01TACD2021

BETWEEN/

[APPELLANT]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

[**1**] This is an appeal against a Notice of Amended Assessment to Capital Gains Tax for the year 2016 dated 27 February 2019. The amount of the chargeable gain is €305,021. The amount of tax payable is €100,237. A Notice of Appeal was received by the Tax Appeals Commission on 15 March 2019.

Background

[**2**] The Appellant was the Respondent in High Court family law proceedings commenced by his former spouse in 2012. The Appellant and his former spouse were legally represented in those proceedings. On [*redacted*] 2016, the parties signed an 'Interim Settlement'. On the same date, the High Court granted a decree of judicial separation to the Appellant and his former spouse and deemed the Interim Settlement to be part of the Order

of the High Court. The High Court proceedings were adjourned to a later date for case management.

[**3**] The following term was included in the Interim Settlement:

"*4. The [redacted] Portfolio and Bank a/c [redacted] to be liquidated and after costs associated with such liquidation the Bank [redacted] in the sum of approx. €358,000 to be repaid together with Bank [redacted] in the approximate sum of €64,166 and Bank [redacted] in the sum of €97,173 approximately. The parties to follow the advice of [redacted] in relation to the appropriate method of liquidation.*

From the balance funds, CGT liability to be discharged when due and from the approximate balance of €694,335 the following sums to be dispersed to the parties

(1) €50,000 (fifty thousand) to the Applicant for her personal use.

(2) €50,000 (fifty thousand) to the Applicant to discharge household and children expenses, same to be vouched by her in advance of the adjourned hearing.

(3) €50,000 (fifty thousand) to the Respondent for his personal use.

The balance funds to be transferred to an account in the name of [redacted] to be held in trust pending further order or agreement.

Liberty to apply in respect of these funds. This agreement is to be without prejudice to any argument as to the disbursement of these funds at the hearing."

[**4**] The [*redacted*] portfolio referred to in paragraph 4 of the Interim Settlement comprised shares in the joint name of the Appellant and his former spouse. The disposal of the shares took place during the period [*redacted*] 2016. The proceeds on the disposal of the shares was €610,043. The Appellant delivered a timely return of income, charges and

capital gains for the year 2016 on a joint assessment basis with his former spouse wherein he declared the disposal of shares for consideration of €610,043.

[**5**] The Collector General of the Revenue Commissioners commenced High Court debt collection proceedings on [*redacted*] 2017 in which the Appellant was named as the Defendant. The debt collection proceedings were instituted on foot of an assessment issued following the delivery of the joint return by the Appellant. The proceedings sought judgment against the Appellant for the capital gains tax on the proceeds of €610,043. The Appellant's former spouse was joined to the proceedings by order of the Master of the High Court. The matter was transferred to a sitting of the High Court on foot of a motion brought by the Appellant's former spouse and was heard before [*redacted*] in [*redacted*] 2019. The debt collection proceedings were ultimately withdrawn before the Master of the High Court in [*redacted*] 2019.

[**6**] A Notice of Amended Assessment to Capital Gains Tax for the year 2016 dated 27 February 2019 was issued by the Revenue Commissioners to the Appellant with a chargeable gain of €305,021. This represents one half of the proceeds on the disposal of the shares.

Legislation

[**7**] Insofar as relevant, section 28 of the Taxes Consolidation Act, 1997 provides:

"***28. Taxation of capital gains and rate of charge***

(1) Capital gains tax shall be charged in accordance with the Capital Gains Tax Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets.

(2) Capital gains tax shall be assessed and charged for years of assessment in respect of chargeable gains accruing in those years.

(3) *Except where otherwise provided by the Capital Gains Tax Acts, the rate of capital gains tax in respect of a chargeable gain accruing to a person on the disposal of an asset shall be 33 per cent, and any reference in those Acts to the rate specified in this section shall be construed accordingly*."

[**8**] Insofar as relevant, section 29 of the Taxes Consolidation Act, 1997 provides:

"***29. Persons chargeable***

...

(2) *Subject to any exceptions in the Capital Gains Tax Acts, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to such person in a year of assessment for which such person is resident or ordinarily resident in the State*."

[**9**] Insofar as relevant, section 31 of the Taxes Consolidation Act, 1997 provides:

"***31. Amount chargeable***

Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment after deducting –

(a) *any allowable losses accruing to that person in that year of assessment, and*

(b) *in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75).*"

[**10**] Insofar as relevant, section 532 of the Taxes Consolidation Act, 1997 provides:

"***532. Assets***

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

(a) *options, debts and incorporeal property generally,*

(b) *any currency other than the currency of the State, and*

(c) *any form of property created by the person disposing of it, or otherwise becoming owned without being acquired*."

Submissions on behalf of the Appellant

[**11**] In the Notice of Appeal given by the Appellant to the Tax Appeals Commission on 15 March 2019, the grounds for appeal are described as:

"*[Appellant] made a joint return on behalf of [Appellant] and [redacted] in 2016 on foot of a High Court Order of [redacted] 2016 (which has not been changed or varied) together with directions of [redacted] in the High Court. In breach of this High Court Order, [redacted] and her Solicitors refused to pay the capital gains tax, as ordered. [Appellant] copied the Revenue with this court order and all relevant correspondence. He took all possible steps to have the High Court Order enforced, and the CGT promptly paid. [Appellant] did not receive the proceeds from the share sales. Accordingly, [Appellant] should in law and equity, be assessed as zero for 2016*."

[**12**] In the Statement of Case provided by the Appellant to the Tax Appeals Commission on 25 September 2019, the relevant facts are described as:

"*[Appellant], a compliant taxpayer, made a joint return in respect of 2016 on behalf of [Appellant] and [redacted], from whom he separated by High Court Order in [redacted] 2016. The same High Court Order directed that capital gains tax will be paid from the proceeds of the shares sold. [redacted] directed that [Appellant] make a joint return, which he did, having fully briefed the Revenue. Neither the High Court Order nor [redacted] directions have been varied or changed in any way. In breach of this High Court Order, [redacted] and her Solicitors failed to obey this High Court Order by refusing to pay the capital gains tax, as instructed. [Appellant] vigorously pursued this matter, fully briefing the Revenue, and copying the Revenue with both the court order and all relevant*

correspondence. He took all possible steps to have the High Court obeyed, by having [redacted] and her Solicitors pay the CGT. As far as I am aware, the funds remain available. [Appellant] did not receive any of the proceeds nor did he crystallise any CGT liability, re the sale of these shares. Accordingly, [Appellant] should in law and equity be assessed as zero CGT liability for 2016."

[**13**] In the Statement of Case, the legal arguments are described as:

"*No capital gains tax liability can arise except where such CGT liability is crystallised and/or received. No taxpayer should be prejudiced for following a High Court Order and/or judicial directions in good faith. Any loss to the Revenue from the non-payment of CGT due can be, and could always have been, easily rectified by pursuing [redacted] and her Solicitors for the CGT unlawfully withheld, in breach of a High Court Order*."

[**14**] At the hearing, the Appellant stated that the [*redacted*] portfolio referred to in paragraph 4 of the Interim Settlement was a portfolio of shares in the joint names of the Appellant and his former spouse. The Appellant stated that he instructed [*redacted*] to sell the shares, which were sold in the period [*redacted*] 2016. The proceeds on the disposal of the shares was €610,043. The Appellant stated that he did receive the sum of €50,000 referred to at paragraph 4(3) of the Interim Settlement, which the Appellant stated was from funds held in a bank account rather than from the disposal of the [*redacted*] portfolio. The funds in the bank account arose from previous disposals of shares. The Appellant stated that he delivered a tax return on a joint assessment basis with his former spouse because he was directed by [*redacted*] in the High Court to deliver a joint return. The return was delivered in a timely manner and declared the disposal of shares for consideration €610,043. The Appellant stated that he proceeded to implement the terms of the Interim Settlement in good faith and dispose of the shares because he understood from the terms of the Interim Settlement and the Order of the High Court there would be no issue regarding the capital gains tax. The Appellant submitted that it was unjust and unfair that he was being pursued as it was the failure of his former spouse and her firm of solicitors to

implement the terms of the Interim Settlement and the Order of the High Court that caused the non-payment of the capital gains tax. The Appellant stated that, to his knowledge, the funds remain in an account in the name of [*redacted*], the firm of solicitors acting for his former spouse. The Appellant submitted that the justice of the situation should be considered, given that the Appellant acted at all times pursuant to the Interim Settlement and Order of the High Court. The Appellant submitted that the Appeal Commissioners should devise a form of wording which would ensure the payment of the capital gains tax by his former spouse and her firm of solicitors and thereby safeguard the position of the Revenue Commissioners.

Submissions on behalf of the Revenue Commissioners

[**15**] In the Statement of Case provided by the Revenue Commissioners to the Tax Appeals Commission on 16 July 2019, the relevant facts are described as:

"*The appellant separated from his spouse and as per the interim separation agreement dated [redacted] 2016 the joint [redacted] portfolio was to be liquidated. The CGT liability was to be discharged when due from these funds.*

Per the Appellant's Tax Return the [redacted] portfolio was sold between [redacted] 2016 and [redacted] 2016. The Appellant made a joint return in respect of himself and his former spouse for the tax year ended 31 December 2016. This assessment was amended on 27 February 2019 and issued in respect of the Appellant's portion of the disposal only.

As there was a disposal of assets the Appellant is a chargeable person under Section 29(2) TCA 1997 and is obliged to make a return under Section 959J TCA 1997. The appellant states in his appeal that he did not receive the proceeds from the share sales and accordingly should be assessed as Nil for the tax year 2016. Section 28(1) TCA 1997 states "Capital gains tax shall be charged in accordance with the Capital Gains Tax Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance

with those Acts and accruing to a person on the disposal of assets." It is the disposal of an asset that gives rise to the charge rather than whether proceeds have been received and a disposal of assets has taken place in this instance."

[**16**] At the hearing, the Revenue Commissioners submitted (i) the shares in the [*redacted*] portfolio were an asset (ii) the asset was held in the name of the Appellant and his former spouse (iii) there was a disposal of the asset in 2016 (iv) the disposal gave rise to a chargeable gain (v) the Appellant was the person chargeable and (vi) the amount of the chargeable gain accruing to the Appellant was €305,021. Accordingly, the Notice of Amended Assessment to Capital Gains Tax for the year 2016 dated 27 February 2019 should stand.

Analysis and Findings

[**17**] The charge to capital gains tax arises where there is a disposal of an asset giving rise to a chargeable gain. A person is chargeable to capital gains tax on chargeable gains accruing to that person in a year of assessment for which such person is resident or ordinarily resident in the State. In this appeal, it is not disputed that there was a disposal of shares giving rise to a chargeable gain. The Appellant submits that the charge to capital gains tax does not accrue to him as the capital gains tax was to be discharged in accordance with the terms of the Interim Settlement and it is the failure of his former spouse and her firm of solicitors to comply with the terms of the Interim Settlement that has caused the non-payment of the capital gains tax. The Appellant submits that he is not liable for capital gains tax as he did not receive the proceeds from the disposal of the shares. The Appellant submits that the firm of solicitors acting for his former spouse are in possession of the proceeds from the disposal of the shares from which the capital gains tax should be discharged.

[**18**] The Interim Settlement was structured as the disposal of the shares, the payment of the capital gains tax liability and the remainder funds being distributed between the parties

in accordance with a subsequent arrangement. The Interim Settlement expressly acknowledges that capital gains tax would follow the actions being taken under paragraph 4. The Interim Settlement was not structured in a way whereby the Appellant transferred the shares in the [*redacted*] portfolio to his former spouse, which may have brought into consideration the provisions of section 1030 of the Taxes Consolidation Act, 1997. This section provides that where a person disposes of an asset to his/her spouse as a consequence of an order made on or following a judicial separation a charge to capital gains tax does not arise unless the asset is part of the trading stock of a trade carried on by the spouse making the disposal. If the Interim Settlement had been structured whereby the Appellant transferred the shares in the [*redacted*] portfolio to his former spouse, the former spouse would have been the person chargeable on the entire proceeds on the disposal of the shares. However, the facts pertaining to the Appellant are that at the time of the disposal of the shares in the [*redacted*] portfolio, the shares were in the joint names of the Appellant and his former spouse. Therefore, the tax consequences on the disposal of the shares are considered in this factual context.

[**19**] The Interim Settlement makes clear that the capital gains tax arising on the disposal of the shares in the [*redacted*] portfolio was to be discharged from the balance funds. There is no discernible reason why the capital gains tax has not been so discharged. The Appeal Commissioners have no statutory authority to direct a payment of capital gains tax on foot of the terms of an Interim Settlement and Order of the High Court. The Law Society of Ireland are the regulatory body of the solicitors' profession in Ireland. The Legal Services Regulatory Authority deals with complaints against solicitors. I accept the evidence of the Appellant that he signed the Interim Settlement on the understanding that there would be no issue regarding the capital gains tax. I accept the evidence of the Appellant that he has acted in good faith and has actively pursued the matter with his former spouse and her firm of solicitors. However, the functions of the Appeal Commissioners are prescribed by statute and include, as described in section 6 of the Finance (Tax Appeals) Act, 2015, '*the establishment of the correct liability to tax of appellants*'. As regards appeals before the Appeal Commissioners, the burden of proof rests on the Appellant who must prove, on the

balance of probabilities, that the relevant tax is not payable. In the High Court judgment of ***Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners*** [2010] IEHC 49 (at paragraph 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*". It was also stated by Charleton J. that "*Revenue law has no equity*."

[**20**] While I am sympathetic to the position of the Appellant, the statutory provisions must be construed with the facts pertaining to the Appellant. Accordingly, I find the Appellant disposed of an asset giving rise to a chargeable gain and is the person chargeable on the gain of €305,021. No exemptions, reliefs or credits reduce the capital gains tax charged on the Appellant. The Appellant has not discharged the burden of proof.

Determination

[**21**] Based on a review of the facts and a consideration of the evidence, materials and submissions of the parties, I determine that the Notice of Amended Assessment to Capital Gains Tax for the year 2016 dated 27 February 2019 shall stand. This appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

21 OCTOBER 2020