AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

100TACD2023

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") of amended notices of assessment raised by the Respondent for the years 2014 and 2015, which assessed the Appellant as having charges to Capital Gains Tax ("CGT") in the amount of €33,284 and €49,427.00 respectively. The amended assessment for the year 2014 was made on 17 June 2019 and that made in respect of 2015 on 12 June 2019.

2. The question that arises for determination is whether the Appellant has allowable losses that can be carried forward and set against the gains assessed by the Respondent.

Background

3. Following the conduct of an enquiry into the Appellant's tax affairs in relation to the years 2008 – 2015 the Respondent raised an assessment on 12 June 2019 in respect of the tax year 2015 ("the 2015 assessment"). In this, the Respondent assessed the Appellant to have made a chargeable gain of €143,919.00 (not including personal exemption) arising from the sale of his shares in a company called [redacted] Ltd. This gain gave rise to the assessment of a charge to CGT of €49,427.00 for 2015.

[redacted]

4. Shortly after this, on 17 June 2019, the Respondent raised another assessment in respect of the tax year 2014 ("the 2014 assessment"), which assessed the Appellant as having made a chargeable gain of €102,131 (not including personal exemption) arising from his disposal of his shares in a company named [redacted] SAS. This gain gave rise to the assessment of a charge to CGT of €33,284 for the year 2014.

5. By way of correspondence to the Commission dated 11 July 2019, the agent for the Appellant indicated that his client wished to appeal the 2014 assessment on the grounds that "*The revised chargeable gain in the sum of €102,131 is excessive and does not take account of certain acquisition costs and losses forward."* This was the full extent of the explanation of the Appellant's grounds given in this letter constituting his Notice of Appeal to the Commission.

6. By way of separate correspondence dated 11 July 2019, the agent for the Appellant indicated that his client also wished to appeal the 2015 assessment on the grounds that "*The revised chargeable gain in the sum of €143,919 is excessive and does not take account of certain acquisition costs and losses forward."* As with the letter in respect of the 2014 assessment, this was the full extent of the explanation of the Appellant's grounds.

7. In his written Outline of Arguments, delivered to the Commission the day before the hearing of the appeal, the Appellant asserted at paragraph 3 that he:-

   "[…] *disputes the* [2014 assessment] *as it does not take into account losses brought forward from 2009, in the sum of €90,625, and for 2011 in the sum of €150,000.*

8. This was the first time that the CGT losses forward, referred to in the Notices of Appeal, had been specified in the context of the appeal before the Commission.

9. The Appellant then asserted in paragraph 4 of the Outline of Arguments that:-

   "The loss from 2009 arises from the purchase of shares and loan stock in a company called [redacted] [redacted]*Ltd (in liquidation). The Appellant invested STG£62,500 during 2005 in this company. In return for his investment, he was issued with 12 ordinary shares of £1 each, and £62,488 units of loan stock of £1 per unit. This equated to 7.14%. Due to trading difficulties the company went into liquidation during 2009, with* [redacted] *being appointed liquidator. Due to an insufficiency of assets, there was no return to the shareholders or stockholders. The Appellant contends that his lost capital of £62,500 is an allowable loss for CGT purposes."*

10. Paragraph 10 of the Appellant's Outline of Arguments states that:-

"The loss from 2011 arises from trading losses incurred from the trade of 'marketable options' and operated through an account with [redacted] *Markets UK Ltd."*

11. At paragraph 14 of the Outline of Arguments the Appellant submitted that he contested the 2015 assessment on the grounds that the sum assessed did not take into consideration legal fees incurred in the sale of the asset. This submission was deemed by the Commissioner to be the addition of a new ground not included in his Notice of Appeal and was therefore not accepted. The refusal to accept this additional ground was the subject of a separate written decision of the Commissioner delivered on 3 November 2022, which was final and conclusive.

12. At paragraph 15 of the Outline of Arguments the Appellant added in relation to the 2015 assessment that:-

    "*The Appellant also contests the Assessment on the basis that it does not take account of unused losses brought forward and arising in 2009 and 2011, as set out in detail above."*

13. In the course of the aforementioned audit into the Appellants tax affairs, the agent for the Appellant wrote to the Respondent on 2 October 2017 enclosing his CGT computations for the years 2008 to 2015, which, at Note 1, identified losses in the amount of €91,000 in respect of "[redacted].", €275,000 in respect of "[redacted]*"* and a further €100,000 in respect of an entity called "[redacted]*".* The combined losses were calculated at €466,000. It should be mentioned that no claim was advanced at hearing regarding the loss associated with [redacted].

14. These losses were queried by the Respondent and supporting material was sought in respect of them. On 3 November 2017, the agent for the Appellant wrote to the Respondent and at point 3 therein stated in relation to the [redacted] Ltd claim:-

    "*We enclose correspondence dated February 17th, 2005, confirming our client's investment of £62,500. We also enclose correspondence dated January 12th, 2009, from* [redacted]*, who were liquidators to the company, confirming that there was a deficiency on winding up and that there were no funds available to the unsecured creditors."*

15. The correspondence of 17 February 2005 referred to is headed [redacted] and entitled "*Memo To All Shareholders Re:* [redacted]*".* Therein [redacted], a director and the company secretary of [redacted], stated:-

"*I attach a list of shareholders for* [redacted]. *The closing date is scheduled for Monday 28th February 2005. Please transfer funds (£62,500 sterling) to:*

[redacted].,

[…]

Please transfer money by telegraphic transfer and use your surname as the reference.

[redacted] *(my daughter) will contact you shortly to sign*

(1) Letter of subordination for Bank of Ireland

(2) Shareholders Agreement

If you wish to become a director (to reclaim interest) or have any queries, please contact [redacted] […]"

16. The attached list of shareholders is in the form of a printed table. In a column entitled "amount", the line bearing the Appellant's name bears the entry "62,500". Next to it, a column entitled "Loan Capital" states "62,488". "Share Capital" and "No. of Shares" are both stated to be "12" and the column "%" states 7.14%.

17. At the hearing of the appeal the agent for the Appellant produced correspondence of 12 January 2009 of [redacted] of [redacted], who acted as the liquidator in the winding-up of [redacted] Ltd in early 2009. This correspondence, which enclosed a history, statement of affairs and list of creditors of the company, states that as the value of the company's assets available to unsecured creditors was negligible, distribution to them would be disproportionate. The statutory information and history of the company discloses that it was purchased on 21 March 2005, whereupon the Appellant became one of its shareholders. The history given by the liquidator states that the purchase was partially funded by a loan from Bank of Ireland and that "*The Company was unable to deliver profits but* […] *continued to trade as the shareholders* […] *made loans to the Company in order to maintain working capital."* Following a downturn in business in 2008, the Company was unable to pay the salaries of its employees. The penultimate paragraph in this part of the liquidator's report states:-

"*The shareholders refused to advance funds as they considered that under the current economic conditions the* [redacted] *industry would be suppressed for a considerable period of time. An injection of capital would only assist the Company to trade in the short term and not improve the long term viability of the Company. The*

directors therefore decided that there was no option but to cease trading and place the company into voluntary liquidation."

18. The second and third paragraphs of the "*liabilities"* section of the statement of affairs states:-

    The main liability is due to the Bank of Ireland totalling £2,051,655 (including interest accrued to 6 January 2009). This includes the Company overdraft, credit cards and mortgage loan accounts.

    The Bank of Ireland has the benefit of a legal charge on the property and a fixed and floating charge over "all monies due or to become due from the Company", in addition, the director [redacted] *has provided a personal guarantee to the Bank of Ireland."*

19. The fifth paragraph of the same section then states:-

    "*Shareholder loans totalling £624,880 and director's loan totalling £85,952 were advanced to the Company in March 2005 to cover trading losses and to be used as working capital."*

20. An appendix to the statement of affairs listing creditors includes a debt to the Appellant in the amount of £62,488. In the column in this appendix entitled "*Details of any security held by creditor"* there is no entry relating to the Appellant. This is in contrast to the debt held by Bank of Ireland which, in accordance with the liabilities section of the statement of affairs, states in this column "*Debenture providing fixed and floating charges, Legal mortgage over property".*

21. Returning to the correspondence of 3 November 2017, in the "*Matters Outstanding"* section the agent for the Appellant listed the following item:-

    "*Supporting documentation in relation to our client's investment in an Options Account with* [redacted] *during March and April 2011 and subsequent loss incurred."*

22. This seems to represent the full extent of the material furnished to the Respondent in support of the Appellant's claim, which it appears was advanced for the first time in the computation attached to the correspondence of 2 October 2017, that the Appellant's CGT liability arising from the [redacted] and [redacted] disposals should be assessed at nil.

23. In correspondence of 18 June 2019, the day after the issuing of the 2014 assessment, the Respondent's auditor wrote directly to the Appellant, stating:-

"Dear [Appellant],

I refer to the ongoing audit of your tax affairs and in particular a schedule of disposals for the years 2008 – 2015 which are subject to Capital Gains Tax. This schedule was provided by [the Appellant's agent] *at a meeting on the 20th October 2017 and a revised schedule was submitted on the 3rd November 2017. The disposals for 2009 – 2015 were not previously declared to the Revenue Commissioners.*

[…]

I am satisfied with the documentation provided to support the purchase/sale of the [redacted] *shareholding and the Capital Gains Tax assessments raised are in accordance with the schedule provided by your agent for these sales.*

Despite repeated requests form Revenue since October 2017, you failed to furnish adequate documentation to support the losses claimed in 2014 in the amount of €466,000. Therefore such losses have not been included in the assessments raised (2014 – 17th June 2019 & 2015 – 12th June 2019)."

24. On the day of the hearing of the appeal, the Appellant's agent produced a copy of an account statement in the name of the Appellant from [redacted] Capital Markets ("the [redacted] statement"), which ran from 1 January 2010 – 9 November 2017. The agent for the Appellant suggested that this had been furnished previously to the Respondent, though it does not appear in the correspondence booklet furnished to the Commissioner. Whatever the position in this regard its furnishing at this point was in breach of directions issued under section 949E of the Taxes Consolidation Act 1997 ("the TCA 1997") concerning the preparation of the case for hearing. Notwithstanding the objection from the counsel for the Respondent to the non-admission of the document on account of this breach, the Commissioner agreed to receive it *de bene esse* and thereafter decide what weight, if any, should be given to it in the determination of the appeal.

25. The four page [redacted] statement indicates on its face that the value and cash balance of the account as of 1 January 2010 was 0.00. On 22 March 2011 it states that €100,000 was deposited from another account. It then lists 18 transactions, described as "*FX Options USDJPY",* as occurring from 24 March 2011 to 5 April 2011. These resulted, according to the [redacted] statement, in a cumulative loss of €65,540.77, leaving a balance on the latter date of €34,459.23. It would appear that on 11 April 2011 a further €50,000 was deposited in this account, leaving a new balance of €84,459.23. Thereafter, numerous different transactions are listed as taking place from 20 April 2011 – 4 January 2016, with the considerable bulk of these occurring in 2011. Indeed, by the end of this year the balance

of the account had reduced down to €6,723.95, with the remainder dissipating to €0.01 by 4 January 2016. The transactions occurring from 20 April 2011 – 4 January 2016 are variously described, including "*FX Spot & Forwards USDJPY", "*"*FX Spot & Forwards EURUSD",* "*FX Spot & Forwards USDCHF", "CFDs", "Contract Futures",* as well as the aforementioned *"FX Options USDJPY"*.

26. In addition to the late delivery of written Outline of Arguments and documentary material, the Appellant did not attend the hearing. Rather, he was represented by his agent who was necessarily limited to making legal argument and could not give evidence pertinent to the appeals.

Legislation and Guidelines

27. Part 19 of the TCA 1997 is entitled *"Principle Provisions Relating to Taxation of Chargeable Gains"* and Chapter 1 therein *"Assets and acquisitions and disposals of assets".* The first provision in Chapter 1 of Part 19 is section 532 of the TCA 1997. This defines "*assets"* in the following manner:-

> *"All forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not, including—*
>
> *(a) options, debts and incorporeal property generally,*
>
> *(b) any currency other than the Currency of the State, and*
>
> *(c) any form of property created by the person disposing of it, or otherwise becoming owned without being acquired."*

28. Section 546 of the TCA 1997 is entitled "*Allowable losses".* In full it provides:-

> *"(1) Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.*
>
> *(2) Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.*
>
> *(3) Except where otherwise expressly provided, the provisions of the Capital Gains Tax Acts which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make*

part of a loss an allowable loss and part not, and references in the Capital Gains Tax Acts to an allowable loss shall be construed accordingly.

(4) A loss accruing to a person in a year of assessment for which the person is neither resident nor ordinarily resident in the State shall not be an allowable loss for the purposes of the Capital Gains Tax Acts unless under section 29(3) the person would be chargeable to capital gains tax in respect of a chargeable gain if there had been a gain instead of a loss on that occasion.

(5) Except where provided by section 573, an allowable loss accruing in a year of assessment shall not be allowable as a deduction from chargeable gains in any earlier year of assessment, and relief shall not be given under the Capital Gains Tax Acts—

(a) more than once in respect of any loss or part of a loss, and

(b) if and in so far as relief has been or may be given in respect of that loss or part of a loss under the Income Tax Acts.

(6) For the purposes of section 31, where, on the assumption that there were no allowable losses to be deducted under that section, a person would be chargeable under the Capital Gains Tax Acts at more than one rate of tax for a year of assessment, any allowable losses to be deducted under that section shall be deducted—

(a) if the person would be so chargeable at 2 different rates, from the chargeable gains which would be so chargeable at the higher of those rates and, in so far as they cannot be so deducted, from the chargeable gains which would be so chargeable at the lower of those rates, and

(b) if the person would be so chargeable at 3 or more rates, from the chargeable gains which would be so chargeable at the highest of those rates and, in so far as they cannot be so deducted, from the chargeable gains which would be so chargeable at the next highest of those rates, and so on."

29. Section 541 of the TCA 1997 is headed *"Debts".* Subsection (1) therein provides:-

"(a) For the purposes of the Capital Gains Tax Acts but subject to paragraph (b), where a person incurs a debt to another person (being the original creditor), whether in the currency of the State or in some other currency, no chargeable gain shall accrue to

that creditor or to that creditor's personal representative or legatee on a disposal of the debt."

(b) Paragraph (a) shall not apply in the case of a debt on a security within the meaning of section 585."

30. Section 585 of the TCA 1997 describes a "*security"* as including:-

"[…] *any loan stock or similar security, whether of any government or of any public or local authority or of any company and whether secured or unsecured but excluding securities within section 607."*

31. Section 538 of the TCA 1997 is entitled "*Disposal where assets lost or destroyed or become of negligible value".* In essence it allows a person to make a claim for an allowable loss where they possess a chargeable asset that has become worthless. This provision provides:-

"(1) Subject to the Capital Gains Tax Acts and in particular to section 540, the occasion of the entire loss, destruction, dissipation or extinction of an asset shall for the purposes of those Acts constitute a disposal of the asset whether or not any capital sum as compensation or otherwise is received in respect of the destruction, dissipation or extinction of the asset.

(2) Where on a claim by the owner of an asset the inspector is satisfied that the value of an asset has become negligible, the inspector may allow the claim, and thereupon the Capital Gains Tax Acts shall apply as if the claimant had sold and immediately reacquired the asset for a consideration of an amount equal to the value specified in the claim."

32. Section 540 of the TCA 1997 is entitled "Options and forfeited deposits". Subsection (1)(b) defines a "traded option" as "[…] an option which at the time of abandonment or other disposal is quoted on a stock exchange or a futures exchange in the State or elsewhere".

33. Section 540(5)(b) of the TCA 1997 provides:-

"Subject to subsections (7) and (8)(a), the abandonment of an option by the person for the time being entitled to exercise it shall not for the purposes of the Capital Gains Tax Acts give rise to an allowable loss."

34. Section 540(7) and (8)(a) of the TCA 1997 provide:-

"(7) Where an option, being an option to acquire assets exercisable by a person intending to use the assets, if acquired, for the purposes of a trade carried on by that

person or which that person commences to carry on within 2 years of that person's acquisition of the option, is disposed of or abandoned, then—

(a) if the option is abandoned, subsection (5)(b) shall not apply

[…]

(8)

(a) Where –

(i) a quoted option to subscribe for shares in a company, or

(ii) a traded option,

is disposed of or abandoned, then—

(I) if the option is abandoned, subsection (5)(b) shall not apply"

Submissions

Appellant

35. The agent for the Appellant submitted that the documentary material proffered to the Commissioner proved that his client made losses upon the disposal of chargeable assets in the form, firstly, of a debt on security owed to him by [redacted] Ltd and, secondly, options and other marketable securities enumerated in the [redacted] statement. It was submitted that these losses, which it was stated arose in 2009 and 2011, could be set against the subsequent taxed gains made in respect of the [redacted] and [redacted] share disposals in 2014 and 2015.

36. In relation to the [redacted] Ltd debt, the agent for the Appellant submitted that the memo headed "[redacted]", together with table of shareholders, verified the assertion made in written legal argument that his client had received "loan stock" in return for the "investment" of £62,500 (€90,625 in 2005) in [redacted] Ltd. This made the investment, he said, a marketable asset and, therefore, a "debt on security" under section 585 of the TCA 1997 capable of giving rise to a chargeable gain and an allowable loss.

37. Clarifying his submissions in this regard at reply stage, the agent for the Appellant suggested that the CGT loss claimed in respect of the alleged loan stock was not one made pursuant to section 538 of the TCA 1997 (i.e. where an asset is treated as having

been disposed of where it is destroyed or becomes of negligible value. In this regard he submitted:-

> "*My point here is that section 538 deals with where an asset becomes of negligible value through destruction, dissipation or extinction. This was a formal winding up due to a change in market conditions and if you read through the liquidator's report, he makes the point that this was 2009 and the company was originally set up* […] *to promote or carry on* [redacted] *and with the downturn that came in 2009* […] *that part of the business didn't take off.*
>
> […]
>
> *It is beyond me to get into a technical argument of it, but I would suggest that section 538 does not apply in the instant case, that is my argument, that it's not of negligible value. This was a formal winding up and because of a down turn in market conditions these assets were actually repatriated back to the liquidator* […] *they didn't just become of negligible value overnight* […] *the loan capital was actually cancelled, the shares were cancelled as part of the winding up process and the company was struck off. So I am not sure and not clear that it is a negligible value claim."*

38. In relation to the [redacted] statement, the agent for the Appellant submitted that it showed that his client had invested €150,000 in the buying and selling of futures, which were marketable securities on which he had made a loss. He submitted on behalf of the Appellant that:-

> "[The] *options under section* 532 [are] *chargeable* […] *asset*[s] *and where those options are traded at a loss that loss should be an allowable loss by virtue of the fact that if there was a profit we would be taxing it to Capital Gains Tax* […]".

39. In this respect he cited section 540 of the TCA 1997 in support of the proposition that a traded option was, pursuant to subsection (8) of that provision, not prohibited from giving rise to an allowable loss.

Respondent

40. The Respondent submitted, firstly, that the case being made by the agent for the Appellant appeared, on its face, to be that the €62,488 purportedly provided to [redacted] Ltd was a "debt on security", and thus a chargeable asset by virtue of the fact that it fell outside the exclusionary provision in relation to debts under section 541 of the TCA 1997. This debt on security had come to be of negligible value upon the liquidation of the

company and thus could be deemed, pursuant to section 538(2) of the TCA 1997, to be a disposal giving rise to an allowable loss.

41. If this was so, the Appellant's claim was, according to the Respondent, doomed to fail. In this regard counsel cited the judgment of the High Court of England and Wales in *Williams v Bullivant [1983] STC 107*, which concerned the application of legislation in that jurisdiction relating to "negligible value" disposals worded almost identically to section 538(2) of the TCA 1997. In this case a couple acquired shares in a company on or before 1973. By a point in 1974 they had become of only negligible value. In 1978 the couple made a claim to set the loss made on the shares against separate smaller gains made on the disposal of other assets in 1973/1974. Vinelott J agreed with the decision of the tax authority to refuse the attempt to set the loss against the gains on the grounds that the wording of the section meant that the deemed disposal of the valueless shares did not occur until the claim was made by the couple. As losses could only be carried forward it was not possible to set them against gains made in the earlier years of 1973/1974.

42. Counsel for the Respondent argued that what the Appellant sought to do in the instant case was precisely what was found could not be done under the equivalent legislation applicable in *Williams v Bullivant.* It was not in dispute that the earliest point at which the Appellant could be said to have made his claim in respect of the £62,488 loaned to [redacted] Ltd was in October or November 2017. In accordance with the wording of section 538(2) of the TCA 1997, it was only "thereupon" that the disposal could be deemed to have occurred and losses from it carried forward. Consequently, the attempt to set it against the gain made in 2014 and 2015 could not be allowed.

43. Counsel then submitted that even if the Commissioner was not in agreement with him in relation to the consequences of the timing of the claim, there was no evidence at all that the money advanced to [redacted] by the Appellant constituted a "debt on security", that could give rise to a capital gain and, conversely, an allowable loss.

44. Counsel noted that while section 541(1)(b) of the TCA 1997 provided that there was no exclusion on a "*debt on security within the meaning of section 585*" giving rise to a chargeable gain and allowable loss, this latter provision did not actually define the term.

45. In order to identify what constituted a debt on security, counsel opened the decision of the Supreme Court in *O'Connell v Keleghan,* [2001] 2 IR 490*,* in which Murphy J endorsed the earlier analysis of Morris J, as he was then, in *Mooney v McSweeney,* [1997] 2 ILRM 429. In his analysis, Morris J himself quoted with approval the view of Lord Wilberforce expressed in *Ramsay (W.T.) Ltd v IRC [1982] AC 300* that a debt on security is a debt "[…] *with added characteristics such as may enable* [it] *to be realised or dealt with at a profit"*,

or that has "…*such characteristics as enable it to be dealt in and, if necessary, converted into shares or other securities."* Morris J then stated in his own words at paragraph 26 of *Mooney v McSweeney* that:-

> "*The pure loan is exempt from capital gains tax because it can never increase in value. With additional rights to convert it into stock, a debt on a security may appreciate in value and can be marketed at a profit. This is a clear distinction between the two."*

46. In the subsequent paragraph he then held:-

> *"The essence of a loan on a security must be whether the additional 'bundle of rights' acquired with the granting of the loan, to use Wilberforce L.J.'s phrase, enhances the loan so as to make it marketable and potentially more valuable than the value of the repaid loan upon repayment. This potential increase in value must not be illusory or theoretical. It must be realistic at the time when the loan and the rights are acquired by the lender."*

47. Counsel for the Respondent submitted that there was simply no evidence of an "additional bundle of rights" attaching to the sum of £62,488 given by the Appellant to [redacted] Ltd. The Appellant's agent, he said, had referred to "loan stock" in written and oral submission, but this was not reflected in the documentation provided. The agent had also indicated that his instructions from his client were that the loan was transferable and therefore it was an asset marketable to potential buyers. Noting again that there was no evidence as to whether or not the debt was transferable, counsel also submitted that even if it was, this alone would not make it marketable. To be marketable there still had to be rights attaching to it that would give rise to the possibility that it could increase in value and thus come within the definition of a chargeable asset for the purposes of CGT.

48. In relation to the [redacted] statement, it was submitted that the Appellant, at paragraph 10 of its written submissions, argued that it had suffered "*trading losses"* in respect of "*marketable options".* In the view of counsel for the Respondent this indicated that what the Appellant's agent was suggesting was that his client had suffered losses relating to income, but not CGT losses that could be set against chargeable gains.

49. Counsel finally submitted in relation both to the [redacted] and the [redacted] statement matters that the Appellant had failed to show that these losses had not been used up in previous years against other chargeable gains.

Material Facts

50. The facts material to this appeal were as follows:-

- in 2014 the Appellant disposed of his shares in a company called [redacted] giving rise to a chargeable gain not including personal exemption of €102,131;
- this chargeable gain resulted in the Respondent assessing the Appellant as having a CGT liability in the amount of €33,284;
- in 2015 the Appellant disposed of his shares in [redacted] Ltd giving rise to a chargeable gain not including personal exemption of €143,919.00;
- this chargeable gain resulted in the Appellant assessing the Respondent as having a CGT liability in the amount of €49,427.00;

Analysis

51. It is appropriate to begin this part of the Determination by quoting the following words of Charleton J at paragraph 22 of *Mennolly Homes v Revenue Commissioners [2010] IEHC 49*:-

> *"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."*

52. The agent for the Appellant sought to introduce documents purportedly belonging to his client as evidence in this appeal. While these documents had been furnished previously to the Respondent in 2017, it was unclear from the Notices of Appeal that they were to be relied on at hearing. It was therefore understandable that the Respondent sought to object to their acceptance and consideration. Nonetheless, the Commissioner thought the interests of justice warranted receiving the documents *de bene esse* and determining later what influence, if any, they should have in the outcome of the appeal.

53. As already observed, the Appellant did not attend the appeal hearing and gave no explanation either before or after as to why he did not do so. The appeal proceeded therefore without the calling of any oral evidence. That the Appellant took this course ensured that the documents proffered in relation to [redacted] Ltd and the [redacted] statement were entirely unproven.

54. As a quasi-judicial body the Commission is permitted to exercise some discretion in relation to its procedures, including in relation to the evidential rules regarding hearsay. Ultimately, however, for an Appellant to succeed it is necessary for them to satisfy the Commissioner to the requisite standard that the assessment appealed was in error. Having

examined the documents proffered, the Commissioner finds that they represent an inadequate basis on which to determine the assessments appealed to have been in error.

The loss claimed in respect of [redacted] *Limited*

55. Regarding the documents furnished in respect of [redacted] Ltd, included among which was the report of its liquidator, the Commissioner is prepared to find that they prove that in March 2005 the Appellant advanced a loan of £62,488 to the company, to be used as working capital. Other shareholders appear to have done likewise.

56. It was clear from counsel for the Respondent's oral submissions that he understood the case made on behalf of the Appellant in relation to [redacted] Ltd to be a negligible value claim in respect of the deemed disposal of a chargeable asset. In reply, the agent for the Appellant suggested that it was not such a claim. Though far from clear, the Commissioner understands the argument made on behalf of the Appellant to be that the advent of the winding-up of the company meant, *ipso facto*, that the Appellant had actually disposed of the asset in question, being a debt on security, on or about 2014.

57. If this was the argument made, the Commissioner views it to be a questionable legal proposition. Nevertheless, it is not necessary to make a ruling on it in circumstances where, one way or the other, the Appellant must prove that the sum advanced to [redacted] Ltd constituted a debt on security, and therefore a chargeable asset, rather than a simple debt incapable of giving rise to a CGT gain and, conversely, an allowable loss.

58. The Commissioner agrees with the submission of counsel for the Respondent that the documents proffered fail to prove that there was, to use the words of Morris J in *Mooney v McSweeney*, an "*additional bundle of rights*" attaching to the [redacted] Ltd debt that rendered it a marketable asset and therefore a debt on security.

59. While the agent for the Appellant asserted in written and oral submission that the Appellant acquired "*£62,488 units of loan stock of £1 per unit"* as security for the loan, the documents on which he sought to base this assertion do not bear this out. Reference to "loan capital" in the list of shareholders attached to the [redacted] Memo cannot be taken on its own as meaning that the Appellant, in return for the loan, acquired stock in [redacted] Ltd. This want of any evidence is fatal to the Appellant's claim given the aforementioned burden of proof resting on him in the appeal.

60. Furthermore, the Commissioner notes that the documents produced in this context could actually be seen as raising doubt regarding the Appellant holding rights arising from the loan additional to his right to repayment and receipt of interest. In this respect, the Memo

to Shareholders of 17 February 2005, attached list of shareholders and [redacted] liquidator's report of 12 January 2009 indicate that the only secured creditor of the company at the time of the winding-up was Bank of Ireland. The liquidator's report and attached list of company creditors state that the Appellant's loan to [redacted] Ltd in the amount of £62,488 was, in common with those advanced by other shareholders, unsecured.

61. It also is necessary to observe that other statements made during the hearing by the agent of the Appellant that he had instructions relating to the nature of the loan and its terms cannot be regarded or accepted as evidence. Included among these was that there was no prohibition on the transfer of the debt by the Appellant to any prospective purchaser. Accordingly, the Commissioner is in no position to make any finding on whether it was or was not an asset that could be disposed of to another. Notwithstanding this finding, it must be observed that even if it were the case that the debt was transferable, this alone would not make it a marketable asset falling within the definition of a debt on security as there would still need to be some additional right of rights attaching to the debt making it capable of rising in value. As has already been found, no evidence of such rights was forthcoming.

The [redacted] Statement

62. The Commissioner finds that the [redacted] statement is incapable of proving the Appellant's claim that CGT arising from the sale of his shares in [redacted] and [redacted] should be set against the larger losses that his agent suggested he incurred in the course of trading various financial instruments.

63. The statement is in the name of the Appellant and, on its face, indicates that sums of €100,000 and €50,000 were lodged into the account on 22 March 2011 and 20 April 2011 and that by the end of that year the sum remaining in the account had dissipated to €6,723.95, with the account being of essentially nil value by November 2017. It was, however, accompanied by no further material that might shed light on the provenance of the money deposited or the exact nature of the transactions represented. The Appellant may have been in a position to give oral evidence on these matters, but instead was absent from the hearing. He could even have sought to furnish further documentary material explaining the background to and nature of his supposed trading activities in financial instruments. The Commissioner is not prepared, in the absence of any such evidence, to draw inferences regarding the existence of an allowable loss from sparse and incomplete information contained in what is an unproven document in the form of an account statement. For this reason the Appellant's claim is refused.

Determination

64. As a consequence of the foregoing, the Commissioner determines that the Appellant has failed to prove that the assessments for 2014 and 2015, whereby he was found to have a CGT liability in the amounts of €33,284 and €49,427, were in error. The Commissioner therefore confirms the assessments under appeal.

65. This appeal has been determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and law. Any party dissatisfied with the determination has the right to appeal on a point or points of law only within a period of 42 days from receipt of this Determination in accordance with the provisions of the TCA 1997.

Conor O'Higgins
Appeal Commissioner
11 May 2023