AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

105TACD2023

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against Notices of Estimation of Amounts Due ("the Estimation") for Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax ("LPT") – (hereinafter "PREM") and amended notices of assessment to Corporation Tax (hereinafter "CT") raised by the Revenue Commissioners ("the Respondent") on 16th December 2021 and 21st June 2022. The amount of tax sought on the PREM Estimations is €56,616 for 2016 and €92,090 for 2017. The amount of tax sought on the CT assessments is €67,046 for 2016 and €8,392 for 2017. These amounts of tax are exclusive of interest and penalties. The Appellant makes its appeal in accordance with the provisions of section 990 and section 933 of the Taxes Consolidation Act 1997 ("TCA 1997").

2. The PREM Estimations in the sum of €148,706 and the amended notices of assessment to CT in the sum of €75,438 were appealed under the reference numbers 158/22 and 760/22. Following a direction of the Commission on 12th October 2022, in accordance with the provisions of section 949E (2) (b) TCA 1997, the appeals were heard at the same time under the merged reference number 158/22 as similar facts are in issue.

3. The appeal concerns whether certain payments made to [redacted] ("the Appellant Director") and his business partner, [redacted] ("the partner") were for their benefit or whether the Appellant purchased and acquired three properties from the Appellant Director and one property from the Appellant Director and his partner in 2016.

Background

4. The Appellant is a private limited company, tax resident and incorporated in Ireland. For CT purposes, the Appellant is considered a "close company" under section 430 TCA 1997. A close company is defined as an "*a company under the control of 5 or fewer participators, or of participators who are directors*". "Participators" in this context is generally taken to mean "shareholders".

5. The tax implications of a company being deemed a close company is that it is subject to certain specific anti-avoidance provisions of the TCA 1997. In the Appellant's case, the relevant applicable provision is section 438 TCA 1997 which requires that any sums in the form of a loan or advance paid to the Appellant Director are required to be made under the deduction of tax. In addition, under section 122 TCA 1997, if the Appellant Director is deemed to acquire a loan from the Appellant and does not pay interest on that

loan, he is liable to benefit in kind ("BIK") at an annual rate of 13.5% unless that loan is to acquire a residence in which case the rate is reduced to 4% per annum.

6. On 21st November 2019, the Respondent issued the Appellant with an "Aspect Query" letter. This letter sought details of certain items contained in the Appellant's Profit and Loss Account and Balance Sheet for the years 2016 and 2017. An Aspect Query is a type of assurance check initiated by the Respondent on the taxpayer and is regarded as a short, targeted intervention for the purpose of checking a particular risk associated with a taxpayer's affairs.

7. Owing to the initial responses provided by the Appellant, the Respondent subsequently escalated the Aspect Query to a Revenue Audit ("Audit") on 10th March 2020. This Audit sought to examine the Appellant's taxation affairs for 2016 and 2017 and detailed financial information for those years was requested by the Respondent in the Audit initiation letter.

8. The audit findings revealed in 2016 the sum of €250,000 was transferred into the personal bank accounts of the Appellant Director and the additional sum of €180,000 was transferred into the bank account of the Appellant Director and his partner.

9. The Appellant contended that these payments represented the consideration paid by it in respect of the following properties:

Property Details	**Vendor**	**Consideration**
[redacted],		
[redacted]	*Appellant*	€125,000
[redacted],		
[redacted]	*Appellant*	€75,000
[redacted]		
[redacted]	*Appellant*	€50,000
		€250,000
[redacted]	*Appellant*	
[redacted]	*& Partner*	€180,000
Total		**€430,000**

10. For the purposes of this Determination, hereinafter, the [redacted], [redacted] are referred to as "the 18 acres", the 7.5 acres at the same location as "the 7.5 acres", [redacted] as "[redacted]" and the [redacted] as the [redacted]".

11. The Respondent disagreed with the Appellant's position and claimed the payment of the €250,000 in respect of the [redacted] were made for the Appellant Director's own private use and as such, the Appellant did not acquire these properties from the Appellant Director. The Respondent further submitted that the payment of €180,000 to the Appellant and his partner for the [redacted] were also for the Appellant Director and his partner's own private use and the Appellant did not acquire the [redacted] from them.

12. Arising from these findings, the Respondent subsequently issued the PREM Estimations and the notice of amended assessment to CT on 16th December 2021 and 21st June 2022 on the grounds that the sums paid by the Appellant represented loans or advances paid to the Appellant Director and his partner.

13. The Appellant who was not in agreement with the PREM Estimations and the CT assessments lodged appeals with the Commission on 14th January 2022 and 27th July 2022. The consolidated appeal was heard before the Commissioner over two days on 17th January 2023 and 14th February 2023 and the Appellant and the Respondent were represented by Counsel. The Commissioner had the benefit of written submissions from both parties in addition to the oral evidence and submissions presented at the hearing.

Legislation and Guidelines

14. The following legislation is relevant to this appeal.

Section 438 TCA 1997

(1) (a) Subject to this section, where a close company, otherwise than in the ordinary course of a business carried on by it which includes the lending of money, makes any loan or advances any money to an individual who is a participator in the company or an associate of a participator, the company shall be deemed for the purposes of this section to have paid in the year of assessment in which the loan or advance is made an annual payment of an amount which, after deduction of income tax at the standard rate for the year of assessment in which the loan or advance is made, is equal to the amount of the loan or advance.

(b) Section 239 shall apply for the purposes of the charge, assessment and recovery of the tax referred to in paragraph (a).

(c)The annual payment referred to in paragraph (a) shall not be a charge on the company's income within the meaning of section 243.

(2) For the purposes of this section, the cases in which a close company is to be regarded as making a loan to any person shall include a case where –

(a) that person incurs a debt to the close company, or

(b) a debt due from that person to a third person is assigned to the close company, and in such a case the close company shall be regarded as making a loan of an amount equal to the debt; but paragraph (a) shall not apply to a debt incurred for the supply by the close company of goods or services in the ordinary course of its trade or business unless the period of credit given exceeds 6 months or is longer than that normally given to the company's customers.

Section 239 TCA 1997

(1) In this section, "relevant payment" means – (a) any payment from which income tax is deductible and to which subsections (3) to (5) of section 238 apply, and (b) any amount which under section 438 is deemed to be an annual payment.

(2) This section shall apply for the purpose of regulating the time and manner in which companies resident in the State –

(a) are to account for and pay income tax in respect of relevant payments, and

(b) are to be repaid income tax in respect of payments received by them.

...

Section 122 TCA 1997

(1) (A) "employee", in relation to an employer, means an individual employed by the employer in an employment to which Chapter 3 of this Part applies, including, in a case where the employer is a body corporate, a director (within the meaning of that Chapter) of the body corporate;

(i) a person of whom the individual or the spouse of the individual is an employee,

"loan" includes any form of credit, and references to a loan include references to any other loan applied directly or indirectly towards the replacement of another loan;

"preferential loan" means a loan, in respect of which no interest is payable or interest is payable at a preferential rate, made directly or indirectly to an individual or to the spouse of the individual by a person

who in relation to the individual or the spouse is an employer, but does not include any such loan in respect of which interest is payable at a rate that is not less than the rate of interest at which the employer in the course of the employer's trade makes equivalent loans for similar purposes at arm's length to persons other than employees or their spouses;

"preferential rate" means a rate less than the specified rate.

Section 51 Land and Conveyancing Law Reform Act (as amended)

(1) Subject to subsection (2), no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent.

(2) Subsection (1) does not affect the law relating to part performance or other equitable doctrines.

(3) For the avoidance of doubt, but subject to an express provision in the contract to the contrary, payment of a deposit in money or money's worth is not necessary for an enforceable contract

Documentation Presented to the Commission

15. Included within documentation submitted to the Commission was the following:

15.1. A copy of the Appellant's financial statements for the year ended 31st December 2016 and an explanation of "other debtors – deposits paid". This narrative stated that these deposits included the three payments totalling €250,000 made to the Appellant Director in respect of the [redacted]. Also included in those deposits was the additional payment of the €180,000 made to the Appellant Director and his partner in respect of the [redacted]

15.2. In a note underneath that schedule was the following (in relation to the purchase of another parcel of land acquired by the Appellant and which is not in dispute between the Respondent and the Appellant):

"*This was lands bought from a 3rd party in 2016 and purchased by the company. It is included under Deposits but it was fully paid and registered as required at the time. The lands ajoin (sic) the* [redacted]*. The purchase should not be included as "Deposits" under the Nominal as listed*

but could have been posted directly to Fixed Asset - all payments made to [redacted] *Solicitors on 25/05/2016.*

The lands allow access to the [redacted] *and will allow for future development of these lands and access to these. The company plans to expend its manufacturing facility into these lands at the rear of exisiting (sic) premises but most acess (sic) these via these roads. Current access is through the town and is limited. The council have always advised that planning been sought will have to see traffic and HGV diverted from the town entrance and these lands secured the alternative. Contract and Registration documents are attached.*"

15.3. An email from the Appellant's Company Accountant to the Respondent dated 5th May 2021. Included within that email was the following:

"*Some info on the land purchases.*

Firstly it should be clear that the timing of these matters haven't been to the satisfaction of anyone. The delaying in releasing deeds and charges by the bank and then delays with the Solicitor to complete the paperwork. The Company will hold their hands up and this may not have been pushed hard enough but they understand the matters to be moving and have acted as owners of these lands since the payments been made.

…3 other purchases – [redacted]*, […},* [redacted] *– they have been completed by way of transfer on conveyance as attached dated 15.12.20. We've had numerous discussions with the Solicitors over the completion of these purchases in 2020 since the matter arose. This wasn't helped with Covid but we expressed the importance of the matter. They where (sic) to procedure (sic) with detailed contracts dated back to the time of payment but then returned with list of requirements for this including a solicitor to act for the purchaser, while they act for vendor. They stated this would require land surveys for boundaries, legal searches for any claims/charges, rights of way, planning searches, property registration searches and all that comes for the purchase of lands. They said this could take between 6-8 months considering the actions required by both sides plus higher costs. We said in current needs that this was already too long and to look at alternative option considering the vendor and purchaser were connected and could move as quickly as possible. Their solution in December was a signed Transfer of Conveyance. We requested that this should be the dated at the time of land*

purchases but they issued it at current date. In this time the Company has acted as beneficial owner of the land.

…The stamp duty on the completion of the conveyance was paid in December 2020. It is my understanding that the Stamp Duty rate was higher than when the purchases where (sic) paid. We had anticipated paying the 2016 Stamp Duty rates plus interest but as conveyance dated 2020 this didn't transpire.

The payments to the relevant vendor account and then onto the [redacted] *I've attached an email to the Company at the time which agreement of the payments to the account holders.*

…The property at [redacted] *has also caused issues due to a 3rd party been involved in the ownership of this land. This land was owned by [the Appellant Director] and his [partner] and purchase was to proceed to a 3rd party in 2015/16 but this fell through due to concerns over a right of way with the property. The Company then agreed to purchase this.*

As above the completion of the contracts where (sic) never formalised and it was agreed to go down the route of conveyance. However the 3rd party involved has not yet signed. They have been suffering with ill health over the last 12 months and have asked for time to consider and speak to their own representatives. The paperwork has been prepared but not yet signed – I've attached a draft for your records.

At all times these transactions where (sic) at arm's length and valuations have been provided. Since the time of purchase, the Company has acted as owners of these lands and been beneficial owners. It's the opinion that none of these lands have risen in value given their location and if any loss has been suffered it would be at the cost to the Company.

I hope to have further parts for deeds and completed legals (sic) in the coming weeks but such has been the progress to date it's hard to put a timescale on these…"

15.4. An email from the Appellant's Company Accountant to the Respondent dated 4th May 2021. Attached to that email was a number of valuations which included the four properties forming the basis of this appeal.

15.5. An email from [redacted] to the Appellant Director's daughter dated 16th May 2016 headed "Earlier conversation". Included within that email was the following:

"*Following outlines position re various asset sales.*

..

2. [redacted]*. Bank to receive €50k. Funds to be received by 30th June.*

…

4. [redacted] *Bank to receive €125k, this week.*

5. [redacted] *Bank to receive €75k by 30th June.*

…

On receipt of funds we will arrange to release title deeds to various assets to your solicitor.

..

In relation to properties to be disposed of this leaves [redacted] *… Essential this is now prioritised either by concluding sale to one of interested parties or selling property by Allsops or similar style auction process."*

…"

15.6. An email from the Appellant's Estate Agent dated 30th April 2021 addressed to the Appellant Director's daughter which stated:

"*The land at* [redacted] *was agreed for sale twice and both fell through. From memory the issue was related complications with rights-of-way and the local authority.*

The sale was agreed at a value of €175k to [redacted]*, represented by* [redacted]*. Booking deposit in the amount of €5k was received on 06/05/2015 and Sales Advice Notes were issued to the relevant Solicitors on the same date.*

This booking deposit was subsequently refunded on 24/05/2016 after various attempts to resolve the issues failed.

The sale was then agreed at a value of €180k to [redacted] *represented by* [redacted]*. Booking deposit in the amount of €5k was received on 31/08/2016 and Sales Advice*

Notes were issued to the relevant Solicitors on the 07/09/2016. This booking deposit was refunded on 22/02/2017 after negotiations failed…"

15.7. A letter from the Respondent to the Appellant dated 2nd December 2021. Included within that correspondence was the following:

"*Employee Loans*

Under Section 122 TCA 1997, PAYE, PRSI, USC is to apply to the benefit derived by an employee from certain loans at preferential rates of interest.

A "preferential loan", is a loan made by an employer to a director/employee/spouse/civil partner of an employee in respect of which no interest is paid, or interest is paid at a lower rate than the "specific rate".

For the periods under Audit 2016/2017, loans were administered where no BIK was applied. Benefit in Kind is to be applied for the Periods 2016/2017. I note that for the periods 2018-2019 these loans are still outstanding, and BIK applicable is for these periods. Please review and submit supporting documentation showing date on which loans were repaid. In addition to note, these loans are subject to a charge to income tax at the standard rate on the grossed-up amount of the loan, under Section 438 TCA 1997.

…

Included in the accounts for the period under review are the following amounts which have been recorded as other debtors in the financial statements.

[redacted] *€125,000*

[redacted] *75,000*

[redacted] *50,000*

…

[redacted] *180,000*

On review of these transactions in conjunction with the information provided, these transactions are to be treated as Directors loans and are therefore subject to Section 438 TCA and BIK on preferential Loans Rates to be applied.

During 2016 payments totalling [amount] were issued by the company to/on behalf of director [redacted]*. I note in your correspondence you have stated that the company agreed to purchase these properties from* [redacted]

[redacted] *however, there has been no supporting documentation to support this claim of these purchases in 2016 -signed contracts/ownership transfers etc.*

It is Revenue's position that these payments made during 2016 were loans to the director and therefore to be treated as such and subject to section 438 TCA 1997.

Section 438 TCA 1997 imposes on a close company a charge to income tax at the standard rate on the grossed -up equivalent of a loan made by a company to a participator. The Company should have operated Income tax on these loans and these amounts are also subject BIK on preferential loan rates.

…

I have attached a summary of the liabilities calculated based on my findings. Penalties will apply in accordance with Revenue Code of Practice and statutory interest will also apply and detailed calculations of these will be provided in due course."

15.8. A response from the Appellant's taxation advisors to the Respondent dated 9th December 2021. Included within that correspondence was the following:

"*Other Debtors*

As part of the loan restructure by [redacted]*, the loans extended by* [redacted] *to* [redacted] *was to finance the purchase of the various properties as detailed in your list. These properties were sold by* [redacted] *to* [redacted]*. They were not sold by* [redacted]*. BOI assumed the role as Mortgagee in possession and was therefore legally entitled to proceed with the sale of the various properties to the* [redacted]*. The bank assumed the role of receiver in this case.* [redacted] *mortgage deeds on the various properties granted them the legal right to conclude the sales. The loan from* [redacted] *was conditional on the property title vesting with* [redacted]*.*

[redacted] *from* [redacted] *conducted the bank negotiations and final settlements. He can confirm the above if required.*

Accordingly the beneficial ownership and the costs associated with this was carried by [redacted] *The subsequent legal documentation to conclude the sales has taken a considerable time, this has been due to a number of factors which have been previously explained. Notwithstanding the time delay, the original transfer of ownership from* [redacted] *is an enforceable contract.*

Therefore in the circumstances we do not agree that the payments to [redacted] are treated as director's loans and subjected to BIK and have been treated correctly in the accounts.

Included is further evidence that the [redacted] is the property of [redacted]. Correspondence from Estate Agent outlining that benefits of that properties rental are to the Company.

Since 2016 the [redacted] has been insured under the Combined Commercial policy of [redacted]. This property has been used since this time by the company as a storage facility for material, finished fabricated [redacted] and [redacted]. They are responsible for maintaining and managing this facility. All Electric bills are paid for by [redacted].

The lands at [redacted] are very much a company asset and acquired for commercial reasons by the company. These adjacent lands form part of the company expansion plans for a new green field expansion of the manufacturing facility and storage yard. These lands form the major part of these plans as they also secure a new site entrance away from the existing town entrance. The [redacted] Insurance and Electric costs have been paid by [redacted] [redacted] for number of years."

…

Section 438

Based on the above, it is our contention that none of "Other Debtors" amounts related to Directors loan…"

15.9. A follow on email from the Appellant's Company Accountant to the Respondent. This stated:

"As discussed the properties were slow coming into the Company name.

Part of the reasoning for this was that the solicitors had difficulty in obtaining discharges from the [redacted] and they felt they couldn't transfer the assets. I've attached correspondence from late 2016 to mid-2019 that show correspondence on number of fronts requesting this from the bank.

When received notice was issued to [the Appellant Director] as the discharges were in his name as per letter from his solicitor attached. It was then left for the solicitors to complete but at a time when business was growing and

planning for the expansion, we took eye of the ball on this and didn't push through to get the paperwork completed.

Indeed this caused the company, [redacted] *to be struck off before this paperwork could be completed and ensured that the property transfer at* [redacted] *became more complex due to the personal reasons previously outlined.*"

15.10. A letter from the Respondent to the Appellant dated 13th December 2021. That correspondence stated:

"*Directors Loan*

I have reviewed the information provided in your letter received on the 10/12/2021, in connection with amounts to be treated as Director's loans.

Based on the information and documentation provided, I do not accept your claims that these properties were held by the bank and [redacted] *sold these properties to* [redacted]*. No supporting documentation has been provided to support this claim.*

During 2016, [redacted] *made various payments totalling €430,000 to accounts in the name of* [redacted]*. These payments made to* [redacted] *are to be treated as Directors loans and taxed accordingly…*"

15.11. In an undated follow on note, the Appellant stated:

"*Directors Loan*

As requested please see attached Nominal Activity for the funds coming in from the repayment of this loan. As per original posting to the nominal, these are posted against the Nominal 1105 as per dates in (sic) was received in the bank…

In respect of the amounts that you have stated as a Directors loan we ask that you do not raise an assessment on these amounts as we have below further correspondence from the [redacted] *on this that state the nature of these transactions.*

See attached letter from [redacted] *regional manager in* [redacted]*. This confirms that the monies paid out by* [redacted] *were for the sole purpose to purchase the various properties in 2016. The letter also confirms that the various transactions took place under the direction of the bank. We disagree with your interpretation of these transactions; the payments*

were part of the property purchases. There was a number of title issues with the various properties such as adverse titles, right of ways issues. These issues are not easily rectified which resulted in a delay in finalising the purchase transactions. The company prepaid for the properties because [redacted] *insisted on these payment terms. Property ownership transferred to the Company arising from the payments in 2016*."

15.12. A further follow on letter from the Appellant's Company Accountant dated 22nd December 2021. This stated:

"*I refer to your recent email setting out the basis and calculations of the revised liabilities arising from the ongoing Revenue Audit. We do not agree with the treatment of the payments from* [redacted] *for the various properties. Our position is unchanged in that the monies paid to* [redacted] *was the consideration for the various properties and the consideration paid combined with an offer and acceptance by the purchaser and the seller does in fact represent a binding contract.*

In support of our position we are attaching the following

. • *A letter of confirmation from the Company solicitors* [redacted]*, confirming that they were asked to advise the Company on the impending property purchases as far back as 2015. They also clarify the nature of the property transfers. The letter is quite clear in its conclusions – purchase contracts existed when the consideration was paid in 2016.*

• *An email from* [redacted] *tax consultant re-enforcing the above points. In addition* [redacted] *makes the point that in respect of the CGT tax codes, a taxable gain arises on the disposal of a capital asset when an offer is made and accepted and the consideration is fully paid. The* [redacted]*situation mirrors these conditions. Applying the rules contained within the taxation codes a property disposal and purchase has taken place in 2016.*

• [redacted] *also states that any additional taxes incurred, howsoever arising are deductible when calculating the Corporation tax liability. We do ask that the additional taxes (excluding interest & penalties) are allowed as a corporation tax deduction.*

• *Finally we are enclosing confirmation from the Company director that the company agreed to purchase the various properties in 2016. This represented the boards clear intention and if required this statement can be made under oath.*

Accordingly we will be lodging an appeal against the 2016 assessment on the above grounds. In light of the above additional information can you please amend your calculations accordingly?"

15.13. Attached to the above correspondence was the tax advice received from a taxation consultant regarding the land transfers and a letter from the Appellant Director's daughter to the Respondent dated 16th December 2021 which stated:

"*I hereby confirm that I, [redacted], have been Director and Secretary for [the Appellant] from [redacted]*

I confirm that an agreement was reached in 2016 between the company and [the Appellant Director] to purchase various properties from him at market value. As agreed independent market valuations were received and the properties purchased were as follows:

[The four properties forming this appeal were included in a list of properties purchased at the agreed valuations].

It was agreed that payment for the various properties would be fully prepaid, subject thereafter to [The Appellant Director] resolving all title issues. Following payment of the consideration the [Appellant] would have full access to and rights to enjoy the properties as it so wished."

15.14. A letter from the Appellant's solicitors dated 22nd December 2021. This was headed "Property Transfers" and stated:

"*We are writing as requested to confirm that we were consulted with regard to applications for registration of title on foot of agreements in 2016 whereby [redacted] had purchased a number of properties from [redacted] … and from [redacted] and [redacted]*

We were instructed that all of the said properties had been encumbered with [redacted] who had agreed to receive the proceeds of sale in full and final settlement and in consideration of the discharge of its charges on the properties.

We explained that we could not act for both sides to a conveyancing transaction. We were requested to act for [redacted]

We were instructed that the consideration for the purchase of the properties had passed in 2016 and that [redacted] *was in possession of the properties and was familiar with same.*

In circumstances where the purchase monies had passed, the purchaser was in possession and the agreement between the parties had been performed, but for execution of deeds transferring the paper title to the properties and application to the Property Registration Authority to amend the title register, we indicated that the scope of our engagement would be limited.

In circumstances where the agreement between the parties had been performed as aforesaid, we limited our retainer to preparing and stamping deeds of transfer of title to the properties and making application to the Property Registration Authority to amend the title register to record [redacted] *as owner. It was indicated to us that the bank would separately apply to the Property Registration Authority to register discharges of its charges.*

Our recollection is that, having regard to the circumstances, [redacted] *did not wish to incur the expense of retaining the services of a solicitor and indicated that he would simply execute deeds of transfer prepared on behalf of* [redacted]*. Our note is that we have prepared deeds of transfer as aforesaid in respect of the following:*

Transferor	Transferee	Date of Deed	Consideraion	Property
[redacted]	[redacted]	15.12.2020	€250,000	Folios [redacted], [redacted], [redacted], [redacted] ([redacted] lands of [redacted]- purchased for €125,000)
				Folios [redacted] [redacted] lands of [redacted]- purchased for €75,000)
				Folios [redacted] [redacted] & a small plot of unregistered lands (adjacent these folios)) ("[redacted]" - purchased for €50,000)
[redacted] & [redacted]	[redacted]	Not Executed to date	€180,000	Folios [redacted], [redacted], [redacted] (Lands at [redacted])

…

You have asked us if formal written contracts were required. A contract can be verbal or written. However, having a verbal contract only for the sale of land is extremely high risk. This is because, in the event of a dispute, it is provided by statute that no action can be brought to enforce a contract for the sale of land unless the agreement on foot of which the action is brought, or some memorandum of note of it, is in writing and signed by the person against whom the action is brought. Accordingly, while a contract can be verbal, it highly recommended that contracts for the sale of land should be in writing if they are to be enforceable by an action in the event of a dispute…"

15.15. A letter from the Respondent dated 18th May 2022 which stated:

"*€180,000 -* [redacted] *As per assessment raised for the 2016 period, this amount has been fully subject to Section 438 TCA 1997 and Benefit in Kind on a Director loan. On further review of the case, this property is jointly owned by* [redacted] *and* [redacted] *and funds were transferred into a jointly held Bank of Ireland account. As this property is owned jointly this amount should have been treated as follows:*

€90,000: [redacted] *-This amount is to be subject to section 438 TCA 1997 and Benefit in kind on director loan…*

Directors Loans

As per previous correspondence dated 13th December 2021, funds transferred to [redacted] *in 2016 are to be subject to section 438 TCA 1997 and benefit in kind on these loans, until the repayment of the loan. Please note as per above, the adjustment in relation to the jointly held property by* [redacted] *and* [redacted]*. This has been reflected in updated Audit liabilities workings…*"

15.16. A letter from [redacted] dated 14th December 2021 addressed "*To whom it may concern*". This stated:

"*Re:* [redacted]

I confirm [redacted] *approved the purchase of land & assets by* [redacted] *in 2016. These lands & assets included the following:*

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

…

- [redacted]

The above assets were purchased at market value as per the agreement with [redacted] *& ownership was transferred to* [redacted]*)* [redacted] *If you require any further information please let me know"*.

15.17. A balancing statement dated 9th December 2021 from the Appellant's Estate Agent to the Appellant's Daughter at "[redacted]". This statement was headed "[redacted]*. Rental Period December 2017 to December 2021*" and showed recorded rental payments received on those lands for 2017, 2019 and 2020 in the sum of €10,000. From this amount, the agent's fee was deducted, leaving a "*Balance due to* [redacted]" of €8,651.40.

15.18. Undated Land Registry extract for [redacted], ("the [redacted]). These folios showed that the property was owned by the Appellant Director and his partner and that a charge existed on those lands in favour of [redacted]

15.19. An uncompleted and unsigned document headed "Property Registration Authority" in respect of the above folios. The date of this document was the [blank] day of December 2020 and it showed the transfer of the [redacted] from the Appellant Director and his partner to the Appellant.

15.20. An unsigned and undated document entitled "Form of Acknowledgement" between the Appellant Director, his partner and the Appellant. This document acknowledged that the [redacted] were in the possession of the Appellant, that the Appellant Director and his partner sold their interest in those lands to the Appellant and that no formal written contract was entered into in relation to the sale.

15.21. An email from [redacted] to the Appellant's Company Accountant dated 1st December 2021. This email confirmed that the amount of €180,000 was

transferred from the Appellant to an account in the name of the Appellant Director and his partner on 29th November 2016.

15.22. A letter from [redacted] to the Appellant Director dated 5th August 2014. This confirmed a valuation of €75,000 on the [redacted] €50,000 on the [redacted], €125,000 on the [redacted].

15.23. An email from [redacted] to the Appellant Director's daughter dated 7th June 2016. *This included "Ref earlier telcon (sic). Funds should be lodged to the following accounts €75k… account number… in name of* [redacted] *… €50k account number… in name of* [redacted] *… 2 other issues I forgot to raise with you in telcon (sic). 1. What progress (if any) re* [redacted]*? If minimal or none then we need to agree on auction optio*n…"

15.24. A completed transfer and conveyance deed in respect of the [redacted], the [redacted] and the [redacted] dated 15th December 2020 in the sum of €250,000. This document was signed by the Appellant Director and on behalf of the Appellant by the Appellant Director's daughter.

15.25. A copy of a stamp duty return submitted to the Respondent. This document showed the [redacted], the [redacted] and the [redacted] being transferred from the Appellant Director to the Appellant on 15th December 2020 and that stamp duty at the rate of 7.5% was paid on the consideration of €250,000.

15.26. Email correspondence between the Appellant Director and [redacted] from 2015. These emails discussed the debt settlement arrangement subsequently agreed between the Appellant Director and the bank.

15.27. An email from a [redacted] of [redacted] who assisted the Appellant Director with his debt settlement negotiations to the Appellant. This email was dated 17th November 2017 and stated that he had received a call from [redacted] about the delay in releasing documents but advised there was "*no difficulties with same*".

15.28. A letter from the Appellant Director's solicitors to [redacted] dated 27th June 2018. That letter refers to a number of secured properties which the solicitor states are "still to be released" and is looking for an update on matters.

15.29. An email from the Appellant's Financial Accountant to [redacted] dated 13th September 2018. This email is further requesting that the secured properties be released so that they can be transferred into the Appellant's name.

15.30. Letter to the Appellant Director from his solicitor dated 7th March 2019 which states "*the PRSA have written to us to say that the application to register the deed of discharge sealed by* [redacted] *in respect of the above folios has been completed*".

15.31. Email from [redacted] to Appellant's Financial Accountant dated 10th December 2021. This email states:

"*I refer to the ongoing Revenue audit and in particular the queries that have been raised in respect of the asset sales by* [redacted]

It is important to point out the sale of the various assets is quite separate to the loan restructuring arrangement that was agreed separately with [redacted]

Originally [redacted] *allowed the* [redacted] *time to dispose of all the properties. They were not successful and on 16th September 2014* [redacted] *withdrew the offer from the* [redacted] *– copy letter attached. From that point on* [redacted] *assumed control over the selling process. They secured their own valuations on the various properties and set out a time line during which the various properties were to be disposed. The legal right to sell the properties was conferred on* [redacted] *by virtue of the conditions contained in the various loan agreements.*

Copies of various email are attached from [redacted]*, showing quite clearly that they were directing the sales and disposal process. There are several references to agreed time scales, which were set out by* [redacted] *The target selling prices were set out by* [redacted]*. The process was under continuous scrutiny by* [redacted]*, all decisions in respect of any sale had to be agreed in advance by* [redacted] *personnel.* [redacted] *had assumed the role of a Receiver. The legal process to complete the sale is known as a mortgagee in possession.*

[redacted] *was expanding its operations and they required additional storage and space to facilitate expansion. This development was communicated to* [redacted] *via the new board pf* [redacted] *.* [redacted] *agreed that* [redacted] *could purchase the properties at full market values. This they proceeded to complete.* [redacted] *had departed the company by this stage and had no shareholding or directorship in* [redacted]*. . A new board of directors and new shareholders were in place"*.

Witness Evidence

16. The following witnesses gave evidence to the Commission during the course of the appeal hearing:

The Appellant Director

17. The Appellant Director stated that:

    17.1. He was the Managing Director of the Appellant until 2017 and owned or co-owned the land and properties under appeal ("the properties"). He advised that the Appellant was a family run [redacted] which was in operation for over 30 years. He further advised that he originally purchased land and properties to diversify into either residential development or nursing homes and [redacted] and the [redacted] were beside the Appellant's business premises to enable it to extend the workshop it operated its business activities from. In relation to some of the properties, the Appellant Director explained that he started the process of developing but upon commencing preliminary works it was discovered that building on those lands was problematic as the lands were situate on a bog. He stated that the commencement of these preliminary works coincided with a drop in residential property prices and as a result the project was deferred in anticipation of a resurgence in the property market.

    17.2. As a result of the downturn in the economy, in or around 2010, some of his properties became distressed and he was required to enter into debt restructuring arrangements with [redacted] who were the mortgage providers.

    17.3. As part of those debt restructuring arrangements, he advised that he was required to sell the properties at agreed market values. He explained that agreement was negotiated by his accountant and his daughter, [redacted], who tended to his general day to day business affairs and acted as company secretary to the Appellant. He advised that a condition of the restructuring with [redacted] was that he was to resign as Director to and relinquish his shareholding in the Appellant. The Appellant Director advised that he resigned and transferred his shareholding as stipulated in 2017, at which stage he transferred that shareholding to his children.

    17.4. The Appellant Director stated that he intended for the Appellant to carry on the activities he had envisaged for properties after it acquired them from him. In relation to alterations to the properties, he stated that they were currently largely unchanged from the date the Appellant acquired them but the [redacted],

which had always been utilised by the Appellant for storage, had some monies spent on it to enable that premises be more effectively used for storage of the Appellant's goods.

17.5. Under cross examination by the Respondent's Counsel, the Appellant Director agreed that [redacted] had agreed to reduce the amount of money he owed them as part of the debt restructuring arrangement. He advised that this debt forgiveness was subject to him selling the properties at agreed market valuations and that he was further required to make a personal contribution of funds in discharge of the agreed residual.

17.6. The Appellant Director advised that he was unsure of the exact nature of the debt restructuring provisions agreed with [redacted] as he was not familiar with the process and in those circumstances he had delegated the matter to his daughter and a number of professionals. The Appellant Director submitted that as those individuals were present at the appeal hearing, they would be better equipped to assist the Respondent's Counsel with any queries he had in relation to the Bank of Ireland debt restructuring.

The Appellant's and the Appellant Director's Accountant

18. [redacted] advised that he acted for the Appellant and the Appellant Director for a period of approximately 25 years and during that time he looked after both parties' accountancy, taxation and financial advisory affairs. He explained that part of those duties involved arranging new loans and dealing with debt restructuring when the Appellant Director fell into difficulty with [redacted]. In relation to the latter he advised:

18.1. In or around 2009 or 2010, he approached [redacted] on the Appellant Director's behalf. He stated arising from the "magnitude of debt" owed by the Appellant Director to [redacted] that it took some years for an agreement suitable to both the Appellant Director and the bank to be agreed.

18.2. The settlement terms agreed between the Appellant Director and [redacted] required the Appellant Director to sell all of his mortgaged properties and to make a contribution towards the residual debt before the resultant balance owed was written off. He further advised that the mortgaged properties were required to be sold at agreed prices and these prices, which were based on independent market valuations, were agreed between the Appellant Director's Estate Agent and [redacted] own valuation specialist.

18.3. That all of the properties were put on the open market at those agreed sale prices but there was little interest shown in them as a result of the prevailing market conditions. Subsequently he advised that the Appellant agreed to purchase the properties as they "were useful" to it.

18.4. Under cross examination, that in the event of the Appellant Director defaulting on the agreed terms of the debt restructuring, [redacted] were entitled under the loan documentation to appoint a Receiver over the properties, sell them for market value and pursue the Appellant Director for the remaining balance owed to them in full. He agreed with the Respondent's Counsel that this course of action was not necessary by [redacted] as the Appellant had agreed to purchase the properties from the Appellant Director.

18.5. That the properties allegedly acquired by the Appellant were entered on its Balance Sheet as "other debtor deposits" rather than fixed assets. When asked to explain this position, he advised that as the full legal title could not be transferred to the Appellant owing to "various reasons to do with title", then it was more proper that the premises be entered on the Appellant's Balance Sheet in the manner it was done. When pressed by the Respondent's Counsel, the Appellant's Accountant confirmed that there was no finalised contract in "them days".

[redacted] – [redacted]

19. [redacted] advised that he was engaged as a Senior Business Manager in the [redacted] and that the Bank had originally provided the property mortgages to the Appellant Director. He advised that he only became involved in the Appellant Director's and the Appellant's banking affairs when he took over the file in 2021. He advised that he was requested by the Appellant to attend the appeal hearing to discuss the release of assets which the bank previously held and that the information he was presenting to the Commission was based upon historic information obtained from the bank's files. He further advised:

19.1. The bank agreed to release the properties from their charge subject to them being sold for market value and the full market value being remitted to them.

19.2. Under cross examination that he was unable to provide the exact date the charges were released nor was he able to confirm any evidence of contracts on the bank's files. When asked who acquired the properties following the release of the bank's charges, he stated "*they were bought by the [Appellant] company*".

[redacted] – *The Appellant Director's and the Appellant's Solicitor*

20. [redacted] advised that his firm looked after the legal affairs of the Appellant Director and the Appellant in relation to the properties. He stated that the individual who had looked after the matter had subsequently left his employment and as such, the information he was providing to the Commission was based on his examination of the documentation available to him for his clients' files. On that basis, he advised:

    20.1. As of 2018, two of the properties (the [redacted]) had been released from Bank of Ireland's charge. He added from his review of the files that he was unsure when the [redacted] and the [redacted] were released from charges but added that he was of the view that the [redacted] were problematic as there was a right of way issue on those lands which caused conveyancing difficulties.

    20.2. Under cross examination that his firm's correspondence indicated on 27th June 2018 not all of [redacted] securities on the properties had been released. He continued that in or around December 2020, his firm was requested to regulate the title on the properties into the name of the Appellant, having been advised that the Appellant had taken possession of and paid for those properties in 2016. He concluded his evidence by stating that he was unsure if all of the properties had been transferred into the Appellant's name as at the date of the appeal hearing as his files were not conclusive in this regard.

[redacted] – *The Appellant Director's Daughter*

21. The Appellant's daughter advised that she is a director of the Appellant since [redacted] and is involved in the general running of the business, in addition to the day to day administration. She advised that she has worked for the Appellant since 1996 or 1997 as an administrative assistant and was later appointed as Company Secretary. In addition she stated that:

    21.1. She represented both her father and the Appellant in the bank negotiations and transfer of the properties. She advised that she began discussions with [redacted] in or around 2014 or 2015 and those negotiations progressed when she provided the bank with valuations of the properties. She further advised that the bank were satisfied with the valuations placed on the properties and that it was agreed that the properties would be placed on the open market for sale at a price consistent with the valuations obtained.

21.2. The [redacted] and [redacted] acres were adjoined to the Appellant's property and given this proximity, they were of benefit to the Appellant's business activities. She further advised, prior to the transfer, that the [redacted] had been in use by the Appellant as storage and that it was in continuous use post acquisition for the same purpose.

21.3. Given the perceived benefit of acquiring the [redacted], the Appellant agreed to purchase them from the Appellant Director without putting them on the open market. She advised that the price paid for these properties was the open market value which had been agreed with [redacted]

21.4. The [redacted] were of no real interest to the Appellant as they were not near to its business operations. She advised that this land had originally been "sale agreed" with two third parties but when those sales fell through, the Appellant subsequently agreed to buy them from the Appellant Director. She stated that the price paid for the [redacted] was also the open market value agreed with the bank.

21.5. After the Appellant agreed to buy the four properties from the Appellant Director, the Appellant lodged sums of money with the bank to pay for those properties.

21.6. She recollected that those payments were made in or around May/June 2016 in respect of the [redacted]. In respect of the [redacted], she recalled this was at a later date, possibly December 2016 as that property had initially been sale agreed with a third party in May/June 2016.

21.7. [*Under cross examination*] the Appellant was involved mainly in [redacted] and [redacted] but did not engage in the business of land speculation.

21.8. Her father received a debt write down on the mortgages on the four properties as a result of selling them to the Appellant and the purpose of transferring the properties was to ensure her father was debt free.

21.9. No minutes of director's meetings discussing the property sales were maintained but rather informal discussions took place between her and her family on the benefit of the sales to the Appellant.

21.10. There was potential development on the [redacted] lands but the Appellant "*just didn't go down that road*" and instead chose to use it as storage for the Appellant's business activities.

21.11. Through the Appellant's accountant, she instructed a solicitor to attend to transferring the legal title of all four properties to the Appellant around the time it paid for them.

21.12. While acknowledging her duties as the then Company Secretary to the Appellant, she had no concerns in relation to acquiring the [redacted] despite the Appellant having no need or plans for those lands as at the date of acquisition.

21.13. There was no contracts for the sales of the properties to her knowledge but as the Appellant Director, his partner and the Appellant knew one another and were connected, she did not see any difficulties arising with the sales.

21.14. The [redacted]ty were legally transferred in or around 2020 to the Appellant. She further advised that the [redacted] were not yet transferred but that she was optimistic they would be closed in the next "t*wo to three*" weeks.

21.15. [*Following questions from the Commissioner*] The Appellant's premises consisted of buildings, offices and a storage yard on some [redacted] acres of land. She further advised that the [redacted] share common boundaries with the Appellant's premises and are located to the immediate left and right of the premises.

21.16. The [redacted] is in close proximity to the Appellant's premises.

21.17. Subsequent to the acquisition of the [redacted]res, the Appellant obtained planning permission on those lands to develop commercial buildings and that the Appellant is in the process of building units "*for use with the rest of the property*".

21.18. Owing to the Appellant Director's partner's ill health and right of way issues with the [redacted], those lands were in original condition and had not been developed in any way by the Appellant. She further advised that the [redacted] had been rented out to a local[redacted] for the past "*five or six years*" and the rent receivable on those lands was paid to the Appellant.

21.19. The delay in transferring the properties from the previous owners to the Appellant arose owing to no particular factor but that the onset of Covid related restrictions hampered that process somewhat.

[redacted] – *The Appellant's Company Accountant*

22. [redacted] advised that he commenced in the position of Company Accountant to the Appellant in January 2016 and early in his tenure, he was made aware of the active debt restructuring taking place with [redacted]. He further advised:

    22.1. In May 2016, he received instructions from [redacted] for the Appellant to pay €250,000 in respect of the [redacted]. He further advised that he did as instructed and made these payments on the Appellant's behalf in or around June 2016.

    22.2. There was a third party buying the [redacted] at that time but he was notified by the Appellant Director's solicitor that the sale of those lands fell through in November 2016. Subsequently, he advised that the Appellant agreed to buy the [redacted] and that process completed in late December 2016 or early January 2017.

    22.3. He was required to liaise with the solicitors to get the properties transferred. He further stated that he received correspondence from the solicitor in February 2017 detailing the next steps required for the properties to be transferred from the Appellant Director and his partner's names to the Appellant. He stated that he instructed the solicitor to proceed with these transfers but as his initial email went into the solicitor's "junk" email folder, it was not until May 2017 when he re-sent the original email again to the solicitor, that his instructions were received.

    22.4. He was advised shortly afterwards, that [redacted] legal department were in the process of "sorting out their paperwork" in terms of the discharges and "everything else" that was involved in getting the properties transferred to the Appellant.

    22.5. [redacted] were very slow to update him on progress and despite several follow on correspondences, it was not until 2019 or 2020 that the necessary documentation was available to register the [redacted] from the Appellant Director's name into the Appellant's name. He further advised that these three properties were perfected into the Appellant's name in December 2020.

    22.6. The [redacted] were problematic from a conveyancing point of view owing to a right of way issue over those lands. He stated that the documents to complete the conveyance on the [redacted] had just issued before the appeal hearing

and he was optimistic the registration of those lands would be completed in the Appellant's name in "the next week or so".

22.7. In 2017, there was initial discussions with the Council regarding planning on the [redacted]. He stated that as the Council had some difficulties with the submitted plans that the process took some time before planning permission was eventually obtained by the Appellant for the construction of the new commercial premises. He further advised following receipt of the planning permission as a result of the uncertainty arising from the Covid pandemic, the Appellant delayed building works for some 12 to 16 months but that those development works were actively in place.

22.8. In relation to the [redacted], that it was a secure compound just off the centre of the town and it had been in use for the storage of trailers and materials. He advised post acquisition, that the Appellant had extended its use and made it more manageable by virtue of clearing it out, tidying it up and conducting resurfacing works. He stated had this premises had not been acquired or made available for use by the Appellant that the Appellant would have been required to take on an additional premises as the its business activities grew significantly over the years 2017 onwards.

22.9. Regarding the [redacted] that the Appellant's estate agent collected the rent on those lands from the [redacted] and paid it to the Appellant "in bulk". He further advised that these rental payments were returned by the Appellant in its corporation tax returns.

22.10. To his knowledge the Appellant was entitled to buy any land or buildings from a willing seller and that is what it had done. In relation to the risk associated with the land and buildings not being immediately conveyed, he stated:

> "*They understood the situation of the properties, who they were buying it from, the use of the properties, what came with the properties. So, you know, it was a low risk purchase in the company's eyes. They had use of the properties at the time and they have used them fairly quickly after purchasing them. There was no risk in terms of security because they had received assurances from the bank that they would release their security over them so there was going to be no come back from a third party to say that they had title or ownership of the properties. We were aware who we were buying it from. They were connected parties at the time so there was a strong element of trust that they knew what they were buying"*.

22.11. When the Appellant acquired the properties, as Company Accountant, he posted them into the fixed asset section of the Appellant's Balance Sheet. Subsequently when the Appellant's external accountant questioned him on the status of the transactions when preparing the Appellant's year-end financial statements, he explained the situation. He advised following the discussion that the accountants removed the properties from Fixed Assets and put them into "other debtors" but that was only until such stage as the title to those properties was perfected and put into the Appellant's name.

22.12. The business activities of the Appellant had grown significantly following the acquisition of the properties. He stated the Appellant's employee numbers in 2016 were [redacted] or [redacted] but currently the Appellant employs over [redacted] employees and that the Appellant's turnover had more than doubled from [redacted] in 2006 to [redacted] a year now. He further stated that the Appellant's business growth had occurred from it expanding primarily from the domestic market to the European market, in particular [redacted] and [redacted] where it was doing a lot of business. He stated that the acquisition of the properties by the Appellant had been a significant contributor to the Appellant's growth.

22.13. In 2018, the Appellant acquired an additional business premises, outside the properties acquired from the Appellant Director and his partner in 2016. These additional premises were situate between the Appellant's premises and [redacted] and further assisted the Appellant's business growth. He advised that some of the projects the Appellant was involved in were large scale projects, such as the [redacted] required for the [redacted] and as a result of these projects, the Appellant required additional space in excess of that acquired in 2016, to facilitate its business growth.

22.14. Under cross examination, that the additional space required to facilitate the business growth was about "*the size of a GAA pitch or some 1/3rd of an acre*".

22.15. Under questioning from the Commissioner, that the activities of the Appellant involved the use of [redacted] and they were large scale projects involving [redacted]. In essence, he advised that the Appellant provided the "[redacted]" [redacted] and as [redacted] were chiefly large scale projects, such as [redacted] and such like, significant space was required by the Appellant to accommodate its business activities.

Submissions

Appellant

23. The Appellant's Counsel opened his submissions by stating that in order for the Appellant to be unsuccessful in its appeal, it was necessary for the Respondent to establish that [redacted] were mistaken or untruthful in its correspondence, that the Appellant's Solicitor and Estate Agent were "in cahoots" with the Appellant and that the Appellant itself was not being truthful in recounting its acts and dealings in acquiring the four properties under appeal. The Appellant's Counsel further submitted that for this to be proven the Commissioner would have to find that the substantial correlating evidence given by the Appellant's witnesses under oath was incorrectly tendered by those witnesses.

24. The Appellant's Counsel submitted that the Appellant's position was quite clear. Firstly that there was a concluded oral agreement, secondly that the vendor was not only willing but required to sell the properties and thirdly that the Appellant had not only agreed to acquire the properties but had indeed acquired those properties and put them to use within its business. As the Appellant was permitted under its Articles and Memorandum of Association to acquire any assets it wished, then the Appellant's Counsel submitted, it had lawfully acquired the properties.

25. Counsel for the Appellant submitted that this position was in no way contrived, as the Memoranda of Agreements for the sale of the properties were in existence prior to the Respondent initiating its enquiries into the Appellant's affairs. In addition, the Appellant's Counsel submitted that those Memoranda satisfied the requirements of Section 51 of the Land and Conveyancing Law Reform Act 2009 ("LCLRA 2009").

26. The Appellant's Counsel submitted that it is trite law that a Memorandum of Agreement can constitute multiple documents as was held in *Lavan v Walsh* [1964] ("*Lavan*") in which a chain of letters was deemed to constitute a Memorandum of Agreement.

27. In acknowledging that the Memoranda of Agreements were required to be signed, the Appellant's Counsel submitted that a "signature" need not be a "signature in the strict sense" and in support of that submission opened the case of *Halley v O'Brien* [1920] 1 IR 330 ("*Halley*") in which O'Connor LJ held:

> "*Accordingly the signature may—as has been decided in many cases under this statute—take any one of a great variety of forms. It may be typewritten; commercial contracts are, of course, frequently entered into by means of an offer or acceptance where the names of the persons making the offer or accepting it are typewritten. So*

also it may be lithographed or printed; there is no greater magic about typewriting than about print; and many cases have been decided in which print was held to be a good signature within the statute: Schneider v. Morris(1). Initials will do: Phillimore v. Barry(2), Sweet v. Lee(3); for why should not one man sign a memorandum of a contract with his initials when a painter can "sign" his picture, or an architect his plans, in that fashion?"

28. The Appellant's Counsel further acknowledged that for the Memoranda to be effective it was required to include the "material terms" of the agreement as was held by Hardiman J in *Supermacs Ireland Ltd v Katesan (Nass) Ltd* [2000] 4 IR 273 ("*Supermacs*") in delivering the judgment of the Supreme Court:

    ""*Only the "material terms" need be included in a note or memorandum for it to be sufficient but all the terms, whether they be important or unimportant, must be agreed before there can be said to be a concluded agreement.*"

29. Counsel for the Appellant submitted that all material terms are taken to be included in an agreement in circumstances where there are no matters remaining to be negotiated by the parties to an agreement such as the value of the deposit or such like. In support of this submission, Counsel opened the case of *Godley v Power* [1961] 95 ILTR 135 in which it was held that "*A memorandum must contain all essential terms. The parties, the property, and the consideration must always be ascertainable from it…*"

30. The Appellant's Counsel submitted that the terms of the Memoranda need not be clearly stated so long as they can be ascertained by reference to extraneous material as was held by Finlay J in *Doherty v Gallagher* (11 July 1975, unreported) where he stated that lands which were being transferred were to be handed over for farming purposes, even though the accompanying documentation did not specify that use.

31. Arising from the foregoing considerations, the Appellant's Counsel submitted that as there were "extensive exchanges" between the vendors, the purchaser and the bank, that those exchanges were more than sufficient to demonstrate that Memoranda's of Agreement were in place and that those agreements satisfied the requirements of section 51 of the LCLRA 2009.

32. Turning to the referenced exchanges, the Appellant's Counsel submitted that the email from [redacted] to the Appellant's daughter on 16th May 2016 clearly detailed the parties to the agreement, a description of the underlying properties ([redacted]), the consideration payable for those properties and the dates those payments were required to be made.

33. Furthermore, the Appellant's Counsel submitted that the Appellant accepted that offer in its reply email of the 17th May 2016 in which the Appellant's daughter in her capacity as Company Secretary to the Appellant stated "*Thanks for that, as discussed we agree to the below"* (with the reference to "the below" being [redacted] email of the 16th May 2016).

34. Having accepted the offer to acquire those three properties, the Appellant's Counsel submitted that the Appellant concluded the agreement, having been informed by [redacted] on 7th June 2016 of the specific bank accounts payments were required to be deposited into, when it made the requisite payments as instructed.

35. In consideration of the foregoing, the Appellant's Counsel submitted it was evident that all material terms of the agreement to acquire those three properties were readily ascertainable from the documentation exchanged between the parties and that this agreement was sufficient to satisfy the requirements of section 51 LCLRA 2009.

36. In respect of the fourth property (the [redacted]), the Appellant's Counsel stated, in 2016, that those lands had been "sale agreed" with two third parties but in late 2016 when those sales fell through, the Appellant subsequently purchased those lands from the Appellant and his partner. The Appellant's Counsel submitted that this position was evident having regard to the payment of €180,000 made by the Appellant on 29th November 2016, and as the payment represented the amount payable by the third party under the second failed sale, the sale was completed at market value. The Appellant's Counsel further submitted that the payment of €180,000 was evidenced in the bank's email of 1st December 2021 to the Appellant's Company Accountant in which it stated "*I also confirm the following… 29/11/2016 €180k was credited to Loan account in the name of* [redacted] *&* [redacted]

37. Having secured the payments for the four properties under appeal, the Appellant's Counsel submitted that the Bank then proceeded to agree to release the title deeds on those properties to the Appellant and this was evident from the bank's email of 16th December 2016 which was addressed to [redacted] and the Appellant's daughter and which stated:

> *"I confirm that Bank have agreed to release title deeds of various properties owned by … [parties] where we have received sale proceeds i.e.* [redacted]

38. In addition, the Appellant's Counsel submitted that there could be no doubt that the Appellant had acquired the four properties in 2016 and this was evidenced in the banks email to the Appellant on 14th December 2021 in which it stated "*I confirm* [redacted] *approved the purchase of land & assets by* [redacted] *in 2016. These land & assets included the [four properties]…The above assets were purchased at market value as per the agreement with* [redacted] *& ownership was transferred to* [redacted]*."*

39. The Appellant's Counsel submitted that Memoranda of Agreements were in place in respect of all four properties and as all material facts of those agreements were ascertainable from the documentation provided to the Commission, that the properties purchased by the Appellant satisfied the requirements of section 51 LCLRA 2009 and as such the Commission should find that the Appellant acquired those properties. The Appellant's Counsel further submitted that it was evident as a result of [redacted] releasing its charges over the properties that the Appellant had acquired them from it.

40. Further or in the alternative, the Appellant's Counsel submitted if the Commission determined that there were no such Memoranda of Agreements in place in relation to some or all of the properties, then the equitable doctrine of part performance applies.

41. Having regard to the judgment of Murray J. in *Lee v. Revenue Commissioners* [2021] IECA 18, and in noting that the Commission's jurisdiction is focussed on assessment and charge and that it does not enjoy general jurisdiction to consider equitable remedies, the Commissioner is unable to consider these submissions.

42. The Appellant's Counsel concluded his submissions by requesting, in the event of the Commissioner determining that a PREM charge was payable by the Appellant and/or his partner, that the Commission permit the Appellant to claim the amount of the PREM charge as a deduction against its schedule D, Case I income in computing its amount of profits liable to corporation tax.

Respondent

43. The Respondent's Counsel submitted that the Appellant was mistaken in its belief that it has acquired properties from the Appellant Director and his partner as the transfer of monies to those parties was merely an advancement of funds to enable them to secure a reduction in the amount of debt they owed the bank. The Respondent's Counsel submitted that this position was evident from the Appellant's own evidence in which it stated that no contract was in place in respect of any of the properties, that no conveyance of those properties took place in the period under appeal and that the purpose of the

transactions was to ensure the Appellant Director was debt free. Furthermore, in reference to the Appellant's Company Accountant stating that the Appellant only required a third of an acre of the lands acquired in which to conduct its business activities then the Respondent submitted that the Appellant had no business purpose in acquiring the majority of the properties and hence the sums paid for the properties ought to be treated as loans or advancements.

44. While acknowledging the correspondence exchanged between the Appellant and the various parties, the Respondent's Council submitted that this correspondence taken in isolation or cumulatively did not constitute a note or memorandum evidencing the property sales and as such, did not satisfy the requirements of section 51 LCLRA 2009.

45. In order to satisfy those requirements, the Respondent's Counsel submitted that it was necessary to demonstrate that an agreement to acquire the properties had been concluded between the Appellant Director, his partner and the Appellant. In support of this submission, the Respondent's Counsel opened the case of *Guardian Builders v Kelly* [1981] ILRM 127 in which it was held that the parties must be identifiable as the vendor and purchaser from the documents relied upon as constituting the note or memorandum.

46. The Respondent's Counsel submitted as the documentation upon which the Appellant wished to reply was between [redacted] and the Appellant, and not between the Appellant Director and his partner (as vendors) and the Appellant (as purchaser), then it was not possible for any binding note or memorandum to have come into existence and hence, the Appellant's submissions to the contrary must fail.

47. In addition, having considered all of the alleged linked documentation, the Respondent's Counsel further submitted as all of the terms of the contract were not agreed between the vendor(s) and the Appellant in advance of that documentation coming into being, then this was further evidence that no valid contract, note or memorandum existed and as such the Appellant's appeal should be refused. In support of this submission, the Respondent's Counsel opened the *Supermacs* case where Henchy J held:

> "*In this court, counsel for the plaintiff contended that the first document and the second document should be read together and as such should be held to constitute the note or memorandum required by the Statute of Frauds. However, before one comes to the question of a note or memorandum it is necessary to see if an entire contract was concluded on Sunday the 24th October, for it is only in that event that the statutory note or memorandum would be required. If the negotiations between the parties had not ripened into the fullness of an entire contract, the plaintiff's claim for specific performance would fail, not for want of the*

statutory evidence necessary for the enforcement of a contract for the sale of lands, but simply in default of the existence of any such contract. There would be no contract to be specifically enforced."

48. Further or in the alternative, the Appellant's Counsel submitted In addition to the foregoing requirements, there was a further condition imposed upon the Appellant and that was to prove the existence of an oral contract as was held by Morris J in *Aga Khan v Firestone* [1992] ILRM 34. The Respondent's Counsel submitted as the Appellant's referenced correspondence did not contain the essential material terms of the alleged oral agreement, then this was decisive in refusing the Appellant's appeal.

49. The Respondent's Counsel continued that in addition to the parties to the contract, the Appellant was required to establish that the Memoranda referenced the properties, the price payable for those properties and the essential terms of the agreement.

50. In order to support the Appellant's submission that these additional requirements were satisfied by the various emails, the Respondent's Counsel submitted that there must be an express or implied reference in one document to the second document for that proposition to hold. In support of this submission, the Respondent's Counsel referenced *Kelly v Ross & Ross* (unreported, High Court, 29th April 1980) in which it was held that nine documents contended to be the note or memorandum (including particulars and conditions of sale, drawings, a solicitor's attendance dockets, an estate agent's day book and correspondence) could not be joined together to form a note or memorandum on the ground that the signed documents, which did not contain all of the material terms of the alleged agreement, did not expressly or implicitly refer to the other documents. The Respondent's Counsel submitted as the Appellant failed to satisfy this requirement, then the Commission should view the emails in isolation.

51. However, the Respondent's Counsel submitted if the Commission was not agreeable to that proposition, then the three documents relied upon by the Appellant as constituting the alleged note or memorandum, individually and cumulatively, did not recognise the existence of a concluded agreement.

52. Turning to the documentation, the Respondent's Counsel submitted that the email of 16th May 2016 does not identify or refer to the vendor or purchaser nor are they identifiable from the document. In addition, the Respondent's Counsel submitted the email does not refer to any other terms of the agreement and that this email alone is indicative that there is no agreement reached in relation to the [redacted]. In relation to the second document, the email of 17th May 2016, the Respondent submitted that it does not identify or refer any of the parties at all nor identify the purchaser or vendor of the properties. The

Respondent's Counsel submitted that document merely portrays the acceptance of an offer by some party but as it is not clear who those parties are then this cannot be construed as an agreement between the vendor and/or the purchaser. In citing the third document, the email of 7th June 2016, the Respondent's Counsel submitted that as this does not refer to any agreement made between the parties, nor does it refer to the vendor or purchaser of the properties then the Commission ought to disregard the contents of this email. The Respondent's Counsel further submitted that this email was conclusive evidence by reference to the [redacted] that no contract had come into being in respect of those lands.

53. In looking at the totality of the three documents, the Respondent's Counsel submitted that as those documents do not make any reference to a concluded contract then this was evidence that no such contract existed. Furthermore the Respondent's Counsel submitted that the three emails relied upon by the Appellant cannot be joined together to form the alleged note or memorandum of the alleged agreement as they are not sufficiently connected. In those circumstances, the Respondent's Counsel submitted that no weight should be attached to those three documents in determining the Appellant's appeal.

54. In addition, the Respondent's Counsel submitted that as those documents are not signed by the alleged vendor or an authorised agent of the vendor as required by section 51 LCLRA 2009 then the alleged Memorandum or note relied on by the Appellant is not in compliance with the legislation and as such was ineffective. As authority for that proposition, the Respondent's Counsel opened the case of *Lavan* which held in signing the memorandum or note the agent is required to make its agency clear by signing 'as agent' or 'for' its principal.

55. The Respondent's Counsel also submitted in establishing if the terms were agreed by the parties, the signed document must authenticate the entire memorandum as was held in *McQuaid v Lynam* [1965] IR 564:

> ""*But as the memorandum or note considered as a whole must be signed, it would seem to follow that the document which is signed must be the last of the documents in point of time, for it would be absurd to hold that a person who signed a document could be regarded as having signed another document which was not in existence when he signed the first…It is settled law that the memorandum or note required by the Statute of Frauds may consist of a document which was not intended to be such a note or memorandum but it must, however, be signed by the party to be charged and the*

signature must have been intended to authenticate the whole document of which it forms a part…"

56. In summation, the Respondent's Counsel submitted the Appellant did not discharge the necessary burden of proof to establish that it had acquired any of the properties from the Appellant Director and/or his partner. In those circumstances, the Respondent's Counsel submitted that the loan or advances to the Appellant Director and his partner had been correctly assessed in accordance with the provisions of section 438 TCA 1997 and that the corresponding PREM assessments should also be upheld by the Commission.

57. Furthermore, the Respondent's Counsel submitted that the amount of tax on the PREM assessment was not available to the Appellant as a deduction in computing its Case I profits as the expense was not incurred "wholly and mainly" for in the performance of the Appellant's activities. In support of this position, the Respondent's Counsel opened the case of *Euro Fire Ltd. v Davinson (HM Inspector of Taxes); Hail v Davinson (HM Inspector of Taxes)* 1997 STC 538 in which it was held that funds on an overdrawn Director's current account were considered a loan to the Director and in such circumstances the corresponding PREM assessment was not deductible by the Appellant as it was not incurred "wholly or mainly" in the operation of the trade.

Material Facts

58. The Commissioner finds the following material facts:

    58.1. The Appellant is a close company within the meaning of section 430 TCA 1997.

    58.2. In 2016 the Appellant transferred the sum of €250,000 into the personal bank accounts of the Appellant Director and the further sum of €180,000 into the personal bank account of the Appellant Director and his partner.

    58.3. A dispute has arisen between the Appellant and the Respondent as to whether those payments represent payment for properties acquired by the Appellant or whether those payments represent loans or advances to the Appellant Director and his partner.

    58.4. The disputed properties ("the properties") are referred to as "[redacted]", "[redacted]".

    58.5. The properties were valued by the Appellant's Estate Agent as having open market values of €125,000, €75,000, €50,000 and €180,000 respectively.

58.6. The sums the Appellant paid represented the open market values of the properties.

58.7. The Appellant's Financial Statements for the year 2016 show the payments of €250,000 and €180,000 made by the Appellant as being recorded in Debtors/Deposits paid.

58.8. In a note to those Financial Statements it detailed that the [redacted] and the [redacted] adjoin the Appellant's existing premises and that it intended on extending its premises by developing those lands.

58.9. The Appellant engaged in the process of obtaining planning permission for the [redacted] in 2017. Owing to market turmoil and the onset of the Covid-19 pandemic, the Appellant delayed developing those properties but is currently in the process of developing those lands for use in the Appellant's business.

58.10. The Appellant's is involved in the business of [redacted]. The scale of these projects require the use of storage facilities.

58.11. The Appellant utilised and utilises the [redacted] as a storage yard for its products. Post 2016, the Appellant expended sums for repairs and renovations to this property. The purpose of this expenditure was to make those premises more efficient for use within its business.

58.12. Post 2016, the Appellant discharged the utility bills on the [redacted], the [redacted]es [redacted].

58.13. Since 2016, the Appellant's business activity has considerably grown to the extent that it has almost doubled its staff numbers and more than doubled its turnover. This growth has arisen from its divergence into the European market in addition to the domestic market.

58.14. The payment of €180,000 for the [redacted] was made on 29th November 2016. As at the date of the appeal, primarily owing to right of way issues, those lands were not transferred into the Appellant's name.

58.15. The Appellant Director's daughter in her evidence stated that the Appellant had no use for those lands and its primary purpose of acquiring them was to ensure her father was "debt free".

58.16. On 9th December 2021, the Appellant's Estate Agent gave the Appellant the gross sum of €10,000. This sum represented the rents received on the [redacted] for the years 2017, 2019 and 2020.

58.17. Aside from that rental payment, no evidence was produced to the Commission as to the use of those lands by the Appellant.

58.18. No evidence was provided to the Commission that the payment of €90,000, which represents the payment made to the Appellant Director's partner was in the form of a loan to the Appellant Director's partner. In addition, no contract or documentation was made available to the Commission in respect of this payment.

58.19. At the time the Appellant made the payments of €250,000 and €180,000, the Appellant Director's Daughter was engaged by the Appellant in the role of Company Secretary.

58.20. The Appellant Director's daughter was authorised to bind the Appellant in contractual matters arising from her role as Company Secretary and as a result of her acting on the then Appellant Director's instructions.

58.21. The Appellant Director resigned from his role and disposed of his shareholding in 2017.

58.22. As [redacted] ("the bank") held charges over the properties they could not be sold without the consent of the bank.

58.23. No evidence was provided to the Commission that neither the Appellant Director nor his partner objected to the disposal of the properties.

58.24. The bank's email to the Appellant Director's daughter of 16th May 2016 headed "re earlier conversation" sets out details of the [redacted] the [redacted] and the [redacted] ("the three properties"), the amount payable for those properties and the dates those payments were required to be made. Taken in context, this email suggests that an oral agreement was reached between the bank and the Appellant to enable it to acquire the three properties and upon payment of the specified sums by the specified dates that bank would release the title deeds to the Appellant's solicitor.

58.25. On 17th May 2016, the Appellant's daughter accepted the bank's offer when she stated in reply, "Thanks for that. As discussed we agree to the below."

58.26. The Appellant paid for those three properties on 7th June 2016 when it obtained the specific accounts into which the payments were required to be made and subsequently effected those transactions.

58.27. Correspondence and evidence presented to the Commission indicates that the Appellant was engaging throughout 2016 to 2019 with the bank, to get the title deeds released to the Appellant, so as to transfer ownership of the three properties into its name.

58.28. The bank did not release its charge over the three properties until 7th March 2019.

58.29. The three properties were not registered in the Appellant's name until 15th December 2020.

58.30. While the Appellant paid the sum of €180,000 in 2016, purportedly in respect of the acquisition of the [redacted], insufficient documentation was provided to the Commission evidencing that a concluded memorandum or contract for the sale of this property was agreed between the vendors and the Appellant.

Analysis

59. As with all appeals before the Commission the burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable*."

60. The central issue to be determined in this appeal is whether the exchanges of correspondence between the bank and the Appellant are sufficient as to constitute Memoranda of Agreement so as to satisfy the provisions of section 51 of the LCLRA 2009.

61. In order for such Memoranda to exist, jurisprudence of the Irish Courts such as *Supermacs* have held that there must be a concluded oral agreement which details the parties, the properties, the price payable for those properties and any other essential terms. In addition that agreement must be signed by the parties as was held in *Halley*.

62. In ascertaining whether such agreements exist, having regard to the principles promulgated in *Lavan*, the Commissioner in examining the chain of correspondence between the Appellant and the bank (as effective mortgagee in possession – see below

at paragraph 64), notably the email exchanges of 16th and 17th May 2016 and 7th June 2016, is satisfied that valid Memoranda's were in existence for three of the properties [redacted] but not in respect of the fourth property [redacted]

63. In coming to that finding, the Commissioner notes that the email exchanges detail, in respect of the three properties, the existence of a concluded oral agreement, the parties to the contract, the properties in question, the price payable for those properties and the other essential terms (notably the bank accounts and the dates the payments were required to be made). In addition, as those emails constitute "signatures", the Commissioner further determines that the Memoranda was agreed between the parties "by signature" in writing as required.

64. Furthermore, the Commissioner notes that the payment for the three properties was made in 2016 but it was not until 2020 that those properties were transferred into the Appellant's name. However, taking into consideration the prevailing economic environment and the customs which evolved at the time the transactions were occurring, the Commissioner considers that the delay in the bank releasing its charges in 2019, some three years after the agreement concluded, is not unusual given the magnitude of distressed mortgagees the bank would have been dealing with at that time. Furthermore, the Commissioner considers that those evolved customs included situations where the bank did not appoint a Receiver over properties in situations where amicable debt restructuring negotiations were occurring but in place choose to act in the capacity as "mortgagee in possession" meaning that absent the mortgagors' objections, the bank was empowered to conclude contracts on behalf of the vendors. In noting that the bank acted in that capacity and the Appellant Director did not object to the bank acting in the manner which it did, the Commissioner finds that the bank was acting in the capacity as "agent for the vendor" in the sale of the three properties and as such was a party to the contracts.

65. In noting that no evidence was provided to the Commission in respect of the fourth property, which would satisfy the requirements for there to be a concluded oral agreement or completed Memorandum of Agreement in existence, the Commissioner finds that the provisions of section 51 LCLRA 2009 are not satisfied and as such the payment of €180,000 in respect of the fourth property, [redacted] constitutes a loan or advance to the Appellant Director and his partner.

66. While the Appellant's Counsel submitted that the Appellant was permitted under its Memorandum and Articles of Association to acquire "whatever assets it wished", the Commissioner in consideration of Sanfey J's decision in *Pat Keating v Shannon Foynes*

Port Company [2022] IEHC 505 ("*Keating*") does not agree with this submission. As *Keating* held that company directors are required to "always act" in what they consider to be the interests of the Company and not what they think (or are told) by the shareholders to do, the Commissioner finds that the Appellant was not permitted to acquire any assets but in place a positive obligation is imposed on the Appellant to demonstrate that the properties were acquired in the interest of the Appellant's business rather than in the interest of the Appellant Director. The Commissioner considers this test particularly relevant in noting the significant debt forgiveness afforded to the Appellant Director as a result of the Appellant acquiring the properties from him.

67. Turning firstly to the [redacted] and the [redacted] which adjoin the Appellant's existing premises, the Commissioner notes that the 2016 Financial Statements detailed the use of these lands and following their acquisition the Appellant has obtained planning permission for development of those lands and is currently in the active process of that development. While the Appellant's Company accountant stated that the Appellant only needed a third of an acre in which to conduct its "expanded" business activities, the Commissioner disregards this evidence as that witness was not qualified to tender such evidence and furthermore that position ignores the potential for future expansion of the Appellant's business. As such, in acquiring the [redacted] and the [redacted], the Commissioner determines that the Appellant was acting in its own interest rather than the interest of the Appellant Director in acquiring those lands. Furthermore, the Commissioner makes an identical finding in respect of the [redacted] in noting that the Appellant used and uses this property for storage of its goods.

68. The Commissioner is reassured in his findings that the Appellant did not acquire the [redacted] in noting that no agreement has been concluded in respect of those lands some 7 years post-acquisition. The Commissioner considers that if that transaction was an independent third party acquisition, the Appellant would most likely have rescinded the contract if one was in existence owing to non-performance. Furthermore, given the Appellant's daughter's evidence that those lands were acquired to ensure her "father was debt free" and in noting the uneconomic rent being received on those lands, the Commissioner determines that the acquisition of the [redacted] could not occur as the Appellant is unable to demonstrate they were acquired in the interests of its business activities.

69. As the Appellant and his partner are deemed to have each acquired €90,000 from the Appellant, the Commissioner is required to consider whether those payments represent "loans" or "advances" in order to ensure their correct assessment and charge to tax.

70. Turning firstly to the payment of €90,000 to the Appellant Director. As he was a director and shareholder in the Appellant in 2016, it follows that he was a "participator" for the purpose of section 438 TCA 1997 and as such, the deemed payment of €90,000 paid to him in that year is subject to that provision. Additionally, while the Appellant Director resigned his position and transferred his shareholding to his children in 2017, as he is a "relative" to his successors in the Appellant, he is also considered a participator for the years of assessment 2017 and subsequent and similarly subject to that provision .

71. Those provisions require in circumstances where a loan or advance is provided to a participator, the Appellant is required to make a payment of an amount which, after deduction of income tax at the standard rate for the year of assessment in which the loan or advance is made, is equal to the amount of the loan or advance. Thus, as the Appellant Director received €90,000 in 2016, the Company was obliged to deduct and remit a sum of €22,500 (being €90,000/80% x 20%) in respect of that payment.

72. Furthermore, as the Appellant Director was an employee of the Appellant for the year 2016 and having regard to the provisions of section 10 (3) TCA 1997 a "deemed" employee of the Appellant for the years of assessment 2017 onwards, (by virtue of him being a relative of his successors in the company), the Appellant Director is liable to a Benefit in Kind ("BIK") charge under section 122 TCA 1997. The amount of this annual charge is 13.5% on the amount of the payment advanced by the Appellant, €90,000.

73. As no contractual documentation exists in relation to the payment of €90,000 made to the Appellant Director's partner and given this position the Appellant has no contractual right to recover this payment from the Appellant Director's partner, the Commissioner finds that the payment does not constitute a loan but rather an advance or distribution to the Appellant Director's partner. This finding is supported by the provisions of section 438 TCA 1997 which extends the meaning of the word "participator" to include the Appellant Director's partner and the provisions of section 436 TCA 1997 which requires "payments of any kind" to the Appellant Director's partner to be treated as a distribution.

74. As the Appellant made a distribution of €90,000 to the Appellant Director's partner, the provisions of section 172B TCA 1997 required the Appellant to have withheld the sum of 20% in the form of Dividend Withholding Tax ("DWT") and to have made that payment to the Respondent at the time the payment was made in 2016. As this was not done, it follows that the Appellant is required to be assessed on this additional sum of corporation tax in the amount of €22,500 (being €90,000/80%).

75. Having regard to the Appellant's request that it be permitted to deduct the additional PREM liability on the BIK charge imposed on the Appellant Director, the Commissioner

finds firstly that the amount of the deemed interest receivable is required to be included in the Appellant's Schedule D, Case IV income in accordance with the provisions of section 74 TCA 1997. As the corresponding PREM charge is referable to the Appellant's trading activities, it follows that this charge is deductible by the Appellant in computing its liability to CT under Schedule D, Case IV. Therefore, the Commissioner finds that the amount of the Schedule D, Case IV income (being €90,000 x 13.5% = €12,150) be reduced by the amount of the PREM charge calculated by applying the Appellant Director's appropriate rate of income tax to the BIK received by him in year of assessment 2016 and subsequent (unless the loan was repaid in the interim).

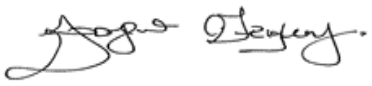
Determination

76. For the reasons set out above, the Commissioner determines that the Appellant has partly succeeded in its appeal in that it is deemed to have acquired the [redacted] from the Appellant Director. However as the Commissioner finds that the Appellant did not acquire the fourth property, [redacted], from the Appellant Director and his partner, the Appellant is liable to a CT charge for 2016 of €45,000 which relates to the section 438 TCA 1997 charge of €22,500 and the amount of €22,500 in DWT.

77. In addition to that charge, the Commissioner determines that the Appellant is liable to PREM, the sum of which is to be calculated by applying the Appellant Director's tax rate to the deemed interest (€12,150) received by him. As this deemed interest gives rise to an additional CT charge, the Respondent is further authorised to raise an additional CT assessment for 2016 and subsequent (until discharge or repayment of the loan), by including the amount of the deemed interest received by the Appellant Director less the corresponding PREM liability, in its Schedule D, Case IV assessment.

78. Finally, as the Appellant Director's partner is deemed to have received a distribution of €120,000 in 2016 from the Appellant, the Respondent is further required to raise an assessment to Income Tax for that year after taking account of the DWT paid on that distribution.

79. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Andrew Feighery

Appeal Commissioner

01 June 2023