185TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments to Capital Gains Tax ('CGT') raised in 2016, in relation to a payment of €1.1m ('the payment') received by the Appellant from a non-resident discretionary trust, in April 1999.

2. The details of the assessments are as follows;

   - On 2 August 2016, the Respondent raised an assessment to CGT in the sum of €234,645 in relation to the payment in respect of the tax year of assessment ended 5 April 1999, in accordance with section 590 of the Taxes Consolidation Act 1997, as amended ('TCA 1997')
   - On 24 November 2016, the Respondent raised an alternative assessment to CGT in the sum of €234,645 in relation to the payment, in respect of the tax year of assessment ended 5 April 2000, in accordance with section 590 and section 579A TCA 1997

3. The Appellant raised a preliminary point in relation to the assessments pursuant to section 956 TCA 1997, namely, that the enquiries made by the Respondent approximately fourteen years after the relevant tax years of assessment, which led to the raising of the assessments in 2016, were out of time on the basis they were outside the statutory limitation period contained in section 956(1)(c) TCA 1997 and were made in the absence of '*reasonable grounds'* contrary to the provisions of section 956(1)(c) TCA 1997.

Background

4. A discretionary trust incorporated and resident in the Isle of Man ('the discretionary trust') was established on 4 December 1987, by the settlor, an individual who was at that time, resident and domiciled outside the State. The settlor settled a sum of 28,000 [currency redacted] on the trust. The appointed trustees were at all times resident in the Isle of Man.

5. The Trust deed, dated 31 December 1987, lists as beneficiaries of the trust, a number of persons including the Appellant.

6. AC Limited ('ACL'), a company incorporated in the Isle of Man, held an 80% shareholding in XY Limited ('XYL') with the remaining 20% of the shares held by JK Limited. The shares in ACL were held by the discretionary trust.

7. By sale agreement dated 4 March 1999, ACL and JK Limited, disposed of their shareholding in XYL, to a third company, EFG.

8. Shortly after the disposal of the shares, the discretionary trust trustees exercised their discretion and made an appointment to the Appellant in the sum of €1.1m which was received by the Appellant on 7 April 1999. In order to put the trustees in funds, ACL provided a loan to the trustees from the proceeds of sale of the disposal of shares in XYL.

9. The Appellant did not include this payment in his return for either 1998/1999 or 1999/2000 and did not pay tax in respect thereon.

10. In 2014, pursuant to proceedings in accordance with section 908 TCA 1997, High Court Orders were obtained by the Respondent against various financial institutions as part of an investigation into the use of offshore bank accounts. Under the terms of the High Court Orders, the financial institutions were obliged to provide the Respondent with details of transactions involving certain foreign jurisdictions. Information furnished to the Respondent pursuant to these Court Orders contained details of the payment of €1.1m received by the Appellant in April 1999.

11. On 28 March 2014, the Respondent wrote to the Appellant querying the payment. The parties engaged in correspondence for a period and in 2016, the Respondent raised two assessments to CGT; the first, in respect of the tax year ended 5 April 1999, and the second in respect of the tax year ended 5 April 2000.

Submissions

Preliminary point

12. Section 956 TCA 1997, provides that enquiries and/or actions cannot be made by the Respondent outside of a four-year statutory limitation period unless, at that time, the Revenue Inspector had reasonable grounds for believing that the return was insufficient due to its having been completed in a fraudulent or negligent manner.

13. The Appellant raised a preliminary point namely, that the Respondent in making enquiries or taking actions outside the statutory limitation period, was statute barred from so doing in accordance with section 956 TCA 1997.

14. The Respondent contended that there were reasonable grounds for believing that the return was insufficient due to its having been completed in a negligent manner, due to the fact that

details of the payment were not included in the Appellant's return for the relevant tax years of assessment.

15. The Appellant submitted that he relied on the advice of his tax agent and on legal advice obtained by a fellow beneficiary that concluded that the payment was not subject to tax and that there was no requirement to include details of the payment in his tax return for 1998/1999. The Appellant further contended that the enquiries made by the Respondent in 2014 were statute barred in accordance with the provisions of section 956 TCA 1997.

Assessment dated 2 August 2016

16. The assessment dated 2 August 2016, ('the first assessment') was raised on the basis that the Appellant was the beneficial owner of shares in XYL and that the payment of €1.1m received by the Appellant on 7 April 1999, represented proceeds of the disposal of this shareholding. This assessment was raised on the basis that the payment received was subject to capital gains tax in accordance with section 590 TCA 1997.

17. The Appellant submitted that he was not a shareholder or participator in XYL and that he was therefore not subject to CGT in accordance with section 590 TCA 1997.

Assessment dated 24 November 2016 ('the second assessment')

18. The assessment dated 24 November 2016 ('the second assessment') was raised on the basis of the gain which accrued to ACL from the sale of its shareholding in XYL on the basis that this gain was ultimately attributable to beneficiaries of the trust in receipt of capital payments from the trust, in accordance with the combined provisions of sections 590 and 579A TCA 1997.

19. The Appellant claimed that the commencement and operation of these provisions, as introduced by sections 88 and 89 of the Finance Act 1999, meant that the Appellant was not subject to a CGT liability in respect thereof.

Legislation

20. The applicable legislative provisions, relevant excerpts of which are set out below, are as follows;

- Section 956 TCA 1997
- Section 955 TCA 1997
- Section 17(1)(h) of the Finance Act 2003
- Section 129 and schedule 4 of the Finance Act 2012
- Section 590 TCA 1997 (as enacted by section 89 FA 1999)
- Section 579A TCA 1997 (as enacted by section 88 FA 1999)

Section 956 TCA 1997 - Inspector's right to make enquiries and amend assessments;

(1)(a)For the purpose of making an assessment on a chargeable person for a chargeable period or for the purpose of amending such an assessment, the inspector –

> *(i)may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and*
>
> *(ii)may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains, or allow any deduction, allowance or relief by reference to such statement or particular.*

(b)The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a)(i) shall not preclude the inspector-

> *(i)from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and*
>
> *(ii)subject to section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate.*

(c)Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 6 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable

grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.

(2)

(a)A chargeable person who is aggrieved by any enquiry made or action taken by an inspector for a chargeable period, after the expiry of the period referred to in subsection (1)(c) in respect of that chargeable period, on the grounds that the chargeable person considers that the inspector is precluded from making that enquiry or taking that action by reason of subsection (1)(c) may, by notice in writing given to the inspector within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners, and the Appeal Commissioners shall hear the appeal in all respects as if it were an appeal against an assessment.

(b)Any action required to be taken by the chargeable person and any further action proposed to be taken by the inspector pursuant to the inspector's enquiry or action shall be suspended pending the determination of the appeal.

(c)Where on the hearing of the appeal the Appeal Commissioners –

(i)determine that the inspector was precluded from making the enquiry or taking the action by reason of subsection (1)(c), the chargeable person shall not be required to take any action pursuant to the inspector's enquiry or action and the inspector shall be prohibited from pursuing his enquiry or action, or

(ii)decide that the inspector was not so precluded, it shall be lawful for the inspector to continue with his or her enquiry or action.

Section 17(1)(h) of the Finance Act 2003

(1) With effect from the day appointed by the Minister for Finance in accordance with the provisions of subsection (2), the Principal Act is amended –

…. (h) in section 956(1)(c), by substituting "4 years" for "6 years"…

Section 579A TCA 1997 - Attribution of gains to beneficiaries

(1) (a)For the purposes of this section and the following sections of this Chapter, "capital payments" means any payment which is not chargeable to income tax on the recipient

or, in the case of a recipient who is neither resident nor ordinarily resident in the State, any payment received otherwise than as income, but does not include a payment under a transaction entered into at arm's length.

(b) In paragraph (a) references to a payment include references to the transfer of an asset and the conferring of any benefit, and to any occasion on which settled property becomes property to which section 567(2) applies.

(c) The amount of a capital payment made by way of loan, and of any other capital payment which is not an outright payment of money, shall be taken to be equal to the value of the benefit conferred by it.

(d) A capital payment shall be treated as received by a beneficiary from the trustees of a settlement if –

(i) the beneficiary receives it from the trustees directly or indirectly,

(ii) it is directly or indirectly applied by the trustees in payment of any debt of the beneficiary or is otherwise paid for the benefit of the beneficiary, or

(iii) it is received by a third party at the beneficiary's direction.

[(2) (a) This section shall apply to a settlement for any year of assessment (beginning on or after 6 April 1999) during which the trustees are at no time resident or ordinarily resident in the State, and—

(i) the settlor does not have an interest in the settlement at any time in that year of assessment, or

(ii) the settlor does have an interest in the settlement but—

(I) was not domiciled in the State, and

(II) was neither resident nor ordinarily resident in the State,

in that year of assessment, or when the settlor made the settlement.

(b) Section 579 shall not apply as respects chargeable gains accruing after April 1999 to trustees of a settlement to which this section applies; and references in subsections (4) and (5) to capital payments received by beneficiaries do not include references to any payments received before 11 February 1999 or any payments received on or after that date so far as they represent a chargeable gain which accrued to the trustees in respect of a disposal by the trustees before 11 February 1999.

(c) For the purposes of this subsection a settlor has an interest in a settlement if—

(i)any relevant property which is, or may at any time become, comprised in the settlement is, or will or may become, applicable for the benefit of or payable in any circumstances to, a relevant beneficiary,

(ii)any relevant income which arises, or may arise, under the settlement is, or will or may become, applicable for the benefit of or payable in any circumstances to, a relevant beneficiary, or

(iii)a relevant beneficiary enjoys a benefit directly or indirectly from any relevant property which is comprised in the settlement or any relevant income arising under the settlement.

(d)In this subsection—

"relevant beneficiary" means—

(i)the settlor,

(ii)the spouse of the settlor,

(iii)a company controlled by either or both the settlor and the spouse of the settlor, or

(iv)a company associated with a company referred to in paragraph (iii) of this definition;

"relevant income" means income originating from the settlor;

"relevant property" means property originating from the settlor.

(e)For the purposes of this subsection—

(i)references to property originating from a person are references to property provided by that person, and property representing that property,

(ii)references to income originating from a person are references to income from property originating from that person and income provided by that person,

(iii)whether a company is controlled by a person or persons shall be construed in accordance with section 432 without regard to subsection (6) of that section,

(iv)whether a company is associated with another company shall be construed in accordance with section 432 without regard to subsection (6) of that section, and

(v)references to relevant property comprised in a settlement being, or becoming, applicable for the benefit of or payable in any circumstances to, a relevant beneficiary, do not include references to the repayment of, or obligation to

repay, a loan to a settlor which loan was provided by the settlor to the trustees of the settlement on terms that it would be repaid.

(f) Where, for the year of assessment 2002 or any subsequent year of assessment, chargeable gains are treated as accruing to a beneficiary under a settlement by virtue of section 579, then notwithstanding that section such chargeable gains, in so far as they are in respect of a disposal made on or after 7 March 2002 by the trustees of the settlement, shall be treated as accruing to the settlor in relation to the settlement and not to any other person, if the settlor is resident or ordinarily resident in the State, whether or not the settlor is the beneficiary.]

(3) There shall be computed in respect of every year of assessment for which this section applies the amount on which the trustees would have been chargeable to capital gains tax under section 31 if they had been resident and ordinarily resident in the State in the year of assessment and that amount, together with the corresponding amount in respect of any earlier such year of assessment, so far as not already treated under subsection (4) or section 579F(2) as chargeable gains accruing to beneficiaries under the settlement, is in this section referred to as "the trust gains for the year of assessment".

(4) Subject to this section, the trust gains for a year of assessment shall be treated for the purposes of the Capital Gains Tax Acts as chargeable gains accruing in the year of assessment to beneficiaries of the settlement who receive capital payments from the trustees in the year of assessment or have received such payments in any earlier year of assessment.

(5) The attribution of chargeable gains to beneficiaries under subsection (4) shall be made in proportion to, but shall not exceed, the amounts of capital payments received by them.

(6) A capital payment shall be left out of account for the purposes of subsections (4) and (5) to the extent that chargeable gains have, by reason of the payment, been treated as accruing to the recipient in an earlier year of assessment.

(7) A beneficiary shall not be charged to tax on chargeable gains treated by virtue of subsection (4) as accruing to him or her in any year of assessment unless he or she is domiciled in the State at some time in that year of assessment.

(8) For the purposes of this section a settlement arising under a will or intestacy shall be treated as made by the testator or, as the case may be, intestate at the time of death.

(9A) This section shall not apply where it is shown in writing or otherwise to the satisfaction of the Revenue Commissioners that, at the time when the charge to capital gains tax arises, genuine economic activities are carried on by the settlement in a relevant Member State (within the meaning of section 806(11)(a))

Section 590 TCA 1997 - Attribution to participators of chargeable gains accruing to non-resident company

(1) In this section –

(a)"participator", in relation to a company, has the meaning assigned to it by section 433(1);

(b)references to a person's interest as a participator in a company are references to the interest in the company which is represented by all the factors by reference to which the person falls to be treated as such a participator; and

(c)references to the extent of such an interest are references to the proportion of the interests as participators of all the participators in the company (including any who are not resident or ordinarily resident in the State) which on a just and reasonable apportionment is represented by that interest.

(2)For the purposes of this section, where –

(a)the interest of any person in a company is wholly or partly represented by an interest (in this subsection referred to as the "person's beneficial interest") which the person has under any settlement, and

(b)the person's beneficial interest is the factor, or one of the factors, by reference to which the person would be treated, apart from this subsection, as having an interest as a participator in the company,

the interest as a participator in the company which would be that person's shall be deemed, to the extent that it is represented by the person's beneficial interest, to be an interest of the trustees of the settlement, and not an interest of the person's, and references in this section, in relation to a company, to a participator shall be construed accordingly.

(3)This section shall apply as respects chargeable gains accruing to a company –

(a)which is not resident in the State, and

(b)which would be a close company if it were resident in the State.

(4)Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person.

(5)The part of the chargeable gain referred to in subsection (4) shall be equal to the proportion of that gain that corresponds to the extent of the participator's interest as a participator in the company.

(6)Subsection (4) shall not apply in the case of any participator in the company to which the gain accrues where the aggregate amount falling under that subsection to be apportioned to the participator and to persons connected with the participator does not exceed one-twentieth of the gain.

(7)This section shall not apply in relation to –

> *(a)a chargeable gain accruing on the disposal of assets, being tangible property, whether movable or immovable, or a lease of such property, where the property was used, and used only, for the purposes of a trade carried on by the company wholly outside the State,*
>
> *(b)a chargeable gain accruing on the disposal of currency or of a debt within section 541(6), where the currency or debt is or represents money in use for the purposes of a trade carried on by the company wholly outside the State, or*
>
> *(c)a chargeable gain in respect of which the company is chargeable to capital gains tax by virtue of section 29 or to corporation tax by virtue of section 25(2)(b).*

(8)Where –

> *(a)any amount of capital gains tax is paid by a person in pursuance of subsection (4), and*
>
> *(b)an amount in respect of the chargeable gain is distributed, whether by way of dividend or distribution of capital or on the dissolution of the company, within 2 years from the time when the chargeable gain accrued to the company,*
>
> *that amount of tax, so far as neither reimbursed by the company nor applied as a deduction under subsection (9), shall be applied for reducing or extinguishing any liability of the person to income tax in respect of the distribution or (in the case of a distribution falling to be treated as a disposal on which a chargeable gain accrues to the person) to any capital gains tax in respect of the distribution.*

(9)The amount of capital gains tax paid by a person in pursuance of subsection (4), so far as neither reimbursed by the company nor applied under subsection (8) for reducing any liability to tax, shall be allowable as a deduction in the computation under the Capital Gains Tax Acts of a gain accruing on the disposal by the person of any asset representing the person's interest as a participator in the company.

(10)In ascertaining for the purposes of subsection (8) the amount of income tax chargeable on any person for any year of assessment on or in respect of a distribution, any such distribution mentioned in that subsection which falls to be treated as income of that person for that year of assessment shall be regarded as forming the highest part of the income on which the person is charged to tax for the year of assessment.

(11)To the extent that it would reduce or extinguish chargeable gains accruing by virtue of this section to a person in a year of assessment, this section shall apply in relation to a loss accruing to the company on the disposal of an asset in that year of assessment as it would apply if a gain instead of a loss had accrued to the company on the disposal, but shall only apply in relation to that person; and, subject to the preceding provisions of this subsection, this section shall not apply in relation to a loss accruing to the company.

(12)Where the person who is a participator in the company at the time when the chargeable gain accrued to the company is itself a company which is not resident in the State but which would be a close company if it were resident in the State, an amount equal to the amount apportioned under subsection (5) out of the chargeable gain to the participating company's interest as a participator in the company to which the gain accrues shall be further apportioned among the participators in the participating company according to the extent of their respective interests as participators, and subsection (4) shall apply to them accordingly in relation to the amounts further apportioned, and so on through any number of companies.

(13)The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include trustees who are participators in the company, or in any company amongst the participators in which the gain is apportioned under subsection (12), if when the gain accrued to the company the trustees are neither resident nor ordinarily resident in the State.

(14)Where any tax payable by any person by virtue of subsection (4) is paid by the company to which the chargeable gain accrues, or in a case under subsection (12) is paid by any such other company, the amount so paid shall not, for the purposes of income tax, capital gains tax or corporation tax, be regarded as a payment to the person by whom the tax was originally payable.

(15)For the purposes of this section, the amount of the gain or loss accruing at any time to a company which is not resident in the State shall be computed (where it is not the case) as if the company were within the charge to corporation tax on capital gains.

(16)(a)In this subsection –

> *"group" shall be construed in accordance with subsections (1) (excluding paragraph (a)), (3) and (4) of section 616;*

"non-resident group" of companies –

(i)in the case of a group none of the members of which is resident in the State, means that group, and

(ii)in the case of a group 2 or more members of which are not resident in the State, means the members not resident in the State.

(b)For the purposes of this section –

(i)[section 617 (other than paragraphs (b) and (c) of subsection (1)), section 618 (with the omission of the words "to which this section applies" in subsections (1)(a) and (2), of "such" in subsection (1)(c) and of subsection (3)), section 619(2) (with the substitution for "in the course of a disposal to which section 617 applies" of "at a time when both were members of the group") and section 620(2) (with the omission of the words "to which this section applies")][2] shall apply in relation to non-resident companies which are members of a non-resident group of companies as they apply in relation to companies resident in the State which are members of a group of companies, and

(ii)sections 623 [(apart from paragraphs (c) and (d) of subsection (2))][3] and 625 shall apply as if for any reference in those sections to a group of companies there were substituted a reference to a non-resident group of companies, and as if references to companies were references to companies not resident in the State.]

Evidence

21. Documentary evidence furnished included *inter alia*; documentation relating to the receipt of the payment by the Appellant, the Appellant's tax returns for the relevant tax years of assessment, notices of assessment for the tax years of assessment, CRO documentation from Ireland and the Isle of Man, returns and financial statements regarding relevant companies, *inter partes* correspondence, Counsel's opinion and the deed of trust.

22. Witness evidence was provided by the Appellant, as follows;

- The Appellant joined XYL, in 1981. At that time the managing director was Mr. D. The Appellant stated that his relationship with Mr. D. was very difficult, describing it as 'fraught' around 1999.
- In 1987, the Appellant was part of the senior management team when he learned that ACL was the new parent company of XYL. The Appellant stated that he did not own or acquire shares in XYL at any time, that he did not pay money into any trust and that he did not make capital contributions to either XYL or ACL. He stated that in 1988 he was told of the existence of the trust and that he was named as a beneficiary.
- The Appellant stated that he was told by Mr. D. in March 1999, that he was going to receive a gift from the trust. On 7 April 1999, he received the sum of €1.1m by bank transfer. He was told by Mr. D. that tax advisors had received legal advice that the sum was not subject to tax and that there was no need to include it in his tax return.
- The Appellant stated that he met the settlor approximately thirty years ago and that he did not know him personally but knew he was the managing director of a company which employed approximately 1,500 people.
- The Appellant stated that the discretionary trust incorporated ACL in the Isle of Man which in turn acquired an 80% shareholding in XYL
- The Appellant stated that he saw the trust deed for the first time in 2014, prior to a meeting with the Respondent's officials.
- The Appellant's evidence was that the earliest date on which there could have been a trust gain was 4 March 1999, based on the completion of the sale and that he received the payment of €1.1m on 7 April 1999.

In cross-examination, the Appellant accepted that:

- the letter of 15 April from [tax advisors] which stated that a copy of the resolution of the trustees had been requested, was not followed up.
- he did not see the legal opinion until 2014 or 2015, but that he was informed of the existence of the opinion by Mr. D. in 1999.
- when he received the capital payment he did not ask Mr. D. who the settlor of the trust was nor who the trustees were.
- that he did not make contact with the trustees in advance of the hearing.

Preliminary point

Impermissible pleading

23. The Appellant submitted that the Respondent's case based on the two assessments (the second of which was raised on an alternative basis to the first) contained impermissible pleading contrary to the rules in relation to such pleadings as discussed in *IBB Internet services Ltd. and other v Motorola* [2011] IEHC 253.

24. However, a hearing before the TAC is not a plenary hearing and the scope of the jurisdiction of an Appeal Commissioner as discussed in a number of Irish cases, namely; *The State (Whelan) v Smidic [1938] 1 I.R. 626, Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49 and the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577* is confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner.

25. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

> *'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.'*

Thus, the onus of proof is on the Appellant and the question in this appeal is whether the Appellant has discharged the onus to demonstrate that he is not liable to CGT in relation to the payment he received.

Section 949I TCA 1997

26. The Appellant's notice of appeal submitted on 31 August 2016, in relation to the notice of assessment dated 2 August 2016, contains on page two of the 'grounds of appeal' document separately attached, an assertion that the Respondent did not have '*reasonable grounds*' in respect of the assessment. It also pleads the Appellant's reliance on the four year statutory limitation period.

27. In relation to the notice of appeal submitted on 20 December 2016, regarding the notice of assessment dated 24 November 2016, a ground of appeal is clearly raised in relation to the

'*reasonable grounds*' test in respect of the making of enquiries. The notice also pleads the Appellant's reliance on the four-year limitation period.

28. Both notices of appeal were drafted taking into account the provisions of section 949I(6) TCA 1997, which is duly cited.

29. It was suggested in written submissions that the preliminary point raised by the Appellant in relation to section 956 TCA 1997, was not contained in the Appellant's notice of appeal and that the Appellant, in accordance with the test contained in section 949AI(6) TCA 1997, was not permitted to raise it. This is incorrect. The preliminary point is included in the Appellant's notices of appeal and forms part of this appeal.

Relevant provisions

30. Section 129 and schedule 4 of the Finance Act 2012 replaced Parts 39 and 41 of the Taxes Consolidation Act 1997, with a new Part 41A. However, Parts 39 and 41 continue to apply for chargeable periods prior to 2013. This is clear from section 129 which provides;

> *(1)The Principal Act is amended in the manner and to the extent specified in Schedule 4.*
>
> *(2)The Principal Act is amended by deleting Parts 39 and 41.*
>
> *(3)Subject to subsections (4) and (5), this section takes effect on and from 1 January 2013.*
>
> *(4)This section applies—*
>
> > *(a)in the case of a chargeable period (within the meaning of section 321(2) of the Principal Act) which is an accounting period of a company, as respects chargeable periods that start on or after 1 January 2013, and*
> >
> > *(b)in a case other than that referred to in paragraph (a), as respects the year of assessment 2013 and subsequent years of assessment.*
>
> *(5)This section does not affect the application of the provisions of the Principal Act, which are amended or deleted by this section, as respects chargeable periods prior to those referred to in subsection (4).*

31. As this appeal relates to the tax years of assessment 1998/1999 and 1999/2000, the relevant provisions in respect of the raising of enquiries and the amendment of assessment are sections 955 and 956 TCA 1997, as contained in Part 41 TCA 1997, as amended.

32. A Revenue officer or inspector who makes enquiries, does so in respect of a statement or particular contained in a return for a chargeable period. The time limit runs from the end of the chargeable period in which the return (the subject of the section 956 enquiries) is delivered. The original six-year statutory period was reduced to four years pursuant to section 17 of the Finance Act 2003. As enquiries made in this appeal were made more than a decade after the relevant tax years of assessment, it is immaterial whether the limitation period was six years or four years and for ease of reference, I will refer to the current limitation period of four years.

Section 956 TCA 1997

33. In this appeal, it is not disputed as a matter of fact that the payment of €1.1m was made to the Appellant on 7 April 1999. However, the Appellant did not include details of the payment in his return for the tax year of assessment ended 5 April 1999, nor for the tax year ended 5 April 2000. The Appellant's position was that he relied on the advice of his tax advisors and also on the assurance of another beneficiary of the trust who had obtained legal advice in relation to the payment, in respect of the tax year ending 5 April 1999.

34. Leaving aside for a moment the question of whether there was an obligation to include the payment in the return for either 1998/1999 or 1999/2000, the first question is whether the Respondent was entitled to raise enquiries outside the statutory time limit contained in section 956(1)(c) TCA 1997. The Respondent may make such enquiries where the Respondent has *'reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner'.*

35. As regards satisfaction of the '*reasonable grounds*' test in section 956(1)(c) TCA 1997, the Respondent relied on the facts which were common case between the parties. These facts in essence relate to the receipt by the Respondent of the payment in April 1999, of €1.1m together with the fact that the payment was not included in the Appellant's tax returns for either of the relevant tax years of assessment. As is clear from the Respondent's letter of 28 March 2014, the Respondent came upon the information in relation to the payment, due to an investigation into the use of offshore accounts. That letter provides;

'Dear Sir/Madam,

High Court Orders have been obtained by Revenue against financial institutions in the State as part of its ongoing investigation into the use of offshore bank accounts and other investment products to evade or avoid taxes and duties. Under the terms of the High Court Orders the financial institutions are obliged to provide Revenue with details of transactions involving certain foreign jurisdictions.

Arising from a High Court Order obtained by Revenue I have been notified of one or more transactions with which you were associated relating to an offshore account. …

The fact that you have been associated with these transactions is not, of itself, interpreted by Revenue as indicating that you have been non-compliant with your tax obligations. However, in order to identify taxpayers who may have outstanding tax issues it is necessary to ask you to reply to the following questions:

1. *Do you hold or have you held an offshore account or other offshore financial product, or were you the settlor or beneficiary of an offshore trust?*
2. *Were you in receipt of funds from an offshore source, or have you made payments to any offshore account?*
3. *Have you any undeclared tax liabilities, whether related to the offshore account/receipts of funds or otherwise, for any year of assessment or taxable period?*
4. *If your answer to either question 1 or question 2 is "yes", but your answer to question 3 is "no" , please outline why you have no undeclared tax liabilities.*

If you have any undeclared tax liabilities for any year of assessment or taxable period, please now forward a computation of those liabilities and the related statutory interest and penalties, You should also forward a remittance in settlement of the full amount due.

If information in respect of these matters has already been included in a return or supplied by you please advise me of the date of the correspondence and the address of the Revenue office to which it was sent.'

36. The Appellant's agent responded to the letter on 28 May 2014, as follows;

'Our replies to your questions are as follows;

1. [The Appellant] *does not hold nor has be held an offshore account or other offshore financial product. He is not the settlor of an offshore trust. He was the beneficiary of an offshore trust (see below).*

2. [The Appellant] *was in receipt of funds from an offshore source (see below), he has not made payments to an offshore account.*
3. *To the best of his knowledge and belief,* [The Appellant] *does not have any undeclared tax liabilities.*
4. *In April 1999* [The Appellant], *as beneficiary of a trust, received* [€1,1m]. *These funds represented a capital distribution from an offshore trust. The settlor was a* [non]-*resident and domiciled individual. The distribution was from an account outside of Ireland. In the circumstances no liability to either income tax or capital acquisitions tax arises.*

We trust the above information will enable you conclude your enquiries into this matter, however, if you require further information please contact …. this office.'

As is clear from the correspondence, the Respondent was notified of the existence of the payment through information obtained on foot of High Court proceedings initiated by the Respondent pursuant to section 908 TCA 1997. The Appellant in response and through his agent, confirmed receipt of the payment and provided certain details in respect thereof.

37. It is clear from the Supreme Court judgment in *The Revenue Commissioners v Droog* [2016] IESC 55, that the section 956(1)(c) test of '*reasonable grounds'* must be established *before* enquiries or actions are made in accordance with section 956. This is clear from the judgment of Clarke J. as he then was, giving judgment on behalf of the Court, at paragraphs 4.7 and 4.8 as follows;

> *'4.7 …… A person who makes a full and true disclosure and pays their tax on foot of an assessment raised thereon cannot have their tax affairs reopened after four years have elapsed. An inspector is given wide power to inquire into the accuracy of any return but is precluded from engaging in such inquiry outside the four year period unless the inspector has reasonable grounds for believing that the original return was fraudulent or negligent and thus not a full and true disclosure. An inspector is not, therefore, entitled to engage in a purely "fishing" exploration of whether old returns (i.e. returns more than four years previous) were inaccurate but rather is required to have some reasonable basis for considering that the return was fraudulent or negligent before embarking on inquiries. Section 956(2)(a) allows a tax payer who feels that an inspector is making inquiries outside the time limit in circumstances not permitted to appeal to the Appeal Commissioners.*
>
> *4.8 It follows that, at least in general terms, ss.955 and 956 are designed to prevent the reopening of the tax affairs of a tax payer in respect of the types of tax covered by Part 41 outside of a four year period except in circumstances where the original return was, or was reasonably suspected to be, fraudulent or negligent. Even if such a reasonable*

suspicion exists no ultimate exposure to adverse tax consequences can be placed on the tax payer concerned unless it is ultimately established that the relevant return was in fact not full and true in its disclosure.'

[emphasis added]

38. Senior Counsel on behalf of the Appellant argued that the Respondent was not permitted to embark upon an enquiry or investigation pursuant to section 908 TCA 1997, beyond the statutory time limit in section 956 TCA 1997, and was not permitted to use information discovered in that enquiry to meet the test of '*reasonable grounds'* for the purposes of an out-of-time enquiry pursuant to section 956(1)(c) TCA 1997.

39. Enquiries pursuant to section 956 relate to enquiries for a particular tax year of assessment in relation to a particular return delivered by a taxpayer. The statutory limitation period of four years which applies pursuant to section 956(1)(c) TCA 1997, applies to enquiries made in accordance with section 956(1)(b) TCA 1997, namely the '*making of such enquiries or taking of such actions within* [the Inspector's] *powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise'* of a statement or particular contained in a return delivered. The proceedings by the Respondent, pursuant to section 908 TCA 1997, were taken in relation to a class of taxpayers in the context of an investigation into the use of offshore bank accounts. The section 908 Orders directed certain actions on the part of a number of financial institutions.

40. Further, a 'taxpayer' for the purposes of section 908(1) TCA 1997, includes a person whose identity is not known to the authorised officer and includes a class of persons whose individual identities are not known by the authorised officer. While section 908 requires an authorised officer to be satisfied that there are 'reasonable grounds' for suspecting that the taxpayer or a class of taxpayers may have failed to comply with the Tax Acts, the 'reasonable grounds' test under section 908 is a broad test which is satisfied in relation to a class of persons where it is demonstrated in respect of any person belonging to that class (section 908(3) TCA 1997). By contrast, the test of '*reasonable grounds'* as set out in section 956(1)(c) expressly applied in respect of a specific chargeable person for a specific chargeable period.

41. I am satisfied that the High Court proceedings pursuant to section 908 TCA 1997, did not constitute the making of enquiries by the Inspector for the purposes of section 956(1)(b)(i) TCA 1997. As a result, I find that the information received on foot of Orders pursuant to section 908 TCA 1997, in relation to the existence of the payment of €1.1m received by the Appellant on 7 April 1999, provided the Inspector with '*reasonable grounds'* for the purposes

of section 956(1)(c) TCA 1997, which allowed the making of enquiries beyond the four year statutory limitation period.

42. Senior Counsel for the Appellant opened various authorities on the matter of negligence and submitted that the Appellant had obtained proper and appropriate professional advice with a view to ensuring that his tax return was correct. On behalf of the Appellant it was submitted that he had not engaged in negligent conduct nor had he been negligent in the preparation of his returns.

43. For an Inspector to make enquiries outside the four-year statutory period, the test requires the Inspector '*at that time'* to have *'reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner'.* The test contained at section 956(1)(c) TCA 1997, does not require proof of negligence in advance of the raising of enquiries but, based on the dicta of Clarke J. in the Supreme Court requires the Inspector *'to have some reasonable basis for considering that the return was fraudulent or negligent before embarking on inquiries'*. I am satisfied that due to the absence of the inclusion of the payment of €1.1m in the Appellant's returns, the Inspector at the time of raising the enquiries, had *'reasonable grounds for believing that the return* [was] *insufficient due to its having been completed in a …. negligent manner'*. The matter of raising assessments pursuant to section 955 TCA 1997, following such enquiries, is addressed below.

Appeal in relation to enquiries

44. Where a taxpayer is aggrieved by enquiries made outside the four-year time limit on grounds that the taxpayer considers that the Inspector was precluded from making such enquiries or taking such actions on the basis of section 956(1)(c) TCA 1997, the taxpayer may, by notice in writing *'within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners..'*

45. Where an appeal against late enquiries is lodged, the enquiries are suspended pending the determination of the appeal. Where it is determined that the inspector was precluded from making the enquiry or taking the action by reason of section 956(1)(c), the chargeable person shall not be required to take any action pursuant to the inspector's enquiries and the inspector shall be prohibited from pursuing his enquiry or action.

46. The Respondent submitted that as the Appellant did not avail of his right to appeal, he was no longer within time to do so and could not now avail of those rights.

47. Where a taxpayer does not avail of the appeal mechanism pursuant to section 956(2) TCA 1997, this does not disapply the requirements of section 956(1)(c) with which the Respondent must comply. Where the Respondent makes enquiries or takes action outside of the four year statutory period, the Respondent must have '*reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner'.* If an assessment is based on enquiries made outside the four-year limitation period in circumstances where the legal threshold of '*reasonable grounds*' is not established by the Respondent in advance of those enquiries being made, the enquiries are simply out of time in accordance with the provisions of section 956(1)(c) TCA 1997.

48. As is clear from the Supreme Court judgment in *Droog*, the test of '*reasonable grounds*' is a legal prerequisite to the validity of enquiries or actions taken outside the four year statutory period.

49. As stated above, I am satisfied that the Respondent has met the test in this appeal and is not precluded by the statutory limitation period from raising enquiries outside of the statutory limitation period in accordance with section 956(1)(c) TCA 1997.

50. As the Appellant has not succeeded in relation to his preliminary application, the assessments in turn are considered below.

ANALYSIS

Assessment dated 2 August 2016

51. The assessment dated 2 August 2016 was raised by the Respondent on the basis that the Appellant was the beneficial owner of shares in XYL and that the payment of €1.1m received by the Appellant on 7 April 1999, represented the proceeds of the disposal of the Appellant's shareholding.

52. Until 5 March 1999, the Appellant was company secretary and director of XYL and while there was a legal requirement to disclose directors' interests in shares in documentation filed in the Companies Office, no interest on behalf of the Appellant was disclosed in the directors' report, in the audited accounts or in the annual returns. The report on consolidated financial statements for the year ended 31 December 1999, provided at paragraph 5: *'None of the directors (one of whom is also the company secretary) had an interest in the share capital of the company at any time during the financial year.'* The auditors of the company are listed as [tax advisors' name redacted].

53. The Appellant in evidence stated that he did not own or acquire shares in XYL at any time, that he did not pay money into any trust and that he did not make capital contributions to either XYL or ACL.

54. I find there is insufficient evidence in this appeal to allow me to conclude as a matter of fact that the Appellant *was* the beneficial owner of shares in XYL for the relevant tax year of assessment and that the payment received by him represented the proceeds of the disposal of the Appellant's shareholding.

Assessment dated 24 November 2016

55. The shares in XYL were held 20% by JK Limited and 80% by ACL.

56. On 4 March 1999, ACL, a non-resident company, made a gain in relation to the disposal of its shareholding in XYL. The shares in ACL were held by the non-resident discretionary trust.

57. The Finance Act 1999, and the enactment of sections 88 and 89 thereof, amended the Taxes Consolidation Act 1997, by introducing *inter alia*, a new section 590 and by the introduction of section 579A.

58. Section 89(2) FA 1999 (which enacted the new section 590 TCA 1997) provides: *'This section shall apply as respects chargeable gains accruing to a company on or after the 11th day of February 1999.'*

59. Section 590(13) TCA 1997 provides;

> *The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include trustees who are participators in the company, or in any company amongst the participators in which the gain is apportioned under subsection (12), if when the gain accrued to the company the trustees are neither resident nor ordinarily resident in the State.*

60. Therefore, the trustees will be treated as participators in ACL.

61. In accordance with section 590(4) TCA 1997 a participator in a company is treated as if part of the company's chargeable gain had accrued to the participator and under section 590(5), that part corresponds to the extent of the participator's interest in the company. These subsections provide as follows;

(4) Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person.

(5)The part of the chargeable gain referred to in subsection (4) shall be equal to the proportion of that gain that corresponds to the extent of the participator's interest as a participator in the company.

62. As a result, the chargeable gain accruing to ACL on the disposal of the shares in XYL is thus deemed to be the chargeable gain of the trustees in accordance with the provisions of section 590 TCA 1997. The Appellant's evidence in this case is that this gain was realised on 4 March 1999.

63. Section 579A TCA 1997 deals with the attribution of gains to beneficiaries. That attribution is provided for in subsections (4) and (5) as follows;

Subject to this section, the trust gains for a year of assessment shall be treated for the purposes of the Capital Gains Tax Acts as chargeable gains accruing in the year of assessment to beneficiaries of the settlement who receive capital payments from the trustees in the year of assessment or have received such payments in any earlier year of assessment.

The attribution of chargeable gains to beneficiaries under subsection (4) shall be made in proportion to, but shall not exceed, the amounts of capital payment received by them.

64. Section 579A(2) TCA 1997 as enacted provided;

(2) Subject to subsection (10), this section shall apply to a settlement for any year of assessment during which the trustees are, at no time, neither resident nor ordinarily resident in the State.

65. Section 579A(10) TCA 1997 as enacted, provided;

(10) Subsection (2) shall not apply in relation to any year of assessment beginning before the 6th day of April, 1999, and the references in subsection (4) and (5) to capital payments received by beneficiaries do not include references to any payments received before the 11th day of February, 1999, or any payments received on or after that date so

far as they represent a chargeable gain which accrued to the trustees in respect of a disposal by the trustees before the 11th day of February, 1999.

66. Subsection 10 was repealed by section 47(1) of the Finance Act 2002, with the provisions contained in that subsection incorporated in subsection (2) by way of amendment.

67. In this appeal, the evidence is that the chargeable gain was realised on 4 March 1999 and the capital payment was received by the Appellant on 7 April 1999. Thus both the chargeable gain and the capital payment arose post 11 February 1999. This gain is attributable to the trustees in accordance with section 590 TCA 1997.

68. Based on the evidence and on the provisions of sections 590 and 579A TCA 1997, the capital payment received by the Appellant on 7 April 1999, in relation to the chargeable gain accruing to the Trustees on 4 March 1999, falls within sections 590 and 579A TCA 1997, and the payment is therefore subject to chargeable gains tax for the tax year of assessment 1999/2000.

Section 955 TCA 1997

69. The Respondent in this appeal raised the amended assessment on 24 November 2016, approximately sixteen years after the relevant tax year of assessment, being the tax year ended 5 April 2000. The Appellant contended that the amended assessment was out of time in accordance with section 955 TCA 1997.

70. The Respondent claimed that there was an entitlement to raise an assessment in accordance with section 955(2)(b) TCA 1997, on the grounds that the return filed did not contain a full and true disclosure of all material facts.

71. The submissions of the Appellant sought to raise questions in relation to whether the Appellant could be considered to have been negligent in circumstances where he sought the advice of his accountant and where he relied upon legal advice received by a fellow beneficiary.

72. However, the wording of section 955(2)(b)(i) TCA 1997, does not refer to negligence nor does it require that a finding of negligence be made as a condition of its application. It relates to the matter of whether the chargeable person has made in the return, a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period.

73. In this appeal, the return for 1999/2000 failed to disclose the payment of €1.1m received by the Appellant on 7 April 1999. In these circumstances I am satisfied that the return did not contain *'a full and true disclosure of the facts'* in accordance with section 955(2)(b)(i) TCA 1997. As a result, the Respondent was not confined to the four year statutory period as regards the raising of the assessment and was not precluded from raising the assessment.

Determination

74. For the reasons set out above, I determine that the capital payment received on 7 April 1999, in relation to the chargeable gain accruing to the Trustees on 4 March 1999, falls within the provisions of sections 590 and 579A TCA 1997, and is subject to chargeable gains tax for the tax year of assessment ending 5 April 2000, and accordingly, I determine that the assessment dated 24 November 2016 shall stand.

75. I determine that the assessment of 2 August 2016 shall not stand.

76. This appeal is hereby determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

2nd day of October 2020

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