will.

100. Regarding the "main purpose" test, the case being made by the Appellant was that it was all a coincidence that he entered into the share for share exchange at the same time that [redacted] was in the process of being sold. The narrative seemed to be that [redacted] did not tell the Appellant because he was afraid the Appellant would tell [redacted]. But the evidence showed that [redacted] was never told by the Appellant. It beggared belief that [redacted] would not have discussed what was a very significant transaction [redacted].

101. The Appellant had previously been involved in major decisions involving [redacted] but it was claimed that he was ignored when it came to the sale until it was a *fait accompli*. [redacted] had clearly told [redacted] that he had instructions from the other two shareholders to sell. It was clear from the Appellant's evidence that the offer in late [redacted] had "*helped focus [his] mind*" to set up the holding company. He also indicated that he had received advice from his accountants regarding tax planning before resiling from that. It beggared belief that his accountants would have charged €25,000 for merely setting up a holding company.

102. It was notable that no advices from his accountant had been provided, and there was no evidence heard from his tax advisers, who were present on both days of the hearing. This was something the Commissioner would have to have regard to.

103. In his evidence, the Appellant had stated that he travelled to [redacted] premises on 2 July to hand [redacted] the section 586 letter, but subsequently stated that he had been wrong to say this. He had also referred to 2 July as a "*time of chaos*", which suggested that the share for share exchange had to be completed quickly before the sale of [redacted] He also stated that he did not know why the stock transfer form to transfer his shares to [redacted] was not completed until 19 July. The only logical explanation was that it was left on hold because it was known there would be a further sale of the shares to [redacted] The Appellant had also said that on 2 July there was "*quite a lot going on with regards to the sale of* [redacted] which indicated he knew about it at the time.

Material Facts

104. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact that he understands to be agreed or uncontroverted:

104.1. The Appellant is [redacted]. He owns a house and farm [redacted] which he acquired in [redacted]

104.2. [redacted]. The company became successful; however, [redacted], the company's bank called in its outstanding loans, and the family ended up losing the company [redacted].

104.3. In [redacted], [redacted]

104.4. In [redacted], [redacted]. After a period of time negotiating the matter, the Appellant invested €100,000. For this investment he was granted [redacted] A Ordinary shares in [redacted]. The memorandum of association of [redacted] was amended on [redacted] to provide *inter alia* that

"*the holders of any of the "A" shares shall be entitled to receive notice of and attend all general meetings of the Company but not to vote on any resolution proposed thereat save with regard to proposal* [sic] *to sell or dispose of part or all of the business of the company or to incur capital expenditure of over €250,000.00 in any one project*."

104.5 The Appellant did not have day-to-day involvement in [redacted] Between [redacted] and early [redacted] he attended regular operational meetings with [redacted] The purpose of these meetings was primarily to [redacted].

104.6 As a result of the Appellant's investment, there were three shareholders in [redacted] The Appellant held [redacted] shares, [redacted] held [redacted] shares, and [redacted], who worked for [redacted] on a day-to-day basis, held [redacted] shares.

104.7 The Appellant attended two board meetings of [redacted] in [redacted] to discuss and approve (1) the purchase of a site in [redacted], which became the company's base, and (2) the drawing down of a loan by the company.

104.8 In late [redacted] was informally approached by [redacted] regarding a potential purchase of [redacted] He was offered around [redacted] to sell [redacted] refused the offer. He informed the Appellant and [redacted] about the offer in January [redacted] after he had refused it.

104.9 On 15 June [redacted] the Appellant applied to the Companies Registration Office ("CRO") to incorporate a holding company, [redacted]. The Appellant was the secretary of the company and its sole shareholder. The Appellant and [redacted] were directors. The Appellant had contemplated setting up a holding company for a number of years. His reasons for setting it up were (1) to protect his house and farm by creating a separate legal vehicle for investment and development, (2) he believed it would be easier to get financing than in a personal capacity, and (3) it would assist in succession planning [redacted]. [redacted] was incorporated on 29 June [redacted]

104.10 In early June [redacted] was approached by [redacted] regarding a potential sale of [redacted] told [redacted] that he would sell for [redacted] which was agreed. On 20 June [redacted] attended a meeting at [redacted] Solicitors in [redacted]

He instructed [redacted], his solicitor, that it had been decided to sell [redacted] to [redacted] The Appellant was not present at the meeting.

104.11 The Appellant decided to transfer his shares in [redacted] to his holding company, [redacted] He decided to do this by way of a share for share exchange pursuant to section 586 of the TCA 1997. On 2 July [redacted] the Appellant as Secretary of [redacted] issued letters to the three shareholders in [redacted] The letters were titled "*General Offer to Members of* [redacted] *pursuant to Section 586 of TCA 1997*". Each letter was addressed to the relevant shareholder (i.e. the Appellant, [redacted]). The letter to [redacted] was worded as follows:

> "*The Directors of the Company* [i.e. [redacted] *have decided to issue additional Ordinary Shares of €1.00 each ranking pari passu with the existing shares in the Capital of the Company and in accordance with Section 586 TCA, 1997, the new shares must be offered in the first instance to all the members of* [redacted] *This is not an invitation or offer to the public to subscribe for any shares in the Company.*
>
> *As you hold* [redacted] *Ordinary Shares in the Capital of* [redacted] *you are entitled to subscribe for* [redacted] *Ordinary Shares in the capital of* [redacted] *in exchange for your shares in* [redacted]
>
> *If you wish to accept this offer, please complete the attached Request for Allotment Form and return the form to us no later than*
>
> *If you do not wish to accept this offer, please confirm so in writing to the Company no later than* "

Except for the number and type of shares held in [redacted] the wording of the letters to the Appellant and to [redacted] identical as to the above letter to [redacted] None of the letters provided a return date, which was left blank on each of them.

104.12 The letters issued by [redacted] to the shareholders of [redacted] on 2 July [redacted] did not explicitly state that the offer was being made on the condition that, if it was satisfied, [redacted] would have control of [redacted]

104.13 The Appellant accepted the offer for the proposed share for share exchange by letter. [redacted] declined the offer by letter. The three letters were signed by the respective signees, but none of the letters were dated.

104.14 On 11 July [redacted] the CRO received a Form B5 Return of Allotments which confirmed that the Appellant had received [redacted] shares in [redacted] in exchange for [redacted] A Ordinary shares in [redacted] The total value was stated to be [redacted]. The form was signed by the Appellant but undated.

104.15 The Appellant claimed that he was informed by [redacted] on 6 July [redacted] of the potential sale of [redacted] to [redacted] and that he agreed to the sale on that date.

104.16 On 14 July [redacted] the board of [redacted] met to agree the sale of its shares in [redacted] to [redacted] On 19 July [redacted] the board of [redacted] met to agree the sale to [redacted]

104.17 The process of selling [redacted] to [redacted] proceeded quickly and smoothly. On 19 July [redacted] the vendors of [redacted] and [redacted] entered into a Share Purchase Agreement ("SPA") for the sale of [redacted] The Appellant personally, as well as [redacted] was listed as a vendor. The Appellant personally was also named as a warrantor. Under clause 5 of the SPA, the warrantors undertook to indemnify the purchaser in certain circumstances, on a joint and several basis. Under clause 6 of the SPA, the aggregate liability of the warrantors was stated not to exceed [redacted]

104.18 Also on 19 July [redacted] the Appellant personally, as well as [redacted] was named as a covenanter on a Deed of Tax Covenant entered into with [redacted] The covenanters were potentially liable under the Deed, on a joint and several basis, to a maximum aggregate of [redacted].

104.19 Also on 19 July [redacted] the Appellant completed the stock transfer form to transfer his shareholding in [redacted] to [redacted] The Appellant had not previously completed a stock transfer form to transfer his shareholding in [redacted] to [redacted] Therefore the Appellant remained the legal owner of the shares in [redacted] until 19 July [redacted] and this was the reason why [redacted] solicitor insisted that he be personally named as a vendor on the SPA.

104.20 [redacted] financial statements for the year ending 31 December [redacted] stated that it acquired [redacted] A Ordinary shares in [redacted] on 19 July [redacted]

104.21 The Appellant's accountants, [redacted], charged the Appellant €30,750 for "*company secretarial costs in relation to the set up of* [redacted] *the sale by* [redacted] *of the shares in* [redacted] *including review of the SPA and advices on the stamp duty aspects of the sub sale*", as per a letter from them to the Respondent dated [redacted]. The Appellant stated that he received no written advices from his accountants. No evidence was heard from his accountants on

what advices (oral or written), if any, were provided by it to the Appellant in respect of tax planning regarding the sale of his shares in [redacted] and associated steps.

104.22 On 28 August [redacted] the Appellant signed a Form B42A Rectification of the Register, which was received by the CRO on 2 September [redacted] The form provided that the Form B5 previously submitted, which was stated to be effective from 2 July [redacted] had incorrectly stated the valuation of the shares to be [redacted]. The form also stated that "*The total value of the non-cash consideration should read* [redacted]."

104.23 [redacted] paid no corporation tax ("CT") on the disposal of its shares in [redacted] to [redacted] on the basis that it had a market value base cost on the [redacted] shares of [redacted], which it put against the subsequent disposal of the shares to [redacted]

104.24 In [redacted], the Appellant conveyed approximately [redacted] of lands held by him to [redacted] [redacted] acres of this land was [redacted]. The remaining [redacted] by the valuer retained by the Appellant as "*good agricultural lands*" [redacted]. The Appellant availed of tax relief under section 604A on the disposal of these lands. Apart from the purchase of these lands in [redacted] [redacted] had not engaged in any substantive transactions since the sale of the shares in [redacted] to [redacted]

105. Additionally, having considered all of the documentary and oral evidence submitted and the submissions provided, the Commissioner makes the following findings of material fact on matters that were not agreed:

105.1. The Appellant was motivated in early [redacted] to set up a holding company by the approach to [redacted] by [redacted] regarding a potential purchase of [redacted] However, he did not adequately explain why [redacted] was not established until June [redacted]

105.2. At the meeting in the offices of [redacted] Solicitors on 20 June [redacted] [redacted] advised [redacted] that the Appellant and the other shareholder in [redacted] [redacted], had agreed to sell the company to [redacted]

105.3. On 2 July [redacted] the Appellant brought the letter addressed to [redacted] from [redacted] titled "*General Offer to Members of* [redacted] *pursuant to Section 586 of TCA 1997*", to [redacted] and handed the letter to [redacted].

105.4. The three letters confirming or declining the offer for the proposed share for share exchange were each signed by the three shareholders in [redacted] on 2 July [redacted]

105.5. The Appellant did not complete the stock transfer form for the transfer of his shares in [redacted] to [redacted] on 2 July [redacted] in order to avoid a liability to stamp duty. This indicated that he was aware of the pending sale to [redacted] on 2 July [redacted]

105.6. The share for share transaction was effected by the Appellant for bona fide commercial reasons.

105.7. The Appellant had been informed of and had agreed to the sale of [redacted] to [redacted] by no later than 20 June [redacted] Therefore, he was aware of the potential sale of [redacted] when his holding company [redacted] made the general offer to the shareholders of [redacted] pursuant to section 586. The share for share exchange was an arrangement, the main purpose of which, or one of the main purposes, was the avoidance of liability to tax.

Analysis

106. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 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.*"

107. Furthermore, in the recent judgment in *Hanrahan v The Revenue Commissioners* [2024] IECA 113, the Court of Appeal clarified the approach to the burden of proof where an appeal relates to the interpretation of law only. The court stated *inter alia* 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……."*

108. Section 584 and 586 of the TCA 1997 provide that a share for share exchange shall not be treated as a disposal for tax purposes but as a reorganisation of share capital. Section 586(3)(b) provides that relevant relief is not navailable unless it is shown that the transaction is (1) made for bona fide commercial reasons and (2) does not form part of any scheme or arrangement of which the main purpose or one of the main purposes is avoidance of liability to tax.

109. The majority of the evidence and submissions heard during the hearing of this appeal concerned whether the transfer of the Appellant's shares in [redacted] to [redacted] satisfied the requirements of section 586(3)(b) in order to avoid a liability to tax. However, the Respondent also argued that the share for share exchange did not satisfy the requirements of section 586(2)(b), and that this constituted a stand-alone reason to refuse the appeal. The Commissioner will consider this argument first, before addressing the requirements of section 586(3)(b).

Section 586(2)(b)

110. Section 586(2) of the TCA 1997 states *inter alia* that

> "*(2) This section shall apply only where…*
>
> *(b) the first-mentioned company issues the shares or debentures in exchange for shares as the result of a general offer made to members of the other company or any class of them (with or without exceptions for persons connected with the first-mentioned company), the offer being made in the first instance on a condition such that if it were satisfied the first-mentioned company would have control of the other company.*" (emphasis added)

111. On 2 July [redacted] [redacted] (via the Appellant as secretary) wrote to the shareholders in [redacted] (the Appellant, [redacted]) to afford them the opportunity to subscribe for shares in [redacted] in exchange for their shares in [redacted]

112. The Respondent contended that these letters did not explicitly state that the offer was being made on the condition that, if it was satisfied, [redacted] would have control of [redacted] The Respondent further contended that this requirement was a condition precedent for section 586 to apply, and that as exemptions from taxation have to be construed strictly against the taxpayer, this was sufficient to deny relief under section 586 to the Appellant. The Appellant replied that section 586(2)(b) did not require the offer to be made in any particular format. In any event, the letters stated that the offer was made "*pursuant to section 586 of the TCA 1997*", so it was open to the recipients to read the provisions of section 586 to fully understand the basis on which the offer was being made. Furthermore,

the Respondent had never raised this alleged issue prior to the hearing, so it seemed reasonable to assume that it did not consider the contended omission to be particularly significant.

113. The letters of 2 July [redacted] were titled "*General Offer to Members of* [redacted] *pursuant to Section 586 of TCA 1997*". Each letter was addressed to the relevant shareholder. The letter to [redacted] was worded as follows:

> "*The Directors of the Company [i.e.* [redacted] *have decided to issue additional Ordinary Shares of €1.00 each ranking pari passu with the existing shares in the Capital of the Company and in accordance with Section 586 TCA, 1997, the new shares must be offered in the first instance to all the members of* [redacted] *This is not an invitation or offer to the public to subscribe for any shares in the Company.*
>
> *As you hold* [redacted] *Ordinary Shares in the Capital of* [redacted] *you are entitled to subscribe for* [redacted] *Ordinary Shares in the capital of* [redacted] *in exchange for your shares in* [redacted]
>
> *If you wish to accept this offer, please complete the attached Request for Allotment Form and return the form to us no later than*
>
> *If you do not wish to accept this offer, please confirm so in writing to the Company no later than* "

The letters to the other two shareholders were, *mutatis mutandis*, identical.

114. The Commissioner is satisfied that the Respondent is correct to state that the letters did not explicitly state that that the offer was being made on the condition that, if it was satisfied, [redacted] would have control of [redacted] The question that arises is whether this is fatal to the Appellant's claim for relief.

115. The Respondent sought to rely on *Revenue Commissioners v Doorley* [1933] IR 750. At page 766, Kennedy CJ stated that

> "*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".

116. It is clear from the above that exemptions must be construed strictly. Consequently, the Commissioner considers that, in order to comply with the provisions of section 586(2)(b), it was necessary for the general offer to the members of [redacted] to explicitly state that the offer was being made on the condition that, if it was satisfied, [redacted] would have control of [redacted] This is clear from the wording of the provision requiring that the offer is made "*in the first instance on a condition*" that if it was satisfied, the company making the offer would have control of the other company. The Commissioner agrees with the Respondent that this wording makes the requirement a condition precedent for the general offer to be valid. The mandatory nature of this requirement is clear from the wording of section 586(2): "*This section shall only apply where…"* (emphasis added).

117. Given the necessity to construe exemptions strictly, the Commissioner does not agree with the Appellant that it was sufficient to head the letters as being made "*pursuant to Section 586 of TCA 1997*", as this in itself does not satisfy the requirement that the offer be made on the applicable condition. While it is correct that section 586 does not prescribe a particular form that the general offer has to take, this does not mean that the specific requirements of section 586 can be disregarded, or can be met by merely referring to the section itself.

118. Counsel for the Respondent accepted the contention of the Appellant that it had not raised this issue prior to the hearing itself. The Commissioner considers that it would have been preferable if the matter had been addressed previously. However, the Appellant's counsel did not contend that it was unfair of the Respondent to do so, and the Commissioner notes that the matter was raised during the cross-examination of the Appellant, on the first day of the hearing, so his counsel had time to consider it prior to his oral submissions on the second day.

119. More fundamentally, the burden rests on the Appellant to demonstrate that he had fully met the statutory requirements in order to be entitled to the relief from taxation. For the reasons set out above, the Commissioner is satisfied that the general offer to the members of [redacted] did not satisfy the requirements of section 586(2)(b), and therefore he concludes that the Appellant was not entitled to relief pursuant to sections 584 and 586.

120. While this finding in itself is dispositive of the appeal, the vast majority of the hearing and submissions were addressed to whether the Appellant had satisfied the requirements of section 586(3)(b). Therefore, notwithstanding the above finding, the Commissioner considers it appropriate to proceed to consider the application of subsection (3)(b) to the evidence adduced.

Section 586(3)(b)

121. There are two tests that must be satisfied by the Appellant under this subsection to demonstrate that he is entitled to relief from tax. Firstly, he must show that the share for share exchange was effected for bona fide commercial reasons. Secondly, he must show that it did not form part of any arrangement or scheme of which the main purpose or one of the main purposes was avoidance of liability to tax. Each of these tests will be considered in turn. In so considering, the Commissioner notes the judgment of the House of Lords in *IRC v Brebner* [1967] 2 AC 18 that these tests are "*a question of fact*."

Whether effected for bona fide commercial reasons

122. The Appellant contended that the share for share exchange was effected for bona fide commercial reasons. He wished to consolidate his investment assets in one holding company, in particular to separate them from his house and farm. He also believed that this would assist with securing financing in the future, and would assist with succession planning. The Respondent did not accept the Appellant's contentions, and in particular drew attention to the lack of activity carried out by [redacted] since [redacted]

123. The Commissioner considered that the Appellant tended to conflate his reasons for setting up [redacted] with his reasons for carrying out the share exchange. The reasons provided were essentially identical, and the Commissioner considers that the Appellant's case would have been more compelling if he had been able to identify a rationale for the share for share exchange that was separate from, or at least independent of, his reasons for establishing his holding company.

124. Nevertheless, on the balance of probabilities, the Commissioner finds that the Appellant did demonstrate that the transaction was effected for bona fide commercial reasons. In so finding, he has particular reliance on the evidence of the Appellant regarding the sale of [redacted] business in or around [redacted]. This resulted in much of the family farm being sold, which unsurprisingly had a very negative impact on his family. The Commissioner accepts the Appellant's evidence that he was motivated by a desire to ensure that he did not lose his home and farm [redacted], which he envisaged as creating a new 'base' for his wider family. The Commissioner found credible the evidence

of the Appellant that the transfer of his shares in [redacted] to the holding company formed part of his strategy to protect his home and farm from potential losses on his investments in the future.

125. The Commissioner was less persuaded by the evidence of the Appellant that he considered it more likely that he would be given financing via [redacted] rather than personally, and he agrees with the Respondent that no evidence was provided to support this contention. On the other hand, the Commissioner accepts the Appellant's evidence that he was also motivated by succession planning, which he considered would be easier through a holding company. While noting the Respondent's argument that the Appellant had not yet made a will, the Commissioner does not consider this particularly significant, as the Appellant is only in [redacted] and succession planning is often a long term activity.

126. The Respondent laid particular emphasis on the lack of activity of [redacted] since [redacted] which it stated indicated that the holding company was not genuinely created for investment purposes. The Commissioner considers that this is *prima facie* convincing; however, he accepts the evidence of the Appellant that the reasons for this were, in the first instance, the impact of Covid on [redacted], and subsequently, the negative impact on his mental health following on from the Respondent's audit.

127. The Respondent also stated that, of the [redacted] acres the Appellant transferred to [redacted] in [redacted] only [redacted] acres was valued on the basis that it was development land, and that this contradicted the Appellant's argument that he wished to keep his farm separate from his investments. The Appellant was adamant that in the future he intended, if possible, to develop all of the transferred lands. The Commissioner does not consider that a lot turns on this issue, and he accepts the Appellant's argument that even with the sale of those lands, he was left with a sizeable farm in his own name.

128. The Commissioner did not consider that the Appellant's argument regarding protecting his home was strengthened by the fact that in [redacted] he carried out limited development [redacted], in his personal capacity, and the Commissioner considers that the Appellant did not adequately explain how this did not potentially risk his ownership of his house and farm. Nevertheless, having considered the evidence in the round, the Commissioner accepts the Appellant's evidence, on the balance of probabilities, that the share for share exchange formed part of his strategy to consolidate his investment assets in a holding company, and therefore he finds that it was effected for bona fide commercial reasons.

Whether forming part of an arrangement or scheme the main purpose, or one of the main purposes, was avoidance of liability to tax

129. The Commissioner agrees with the submission of counsel for the Appellant that if the Appellant did not know about the sale of [redacted] to [redacted] until 6 July [redacted] it follows that the share for share exchange effected on 2 July could not have been done with the main purpose, or one of the main purposes, being the avoidance of liability to tax. Therefore, in order to determine whether the Appellant has satisfied this test, it is necessary to make a finding on when the Appellant learned about the potential sale. The Commissioner considers that there is no "smoking gun" in the evidence that clearly proves when the Appellant learned about the sale. Rather, it is necessary to consider the evidence in the round, and come to a conclusion, on the balance of probabilities, as to whether or not the Appellant's case is true.

130. In so doing, the Commissioner does not agree that, because there was no countervailing evidence put forward by the Respondent at the hearing, he should simply accept the evidence by and on behalf of the Appellant. *In Duffy v McGee* [2022] IECA 254, Collins J stated at paragraph 18 that "*In civil proceedings, the weight to be given to evidence, including expert evidence, is always a matter for the court. Even if uncontradicted, a court is not obliged to accept the evidence of an expert witness, any more than it is obliged to accept the uncontradicted evidence of a witness of fact*".

131. For a number of reasons, the Commissioner is satisfied that the Appellant's contention that he did not know about the sale of [redacted] until 6 July [redacted] lacks credibility and is untrue. The Commissioner is satisfied that he was told by [redacted] about the potential sale at an earlier date, and that he had agreed to the sale by no later than 20 June [redacted] when [redacted] instructed [redacted] Solicitors that it was intended to sell [redacted]

132. The first matter that the Commissioner considers significant is that there was clearly an urgency to complete the share for share exchange that was not properly explained by the Appellant. His evidence was that he had intended to set up a holding company for a number of years, but for various reasons he did not pursue the matter until early [redacted] It seems that he was motivated in early [redacted] by the earlier offer to purchase [redacted] which in itself suggests that a potential sale of the business was in his mind when setting up [redacted] and subsequently carrying out the share for share exchange. That the possible sale of [redacted] was being contemplated by the Appellant is indicated by his evidence that in early [redacted] "*At that stage* [redacted] *had had enough…At that stage there had been an offer which helped focussed my mind.*"

133. However, the setting up of the holding company was not actioned in early [redacted] and an application was not made to the CRO until 15 June [redacted] This was after [redacted] had been approached by [redacted] which he stated was during the June bank holiday. The Appellant claimed that the delay between early [redacted] and June was due to personal difficulties experienced by one of the partners in his accountancy firm, [redacted] The Commissioner notes that no evidence of why there was a delay was provided by the accountants (and the lack of any evidence from them is a matter that will be returned to). Nor was it explained why another person within the firm, which seems to be reasonably sizeable, was not available to carry out the relatively straightforward work required to establish a holding company prior to June [redacted]

134. The setting up of the [redacted] in June [redacted] after [redacted] had been approached regarding a potential purchase of [redacted] is suggestive in itself that it was done in contemplation of a possible sale. Furthermore, the Commissioner considers that the Appellant did not adequately explain the sudden urgency to transfer his shares in [redacted] to [redacted] following its establishment, given the complete lack of urgency in setting up the holding company prior to June [redacted]

135. The Appellant and [redacted] were questioned about when they signed the documentation to effect the share for share exchange. The letters from [redacted] to the three shareholders in [redacted] were dated 2 July [redacted] The three letters left blank the deadline for a reply. The three replying letters, which were signed by the three shareholders, were also undated. It was a curious coincidence that three separate letters, signed by three different individuals, all were undated. The Commissioner considers that no proper explanation was provided by the Appellant for this unusual omission.

136. On cross examination, the Appellant stated that he believed the three replying letters were signed on 2 July [redacted] because "*I would have had to drive to the offices of* [redacted]" He also stated that he believed [redacted] signed the letters at [redacted]. When it was put to him that he had earlier stated in evidence that he had not met [redacted] on 2 July, he attempted to resile from his evidence that he had travelled to [redacted] on that date. However, the Commissioner considers this evidence, by itself, to constitute a clear refutation of the Appellant's claim that he had no contact with [redacted] before 6 July.

137. Furthermore, when he was pushed on the matter, he stated that "*Again we're asking for dates during a time of chaos, I cannot say with a degree of certainty.*" The Appellant did not explain why 2 July was apparently a "*time of chaos*", when by his own evidence he knew nothing about the possible sale of [redacted] at that time. The Commissioner considers

this clearly suggests that he was in fact aware, when effecting the share for share exchange, of the impending sale, and that this explained the urgency of the transaction. While [redacted] was vague about when and where he signed the replying letter to [redacted] (and no evidence was heard from [redacted]), the Commissioner finds, based on the evidence of the Appellant, that the three letters were signed on 2 July [redacted]

138. Therefore, on the basis of the evidence regarding the signing of the share for share exchange documents alone, the Commissioner finds that the Appellant was aware of the potential sale of [redacted] to [redacted] prior to 6 July [redacted] Furthermore, there are other factors that the Commissioner considers demonstrate the lack of credibility of the Appellant and [redacted] on this issue.

139. [redacted], was adamant that he did not tell the Appellant about the potential sale until 6 July. He gave two main reasons for this. The first was that he was worried that the Appellant would tell [redacted], who would attempt to stop the deal. However, he accepted that when he allegedly told the Appellant on 6 July, the Appellant did not inform [redacted] at that stage. He also accepted that 6 July was 13 days before the sale to [redacted] closed. The Commissioner considers that this purported reason for not telling [redacted] did not make much sense, given there still plenty of time from 6 July for [redacted] to potentially interfere in the sale, if that was indeed a genuine concern.

140. The other principal reason was that he did not want to tell the Appellant until the deal with [redacted] was agreed, because "*there is no deal until there is a contract signed, until there is something substantial there to be signed, otherwise it is hearsay and it is hopes and dreams.*" [redacted] referred to occasions previously when [redacted] thought there were deals regarding [redacted], but which subsequently fell through.

141. However, the Commissioner considers [redacted] evidence to lack any credibility in this respect. This is because there could be no deal to cleanly sell [redacted] to [redacted] until the Appellant himself agreed to it. This is clear from [redacted] memorandum of association, which provided that

> "*the holders of any of the "A" shares shall be entitled to receive notice of and attend all general meetings of the Company but not to vote on any resolution proposed thereat save with regard to proposal* [sic] *to sell or dispose of part or all of the business of the company or to incur capital expenditure of over €250,000.00 in any one project*."

142. While the Appellant was not involved in the day to day running of [redacted] he did attend two board meetings of [redacted] in [redacted] to discuss and approve (1) the purchase of a site

in [redacted], which became the company's base, and (2) the drawing down of a loan by the company. Therefore, the Commissioner considers that the Appellant did take a strategic interest in [redacted] in accordance with his rights under his shareholding. While the Appellant claimed that the above provision was only inserted so that he could prevent a sale to [redacted], his rights were clearly more extensive than this, as he had a right to vote on any proposed sale or part sale of the company.

143. Evidence was not given at the hearing regarding what might have happened if the Appellant had refused to sell his shareholding to [redacted] although [redacted] seemed to accept that the deal would not have gone ahead: "*He could have [refused to accept it]. And if he did there would have been an element of fees involved*." However, it was clear from the evidence of [redacted], solicitor for the vendors, and [redacted], director of [redacted] that the sales process moved very quickly and smoothly. It is clear from this that there were no concerns about one of the three shareholders in [redacted] potentially not agreeing to the sale. Consequently, the Commissioner is satisfied that in order to be able to agree the sale, it was necessary to get the Appellant's prior agreement. It would simply have been impossible to wait until 6 July [redacted] before informing the Appellant about the approach from [redacted]

144. Furthermore, the Commissioner rejects the Appellant's evidence that he agreed to the proposed sale almost immediately when he was informed about it. [redacted] evidence was that the Appellant agreed to invest in [redacted] in [redacted] "*Over a period of time…Negotiations*." No explanation was put forward as to why the Appellant took time to agree to his investment, but apparently agreed to divest it without any serious consideration at all.

145. There is another reason why the Commissioner finds the evidence of the Appellant and [redacted] as to when he was informed about the sale to lack any credibility. The Appellant stated that one of the reasons why he set up [redacted] was to separate his investments from his personal assets, in particular his house and farm. This was motivated by the experience of [redacted], who lost much of the land around their house when [redacted] was sold.

146. The Commissioner has accepted this evidence, and indeed has found that it demonstrated that the share for share exchange was carried out for bona fide commercial reasons. However, it therefore beggars belief that the Appellant would readily agree to a proposed sale, without any meaningful consideration or deliberation, that included warrants and covenants which potentially imposed a personal liability on him of up to [redacted]

147. The Appellant was personally named as a warrantor under the SPA. The warrantors were jointly and severally liable up to a maximum liability of [redacted]. The Appellant was also personally named as a covenanter on the Deed of Tax Covenant entered into with [redacted] The covenanters were potentially liable under the Deed, on a joint and several basis, to a maximum aggregate of [redacted]. No evidence was provided by the Appellant as to what advice he was provided with, nor what deliberations he performed, before agreeing to sign these documents. Given the potential risk such liabilities created over his house and farm, the Commissioner can only assume that he must have been fully informed by his advisers of the implications, and must have given the matter serious consideration before agreeing to be bound by them. Therefore, the Commissioner finds absurd the idea that the Appellant was only informed about the potential sale on 6 July [redacted] and agreed to it on the same date.

148. Therefore, for the above reasons, the Commissioner rejects the evidence given by and on behalf of the Appellant that he did not know about the potential sale of [redacted] until 6 July. The question then arises as to when he did know about it. There is no one piece of evidence that clearly shows when he was informed by [redacted] about the sale. However, the Commissioner finds that that he knew, and had agreed to, the sale by 20 June [redacted] This is based on the clear evidence of [redacted], solicitor on behalf of the vendors of [redacted] that he was instructed on that date that the shareholders of the company had agreed to the sale.

149. [redacted] met with [redacted] on 20 June to discuss the proposed sale. He stated that he was aware of the Appellant's shareholding in [redacted] "*Oh yeah, the shareholding speaks for itself.*" He stated that it was important to have clear instructions from the vendors: "*The way it was put to me was 'we're selling the company'…And* [redacted] *was the one giving those instructions but on behalf of his – saying to our shareholder we have decided to sell.*"

150. Therefore, it is clear that [redacted] informed [redacted] on 20 June [redacted] that the shareholders of [redacted] including the Appellant, had agreed to sell the company. [redacted] followed this meeting with a formal letter of engagement addressed to the shareholders dated 6 July [redacted] The letter referred to [redacted] *previous verbal quotation to you*" in respect of fees. The Commissioner accepts that this verbal quotation was given to [redacted] on 20 June; however, it is clear from the letter of engagement that it was in respect of the three shareholders collectively.

151. [redacted] did not explain why he informed [redacted] that the Appellant had agreed to the sale, if he did not notify the Appellant until 6 July. It is possible that [redacted]

[redacted] misled [redacted]. However, [redacted] did not suggest that he did, and the Commissioner is satisfied that the more reasonable conclusion is that [redacted] truthfully instructed [redacted] on 20 June that the Appellant had agreed to the proposed sale.

152. The Commissioner's conclusion is fortified by [redacted] acceptance that there would have been wasted fees incurred if the Appellant refused to sell when (allegedly) notified on 6 July. While the [redacted] attempted to suggest that this would not be a major concern to him, it was clear from his evidence that he was understandably focussed on the amount of money to be received for a sale of [redacted] Given this focus on money, it seems unlikely that he would willingly accept incurring fees on a proposed sale to no end.

153. Consequently, the Commissioner finds on the balance of probabilities that the Appellant knew of and agreed to the sale of [redacted] by no later than 20 June [redacted] Consequently, the Commissioner finds that the Appellant was fully aware of the intended sale when he effected the share for share exchange on 2 July [redacted]

154. Having so found, it falls to be determined whether the share for share exchange formed part of an arrangement or scheme of which the main purpose or one of the main purposes was avoidance of liability to tax. In *Brebner*, Lord Pearce stated at page 27 that whether one of the main objects was to obtain a tax advantage was "*a subjective matter of intention.*" Therefore, what matters is whether the Appellant had as a main purpose the avoidance of liability to tax. In *Snell*, the English High Court stated that "*The ordinary meaning of the word 'scheme' is 'a plan of action devised in order to attain some end'. Similarly an arrangement is 'a structure or combination of things for a purpose'*".

155. The Commissioner is satisfied that the share for share exchange constituted an arrangement for the purposes of section 586(3)(b). The Appellant could have sold his shares in [redacted] directly to [redacted] However, the urgency with which he transferred them to [redacted] before [redacted] in turn sold them to [redacted] indicates that this was a structure put in place for a purpose. The Commissioner is further satisfied that this purpose was the avoidance of tax.

156. The Commissioner notes that no evidence was put forward of what advices (if any) on tax planning were provided to the Appellant by his accountants, [redacted] The Appellant claimed that he received no written advices. The Commissioner considers this somewhat surprising, given the relatively large fee incurred by him (€30,750) for "*company secretarial costs in relation to the set up of* [redacted] *the sale by*

[redacted] *of the shares in* [redacted] *including review of the SPA and advices on the stamp duty aspects of the sub sale*".

157. However, even if it is correct that no written advices were provided by his accountants, the Commissioner considers that oral evidence could have been heard from them regarding whether or not the Appellant sought to avoid tax on the sale of his [redacted] shares. His accountants represented him in this appeal, and representatives from the firm attended both days of the hearing. No reason was provided as to why they did not provide evidence. While there was, of course, no requirement upon them to do so, if the Appellant had not sought to avoid tax on the share for share transaction and subsequent sale of [redacted] one would have anticipated that his accountants could have provided such evidence.

158. This is particularly so given that there was evidence to suggest that the Appellant had sought to avoid tax on other transactions. He accepted that he availed of relief under section 604A of the TCA 1997 on the disposal of lands to [redacted] in [redacted] More pertinently, the Appellant did not execute the share transfer form in respect of the transfer of his [redacted] shares to [redacted] until 19 July [redacted] when they were in turn sold to [redacted] The Appellant was unable to explain why the share transfer form was not executed on 2 July, as part of the share for share transaction. His counsel stated that the Appellant became aware of the sale of [redacted] on 6 July, and that it therefore made sense to wait until 19 July, when all the shares were sold. However, this does not explain why the Appellant did not execute the share transfer form on 2 July, if he was unaware of the potential sale on that date. The Commissioner finds the Respondent's suggestion, that the form was not executed on 2 July because the Appellant wished to avoid a stamp duty liability in circumstances where he knew about the subsequent sale, more convincing.

159. Therefore, the Commissioner finds that the main purpose, or at least one of the main purposes, of the share for share exchange on 2 July [redacted] was the avoidance of liability to tax from the transfer and subsequent sale of the shares to [redacted] Consequently, the Commissioner determines that the Appellant was not entitled to relief from taxation pursuant to sections 584 and 586 of the TCA 1997.

Conclusion

160. The Commissioner finds that the general offer to the members of [redacted] on 2 July [redacted] did not comply with the requirements of section 586(2)(b) of the TCA 1997. Additionally, the Commissioner finds that the share for share exchange was effected for bona fide commercial reasons, but that it constituted an arrangement of which the main purpose,

or one of the main purposes, was the avoidance of liability to tax. Therefore, the appeal is unsuccessful.

Determination

161. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the amended assessment to CGT for [redacted] in the amount of €351,545 should stand.

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

Notification

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

Appeal

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

Simon Noone
Appeal Commissioner
10 February 2025

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997