AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

38TACD2024

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") against the refusal of the Revenue Commissioners ("the Respondent") to refund a Capital Gains Tax ("CGT") charge in the amount of €10,412 arising from the [redacted] of a parcel of land to the [redacted]

2. In accordance with the provisions of section 949U of the Taxes Consolidation Act 1997 as amended ("TCA 1997"), this appeal is determined without a hearing.

Background

3. In [redacted] the Appellant, who is jointly assessed to tax with his wife, [redacted] a parcel of land to [redacted] in order to build a house. The site had a stated area of [redacted] hectares, and consequently did not qualify for an exemption from CGT under section 603A of the Taxes Consolidation Act 1997 as amended ("TCA 1997"). As a result, a CGT liability of €10,412 arose.

4. The Appellant was aggrieved at this as he stated that he was "*compelled by planning regulations*" to gift a site in excess of the size allowed for exemption. The Respondent refused his application for a refund of the CGT.

5. On 12 May 2023, the Appellant appealed against the Respondent's refusal to the Commission. On 20 September 2023, the Commission notified the parties that the appeal was considered suitable for determination without an oral hearing, pursuant to section 949U of the TCA 1997. They were informed that they could object to the appeal proceeding without an oral hearing within 21 days of the notice. No objection was received from either party. The Commissioner is satisfied that it is appropriate to determine this appeal without an oral hearing.

Legislation and Guidelines

6. Section 603A of the TCA 1997 states inter alia that

> "*(1A) This section applies to the disposal of land which at the date of the disposal*
>
> *(a) has a market value that does not exceed €500,000, and*
>
> *(b) comprises –*
>
> *(i) the area of land on which a dwelling house referred to in subsection (2)(b) is to be constructed, and*
>
> *(ii) an area of land for occupation and enjoyment with that dwelling house as its garden or grounds which, exclusive of the area referred to in subparagraph (i), does not exceed 0.4047 hectare.*
>
> *(2) Subject to this section, a chargeable gain shall not accrue on a disposal of land to which this section applies where the disposal –*
>
> *(a) is by a parent or the civil partner of a parent to a child of the parent, and*
>
> *(b) is for the purpose of enabling the child to construct a dwelling house on the land which dwelling house is to be occupied by the child as his or her only or main residence*."

7. The Respondent's Tax and Duty Manual Part 19-07-02A "Transfer of site to child (S. 603A)" states that

> "*The value of the site must not exceed €500,000 (€254,000 for disposals prior to 4 December 2007) to qualify for the relief. For disposals on or after 1 February 2007,*

the site cannot exceed an area of 0.4047 hectare (1 acre) in addition to the area occupied by the dwelling house itself."

Submissions

Appellant

8. In his Statement of Case to the Commission, the Appellant stated that

"We [redacted] a site to [redacted] in [redacted] [redacted] to enable him to build his own home. Due to planning regulations the site was classed as Ribbon Development and had to include the total area between 2 existing houses which resulted in the total site area of [redacted] h/a. Ribbon Development came into place following a document issued by the Minister for Environment in 2005 to all Planning Authorities on Sustainable Rural Housing. This led to policies SS4 and SS8 being implemented by Local authorities in [relation] to planning on Rural Housing in the countryside. Under Section 603A of the [TCA 1997] from 2007 the transfer of a site area exempt from Capital Gains Tax was 0.4047 in addition to the area of the house .

When submitting the Annual Tax return for [redacted] we made contact with Revenue in relation to completion of the Capital Gains sections and was advised that we were liable for Capital Gains Tax as the site was greater than 1 acres (0.4047 h/a).

On calculating the Capital Gains Tax based on the requested information on Form 11 we were due to pay €10,412 which we duly input on our return and subsequently paid.

[…]

We in [redacted] the site to [redacted] were also bound by legislation under The Planning and Development Act 2000. For the planning application to be successful we were left with no choice but to comply with the Ribbon Development on gap sites i.e. A Gap site is defined as a site located within a line of existing and permitted dwellings. One dwelling site will be accommodated in a gap site and other than Agriculture access to the lands at the rear (if required) the site should fully occupy the gap between existing and permitted dwellings. This resulted in a site transfer of [redacted] h/a. being [redacted] to [redacted]

The Finance Act was amended in 2008 to take into account of a change of a monetary value of the value of a site being transferred, the size of the site was amended to 0.4047- yet nothing was taken into account of the Planning and Development Act

amendment in relation [to] Rural Housing and the implementation of Ribbon Developments which was issued to Planning Authorities in 2005.

We are discriminated [against] because of different policies within different Departments - we had to transfer a site area of [redacted] h/a for the planning application to comply with Planning policies- Policies SS4 and SS8 and The Planning and Development Act

The Finance Act amended in 2008 on S 603A did not take into account the changes to the site area as referred in Ribbon Development and how this would implicate with Capital Gain Tax."

9. In a further submission on behalf of the Appellant, his wife stated that

"*Through no fault of our own in [redacted] a site to [redacted] we are caught up in legislation outside of our control in relation to the size of the site.*

This followed on from an EU Directive 2001/42 on environmental issues which had to be implemented by EU members including Ireland. New Government policies on planning for housing in rural areas came into effect with publication of The National Spatial Strategy in 2002. This resulted in the change to planning requirements as outlined in the Sustainable Rural Development Guidelines for Planning Authorities published in April 2005 (copy already submitted) of which Appendix 4 refers to Ribbon Development and subsequent introduction of Policies SS4 and SS8 by all County Council which determines the area of a site known as a gap site.

Revenue has stated that they do not make the Regulations that we had to comply with S603A. S603A Act was amended in 2007 to change the monetary value of the site to €500,000 and yet to penalise persons who had no choice but to comply with legislation from local Authorities, Government Departments and the EU. Why was the size of the site not reviewed to take account of these regulations?"

Respondent

10. In its Statement of Case, the Respondent stated that

"*The Appellant filed their [redacted] Capital Gains Tax return as part of their Income Tax return on the 16th November 2022 and a Capital Gains Tax liability of €10,412 was determined. The Appellant felt that they should have been entitled to an exemption under Section 603A of TCA 1997 in relation to their capital gain and queried the*

determination of the liability. Following review, Revenue confirmed that they did not qualify for the exemption.

In their appeal, dated 10th May 2023, the Appellant states that they transferred (gifted) a piece of land adjoining their house to [redacted] *for the purpose of him to build his house. The size of the piece of land is* [redacted] *hectares. The Appellant states that they intended the transfer to be of* [redacted] *hectares with a 'gap site' of* [redacted] *hectares in between the two houses. However, in order that* [redacted] *could obtain planning permission for his house they were required to include the 'gap site' in the transfer to adhere to regulations included in the Sustainable Rural Housing Guidelines. They ask in their appeal "should Revenue not take into account National Development Plans and Strategies to coincide with their regulation to ensure a fair and equitable system for all".*

[…]

The Appellant does not qualify for the exemption to Capital Gains Tax under Section 603A as the size of the site [redacted] *to* [redacted] *is larger than that allowed by legislation. They transferred* [redacted] [sic] *hectares to* [redacted] *where the maximum size of the site that can qualify for the relief by legislation is 0.4047 hectares*."

Material Facts

11. Having read the documentation submitted by the parties, the Commissioner makes the following finding of material fact:

    11.1. The Appellant [redacted] a parcel of land to [redacted] in [redacted] to enable [redacted] to build a house. The size of the parcel of land was [redacted] hectares.

    11.2. The Appellant paid CGT of €10,412 on the transfer of the land. The Respondent refused the Appellant's request for a refund of the CGT paid.

Analysis

12. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to refuse his application for a refund of CGT. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"

13. CGT is paid on any capital gain made on the disposal of an asset. 'Disposal' includes the gifting of an asset. Section 603A of the TCA 1997 provides for an exemption from CGT in respect of any gain on a disposal, subject to conditions, of a site by a parent to a child. One of the conditions is that the site cannot exceed an area of 0.4047 hectares in addition to the area occupied by the house itself.

14. In this instance, it is accepted by the Appellant that the site that he gifted to [redacted] was in excess of 0.4047 hectares. However, he is aggrieved that section 603A, in his opinion, conflicts with other planning requirements and the national spatial strategy.

15. The Appellant has submitted the planning report of [redacted] in respect of [redacted] application to build on the site ("the report"). The report states that "*The site has a stated area of* [redacted] *The proposed dwelling comprises a floor area of* [redacted] *and a proposed garage of* [redacted]." It is clear, therefore, that the size of the site was considerably in excess of the limit set out in section 603A(1A)(b)(ii) of the TCA 1997.

16. The report makes reference to the [redacted] Development Plan [redacted] and in particular Policy SS4 (Housing in the Rural Countryside) and Policy SS8 (Ribbon Development) thereof. The report states that "*The proposal would be the sixth dwelling within a 250m stretch of road therefore policy SS8 Ribbon Development applies. The site can be considered under part b of the policy which refers to a gap site.*" Part (b) states that "*The site is a 'Gap Site' which is defined as a site located within a line of existing and permitted dwellings. One dwelling site only will be accommodated in a gap site, and other than agricultural access to lands to the rear (if required), the site should fully occupy the gap between existing and permitted dwellings."*

17. The Commissioner appreciates that the Appellant is aggrieved that the Respondent refused his application for a refund of CGT on the disposal of the land, and considers that section 603A is inconsistent with other planning requirements. However, the Commissioner considers that the wording of section 603A(1A)(b)(ii) is clear, and that there is no doubt but that the site disposed of by the Appellant does not come within the exemption provided. The exemption was created by the Oireachtas, and the Respondent, and the Commissioner on appeal, does not have any jurisdiction to extend it, in order to allow the site disposed to come within its scope.

18. While the Appellant considers that the wording of section 603A is inconsistent with planning requirements, this is not something that the Respondent can consider; it can only apply tax law as enacted by the Oireachtas. Similarly, the Commissioner has no jurisdiction to disregard or disapply the clear wording of the statutory provision on the ground that it allegedly conflicts with other provisions of national legislation (and for the

avoidance of doubt, the Commissioner makes no finding regarding such alleged conflict). Consequently, the Commissioner is satisfied that the appeal cannot succeed, and therefore he determines that the Respondent was correct to refuse the application for a refund of CGT.

Determination

19. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner determines that the Appellant is not entitled to a refund of CGT in the amount of €10,412, and the Respondent's decision to refuse the refund stands.

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

Notification

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

Appeal

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

Simon Noone Appeal
Commissioner
4th December2023