



AC Ref: 10TACD2016

NAME REDACTED

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

### DETERMINATION

#### INTRODUCTION

1. The issue for determination in this case, broadly put, is whether the movement in rights attaching to shares between two separate shareholdings, is a transaction chargeable to income tax as a distribution, pursuant to section 130(3)(a) of the Taxes Consolidation Act 1997 (hereafter 'TCA 1997').
2. The issues to be determined include *inter alia* whether intangible share rights constitute 'assets' within the meaning of section 130(3)(a) TCA 1997 and whether there was a "*transfer of assets ..... by a company to its members...*" within the meaning of section 130(3)(a) TCA 1997.

#### BACKGROUND

3. Company 'X' was incorporated on **DATE REDACTED** 1985. The Appellant and the Appellant's spouse were the sole shareholders in Company 'X' from **DATE REDACTED** 1986 to the tax year of assessment (2006) and for the years that followed. They are also each directors of the company.



4. Company 'Y' was incorporated on **DATE REDACTED** 2004. On 17 January 2006 the Appellant and the Appellant's spouse were appointed directors of Company 'Y' and were directors until dissolution of the company on **DATE REDACTED** 2007.
5. On 30 January 2006, Company 'X' as controlling member of Company 'Y' tabled a special resolution which was passed by Company 'Y', amending the memorandum and articles of association of Company 'Y' whereby:
  - The authorised share capital of the company of 1,000,000 ordinary shares of €1 each was increased to 3,000,000 by the creation of 2,000,000 'A' ordinary shares of €1 each.
  - Company 'Y' allotted 100 ordinary shares of nominal value of €1 each to Company 'X' at a premium of € AMOUNT per share totalling € AMOUNT
  - Company 'Y' allotted 94 'A' ordinary shares of nominal value of €1 to the Appellant at par.
  - Company 'Y' allotted 6 'A' ordinary shares of nominal value of €1 to the Appellant's spouse at par.
  - On 31 January 2006, Company 'X' tabled a special resolution proposing to amend the articles of association, which was passed by Company 'Y', whereby the rights attaching to the ordinary shares and the 'A' ordinary shares were altered with the effect that the voting rights, rights to receive the surplus on a winding up and the rights to receive the share premium on a winding up were exchanged



between the classes of shares so that the 'A' Ordinary shares carried these rights and not the Ordinary shares.

6. On 1 February 2006 a special resolution was passed for a voluntary winding up of Company 'Y' and the company was subsequently wound up.
7. On 6 December 2011 the Respondent raised a notice of amended assessment in respect of the tax year of assessment 2006. The amended assessment included a schedule F distribution of € **AMOUNT REDACTED** in respect of the holders of the A ordinary shares i.e. the Appellant and the Appellant's spouse, on the basis that this sum constituted a distribution in accordance with Schedule F.
8. A notice of appeal was filed by the Appellant on 3 January 2012.

## LEGISLATION

The relevant legislation is contained in the Taxes Consolidation Act as amended ("TCA 1997") follows;

### Section 20 Schedule F

1. *In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 and [sections 436 and 437, and subsection 2(b) of section 816]*
2. *Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax, and for the purposes of income tax all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.*



### Section 130 Matters to be treated as distributions

- (1) *The following provisions of this Chapter, together with [sections 436 and 47, and subsection (2) (b) of section 816] shall, subject to any express exceptions, apply with respect to the meaning in the Corporation Tax Acts of “distribution” and for determining the persons to whom certain distributions are to be treated as made; but references in the Corporation Tax Acts to distributions of a company shall not apply to distributions made in respect of share capital in a winding up.*
- (2) *In relation to any company, “distribution” means –*
- (a) Any dividend paid by the company, including a capital dividend;*
  - (b) Any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except, subject to section 132, so much of the distribution, if any, as represents a repayment of capital on the shares or is, when it is made, equal in amount of value to any new consideration received by the company for the distribution;*
  - (c) ....*
  - (d) ...*
  - (e) ...*
  - (f) ...*
- (3)
- (a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as “the relevant amount”).*



Section 18 of the Interpretation Act, 2005 provides:-

*"The following provisions apply to the construction of an enactment.*

- (a) Single and Plural. A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular."*

**Submissions of the parties**

Submissions re the meaning of 'assets' per section 130(3) (a)

9. The Appellant argued that the word 'assets' could only mean the shares in their complete form and could not be interpreted to include intangible share rights such as those which moved from the ordinary shares to the 'A' ordinary shares in this case.
10. The Appellant argued that as the legislation did not include a reference to intangible property or a reference to an asset or part thereof, then the asset could only comprise the share itself and not the voting and other rights attaching to it, which had been disassociated from it.
11. The Respondent argued that the correct interpretation of 'assets' did include intangible share rights such as those which initially attached to the ordinary shares which later attached to the 'A' ordinary shares.

Submissions re the meaning of 'transfer' per section 130(3)(a)

12. The Respondent argued that the movement of the share rights from the ordinary shares (owned by Company 'X') to the 'A' ordinary shares (owned by Company 'Y') constituted a "transfer of assets" within the meaning of section 130(3)(a) TCA 1997.



13. The Appellant argued that there was no ‘transfer of assets’ (on the basis, as contended by the Appellant, there were no assets) but that even if the share rights were determined to be assets, there was no ‘transfer’. The Appellant argued that what in fact occurred was that share rights attaching to the ordinary shares in Company ‘Y’ (belonging to Company ‘X’) were exchanged with rights attaching to the A ordinary shares in Company ‘Y’ (belonging to the Appellant and the Appellant’s spouse) and this did not constitute a ‘transfer’ within the meaning of s.130(3)(a) TCA 1997.

#### Other submissions

14. The Appellant argued that the reference to “company” per section 130(3)(a) TCA 1997 was a reference to Company ‘Y’ (while the Respondent argued that it was a reference to Company ‘X’) and that on a proper reading of the section, the movement of share rights was to be viewed from the perspective of Company ‘Y’, therefore s.130(3)(a) had no application. The Respondent submitted that there was no basis for such an interpretation.

15. The Appellant contended that if assets were transferred to the Appellant, he received them in his capacity as a member of Company ‘Y’ and not in his capacity as a member of Company ‘X’ and thus s.130(3)(a) did not apply. The Respondent argued that section 130(3)(a) does not require a transfer to be made to members *qua member* and thus disputes the relevance of the Appellant’s submission to an analysis of whether there was a transfer of assets “...by a company to its members...” within the meaning of section 130(3)(a) TCA 1997.

16. The Respondent submitted that the meaning of ‘distribution’ per s.130(2)(b) described a ‘distribution’ as being “in respect of shares” and that this can be contrasted with the wording contained in section 130(3)(a) which provides that “.. the company shall be treated as making a distribution...” and that therefore s.130(3)(a) does not come within the meaning of distribution contained within s.130(2) and that the requirement of “in respect of shares” does not apply.



## ANALYSIS

### Meaning of 'assets' per section 130(3)(a) TCA 1997

17. The first matter for consideration is whether the word 'assets' per section 130(3)(a) TCA 1997 includes the intangible share rights (i.e. voting rights and rights to the share premium on a winding up) which moved from the ordinary shares to the 'A' ordinary shares in Company 'Y'.
18. The Appellant contended that such intangible rights are not 'assets' and that only the shares in their most complete form, constitute 'assets' within the meaning of the section. Thus the Appellant argued that for there to be a "transfer of assets" in accordance with section 130(3)(a), there would have to be a transfer of the shares.
19. The Respondent contended that the share rights in issue comprise valuable intangible property capable of alienation in its own right and thus the share rights fall within the meaning of 'assets' for the purposes of section 130(3)(a) TCA 1997.
20. The Appellant contended that if the word 'assets' included intangible share rights that the wording in the legislation should contain the words "assets or part of the assets" as opposed to simply 'assets' or that the legislation would have had to have included a reference to the asset including intangible property. The Appellant contended that in the absence of these additional words, the asset could comprise only the share itself. The Appellant also cited the mechanisms required in relation to the transfer of shares i.e. the requirement for the company to amend the share register so as to reflect the fact that a transfer of shares has taken place. The Appellant argued that in this case the share register wasn't amended and that this indicated that no assets had been transferred. The Appellant stated that what in fact occurred was that the rights associated with the asset (i.e. the shares) had changed and that the share rights exchanged between different classes of shares, did not comprise



‘assets’ in their own right for the purposes of section 130(3)(a) TCA 1997 (and thus there was no transfer of assets per section 130(3)(a) TCA 1997).

21. The Respondent rejected the contention that any additional statutory language would have been required for the word ‘assets’ to include intangible rights attaching to shares. The Respondent contended that there was no basis for interpreting ‘assets’ so narrowly, citing the authority of *Zim Properties Limited v Proctor* [1985] STC 90.
22. In this case, the Appellant argued that the asset is the share itself. Thus I think it will be helpful to consider the question – what is a share?
23. Courtney on the Law of Companies, 3rd edition states that ‘*A share is an intangible accumulation of rights, interests and obligations. It is not a document – though a document (ie, a share certificate) is used to certify that a person has the rights, interests and obligations.*
24. The case of *Lee and Co (Dublin) Ltd v Egan (Wholesale) Ltd* (18 October 1979), unreported HC (Kenny J) is authority for the proposition that a share is a right to personal property and a *chose in action*.
25. In *IRC v Crossman* [1937] AC 26 a share was defined as ‘*.. the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of the company.*’
26. In *Borland’s Trustee v Steel Bros and Co. Ltd* [1901] 1 Ch 279 Farwell J. stated as follows:

*‘A share is the interest of a shareholder measured by a sum of money for the purpose of liability in the first case and of interest in the second, but also consisting of a series of mutual covenants<sup>8</sup> entered into by all the shareholders inter se in accordance with [the Companies Acts]. The contract contained in the articles of association is one of the original incidents of the*





*share. A share is not a sum of money ... but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount'.*

27. More recently, Keane J in *Re Sugar Distributors Ltd* [1995] 2 IR 194 at 207, described a share in the following terms: *'A share in a company is, in effect, a bundle of proprietary rights which can be sold or exchanged for money or other valuable consideration.'*

28. The Appellant argued that the term 'assets' in section 130(3)(a) should be interpreted to mean shares but that 'assets' would not include intangible property or intangible share rights. This submission is inconsistent. If a share is made up of a bundle of intangible rights then a share comprises intangible property. If the Appellant contends that shares in their complete form comprise 'assets' pursuant to section 130(3)(a) [and the Appellant did so contend] then the Appellant must necessarily accept that 'assets' per section 130(3)(a) TCA 1997 includes intangible property. As a result, and for the additional reasons set out below, I determine that rights attaching to shares, if separated from those shares, come within the meaning of 'assets' pursuant to section 130(3)(a) TCA 1997.

29. The Respondent cited the cases of *Borlands Trustee Co. v Steele* [1901] 1 Ch 279, *Attorney General for Ireland v Jameson* [1904] 2 IR 644, *IRC v Crossman* [1937] AC26, *Kerry Co-operative Creamery Ltd v An Board Bainne* [1990] ILRM 664 and *PMPS Ltd & Moore v Attorney General* [1984] ILRM 8 in support of the Respondent's contention that the right to vote, the right to a dividend, the right to distribution on a winding up have been identified by the Courts as a property right and thus should be considered 'assets' in their own right for the purposes of s.130(3)(a). I accept the Respondent's submission in this regard.

30. An important factor in considering whether rights attaching to shares can comprise 'assets' in their own right involves the question of whether such share rights can be alienated. The answer to this question is yes. Share rights can be bought and sold, transferred via contract, exchanged and bargained. A common form of alienation of such rights is the mechanism of the shareholders' agreement. Per these agreements, rights attaching to shares can be



transferred outright or made conditional on the happening of certain events or contingencies etc. This strengthens my view that such rights come within the meaning of 'assets' for the purposes of s.130(3)(a).

31. The Respondent also cited the meaning of 'assets' as set out per Halsbury's laws of England which provides;

*All forms of property are assets for the purposes of capital gains tax, whether situated in the United Kingdom or not. The term includes any rights which the taxpayer can turn to account. It matters not that such rights cannot be transferred or assigned or that they would not vest in a trustee in bankruptcy. A non-proprietary right such as the freedom to trade is not an asset and neither is a mere hope such as a spes successionis or the possibility of a gratuitous payment of compensation.*

32. The Respondent relied on the case of *Zim Properties Limited v Proctor* [1985] STC 90 which applied the reasoning in *O'Brien (Inspector of Taxes) v Benson's Hosiery (Holdings) Ltd* [1980] AC 562, [1979] 3 All ER 652, [1979] STC 735, 53 TC 241, that rights were an asset for CGT purposes where they comprised something that could be turned to account.

33. The Respondent also cited the Irish CGT legislation which contains the following provision as to the meaning of 'assets' in section 532 TCA 1997;

*"All forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not, including-*

- a) Options, debts and incorporeal property generally*
- b) Any currency other than Irish currency, and*
- c) Any form of property created by the person disposing of it, or otherwise becoming owned without being acquired"*



34. Section 532 TCA 1997 and the case of *Zim Properties* consider the meaning of ‘assets’ in a CGT context and this was acknowledged by the Respondent. The Respondent pointed out that the meaning of “asset” is very likely to arise in this context because in capital gains tax assets are being disposed of and thus judicial consideration has been given to the question of ‘*what is an asset?*’ The Respondent submitted that it was difficult to see how the Appellant could successfully argue that a right to vote and a right to receive the share premium and the right to receive monies on a winding up would not comprise ‘assets’. I accept this submission on behalf of the Respondent.
35. As set out below, the appropriate means of interpreting tax statutes in the absence of unclear or ambiguous language is to apply a literal interpretation to the statutory words used. Both parties to this case contended for a literal interpretation to be applied to the word ‘assets’ based on a long line of authorities including inter alia, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicat v Inland Revenue Commissioners* [1921] 1 KB 64, *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449 and I accept this submission. A literal interpretation of ‘assets’ is one which applies its ordinary and natural meaning. In my view, there is no basis for excluding intangible rights attaching to shares from the meaning of ‘assets’ in section 130(3)(a) TCA 1997. Rights attaching to shares can be alienated and are frequently transferred and exchanged via shareholders’ agreements. Such rights are thereby treated as assets in normal commercial and business transactions. I do not accept that for the word ‘assets’ to include intangible share rights, the legislation required the insertion of any additional statutory language as contended by the Appellant.
36. I determine that ‘assets’ pursuant to section 130(3)(a) TCA 1997 includes intangible share rights and thus includes the intangible share rights in this case, namely rights to vote in general meeting the right to receive the share premium and the right to a distribution on a winding up.



### Meaning of 'transfer' per section 130(3)(a) TCA 1997

37. To an extent, the Appellant's submission in respect of the meaning of 'transfer' turned on succeeding in its submission that 'assets' per section 130(3)(a) TCA 1997 could be interpreted as relating to shares, only in their most comprehensive form, but not to share rights disassociated from those shares. The Appellant contended that as the shares in complete form were not transferred, there had been no transfer of 'assets' and thus section 130(3)(a) could not apply. In short the Appellant contended that there were no 'assets' and thus no "transfer of assets". However, for the reasons set out above, I have determined that the word 'assets' per section 130(3)(a) TCA 1997 includes the share rights disassociated from the ordinary shares belonging to Company 'X' and thus the next matter for consideration relates to the meaning of the word 'transfer'. Section 130(3)(a) provides;

*Where on a transfer of assets ... .. by a company to its members ..... the amount or value of the benefit received by a member ..... exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member ...." [emphasis added]*

38. In this regard the Appellant contended that rights associated with the shares had been changed or switched but that they had not been the subject of a 'transfer' within the meaning of section 130(3)(a) TCA 1997.

39. Shares in private companies are *prima facie* transferable. Section 79 of the Companies Act 1963 provides; *'The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate.'* Therefore, pursuant to company law, the share capital of a company is transferable in whatever manner is provided for by the articles of association and a shareholder has a right to transfer his/her share.



40. As set out above share rights can be freely alienated via contract, and this is usually done in the form of a shareholders' agreement. However, this case does not involve a shareholders' agreement. While it is possible to identify a movement of the share rights from the ordinary shares in Company 'Y' (owned by Company 'X') to the 'A' ordinary shares in Company 'Y' (owned by the Appellant), the mechanism utilised to effect this movement was a series of steps altering the articles of association of the company which included the passing of two special resolutions.

*Movement of value*

41. Section 130(3)(a) taxes as a distribution *'the difference'* between value received by a member and the consideration paid by a member in respect of the transfer of assets by a company to the member. The legislation requires there to be a *"transfer ....by a company"* that results in a *"benefit received by a member"*.

42. While the share rights in this case were not transferred by a written contract or by a shareholders' agreement it is possible to identify a movement of value between shareholdings, resulting in a benefit to the Appellant. The Appellant in its submission accepted that value passed between the ordinary shares and the 'A' ordinary shares in Company 'Y' but did not accept that this shift in value amounted to a 'transfer' within the meaning of section 130(3)(a) TCA 1997.

43. The mechanism effecting this movement of value involved a series of steps which included the passing of two separate special resolutions on consecutive days altering the articles of association of Company 'Y'. The issue for consideration is whether this amounts to a 'transfer' within the meaning of section 130(3)(a) TCA 1997.

44. The Respondent's position was that the movement of value through the alteration of the articles of association amounted to a 'transfer' for the purposes of section 130(3)(a)TCA



1997 while the Appellant submitted that an internal company procedure such as the amendment of the articles of a company could not amount to a 'transfer' within the meaning of section 130(3)(a).

### *Special Resolution*

45. The Appellant's submission in relation to the question of whether there was a 'transfer' per section 130(3)(a) was that the passing of a special resolution effecting an alternation in the articles of association was an internal company procedure which did not amount to a 'transfer' within the meaning of section 130(3)(a).
46. However, on a wider consideration of special resolutions in the context of the Taxes Acts, it is clear that these events can carry tax consequences when a shift in value results. Other tax acts have recognised this and have sought to tax the consequences arising in relation thereto, for example;
47. For example, section 2 of the Capital Acquisitions Taxes Act 2003 defines 'disposition' as including 'a resolution passed by a company which is deemed by subsection (3) to be a disposition'. Section 2(3) CATCA2003 provides;

*"For the purpose of the definition of "disposition" contained in subsection (1), the passing by a company of a resolution which, by the extinguishment or alteration of the rights attaching to any share of the company, results, directly or indirectly, in the estate of any shareholder of the company being increased in value at the expense of the estate of any other shareholder, is deemed to be a disposition made by that other shareholder if that other shareholder could have prevented the passing of the resolution by voting against it or otherwise; and in this subsection, "share" includes a debenture and loan stock and "shareholder" includes a debenture holder and holder of loan stock."*



48. During the course of the hearing, counsel for the Appellant opened section 543(2) TCA 1997, a CGT provision, which provides;

*'Where a person having control of a company exercises that control so that value passes out of shares in the company owned by such person or a person with whom such person is connected, or out of rights over the company exercisable by such person or by a person with whom such person is connected, and passes into other shares in or rights over the company, that exercise of such person's control shall be a disposal of the shares or rights out of which the value passes by the person by whom they were owned or exercisable.'*

49. The provisions of section 2(3) CATCA 2003 and section 543(2)(a) TCA 1997 do not inform my view as to the interpretation of section 130(3)(a) TCA 1997 but merely provide background as regards the relevance or otherwise of special resolutions in the context of the Taxes Acts.

50. On behalf of the Respondent it was contended that the word 'transfer' in s.130 (3)(a) had a broader meaning than that of the act of passing a special resolution and that the correct analysis re whether a transfer had taken place within the meaning of section 130(3)(a) TCA 1997, was based on the application of the principles of interpretation applicable to taxation statutes. In response to this the Appellant argued that the statutory meaning of the word 'transfer' did not encompass movement of the share rights intra Company 'Y' in the manner set out hereunder.

51. It is therefore important to examine the process which effected the movement of share rights from the ordinary shares (owned by Company 'X') to the 'A' ordinary shares (owned by the Appellant). That process can be summarised as follows;

- 1) Company 'Y' was incorporated on **DATE REDACTED** 2004. On 17 January 2006 the Appellant and the Appellant's spouse were appointed directors of Company 'Y' while the Appellant was also appointed company secretary of Company 'Y'.



On 30 January 2006, Company 'X', in its capacity as member of Company 'Y', tabled a special resolution which was passed by Company 'Y', amending the memorandum and articles of association of Company 'Y' to provide for an additional class of shares namely, 2,000,000 'A' ordinary shares.

- 2) On 30 January 2006, Company 'Y' allotted 100 ordinary shares of nominal value to Company 'X' at a total premium of € AMOUNT.
- 3) On 30 January 2006, Company 'Y' allotted 94 'A' ordinary shares of nominal value to the Appellant and 6 'A' ordinary shares of nominal value to the Appellant's spouse (totalling €100) .
- 4) On 31 January 2006, Company 'X', in its capacity as member of Company 'Y', tabled a special resolution which was passed by Company 'Y', amending the Articles of Association of Company 'Y' whereby the rights attaching to the 'A' ordinary shares were altered so that the 'A' ordinary shares alone conferred rights to receive notice of, attend and vote at general meetings and became entitled to the share premium on a winding up together with any surplus. On 1 February 2006, the Appellant and the Appellant's spouse as holders of the 'A' Ordinary shares, passed a special resolution to wind up the company.

52. It is clear from points 1-4 above that the means of movement of the share rights from the ordinary shares (owned by Company 'X') to the 'A' ordinary shares (owned by the Appellant) was a process which involved a series of steps. The passing of the special resolutions was part of that process. It is not accurate to characterise the movement of the share rights as taking place on foot of the passing of special resolutions alone, as shares had to be allotted at steps 2 and 3 above, for the movement of share rights to occur.

53. The word 'transfer' must be afforded its meaning in the context of 130(3)(a) TCA 1997. The question is whether the meaning of 'transfer' per s.130(3)(a) encompasses a process which includes the passing of special resolutions as set out above, as opposed to whether the passing of a special resolution amending the articles of a company, amounts to a 'transfer' within the meaning of s.130(3)(a) TCA 1997.





54. Section 130(3)(a) TCA 1997 taxes a movement of assets between two taxable persons and provides that the amount of the difference between the value received and the consideration paid (referred to as 'the relevant amount') '*shall be treated as ....a distribution*' and thus chargeable to income tax in the hands of the recipient.
55. It can be said that a transfer is a decision by a transferor to move an asset (i.e. intangible share rights) from its ownership into the ownership of another. To achieve the transfer, certain actions must be met. The actions necessary to achieve the movement of value (from the ownership of Company 'X' to the ownership of the Appellant) in this case involved the passing of special resolutions. That does not mean, as the Appellant contends, that there is no transfer. It means simply that two separate special resolutions formed part of the process which effected the transfer which occurred in this case.
56. The word 'transfer' in its statutory context must encompass various different means of transfer of assets. I do not accept the submission on behalf of the Appellant, that a special resolution takes the shift in value between shareholdings, outside of the meaning of the word 'transfer' as contained in subsection 130(3)(a).

*Transfer "by" Company 'X'*

57. Section 130(3)(a) provides for tax consequences "*on a transfer of assets .... by a company to its members...*" [emphasis added]. The Appellant contended that if the process of altering the articles in this case falls within the meaning of the word 'transfer' per section 130(3)(a), then the transfer was not effected "*by*" Company 'X' but was effected "*by*" Company 'Y'.
58. The basis for this argument is the submission that the company passed the special resolutions in this case and that company was Company 'Y' and thus the transfer of assets was "*by*" Company 'Y'. In answer to this submission, the Respondent argued that Company 'Y' can do nothing without its members. The Respondent argued that Company 'X' as the



controlling member, tabled the special resolutions and voted in relation to them and without these steps being taken by Company 'X', the special resolutions could not have been passed by Company 'Y'. The Respondent submitted that there was a distinction to be made between the members who call the decision and the decision itself.

59. From the perspective of section 130(3)(a), the question is whether there was "*a transfer of assets .... by a company to its members...*" [emphasis added]. The provision taxes the movement of value (i.e. the transfer of assets) from an original owner to a new owner. In order to ascertain the meaning of this provision, consideration must be given to the word "*by*" as contained in s.130(3)(a) TCA 1997.
60. While Company 'Y' passed the resolution in company law terms, there are no assets belonging to Company 'Y' which are passed. The assets (i.e. the intangible share rights) are assets belonging to Company 'X', not to Company 'Y'. Company 'Y' does not transfer any value that it owns but merely exercises its statutory authority (section 15 in the Companies Acts 1963). In general terms, for a transfer to occur and be valid, assets must be transferred with the consent and agreement of the transferor. While Company 'Y' passed the resolutions, the owner of the share rights was Company 'X' and thus Company 'X' was the transferor. To legally and validly transfer the assets, the co-operation and consent of Company 'X' was required and in this case, was lawfully obtained. The transfer could not be "*by*" Company 'Y' in any sense other than one as to form because the assets being transferred did not belong to Company 'Y'.
61. Where fully paid shares are transferred, the instrument of transfer tends to be a stock transfer form. Section 2 of the Stock Transfer Act 1963 provides that a transfer of shares need only be executed by the transferor. The transferee will then register as a member on the share register of the company. In this case, the transferee (the Appellant) did not have to register an interest in shares in the company because the intangible rights attached to its shares on foot of the special resolution altering the articles of the company. The Respondent



submitted that it would be restrictive to suggest that there had to be some formalised document of transfer in this case for there to be a 'transfer' within the meaning of section 130(3)(a) and I accept this submission. What is required by section 130(3)(a) is a transfer of value which is taxable in the hands of the members and this is what occurred by the transfer of intangible share rights from the ownership of Company 'X' to the ownership of the Appellant.

*Meaning of 'transfer' statutory interpretation*

62. In order to ascertain whether assets have been transferred, consideration must be afforded to the meaning of the word 'transfer' as it appears in s.130(3)(a) TCA 1997 and to the appropriate principles of statutory interpretation to be applied.
63. Both parties in their submissions argued that the interpretative approach to be applied was a literal one taking into account the jurisprudence in respect of the interpretation of taxation statutes based on a long line of authorities including *inter alia*, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449 and I fully accept this submission.
64. In this case, each party argued that the words in the statute were clear and unambiguous and supported their respective interpretation as contended for in the submissions.
65. I am satisfied that there is no inherent ambiguity in the statutory wording used and thus a literal interpretation must be applied. As a result, the words are to be given their ordinary and natural meaning.
66. It is clear on a plain reading of s.130(3)(a) that 'transfer' within the meaning of this section relates to a transfer of "value" or a transfer of "benefit received". In its ordinary and natural meaning the word 'transfer' is a generic description, a means of delineating movement from



A to B. It must be general enough to encompass those types of transfers that are most known in everyday business contexts i.e. a transfer by means of a contract or conveyance.

67. The fact that the passing of a special resolution is part of mechanism which results in a movement of value by a company to its members does not mean that a 'transfer' has not taken place within the meaning of the section. It is apt to consider that if share rights had been extinguished as opposed to altered (in the manner set out above), a different scenario would have arisen i.e. there would have been no shift in value because the shares would have ranked *pari passu*.

68. The Appellant contended that the alteration of share rights within a company by means of the passing of a special resolution could not amount to a 'transfer' per s.130(3)(a) but I think the correct approach is to examine whether the shift in value between a company (Company 'X') and its members falls to be a 'transfer' within the meaning of section 130(3)(a) as determined by the application of the principles of interpretation as applicable to tax statutes.

69. The word 'transfer' pursuant to section 130(3)(a) involves a movement of value or benefit between a company and its members and in this case, the passing of a special resolution was a component of the process by which a movement of value occurred between the owner of the assets (Company 'X') and its members, the Appellant and the Appellant's spouse.

70. I thereby determine that the movement of share rights from one class of shares to another in the manner aforesaid constitutes a "*transfer of assets..... by a company to its members*" within the meaning of section 130(3)(a) TCA 1997.

#### *Other submissions*

71. The Appellant contended that if assets were transferred to the Appellant, the Appellant received them in the Appellant's capacity as a member of Company 'Y' and not as a member



of Company 'X' and thus s.130(3)(a) does not apply. The Appellant contended that the amendment of share rights in Company 'Y' involved the alteration of share rights held by the members of Company 'Y' and therefore there was no transfer of share rights by Company 'X' to the Appellant in his capacity as member of Company 'X'. I do not accept this submission. A literal interpretation of the provision requires the transfer of assets to be "*.... by a company to its members...*" i.e. by Company 'X' to members of Company 'X'. On the facts, this is what occurred.

72. The Respondent submitted that the meaning of 'distribution' per s.130(2)(b) described a 'distribution' as being "*in respect of shares*" and that this can be contrasted with the wording contained in section 130(3)(a) which provides that "*.. the company shall be treated as making a distribution...*" and that therefore s.130(3)(a) does not come within the meaning of distribution contained within s.130(2) and that the requirement of "*in respect of shares*" does not apply. I accept this submission.

## CONCLUSION

73. For the reasons set out above, I determine that the intangible share rights (originally attached to the ordinary shares owned by Company 'X') constitute 'assets' within the meaning of section 130(3)(a) TCA 1997 and that in altering the articles of Company 'Y' so that these share rights attached to the 'A' ordinary shares owned by the Appellant, there was a "*transfer of assets .... by a company to its members...*" (i.e. by Company 'X' to the Appellant) to be "*...treated as ....a distribution...*" in accordance with section 130(3)(a) TCA 1997.

74. Accordingly this appeal is determined in accordance with section 933(5) TCA 1997.

**APPEAL COMMISSIONER**

**June 2016**

