TAX APPEALS COMMISSION

01TACD2022

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against amended assessments to income tax against the Appellant for the tax years 2012 and 2013, dated 25th June 2015. The additional income tax liabilities for 2012 and 2013 are €65,032 and €29,907 respectively. The Appellant appealed both amended assessments.

2. The Appellant, a general medical practitioner, asserted that he transferred his medical practice to an unlimited company, [redacted], (the Company) in November 2011 for a consideration of €416,773. However the Respondent disagreed that such a transfer took place and raised amended assessments on the basis that no legally effective transfer of the business took place in 2011, and, therefore, that the General Medical Scheme (GMS) income from patients under the contract with the Health Services Executive (HSE) remained personal to the Appellant as his share of the partnership income for the years 2012 and 2013 and should be directly assessed on the him.

Issue

3. The issue to be decided in this appeal is whether the Appellant should be assessed personally on the income derived from his contract with the HSE on the provision of GMS services to medical card patients or whether such income was properly assessed on the Company.

Legislation

4. The charge to tax under Schedule D is governed by TCA, section 18(1) and relates to:

> *"(a) the annual profits or gains arising or accruing to —*

(i) *any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere,*
(ii) *any person residing in the State from any trade, profession, or employment, whether carried on in the State or elsewhere,*
(iii) *any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and*
(iv) *any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State, …"*

5. TCA, section 52 TCA identifies the person chargeable to tax and states:

> *"Income tax under Schedule D shall be charged on and paid by the persons ... receiving or entitled to the income in respect of which tax under that Schedule is directed in the Income Tax Acts to be charged."*

Material findings of Fact

The Appellant

6. Based on the Appellant's evidence, I have made the following material findings of fact:

(a) After graduating from medical school in [redacted], he worked in various hospitals in the UK, New Zealand and the Channel Islands, before returning to the [redacted] to train as a general practitioner.

(b) He moved to Ireland in 20[redacted] and worked for several months in a [redacted] GP practice. He is a specialist General Practitioner and is registered with the Irish Medical Council. Later in 20[redacted], he was employed by [redacted] in a [redacted] GP practice as a salaried doctor. After a year in that practice, he was offered and accepted the opportunity of working in a partnership with [redacted]. As such the Appellant could either buy into the practice at cost of €220,000 to €250,000 or by working additional hours for a period

of 4 years until he worked up parity. He chose the latter and commenced in partnership with [redacted] 1st January 20[redacted]. A partnership agreement was executed and provided for the manner in which the parties would conduct their affairs. The partnership also rented the premises from [redacted] and his wife.

(c) Thereafter he applied for and obtained a new GMS number with the HSE to become entitled to treat medical card patients from the HSE panel. As it was a new panel, the Appellant started with no patients but built up a patient list over the years.

(d) The Appellant signed an agreement with the HSE on 14th April 20[redacted]. The following provisions are relevant:

"The medical practitioner shall provide services or arrange for the provision of services in accordance with these terms and conditions in the schedule to this agreement to persons entitled to services under Section 58 of the Act.

….

I undertake, as long as the agreement is in force, not to change my places of attendance or days or hours of attendance so as to materially affect the convenience of my patients in the area in which I am practising on entering into the agreement or to reside beyond reasonable access to the places of attendance listed above."

….

The number of patients whose names may be placed on the list of the practitioner, or in the case of a practitioner who has agreements with two or more Health Boards, the total of the numbers which may replace on the lists for those Boards shall not exceed 2,000, save for the Board or the Boards, in exceptional circumstances, after consultation with the IMO, decide to apply a higher limit."

(e) All of the income paid by the HSE in respect of the Appellant's patients was paid into the partnership bank account.

(f) In 20[redacted], the Appellant was advised to conduct his practice through an unlimited company on the basis that more funds could be retained in the company and used to develop the medical practice. He was also cognisant of the greater scope to fund a pension through a corporate structure. A Mr Paul [redacted] from [redacted] and [redacted] Consulting advised and assisted the Appellant in setting up an unlimited company, [redacted] Unlimited (the Company). However the Appellant was fully aware that he was still primarily responsible for the care of his patients. The Company commenced business on 1st November 20[redacted].

(g) [redacted] also incorporated an unlimited company whereby he would retain the GMS list but the income from the practice would be paid into a company. However both [redacted]'s and the Appellant's Company continued to operate in a format similar to the old partnership agreement.

(h) Company accounts were prepared for the Company and filed with the Companies Office. The tax reference number on the professional fees withholding tax certificates furnished to the HSE was that of the Company.

(i) A new bank account was also set up and the HSE and insurance companies were informed of the new payment details. The practice letterhead changed and private patients were informed that payment should be paid to "[redacted]" and not the previous entity, [redacted]. While the Appellant notified the Respondent of his cessation of practice and the commencement of the Company, the HSE was only informed of the change in bank details into which fees from his GMS list should be paid. The Appellant's GMS number continued to apply to payments from the HSE.

(j) The Appellant placed a value €416,773 on transfer of his practice to the Company and paid capital gains tax of €103,875 on a gain of €416,773. The funds to pay the tax were borrowed from a bank. The transaction was reflected in the Company accounts as goodwill with a corresponding debt to the Appellant which he drew down over the proceeding 2 years. The Appellant did not claim the relief from capital gains tax on the transfer of a business to a company pursuant to TCA, section 600.

(k) In the event of the Appellant's unavailability, another qualified doctor or locum, with the Appellant's permission, could treat one of his patients. In such situations, the HSE would pay the Appellant who would remunerate the locum for the medical services provided to his patient.

(l) The Appellant confirmed that he does not own the GMS list of patients nor could he sell that list as it is a patient's choice whether he or she wishes to be treated by a new doctor under a different GMS number. However in practice, there is usually some form of succession planning so that the GMS list could be transferred to a different doctor.

(m) In 2017, the Appellant and [redacted] were approached by [redacted] Health Primary Care ([redacted]) to acquire their medical practices. [redacted] had acquired about 60 medical practices covering approximately 10% of the Irish population. A new Partnership Agreement was drawn up between the Appellant and [redacted] personally, both of their companies and [redacted]. While [redacted] sold his practice in 2017, the Appellant declined the initial offer to sell his practice however was granted an option to sell his practice to [redacted] when aged 60 as he knew that he was going to work for another number of years and wanted time to establish the practice. [redacted] accepted the offer of €450,000 from [redacted].

(n) The agreement for the "Sale of Equity" dated 21st September 2017 by Dr [redacted] [redacted] Unlimited (DPH) and [redacted] "*(the Practitioner)"* to [redacted] was produced in evidence and is indicative of the agreement that [redacted] would use in acquiring the Appellant's interest in his practice. The relevant parts of the that Agreement are as follows:

"Definitions

"Equity" means the entire equity interest of the Practitioner in the Practice including, but not limited to, the items described in clause 2.2;

..

"Practice" means the medical practice and business carried on by the Practitioner which said practice has been, up to the Completion Date carried out from the Existing Premises and the [redacted] Premises;

"Practice Assets" means all property, rights and assets (or rights in them) of the Practice.

….

2. *SALE OF EQUITY*

2.1.1 DPH agrees to sell as legal and beneficial owner to [redacted] Health who agrees to purchase all right, title and interest in the Equity for the Consideration (with a view to maintaining the Practice as a going concern) with effect from the Completion Date and subject to the terms and conditions set out herein.

2.1.2 ….

2.1.4 [redacted] Health, DPH and the Practitioner shall use reasonable endeavours (so far as lies within their respective powers) to procure that the Conditions are satisfied as soon as practicable.

2.1.5 …..

2.1.7 DPH and the Practitioner hereby covenant with and undertake to [redacted] Health that during the period up to and including the Completion Date:

(i) they shall not without the prior written consent of [redacted] Health dispose or attempt to dispose of any interest in the Practice or grant

any option over, or mortgage, charge or otherwise encumber or dispose of any of the Practice Assets;

(ii) *they shall not without the prior written consent of [redacted] Health enter into any service contract or equipment lease or hire purchase agreements;*

(iii) *they shall not without the prior written consent of [redacted] Health, engage additional employees in the Practice or amend the terms and conditions of any existing Employees of the Practice;*

(iv) *they shall procure that until Completion, the business of the Practice shall be carried out in its ordinary and usual course; and*

(v) *engage with [redacted] Health and provide all reasonable information and assistance in advance of Completion to enable an orderly handover of the Practice.*

…..

2.2 The Equity

The Equity includes, but is not limited to, DPH's entire interest and that of the Practitioner (to the extent of any interest he may have) in the Equity in the following:

2.2.1 the goodwill, custom and connection of the Practitioner and DPH in relation to the Practice, including the exclusive right for [redacted] Health and its successors and assigns to represent themselves as carrying on the Practice in continuation of and in succession to DPH and the Practitioner and including any and all rights to the revenues, profits and cash flows of the Practice;

2.2.2 the benefit of all patient custom, patient lists, records and work in progress of the Practice;

2.2.3 the benefit (in each case, so far as DPH can assign the same and subject to the burden thereof) of the Contracts together with all concomitant cash flows;

2.2.4 the Practice Assets;

2.2.5 any amounts of withholding tax or equivalent tax credits in respect of which the Practitioner or DPH shall be entitled to a credit in his tax returns but which relate Practice income referable to work carried out or to be carried out at any time after the Completion Date;

2.2.6 all books, records, manuals and other materials relating to the Practice; and

2.2.7 all Intellectual property rights (including without limitation all registered and unregistered trademarks, names, domain registrations and applications for the foregoing) and other intangible assets of the Practice.

….

3.1 Purchase Consideration Payments

Subject always to clause 3.3, the Consideration for the purchase of the Equity pursuant to the terms of the Agreement shall be the maximum aggregate amount of €450,000 as may be adjusted in accordance with clause 3.2 and shall, unless otherwise agreed between the Parties, be payable to DPH by [redacted] *Health as follows:*

3.1.1 €115,000 shall be payable on the Completion Date; and

3.1.2 subject to clause 3.2, fifteen individual instalments of €22,333 (the "Instalments", each an "Instalment") which individual Instalments shall be payable quarterly commencing on the first Instalment Payment Date.

DPH hereby consents to the deduction by [redacted] *Health of €10,000 from each Instalment in respect of withholding tax credits accruing in the names of*

Dr [redacted] and/or DPH in connection with deductions made to GMS payments in satisfaction of their obligations under clause 2.4.5. The parties agree to review this figure annually with a view to adjusting as appropriate.

3.2 Purchase Consideration Adjustments

3.2 .1 As soon as practicable following each Assessment Date, and in any event within 30 days of each Assessment Date, [redacted] Health shall procure the preparation of management accounts of the Practice and the calculation of Assessment Revenue. [redacted] Health agrees to provide a copy of the relevant management accounts to the Practitioner as soon as reasonably practicable following the preparation thereof.

….

3.3 Termination

Subject to clause 3.5.2, in the event that there has not been a successful transfer of the Practitioner's GMS list to a doctor nominated by [redacted] Health, [redacted] Health shall be entitled to terminate this Agreement by notice in writing and no further Instalments shall be payable by [redacted] Health pursuant to this Agreement. Termination in accordance with this clause 3.3 shall not affect the accrued rights and obligations of the parties at the date such notice of termination (the "Termination Date") HOWEVER in the event of termination pursuant to this clause 3.3 the Equity shall revert to DPH with effect from the Termination Date provided that the Practitioner and DPH shall indemnify [redacted] Health In relation to all liabilities or obligations relating to the Practice, Practice Assets, or Practice employees which arise, or accrue or are referable to the period following the Termination Date, including any and all liabilities in respect of PRSI, PAYE, VAT other Taxation in respect of the Practice, the Practice Assets or the Practice employees relating

to the period following the Termination Date and including any liabilities in respect of such transfer of the Equity to DPH.

3.4 Successful transfer of GMS list

For the purpose of clause 3.3, there shall be deemed not to have been a successful transfer of the Practitioner's GMS list in circumstances where:

a) [redacted] Health shall have requested the Practitioner to transfer his GMS list to a nominated doctor;

b) the GMS list is not successfully transferred to the nominated doctor or other [redacted] Health practitioner and the HSE advertise the GMS list; and

c) a doctor nominated by [redacted] Health having applied for but has not been successful in winning the GMS list,

provided always that if in excess of 80% of the patients on the list as at the Completion Date transfer, a successful transfer shall be deemed to have been achieved.

4.5 Transfer of Patients

Following the Completion Date the Practitioner and DPH undertake:

4.5.1 to use their best endeavours to ensure that the Practitioner's patients, whether public on GMS list or private, transfer to another doctor or doctors working in the Practice, as and when directed by [redacted] Health;

4.5.2 if requested by [redacted] Health, to use their best endeavours to ensure that the Practitioner' patients, whether public on a GMS list or private,

move to any new premises to which the Practice may be relocated at the discretion of [redacted] Health following Completion; and

4.3.3[sic) to co-operate with [redacted] Health in notifying the patients of any change of data controller and obtaining any necessary consents.

6.2 Passing of Goodwill

Without prejudice to clause 6.1, DPH hereby assigns, with effect from the Completion Date, to [redacted] Health the goodwill, custom and connection of the Practice and the exclusive right for [redacted] Health and its successors and assigns to represent that the Practice as hereafter carried on by [redacted] Health or its successors and assigns is and has been carried on in succession to DPH and the Practitioner

(o) On 21st September 20[redacted], [redacted] and the Appellant and their respective companies entered into a partnership arrangement with [redacted]. The agreement provides, *inter alia*, that Appellant and [redacted] work 8 medical sessions a week and are entitled to an annual drawing of €150,000 and €90,000 respectively. The agreement also provides [redacted] with an entitlement to 10% of the 'Total Medical Practice Revenue' in respect of managing the practice. Furthermore, the distributable profits of less than €300,000 are to be shared equally by the Company and [redacted]. Where profits are in excess of €300,000, the profit share of [redacted] and the Company each reduce to 48% with the Appellant and [redacted] becoming entitled to the remaining 4% of the profit shared equally.

(p) [redacted] also wanted to acquire the expertise of the Appellant.

(q) The 2005 partnership and 2011 arrangements between the Appellant and [redacted] was dissolved by Deed of Dissolution of Partnership on 1st November 20[redacted].

Witness for the Appellant – Mr [redacted], Commercial Director, [redacted]

7. Based on Mr [redacted]'s evidence, I have made the following material findings of fact:

(a) He is the commercial director of [redacted] and his role is to acquire GP practices and to grow the network of practices. [redacted] is an Irish provider of primary care services with a network of 60 GP practices around the country. [redacted]'s main areas of operation are the GP services, medical recruitment and ancillary care to GP services.

(b) When acquiring a GP's practice, [redacted] forms a partnership with that GP and requires the GP to continue in the partnership for a period of 4 years after which the GP could retire. Over the period of 4 years, [redacted] manage the practice so that patients who are attending the retiring doctor migrate their care to another doctor in the practice. The management of that succession ensures continuity of care in the practice which is part of [redacted]'s core operations.

(c) The agreements with the GP's are always governed by an acquisition agreement and a partnership agreement with the GP whereby [redacted] manage the practice over the proceeding years. As such [redacted] adopts the role of managing partner and the doctor plays the role of a clinical partner. The obligations of the partners are set out in the partnership agreement whereby the doctors provide the clinical care and the managing partner manages the practice, ensure high standards of quality assurance, data protection, operational efficiency and provision of IT services.

(d) The critical component in the valuing a GP practice is the cashflow generated by the practice. There are other factors such as the need to upgrade the property, and issues associated with recruiting doctors. A GMS contract in an area of high deprivation or socioeconomic challenges or where there is a lot of young people with GMS cards is regarded as a very low yielding cashflow list, as opposed to a list with private patients and an elderly population over 70 gives rise to a much higher yielding cashflow list. Therefore the cash flow generated by a practice is key.

(e) The employees that previously worked with the GP practice transfer to the new partnership arrangement and are provided with new contracts which reflect the existing terms of their previous employment.

(f) The GMS contract exists between the doctor and the HSE and it cannot be easily manoeuvred or transferred to another doctor and can only arise with the patient's consent. As such [redacted] align the proposal to acquire a GP practice to reflect the timeframe involved in recruitment and ensuring that it has good doctors in place to manage the transmission. The underlying principle is to capture the relationship that the doctor has built up with a patient base and the monetisation that comes off that which is not something that can be easily transferred so it requires a number of years of engagement and working together to ensure that the benefit remains within the practice in the longer term.

(g) The GMS list is attached to a doctor and there is an obligation on that doctor to provide care to those patients within the practice. However while the relationship with the HSE is driven by the list attached to that doctor, the reality of the position is that the care is provided by the practice. The income that comes from the GMS list is lodged into the practice partnership account.

(h) There is a limit under the HSE guidelines which allow patients to transfer from one doctor's list to another. That is usually 8% of a list on a monthly basis and therefore it would take a year to transfer a list within a practice. There is an engagement process to inform and thereafter derive consent to transfer from one doctor to another doctor in the practice.

(i) When acquiring a GP practice, [redacted] usually requires a 4 year period to effect the seamless transfer of a retiring doctor's GMS list. [redacted] also needs to recruit good doctors that are going to settle longer term in the practice. As such the whole process including migrating patients can be "*quite slow*". It usually takes between 10 to 15 years before [redacted] derives a return from its investment.

(j) [redacted] as the managing partner take a monthly drawing of 10% of turnover in return for the services that are provided such as HR support, recruitment, training, Garda vetting, data protection and IT services. [redacted] is also entitled to a share of the profit. Both the Appellant and [redacted] are paid a monthly drawing of €12,500 and €7,500 respectively with the Appellant's company and [redacted] entitled to a share in the partnership's profits. Where gross profits exceed €300,000, both the Appellant and [redacted] each are entitled to a 2% share with the remaining 96% split between [redacted] and the Company equally.

(k) In the performance of medical services, Mr [redacted] was unable to explain why [redacted] had an annual drawing entitlement of €90,000 while the Appellant was entitled to €150,000.

(l) In acquiring [redacted]'s interest in his practice, an initial lump sum of €150,000 was paid followed by 15 quarterly payments of €22,333. The payments are staged to ensure that the retiring doctor is motivated and that his list is seamlessly transferred to another doctor nominated by [redacted].

(m) [redacted]'s financial statements for 2018 reflected the acquisition of 40 GP practices at a cost of €7.8 million and which was described in those accounts as goodwill.

(n) While the value of a practice can be based on a proportion of turnover, it would never be the starting point and it would generally not be a consideration of what [redacted] does. The single driver is the cash flow that is generated from a practice rather than the turnover generated by a practice.

(o) [redacted] does not acquire physical assets of a practice such as cars, fixtures and fittings, IT systems or buildings. The acquisition of a GP's practice entails an acquisition and forming a partnership with that GP and over a period of time it would acquire the GP's practice.

Witness for the Appellant - Mr [redacted] – [redacted] Partners

8. Based on Mr [redacted]'s evidence, I have made the following material findings of fact:

   (a) He was the accountant for the Appellant, his company and the partnership up to the time of its dissolution in 2017.

   (b) He prepared valuations of the Appellant's interest in the partnership based on turnover and net profit and placed a value on the practice at €416,773 based on the practice turnover.

   (c) The accounts of the company reflected the purchase of the practice as goodwill and was written of immediately.

   (d) He did not read the expert evidence reports of the Respondent in relation to the concept of goodwill as he had his own "*opinion on this*".

   (e) He was aware that the GMS contracts are personal to the medical practitioner and it was not within the competency of a doctor to transfer the GMS list.

   (f) He approached [redacted] to establish whether it had an interest in acquiring the medical practices of the Appellant and [redacted].

Witness for the Appellant - Mr [redacted] – [redacted] and [redacted] Consulting

9. Based on Mr [redacted]'s evidence, I have made the following material findings of fact:

   (a) He is an accountant and tax advisor and offers business consultancy to a number of different businesses including accountancy, tax advice and other business advices.

(b) He was introduced to the Appellant in 2011 to outline the possibilities of setting up a company structure to facilitate the transfer of practice income from the Appellant to a company. Mr [redacted] also undertook a similar exercise for [redacted].

(c) Having conducted a valuation, he prepared a one page valuation report and concluded:

"[redacted] Dr. [redacted] and Dr. [redacted], 2010 practice fee income as per accounts, €833,546; percentage of the turnover used to calculate goodwill, 100%, goodwill valuation, €833,546, 50% split apportioned to each Doctor, €416,773, annual exemption, €1,270; date of acquisition 1/11/2011; CGT rate 25% and the capital gains tax 103,875."

(d) Based on his experience and in consultation with the Irish Medical Organisation, the use of a multiple of turnover within the practice was the most appropriate method of valuation.

(e) The HSE were not specifically informed that the Appellant was conducting his practice through a corporate structure.

(f) Prior to 1st November 2011, the income of each partner was reflected in the partnership accounts and profits shared equally. After the 1st November, the income from each of the doctors was reflected in their company accounts and the expenses were apportioned accordingly.

(g) He confirmed that there was a difference between transferring the practice and transferring the income. In the Appellant's case, only the income of the practice transferred to the company.

(h) The income of the Appellant transferred to the new company on 1st November 2011. The Appellant continued to provide medical care to his patients and the GMS list remained in the Appellant's name.

(i) To avoid an exposure to Stamp Duty, there was no written contract transferring the Appellant's interest in his practice to the Company.

Witness for the Respondent - Mr [redacted] – [redacted] [redacted], Chartered Accountants

10. Based on Mr [redacted]'s evidence, I have made the following material findings of fact:

(a) He is a chartered accountant having trained in a large accountancy firm. In 1998 he worked for a UK based multi-national in the corporate office buying and selling companies. He is currently the advisory partner in [redacted] working in transaction type work with significant experience in valuing medical practices for the Respondent. He was engaged by the Respondent to consider the valuation of the Appellant's practice.

(b) In accounting terms, goodwill is the excess of the purchase price over the fair market value of a business's identifiable assets and liabilities. Goodwill is created when one entity acquires another for a price higher than the fair market value of its assets.

(c) A common concept applied in the valuation of businesses and shares is the fair/market value concept where goodwill is an element of this value. Market value is the amount at which the business/shareholding could be transferred between willing parties. The concept assumes that the transaction is an arm's length transaction. The objective of a market value measurement is to estimate the price at which an orderly transaction to sell the asset or to transfer the liability would take place between market participants at the measurement date under current market conditions at that date.

(d) To be able to sell any asset there must be a market for it. Markets establish the going rates for goods and other services, which sellers determine by creating supply and which buyers determine by creating demand. In arriving at the goodwill valuation, no reference was made by the Appellant to similar

transactions. It is standard practice for professional valuers, be it for property or any other assets, to refer to similar transactions when estimating value. Such references were absent in the [redacted] and [redacted] Consultancy valuation. The goodwill valuation working of 2011 simply calculated 100% of the practice income per the 2010 accounts of €833,546. The accounts provided for 2010 showed income of €941,719 which is €108,173 higher than the figure used for the calculation. The income for 2010 was considerably higher than prior years, it was possible that some unclaimed income from prior years was included in the 2010 accounts and this may have been adjusted for before the goodwill was calculated.

(e) GP practices change hands either on the retirement of a GP or on the admission of a new GP to an existing practice but the level of activity in the market in 2011 had reduced significantly as a result the introduction of the Financial Emergency Measures in the Public Interest Act (FEMPI) 2009.

(f) Mr[redacted]'s has had experience of a sole trader GP practice where the existing GP was planning to retire and the practice was joined by a new GP who made a payment in respect of goodwill. The turnover of the practice was in the region of €400K and it was an urban practice. The new GP joined the practice in 2016 and a formal agreement setting up a new partnership was drawn up. The terms of the agreement stated that the goodwill was valued at €60,000, 50% to be paid by the new GP on signing the agreement and 50% on the retirement of the original GP. The original GP was to receive 50% of the partnership profits until retirement at the end of the year. This was an arm's length transaction.

(g) The economic climate in 2011 was very poor. The Troika came to Ireland on 28th November 2010 and the economic conditions that lead to the IMF/EU/ECB intervention were addressed with the implementation of far reaching austerity measures and cuts to government expenditure. The sovereign and financial crisis spilled over into the real economy through tougher credit supply conditions being imposed on potential borrowers. The credit bubble of the previous decade created a large and debilitating debt overhang in the Irish economy which meant

credit supply for SMEs was limited and difficult to access. Obtaining bank finance for a purchase of this kind would have required the bank standard of a 70% loan to value ratio which would be very difficult and this was unquestionably the case in 2011 when the prevailing economic conditions were worse than they are at present.

(h) The negative economic climate put a damper on buying and selling activity in the sector. Even if it was established that the goodwill of this trade was marketable the likelihood of another GP putting a value on it at the time was negligible.

(i) It is highly irregular to structure the business with five employees employed by [redacted]'s company and one employee in the Appellant's company when the goodwill of the partnership was split 50/50 on incorporation. This could only adversely affect any valuation and make it difficult to find a purchaser.

(j) Goodwill was all written off in the first year of trading on a "prudence" basis – that lead to questioning the value of goodwill at the transfer date. Had the practice or part of the practice had been sold on the open market to a suitable qualified person, in the prevailing market conditions in 2011 an expected value would have been in the region of €90,000, therefore the Appellant's 50% share would have been worth in the region of €45,000. In fact, the location is non-urban and it would have been difficult to find a buyer, so the value of €45,000 was optimistic.

(k) With regard to the sale of [redacted]'s practice in 2017 to [redacted], Mr [redacted] regarded the initial payment of €150,000 and the instalment payments of €22,333 as income replacement payments compensating [redacted] for the loss of profit share under the new agreement. The payment for goodwill was not possible to identify separately.

(l) The arrangement between [redacted] and [redacted] resulted in a reduction in [redacted]'s annual income from €184,000 to €90,000. [redacted], by providing management services received €77,000 plus a share of profits which would

substantially fund the cost of the initial payment of €115,000 paid to [redacted] in year one.

Witness for the Respondent – Professor [redacted]

11. Based on Professor [redacted]'s evidence, I have made the following material findings of fact:

    (a) Professor [redacted] was the [redacted] at [redacted] and [redacted]. He has thirty years' experience as an accounting educator and is an expert on both International and US GAAP. He has worked extensively on valuation issues, accounting for mergers and acquisitions, and have supervised over 1000 valuation projects.

    (b) His role as an expert was to consider the valuation and existence of goodwill in relation to the disposal of the Appellant's practice in 2011 to a company whereby the profits of the practice were reported through an unlimited company and thereafter consider accounting for goodwill.

    (c) It was important to establish whether there was a disposal of a business as the accounting rules state a business has to be acquired in order to consider accounting for goodwill. So goodwill can only arise when a business is purchased. So the first prerequisite for booking goodwill is to establish whether a business was sold. However it was unclear whether the Appellant sold a business in or around 31st October 2011 to a company.

    (d) Rather the transaction undertaken by the Appellant in 2011 was an assignment of his practice income to a company and that did not constitute the sale of a business. As such, the transaction was an assignment of income streams to a shell company. The instruction to permit income to accrue to a separate entity does not constitute the acquisition of a business. The shell entity does not control anything and does not own an asset. It only gets to control an asset as cash goes into that entity.

(e) Accounting rules provide that there is a common controlled transaction where there has been no change in the ultimate beneficiaries of a bundle of assets. In such incidences, it cannot be said that an actual acquisition took place. As such he did not believe that the transaction that took place in October 2011 constituted the transfer of a business as it is understood under accounting standards.

(f) The evidence of the Appellant's expert witness on valuations was disappointing as there was very little sense of observable market data informing the valuations. The basis of a valuation is to maximise the use of observable market data.

(g) Under general accepted accounting principles '*Internally generated intangible assets'* such as patents, intellectual property, customer lists, things of that nature, if internally created within an enterprise, should not be recognised. Therefore no asset should be booked on the balance sheet for those items and there is a prohibition on the recognition of an internally generated goodwill. The only type of goodwill from an accounting perspective is that of purchased goodwill. 'Purchased goodwill' is goodwill that is established as a result of the purchase of a business accounted for as an acquisition and represents the difference between the cost of the acquired business and the aggregate of the fair values recorded for the identifiable assets and liabilities acquired. Therefore goodwill is the amount of consideration for the purchase of a business that exceeds the value of identifiable net tangible assets.

(h) Mr. [redacted]'s valuation was based on the idea that one can place income streams into a shell company and then use some sort of multiple applied to those income streams in some way to determine something called goodwill does not make sense.

(i) The auditor of the company, Mr [redacted] should have considered whether a business changed hands and whether there was a common control transaction. These issues were not considered.

(j) The evidence of Mr [redacted] was that the main asset [redacted] acquires is the GMS list, the list of customers that are associated with a practice. [redacted] use a very sophisticated form of contracting to ensure the successful transition of a GMS list from one individual to another individual. To contrast that with the level of documentation considered in Mr. [redacted]'s evidence, which was simply that two income streams are put in a shell company. Such arrangements do not constitute a transfer of a business.

(k) The transaction involving [redacted] and [redacted] in 2017 was a very complex transaction. To merely characterise it as it was a purchase of a business would be wrong as it was the setting up of a partnership, a dissolution of previous partnership, and an acquisition agreement. It required that [redacted] work in the new partnership arrangement for a period of 4 years. As such the [redacted] arrangements were quite complex transactions and a very different transaction to the transaction arrangement undertaken by the Appellant in 2011.

Mr [redacted] – HSE

12. Based on Mr [redacted]'s evidence, I have made the following material findings of fact:

(a) There are three kind of contracts under the General Medical Services scheme:

(i) the 1972 contract which was amended in 1989 by agreement to introduce a new fee system;
(ii) the GP visit card contract which was introduced in 2005 and
(iii) the under six contract which was introduced in 2015.

(b) The GMS contracts are with natural persons who are registered medical practitioners. The 2012 Act requires that every holder of a GMS contract has to be on the specialist register with the Medical Council as a general practice

practitioner. The HSE does not have GMS contracts with either partnerships or entities.

(c) The statutory regulatory framework for pharmacies is significantly different to the regulatory framework that applies to medical practitioners. The 2007 Pharmacy Act provides for the registration and regulation of individual pharmacies and also pharmacy businesses and companies. A similar provision does not exist in the Medical Practitioners Act of 2007.

(d) It is not unusual for GPs who are in partnership, to have a shared bank account. The HSE would be notified of the existence of such an account and would facilitate the payments accordingly. However and notwithstanding the partnership arrangement, the GMS contracts are with the individual GPs.

(e) Clause 12 of the GMS contract with a GP provides:

> *"The medical practitioner shall themselves normally provide in person services in this agreement but may do so through a deputy who shall be a registered medical practitioner."*

(f) That clause facilitates a GP on leave, sick leave or involved in other activities, to appoint a locum or deputy in to cover for them. However under the contract with the HSE, the contract holder carries the clinical responsibility for the patient on their list. It is also permitted to allow another doctor in the practice to see a patient for a specific service but the expectation is that the principal contract holder would ordinarily see the patient for his/her normal routine medical treatment. Also there may be another doctor in the practice who had a special interest in a speciality who could see that doctor's patient.

(g) The GMS list belongs to the doctor however there are certain provisions to cover situations where for instance a partnership ends for whatever reason such as the death or retirement of a partner or where doctors agree to dissolve the partnerships to allow that doctor’s panel to be dispersed but it is ultimately a

matter for the HSE. If the vacant panel was quite small as a result of a partner leaving, the HSE may permit the remaining partner to take on that panel. However, if a panel is above a certain threshold, the HSE could either insist on the doctor taking on a new partner or alternatively the panel could be allocated elsewhere.

(h) There are certain times where the partnership confers benefits to the remaining partners in terms of the succession and continuing the partnership beyond the departure of one of the members. But again the GMS list can only be assigned to an individual doctor.

Appellant's Submissions

Incorporation and Transfer of Business

13. On the 1st November 2011 the Appellant transferred his practice to a Company. The Respondent did not accept that such a transfer took place and assessed the Appellant personally in respect of the practice income that had been returned by the Company. The Appellant has appealed this schedule D assessment.

Burden of Proof

14. In *Brady (Inspector of Taxes) v Group Lotus Car Corporation plc* [1987] STC 635 Mustill LJ stated at 642:

> *" It has been clear law binding on this court for sixty years that an Inspector of taxes has only to raise an assessment to impose on a taxpayer the burden of proving that it is wrong".*

15. In *Menolly Homes Limited v The Appeal Commissioners and The Revenue Commissioners* [2010] IEHC 49 Charlton J stated at 22:

"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer."

16. Although the above statement is not strictly correct it does apply where an assessment has been raised. There are many appeals where the burden of proof rests with the Respondent, in particular appeals where there is no assessment.

17. The cases cited above are binding on the Appeal Commissioner. Appeals are decided on the balance of probabilities having heard the evidence.

Evidence

18. The evidence on behalf of the Appellant is overwhelming and includes the following:

- Sworn evidence of the Appellant
- Sworn evidence of Mr [redacted] accountant for the Appellant and auditor for [redacted] Unlimited Company
- Sworn evidence of Mr [redacted] consultant and valuer.
- Certificate of incorporation dated 20 September 2011
- Statutory accounts of [redacted] Unlimited Company
- CGT return on Form 11 2011 showing the disposal.
- CT returns in respect of [redacted] Unlimited Company
- Dissolution deed dated 1st November 2017 where the Partnership is dissolved
- Sale agreement where [redacted] disposed of his incorporated practice to [redacted] Health
- Purchase offer for the Appellant's incorporated practice.
- Sworn evidence of Mr [redacted] [redacted] of [redacted] Health in relation to the purchase of the [redacted] practice and purchase offer for the Appellant's incorporated practice
- The Company bank account
- Company Tax Registration
- Company registration for PAYE
- Forms F45 from HSE in the company name and tax number.

19. The Evidence Act 1851 Proof of Documents in Ireland provides at Section 9 :

> *"Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."*

20. The accounts of the Appellant's Company are statutory accounts under the Companies Acts. As such they prove themselves.

21. 79 TACD2021 Decision of Commissioner O'Mahony dated 26th February 2021. This case involved a farmer and his son who incorporated their farming business and leased their land to the new company. Revenue questioned the transfer of the business and the existence of the lease. At paragraph 79 Commissioner O'Mahony stated:

> *"As the lease which the Appellants intended to grant was either from year to year, or possibly for a year certain (which is a lesser period than from year to year-see Wylie, Irish Land Law, 5th ed. At para. 19.16), I find there was no legal requirement for it to be made by executed deed or note in writing. Accordingly, while the absence of a formal lease agreement in the instant appeals might be considered unusual, and was certainly less than ideal from a corporate governance perspective, it does not of itself mean that the lease was not granted."*

22. At paragraph 80 Commissioner O'Mahony concluded:

> "*The two key factors which have persuaded me that a lease was granted by the Appellants to the Company are the fact that (a) the Company's audited financial*

statements for at least two of the years under appeal recorded that the Appellants were receiving rent from the Company and specified the amounts and (b) the rent received by the Appellants was recorded on their form 11 returns and they suffered income tax thereon. These factors are, in my view, persuasive contemporaneous evidence of the existence of a lease."

23. The acquisition of the Appellant's business is reflected in the accounts of his company. His disposal is in his Form 11 CGT return and the CGT has been paid.

24. The Respondent raised the Schedule D assessments on the Appellant because he alleged, he had no evidence that the business had transferred to the company (letter of 15 April 2015 to taxpayer's agent). The reality is that the Inspector was in possession of the best evidence available, the statutory accounts of the company, but did not appreciate their evidential value.

25. The Respondent has offered no evidence to show that the business was not transferred to the company. The Respondent relies on the fact that there was no agreement or contract between the Appellant and the Appellant's company. An agreement or contract was not required.

Assignment of GMS Contract

Overview

26. In 2016 Trinity College Dublin published a research report into the Structure of General Practice in Ireland. This research was commissioned by the Irish College of General Practitioners. It found that there had been a big decline in the number of single-handed practitioners from 63% in 1982 to 18% in 2015. There had been a large increase in the number of nursing, clerical and managerial personnel employed in practices. Practices are now well equipped with clinical and diagnostic equipment and computers. In 2015 11% of GP practices were private only while 89% were GMS and private (see 3.2.1 of report). In 2015 52% of practices have 3 or more GP's working (3.6.5 of report). In 2015 58% of GP's worked in formal legal partnerships (3.6.6 of report)

Partnership Agreement

27. Most GP partnerships operate through a legal partnership agreement. The IMO has a template agreement which a majority of GP's use when setting up a partnership. It is this template agreement that the Appellant and [redacted] used when they set up their partnership in 2005. The agreement provides at clause 9 as follows:

    (a) *Practice income shall include all fees, allowances and remuneration paid to The Partnership or any one of the Partners arising out of practice related to the surgeries and consulting rooms laid out in clause 3, but legacies, gifts and specific chattels (valued at not more than €50 in any particular instance) shall be retained by and shall be the separate property of The Partner to whom the same shall have been given or bequeathed.*

    (b) *All income generated outside of The Practice premises and area as outlined in clause 3 shall be deemed to be private income of that partner and shall not be deemed the property of The Partnership.*

    (c) *All partnership income shall be paid into the partnership account*.

28. Clause 3

    The Partnership Practice shall be carried on at the Surgery and Consulting Rooms at (i) [redacted]*, and (ii)* [redacted] *or at such place or places as shall be agreed upon by The Partners and the said Surgery and Consulting Rooms shall be accessible at all reasonable times to either Partner.*
    Practice Income

29. The Practice income is composed of the following:

- HSE payments
- Private patients

- VHI
- Aviva Health Insurance
- Department of Social Protection
- An Garda Siochana
- Acorn Life
- Friends First
- Quinn
- An Post HSE Contract
-

30. Both the Appellant and [redacted] held GMS contracts at the time they entered into Partnership. Both the Appellant and [redacted] assigned the income and performance of these contracts to the new partnership (see clause 9 above). There is no clause in the GMS contract which prohibits this. The terms of the contract allow each doctor to 'arrange for the provision of services in accordance with these terms and conditions'. It has become the practice of a majority of GP's in Ireland to deliver their GMS contractual obligations as Partners in accordance with the standard partnership agreement.

Legality of assignment

31. The assignment of GP contracts to a Partnership is common practice in Ireland. The HSE is well aware of this practice and has never contested a doctor's right to enter a partnership under the terms set out in clause 9.

32. The legality of this practice is not a matter that can concern the Tax Appeal Commission as this is a matter of private law. It is a matter of contractual law between the parties to the contract. The Revenue Commissioners have no locus standi in that regard.

Partnership Law

33. Partnerships in Ireland are governed by the Partnership Act 1890. Section 20 of the Act provides as follows:

All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

34. Section 27 provides as follows:

(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership."

35. Section 30 provides as follows:

"If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business."

36. Section 39 provides as follows:

"On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

37. A question arises as to what happens to the GMS list which was assigned to the Partnership when dissolution of the partnership occurs.

38. The Health (Provision of General Practitioner Services) Act 2012 provides as follows at Section 4:

> *"Notwithstanding any relevant agreement, a relevant medical practitioner who has entered into an agreement with the Executive (whether before, on or after the commencement of this section) to provide relevant services shall be entitled, on the dissolution (by whatever means) of any partnership of relevant medical practitioners in which he or she is a partner, to retain, on his or her list of patients, any eligible person who was on the list immediately before the dissolution, unless the Executive is advised that the eligible person does not wish to be retained on that list."*

39. The above section is proof positive that where medical practitioners form a partnership the list which attaches to each partner moves to the partnership and on dissolution of the partnership it reverts back to the individual practitioner.

Section 600 TCA 1997

40. This section provides a relief for sole practitioners who incorporate. The capital gain on incorporation is "rolled over" in to shares issued in the company. The Appellant's partner [redacted] wished to claim retirement relief under section 598 TCA 1997 as he had reached age 55 and met all the other conditions.

41. Section 600 (3) provides as follows:

> *"This section shall apply for the purposes of the Capital Gains Tax Acts where a person who is not a company transfers to a company a business as a going concern, together with the whole of the assets of the business or together with the whole of those assets other than cash, and the business is so transferred wholly or partly in*

exchange for shares (in this section referred to as "the new assets") issued by the company to the person transferring the business."

42. In order for the Appellant to claim the relief it requires "the whole of the assets" to be transferred to the new company. As Drs [redacted] and [redacted] had practiced in a partnership and their respective companies would continue to trade in partnership there was a concern that it could not be stated with certainty that "the whole of the assets" were being transferred to the Appellant's company.

Goodwill

43. As stated in *Commissioner of Taxation of the Commonwealth of Australia V Murry* [1998] HCA 42;

(a) *….."[g]oodwill'' is notoriously difficult to define'. One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business. Its existence depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business. As Dixon CJ, Williams, Fullagar and Kitto JJ pointed out in Box v Commissioner of Taxation, `[g]oodwill includes whatever adds value to a business, and different businesses derive their value from different considerations.' Another reason is that courts have been called on to define and identify goodwill in greatly differing contexts. In some cases, the nature of goodwill as property may be the focus of the legal inquiry. In other cases, the value of the goodwill of a business may be the focus of the inquiry. And in still other cases, identifying the sources or elements of goodwill may be the focus of the inquiry. It is unsurprising that in these varied situations courts have defined goodwill in ways that, although appropriate enough in one situation, are inadequate in other situations.*

(b) *Goodwill is also an accounting and business term as well as a legal term. The understanding of accountants and business persons as to the meaning of the*

term differs from that of lawyers. That has added to the difficulty of achieving a uniform legal definition of the term, particularly since accounting and business notions of goodwill have proved influential in the valuation of goodwill for legal purposes.

(c) *Australian accounting standards describe goodwill as comprising `the future benefits from unidentifiable assets which, because of their nature, are not normally individually brought to account.' Some accounting theorists see goodwill as representing the difference between the present value of the future earnings of the business and the normal return on its identifiable assets. Business people see goodwill as concerned with the notion of excess value, a notion colourfully expressed in the statement of an American funds manager that `[i]f you pay $450 million for a TV station worth $2.5 million on the books, the accounts call the extra $447.5 million ``goodwill''. 'Accountants adopt a similar approach in the case of purchased goodwill. Approved Accounting Standard ASRB 1— states that:*

> *`Goodwill which is purchased by the company shall be measured as the excess of the cost of acquisition incurred by the company over the fair value of the identifiable net assets acquired.'*

(d) *Originally, the legal definition of goodwill emphasised the patronage of the business. In Cruttwell v Lye, Lord Chancellor Eldon said that goodwill was `nothing more than the probability, that the old customers will resort to the old place.' However, `a wider view soon prevailed'. In Churton v Douglas, Wood VC said that goodwill was:*

> *`every advantage in every positive advantage... that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.'*

This definition received the approval of Lord Herschell in Trego v Hunt. In the United States, Story in his book on partnership defined goodwill as: `the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein'.

(e) *One of the most cited definitions of goodwill for legal purposes in the Anglo-Australian legal world is found in the speech of Lord Lindley in Inland Revenue Commissioners v Muller & Co's Margarine Limited where his Lordship said:*

`Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.'

(f) *Lord Macnaghten gave another much cited definition of goodwill in the same case. His Lordship said:*

`What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers

home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade.

(g) *Earlier Lord Macnaghten had said:*

`It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will of course under the conditions attaching to property of that nature.

(h) …

(i) *This definition comes close to achieving a synthesis between the legal, accounting and business definitions of goodwill. But it cannot be regarded as exhaustive. A business may have goodwill for legal purposes even though its trading losses are such that its sale value would be no greater than its "break-up" value. Once the courts rejected patronage as the touchstone of goodwill in favour of the "added value" concept, it might seem impossible for a business to have goodwill for legal purposes when its value as a going concern does not exceed the value of its identifiable assets of the business. But the attraction of custom still remains central to the legal concept of goodwill. Courts will protect this source or element of goodwill irrespective of the profitability or value of the business. Thus, a person who has sold the goodwill of a business will be restrained by injunction from soliciting business from a customer of the old firm [Trego (1896) AC7] even though the value of that firm is no greater than the value of its identifiable assets.*

(j) *Such considerations seem to make it impossible to achieve a syntheses of the legal and the accounting and business conceptions of goodwill. Accounting*

and business conceptions of the term emphasise the necessity for the business to have some value over and above the value of identifiable assets. For that reason, the definition of goodwill by McHugh J in Hepples [(1992) 173 CLR 492 at 542] "Goodwill is the collective name for various intangible sources of the earnings of a business which are not able to be individually quantified and recorded in the accounts as assets of the business", which was much influenced by the accounting and commercial view of goodwill, should not be regarded as an accurate statement of the legal definition of goodwill. (Emphasis added).

(k) *The definitions of Lord Lindsey, Lord Macnaghten and Judge Swan bring out the point that goodwill has three different aspects- Property, Sources and Value which combine to give definition to the legal concept of goodwill. As Barwick CJ pointed out in Geraghty v Minter [(1979) 142 CLR 177at 181] "goodwill is not something which can be conveyed or held in gross, it is something which attaches to a business. It cannot be dealt with separately from the business associated."*

Goodwill as property

(l) *From the viewpoint of the proprietors of a business and subsequent purchaser goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom". Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.*

The sources of goodwill

(m) *The goodwill of a business is the product of combining and using the tangible and human assets of a business for such purposes and in such ways that*

custom is drawn to it. In Federal Commissioner of Taxation v Williamson [(1943) 67 CLR 561 AT 564], Rich J described the goodwill of a business as referable "in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt actuated by mixed motives in conferring their custom. (Emphasis added)

(n) *Lord Lindley referred to goodwill as adding value to a business "by reason of situation, name and reputation, and other matters and not because goodwill was composed of such elements".*

(o) *In some businesses, price and service may have little effect in attracting custom. The goodwill of such businesses may derive almost wholly from their location. This will often be the case where there is no nearby competition and custom is drawn from nearby residents or those who must pass by the site of the business.*

44. *Primus International Holding Company & Ors v Triumph Controls - UK Ltd & Anor* [2020] EWCA Civ 1228 is a recent civil case which addresses goodwill in a commercial contract. From the introduction

1. *The issue in this appeal is whether the claims brought by the claimants/respondents ("Triumph") were claims "in respect of lost goodwill" and therefore excluded by a clause in the relevant share purchase agreement ("SPA"). O'Farrell J ("the judge") concluded that the exclusion clause did not apply to the claims brought by Triumph. The defendants/appellants ("Primus") challenge that conclusion.*

2. *...*

6. *Amongst the terms in Clause 9 and Schedule 8 of the SPA on which Primus relied to exclude or limit their liability to Triumph after the purchase was paragraph 3.1(f)(i) of Schedule 8 ("the 3.1(f)(i) exclusion"), which excluded*

liability "to the extent that…the matter to which the claim relates… is in respect of lost goodwill".

7. *The trial in the TCC before the judge took five weeks in 2018. She had to deal with a raft of issues which do not arise on this appeal. She concluded that Primus were in breach of the 19.5 warranty because the LRP failed to take into account, properly or accurately, key operational and financial assumptions relating to planned transfers of production lines from the Farnborough company to the Thai company. As a result, the LRP overestimated the rate at which production could be transferred and overstated the future profitability of the companies. The judge found that the purchase price paid by Triumph for the companies would have been lower if they had been provided with a proper LRP.*

8. *…*

16. *The issue before this court is the true construction of the 3.1 (f)(i) exclusion. Before the judge, Triumph alleged that "goodwill" meant the good name, reputation and connections of a business and since their claims were for overpayment due to the careless LRP, and not for lost business reputation, the exclusion clause did not apply. The judge agreed. Triumph maintained that construction on appeal.*

17. *Primus submitted to the judge that "goodwill" meant "an intangible asset recorded when a company acquires another company and the purchase price is greater than the sum of the fair value of the identifiable tangible and intangible assets acquired and the liabilities that were assumed". At the general hearing, Mr Morgan QC put it slightly differently, submitting that loss of goodwill was "a loss of share value, where that value represents the difference between the cost of acquisition and the fair value of its identifiable net assets and/or where that loss of share value is caused by the impairment of the value of non-identifiable assets." It was agreed that in either of the appellants' formulations, this was essentially an accounting definition.*

18. *Mr Morgan QC suggested early in his oral submissions that there was no real conflict between the definitions proffered by either side. I disagree. Triumph's definition is aimed at a specific element of any business: its reputation, its brand recognition, its good name. That definition explains why goodwill is normally the proprietary right of any passing-off dispute, because of the attraction of the brand or good name of the business to a competitor.*

19. *…*

20. *I have concluded that the judge was right to prefer Triumph's definition of 'goodwill and their construction of the 3.1 (f) (i) exclusion.*

THE ORDINARY LEGAL MEANING OF GOODWILL

21. *When considering the ordinary legal meaning of "goodwill", it is important to record two matters at the outset, because they greatly reduce the scope of the debate.*

22. *First, there is no dispute between the parties as to the applicable principles of contractual interpretation…..*

23. *Secondly although it is always necessary to have regard to the factual background when construing a contract (as per lord Hoffman in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896), neither side sought to identify or rely upon any particular part of the factual background to the SPA in order to assist their submissions or to undermine the submissions of the other side. Accordingly, this is one of those rare cases where the dispute about the meaning of a contractual term hinges on the words actually used in that term, read in the context of the contract as a whole and not any extraneous matters.*

24. *It is also important at the outset to make the obvious point that 'goodwill' in this commercial context does not mean friendliness, or a desire to help. That type of goodwill rarely arises in claims for breach of contract. An exception was Foaminol Laboratories Ltd v British Artid Plastics Ltd [1941] 2 All ER 393, where one of the heads of claim, following the defendants' failure to manufacture the special containers for cosmetics they had agreed to supply, was the loss of the co-operation of beauty editors of newspapers. Hallett J said at 399C-E:*

> *"It is the loss of the goodwill of the editresses - the goodwill in the sense of friendliness and a desire to help - which is the subject of this claim. It is not the loss of the goodwill of the public. No such loss is alleged in a statement of claim, and no such loss has been proved. It is a loss quite different from the loss of goodwill in the legal sense which results when a butcher sells bad meat, or when a vendor of another kind sells poisonous ice cream, because the goodwill there damaged or destroyed is goodwill in the sense of the probability that the customers will resort once more to the same source of supply." (Emphasis added)*

25. *As Hallet J noted, in a commercial context, the ordinary legal meaning of goodwill is the good name and public reputation of the business concerned. I have no doubt that that is what the judge was referring to in the present case when, at [496] of her first judgment, she referred to "business reputation". Such goodwill is defined by the Oxford English Dictionary as the "established reputation of a business regarded as a quantifiable asset and calculated as part of its value when it is sold" It is similarly defined in Volume 80 (2013) of Halsbury's Laws of England at 807;*

> *"The goodwill of a business is the whole advantage of the reputation and connection formed with customers together with the circumstances, whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any*

business or businesses product the value of the attraction to customers which the name and reputation possesses."

26. *It could not be suggested that a somewhat convoluted definition advanced by Primus is the same as the ordinary legal meaning of goodwill. There is no reason for this court to depart from that ordinary legal meaning of the word when construing the 3.1 (f) (i) exclusion. Or to utilise the accounting definition of the term instead. Mr Morgan QC does not contend that any part of the factual background to the SPA, or any part of the SPA itself, points to or justifies the adoption of the accounting definition. If a contract contains a term to which the parties intend to give an unusual or technical or non-legal meaning, that must be spelt out. That did not happen.*

27. *To counter this, Mr Morgan QC's central submission was that the accounting definition of 'goodwill' made it synonymous with 'value'. He said that goodwill was something which fell to be valued when a business was acquired, and that normal accounting methodology valued it as the difference between the value of the assets, on the one hand, and the purchase price, on the other. He expressly said that 'goodwill' and 'value' were "interchangeable".*

28. *I reject that proposition. Merely because something – in this case 'goodwill' – is of value and is capable of being valued, does not mean that it is the same thing as 'value'. They are different things. It is quite possible to envisage a situation in which a business being sold has goodwill in the ordinary legal sense, but where, for unconnected reasons, the purchase price is the same as the value of the net assets. That does not mean that there was no commercial goodwill in the business; it just makes that goodwill much harder to value. In my view, the long-accepted ordinary legal meaning of 'goodwill' should not be complicated and extended by muddling it with the concept of 'value'.*

29. *Although I accept that [496] of the judgment might, in hindsight, have benefitted from an explanatory sentence or two, it is clear that the judge was giving the word 'goodwill' its ordinary legal meaning in a commercial context. She used the expression 'business reputation' as shorthand for good name, reputation and business connections. I consider her interpretation was correct. Furthermore, I consider that the authorities support that conclusion.*

THE RELEVANT AUTHORITIES

30. *In Austen v Boys (1858) 2 De G & J 626, the Lord Chancellor was concerned with a claim on retirement for a share of the goodwill in a solicitor's practice. He said at page 1136:*

> *"It is very difficult to give an intelligible meaning to the term 'goodwill' as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'goodwill' is something distinct from the profits of the business, although in determining its value the profits are necessarily taken into account; and it is usually estimated at so many years' purchase upon the amount of these profits."*

31. *This early case is relevant for two reasons. First, it identifies goodwill as relating to local reputation of the business in question, and therefore the chance to carry it on in that same location. At the very least, it militates against the suggestion that the two things are interchangeable.*

32. *The best-known case as to the meaning of 'goodwill' is IRC V Muller and Co's Margarine Limited [1901] AC 217, At 223, Lord MacNaghten said:*

> *"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth*

nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pared down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such." (Emphasis added)

33. *In the same case Lord Lindley said at 235:*

"Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on in one place or country or in several businesses, each having a goodwill of its own." (Emphasis added)

34. *A more recent definition of "goodwill" can be found in the judgment of Lord Dyson MR in Breyer Group Plc and Others v Department of Energy and Climate Change {2015] EWCA Civ 408, [2015[1WLR 4559. That was a case concerned with the particular meaning of "a possession" under Article 1 of the First Protocol to the ECHR ("A1P1"), and the difference between goodwill (which was capable of being a possession and therefore the subject matter of*

an A1P1 claim) and loss of future earnings, which was not a possession under ECHR, and therefore not something for which a claim could be made. At [45], Lord Dyson said:

> *"The same idea was expressed by the ECtHR in Van Marle at para 41 (see para 28 above). A possession comprising the goodwill of a business is the product of past work: "by dint of their own work, the applicants had built up a clientele"' Goodwill is the present value of what has been built up. It is to be distinguished from the value of a future income stream. From an accountants' point of view, this distinction may make little practical sense. But it is the application that has been clearly drawn by the ECtHR for the purposes of A1P1."(Emphasis added)*

35. *In this passage, Lord Dyson touched on the tension between the commercial approach to goodwill, and the way it is treated by accountants. Thus, in Balloon Promotions Limited v Wilson (Inspector of Taxes) [2006] STC (SCD) 167, the Special Commissioner held that the accounting definition of goodwill was "deficient" for the purposes of construing the meaning of 'goodwill' in the Taxation of Chargeable Gains Act 1992. He used the ordinary legal meaning instead. So too did the Supreme Court of Canada in Veuve Clicquot Ponsardin v Boutique Clicquot Ltee [2006] SCC23 when, by reference to a Canadian statute concerned with trademarks, the court defined 'goodwill' as "promoting the positive association that attracts customers towards its owner's wares or services rather than those of its competitors…the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business."*

36. *Thus far, I consider that all the authorities to which I have referred point in the same direction, namely that 'goodwill' has the legal meaning ascribed to it in the present case by Triumph and by the judge. The only authority which, so Primus say, may point in the other way is R (Nicholds) v Security Industry*

Authority [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067, a decision of Kenneth Parker QC (as he then was). He said at paragraph 72:

> *"72. It seems to me that "goodwill" in this context is not being used in the technical accounting sense of the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities (see, for example, Financial Reporting Standard 10). Goodwill is there used to fill a gap in the balance sheet that would otherwise arise, may well be transient, is exclusively the result of acquisition and cannot be internally generated. It appears that 'goodwill' is being used rather in the economic sense of the capitalised value of a business or part of a business as a going concern which, according to modern theory of corporate finance, is best understood as the expected free future cash flows of the business discounted to a present value at an appropriate after tax weighted average cost of funds (see Brealey and Myers, Principles of Corporate Finance, 7TH edition, 2003 at sections 4.5 and 19.1). There is, of course, a connection with the accountancy concept of goodwill, which arises simply because the present value of net future cash flows on the economic model exceeds, or is thought to exceed, the aggregate of the fair values of the identifiable net assets that will be employed to generate those cash flows."*

37. *In reliance on this passage, Mr Morgan QC submits that the reference to the difference between fair value of the net assets of a business and the cost of acquisition, being a methodology which all companies use to value goodwill when a business is acquired, was the interpretation of 'goodwill' that should be applied to 3.1 (f) (i) exclusion.*

38. *I do not consider that the decision in Nicholds is of any assistance in the present case. Like Breyer Group, it was solely concerned with whether goodwill (as opposed to loss of future income) was a 'possession' for the*

purposes of A1P1 of the ECHR. That is a very particular question in European law, with its own set of rules and considerations. The judge in Nicholds was not concerned with the ordinary legal meaning of the term 'goodwill' in domestic law. He was instead distinguishing between what he called the "technical accounting" definition, and the term when used in the 'economic sense of the capitalised value of a business… as a going concern". Even then, he appeared to recognise that the "technical accounting" definition was different to the way in which 'goodwill' is commonly understood in a commercial context.

39. *In summary, therefore, I am satisfied that the authorities point overwhelmingly to the conclusion that 'goodwill' in the contract for the sale of a business refers to a type of proprietary right representing the reputation, good name and connections of a business, and is different to the particular or specific meaning attributed to the term by accountants. (Emphasis added)*

Disposal/Acquisition

45. The Appellant and [redacted] practiced in partnership from the 1st of January 2005. The practice income (partnership income) included all fees, allowances and remuneration paid to The Partnership or any one of the Partners arising out of practice. Both Partners were entitled to 50% of the profits of the Partnership.

46. Both the Appellant and [redacted] incorporated, commencing on the 1st of November 2011. Their unlimited companies, [redacted] and Dr [redacted] [redacted] continued the partnership until the 1st November 2017 when the Partnership was dissolved. Both companies were entitled to a 50% share of the partnership profits.

47. Section 30 TCA 1997 provides as follows:

"Where 2 or more persons carry on a trade, business or profession in partnership-

(a) capital gains tax in respect of chargeable gains accruing to those persons on the disposal of any partnership assets shall be assessed and charged on them separately, and
(b) any partnership dealings in assets shall be treated as dealings by the partners and not by the firm as such."

48. Section 532 TCA 1997 defines 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.

49. The goodwill of the partnership is an asset that belongs to the partners. On incorporation this goodwill is disposed of to the companies. This disposal gives rise to capital gains tax on the Appellant.

50. Section 547 TCA 1997 includes the following:

Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for consideration equal to the market value of the asset where-
(a) The person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift).

51. Section 548(1) TCA 1997 Valuation of assets states:

"Subject to this section, in the Capital Gains Tax Acts, "market value", in relation to any asset, means the price which those assets might reasonably be expected to fetch on a sale in the open market."

52. Section 549(1) and (2) TCA 1997 Transactions between connected persons state:

1) This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.

2) Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain at arm's length.

53. Section 10(2) and (7) TCA 1997 deals with connected persons and provides as follows:

(2) For the purposes of the Tax Acts and the Capital Gains Tax Acts, except where the context otherwise requires, any question whether a person is connected with another person shall be determined in accordance with subsections (3) to (8) (any provision that one person is connected with another person being taken to mean that they are connected with one another).

…

(7) A company shall be connected with another person if that person has control of the company or if that person and persons connected with that person together have control of the company.

54. Both [redacted] and [redacted]'s company are therefore connected persons and market value will apply.

55. The value of goodwill transferred to [redacted]'s company was calculated at €416,773. Capital Gains Tax return was submitted by the Appellant and capital gains tax paid based

on this valuation. There is no amended assessment and there is no Capital Gains Tax Appeal.

56. Section 130 (3)(a) TCA 1997

> *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").. (Emphasis added)*

57. The value of the goodwill acquired by the company was €416,773. This is the same 'market value' as that of the disposal. Therefore there is no distribution.

Evidence of Value of Goodwill

58. There are different types of goodwill, accountancy based, business and legal goodwill. It is legal goodwill which is relevant for tax purposes. See *Commissioner of Taxation of the Commonwealth of Australia v Murry* and *Primus v Triumph* above.

59. Legal goodwill includes such things as good name, reputation and connection of a business. It includes the human assets of a business. It refers in part to its locality, in part to the way in which business is conducted and the personality of those who conduct it, and in part to the likelihood of competition.

Evidence of Mr [redacted] *[redacted]

60. Mr [redacted] was called to give expert evidence. In his statement he confirmed that he had been requested to prepare a valuation (of goodwill) report on behalf of the Revenue Commissioners. This in itself should have disqualified him as an "expert witness" as his evidence could not be peritus.

61. Mr [redacted] relied on the information and explanations provided to him. No information or explanation was given to Mr [redacted] by the Appellant or on his behalf. Mr [redacted] was furnished with a summary of the trading results for the years 2010- 2014. He stated in his report that the partnership trade had ceased. This is incorrect. The partnership continued until 1st of November 2017 when it was dissolved. On the 1st November 2011 the old partners incorporated and the companies continued in partnership.

62. The only definition of goodwill offered by Mr [redacted] was the accountancy definition- "goodwill is created when one entity acquires another for a price higher than the fair market value of its assets".

63. He went on to state "It is relatively straightforward to calculate goodwill on completion of an arm's length transaction when the price can be referenced to a balance sheet at the date of the transaction". Mr [redacted] did not offer any examples of arm's length transactions.

64. Mr [redacted] based his valuation of the goodwill on the accounts information furnished to him. Therefore his valuation is a valuation for accountancy purposes and not for tax purposes.

65. He referred to the recognition and the accountancy treatment of goodwill and how it was amortised in the accounts.

66. It should be stated that amortisation of goodwill has no effect on tax. Where it appears in accounts it is added back in its entirety and not allowed for tax purposes. Mr [redacted] does not make any reference to this.

67. Cross examination revealed the following:

- Mr [redacted] did not know what the appeal was about or what the relevance of his evidence was to the appeal
- He did not know the different types of goodwill
- In particular he had no knowledge of the Legal definition of goodwill

- He had never been to [redacted] and he could not describe the practice
- He had never met the Appellant or any members of the practice staff
- He was unaware of the competition that existed in [redacted]
- He was unaware that a new motorway had opened in 2010 from Dublin to [redacted] and that it is now regarded as a satellite town of Dublin
- He offered no evidence as to the good name and reputation of the practice
- He had no objective market information to support his conclusions. He did not make any attempt to obtain this information.

68. It is self-evident from Mr [redacted]'s evidence that he made no attempt to value the "legal goodwill" of the practice. He did not address the issue. It is of note that the Revenue Commissioners did not request a valuation based on the legal definition of goodwill and did not furnish Mr [redacted] with any relevant information for that purpose. Revenue had information in relation to the sale of over 90 medical practices but did not make this information available to Mr [redacted].

69. Mr [redacted]'s valuation of goodwill must be rejected. He is not an expert on the valuation of goodwill.

Evidence of Professor [redacted]

70. Professor [redacted] was called to give expert evidence. His evidence was given as opinion evidence.

71. At the beginning of his evidence Professor [redacted] stated that he had no expertise in the law or no expertise in taxation. His expertise is in accounting.

72. He stated that as he understood the case, it concerns the "*recognition of goodwill in the amount of €416,773*".

73. After that statement Professor [redacted]'s evidence became irrelevant as the taxation that results from the disposal and acquisition of goodwill is provided for in legislation regardless as to whether the goodwill is recognised in the accounts or not.

74. Professor [redacted] confined his evidence to the acquisition of goodwill and did not give any evidence relevant to the disposal of goodwill. Asked whether you could dispose of something you did not have, he could only think of a stolen bike.

75. Again like Mr [redacted] he referenced the amortisation of the goodwill in the accounts. This has no relevance for tax purposes.

76. Professor [redacted] referred to the difficulty in valuing goodwill in the absence of "*objective market data*". When asked where he could find this data he did not appear to know. He confirmed that Revenue had not furnished him with this data.

77. Professor [redacted]'s evidence was of little value. He did not appear to know that the Capital Gains Tax Acts imposed tax on the disposal and that it was the market value of this disposal which was relevant to the calculation of the CGT liability. The recognition or non-recognition of goodwill for accountancy purposes had no relevance to the CGT calculation.

78. Again the acquisition of goodwill is valued at market value (section 130) and this is the appropriate valuation regardless of the accountancy treatment of the goodwill.

79. Professor [redacted] declined to state that the accounts required correction.

Evidence of [redacted] *Health given by* [redacted] [redacted]

80. [redacted] health employs over 500 people and has a significant presence in healthcare in the Irish market. Since about 2005 it has been acquiring GP practices. To date it has acquired over 90 such practices. [redacted] Health made their accounts for 2017 available to the Appellant. 2017 is the year that [redacted] acquired [redacted]s practice for €450,000. They also acquired an option to purchase the Appellant's practice for a minimum of €450,000. They can exercise this option once the Appellant attains his 60th birthday.

81. In 2017 [redacted] acquired 14 practices with a combined goodwill of €7.8 million. This is an average of €557,142.

82. [redacted]'s accounts show that it acquired 5 practices in 2011/2012. This is the year the Appellant incorporated. The combined goodwill of the 5 practices was 2.6 million Euros or an average of €520,000.

83. This is the objective market data that both Mr [redacted] and Professor [redacted] did not have access to. This is the best evidence available as to the value of goodwill in a GP practice.

84. The Appellant valued his goodwill at €416,773 and based on the above valuations this represents a conservative value and should not be changed.

Fair Procedure

85. It has been the Revenue position that there was no goodwill or that goodwill has been substantially overstated. This position is set out clearly in correspondence and in their statement of case. However Revenue knew or ought to have known that this was not the case. In excess of 90 GP practices had been disposed of by way of contract. These contracts were stamped by Revenue. Each disposal gave rise to Capital Gains Tax. This information is readily available to Revenue. They deliberately did not make this information available to their expert witnesses and had they done so their evidence would have been different.

86. In *Dunnes Stores v Revenue Commissioners & Ors* [2019] IESC 50 Judge McKechnie stated as follows at 92:

> *"There is no doubt but that the appeal body has to apply fair procedures from the inception of the process right throughout the hearing, up to and including finality. Whilst this will become a matter for the parties and the Appeal Commissioners, nonetheless it seems reasonable to assume that if after this judgment there remains any issues to be determined on the "liability side", then that exercise would be*

conducted first. Thereafter, the question of quantum would arise and in such context it would be open to Dunnes Stores to make any submission it thought prudent and worthwhile to the effect that by reason of procedural unfairness, they have been disadvantaged in pursuing in their appeal in a just and fair manner. As the Commissioners are a body with expert knowledge in dealing with taxation appeals, it seems to me that the most appropriate forum in which to pursue the fairness issue if it should remain alive, is before that body. Accordingly, I would not grant any relief under this heading of claim.

87. This was a judicial review case. Fair procedure applies from "the inception of the process". In failing to disclose the goodwill that arose in the disposals referred to above Revenue rendered the appeal process to be unfair. Had it not been for the evidence of Mr [redacted] of [redacted] Health the appellant could have been assessed with the incorrect tax liability.

The law on expert evidence

88. The expert evidence in this case is the evidence of Mr [redacted] and Professor [redacted]. A court or tribunal is not obliged to accept expert evidence however, there must be good reason if it is to be rejected.

89. On the matter of expert evidence, the dicta of Judge Bingham in Eckersley v Binnie[1987] 18 ConLR 1on page 77, as follows:

'If all the evidence on a point is one way, good reason needs to be shown for rejecting that conclusion. If the overwhelming weight of evidence on a point is to one effect, convincing grounds have to be shown for reaching a contrary conclusion. Where the trial judge has founded on a witness's oral evidence, the court will not uphold the finding if persuaded that it is not justified on a fair construction of what the witness actually said. The court will not support the dismissal of a witness's evidence where this rests on what is shown to be a misunderstanding, or a wrong impression.

In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason.'

90. Mr. Justice Clarke in the Supreme Court in *Donegal Investment Group plc v Danbywiske and others* [2017] IESC 14 where Mr. Justice Clarke at paragraph 5 of the judgment stated:

'5. Findings based on expert evidence –The role of an appellate court

5.1 A starting point has to be to identify the proper role of a trial judge in assessing expert evidence. Charleton J. explained that role in James Elliott Construction Ltd v Irish Asphalt Ltd [2011] IEHC 269 (para.12 of the judgment) in the following terms:

> *"Every expert witness has to be evaluated on the basis of sound reasoning. An expert witness is, however, no different to any other witness simply because he or she is entitled to express technical opinions; all of us are subject to human frailty: exaggerated respect based solely on a witness having apparent mastery of arcane knowledge is not an appropriate approach by any court to the assessment of expert testimony. Every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability."*

5.2 In setting out the reasons why he preferred certain expert testimony over others in that case Charleton J. went on to say that:

> *"Of these criteria, the most important reasons whereby I have chosen one expert over another have been the manner in which an opinion has been reasoned through and the extent to which opposing views have been*

genuinely and objectively considered on the basis of their merit. A judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team. Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view. As with demeanour, this is not readily demonstrated on a transcript of evidence. Rather, to a trial judge, it can be possible to see the degree to which a witness is thinking through the potential for an opposing theory before giving a reasoned answer. Experience in other cases demonstrates that there is a danger that experts may erect a barrier of apparent learning in order to disguise what would be an answer awkward to their side were it to be expressed plainly. Apart from the attractions of logic and reasoning, therefore, assessing an answer based on what is seen and heard in the courtroom remains important."

5.3 It follows that the assessment of expert testimony does require a trial judge to assess the way in which that testimony is given. As Charleton J. pointed out, the way in which an expert responds to questioning or to the views of an expert witness tendered by the other side, can play an important role in the assessment by the trial judge of the extent to which the expert's views may truly be said to be uninfluenced by the case which his or her side is seeking to put forward. Furthermore, experience has shown that it is much easier to engage with the detail of evidence which is explored and explained (and, indeed, challenged) atan oral hearing by being present at that hearing rather than reading a transcript of what transpired.

5.4 For those reasons it seems to me that counsel on both sides were correct to accept that the principles in Hay v O'Grady do apply to the role of an appellate court in scrutinising findings made by a trial judge with the assistance of expert testimony.

5.5 However, as Charleton J. also pointed out in Elliott, an important part in the assessment of any evidence is the application by the trial judge of logic and common

sense to the testimony heard. That approach is particularly relevant in the context of expert evidence. Where experts differ the position adopted by the other side will be put to each of the experts in cross-examination. Their reasons for maintaining their view can be examined in some detail. The trial judge can, therefore, assess whether the reasons given by one expert or the other stand up better to scrutiny.

5.6 While it is true, therefore, that the assessment of all evidence, whether expert or factual, requires both the application of logic and common sense, on the one hand, and an assessment of the reliability or credibility of the witness gleaned from having been in the courtroom, on the other, it may be fair to say that it is likely that a decision based on expert evidence will be significantly more amenable to analysis on the basis of the logic of the positions adopted by the competing witnesses and the assessment of the trial judge of their evidence on that basis.

5.7 Precisely because a decision to prefer the evidence of one expert over another is likely to be influenced, to a much greater extent than might be the case in respect of factual evidence, by the rationale put forward by the competing witnesses, there may be somewhat greater scope for an appellate court to assess whether the reasons given by a trial judge for preferring one expert over another can stand up to scrutiny. That being said it must remain the case that an appellate court should show significant deference to the views of a trial judge on the question of findings based on expert evidence because the trial judge will have had the opportunity to see the competing views challenged and scrutinised at the hearing.'

91. With reference to paragraph 5.2 in the Donegal Investment Group case and the statement that: 'Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view' it is evident that neither expert demonstrated this in their respective testimonies.

92. It was Addingtons Act of 1803 that brought in Schedules and Cases.

- Schedule A (tax on income from land)
- Schedule B (tax on commercial occupation of land)
- Schedule C (tax on income from public securities)
- Schedule D (tax on trading income, income from professions and vocations, interest, overseas income and casual income)
- Schedule E (tax on employment income)
- Schedule F was added later (tax on dividend income)

93. Surveyors of Taxes were appointed to assess and collect the taxes. A notice of assessment would issue in respect of each schedule. These Surveyors were later replaced by Inspectors of Taxes.

94. The Finance Acts 1963 and 1969 abolished Schedule A and Schedule B in Ireland.

95. Section 183 Income tax Act 1967 allowed for the 'Aggregation of Assessments' as follows;

> *(1) Where two or more assessments fall to be made on a person under Schedule A, B, D or E, or under two or more Schedules,-*
>
> *(a) The tax in the assessment may be stated in one sum,*
> *(b) As regards Schedule A or B in a case in which there are two or more tenements or rateable hereditaments, one assessment may be made on the total of the annual or assessable values,*
>
> *and the notice of assessment may be stated correspondingly, but particulars of the annual or assessable values comprised in one assessment made pursuant to paragraph (b) shall, on request, be given by the Inspector.*
>
> *(2) A notice of appeal in a case in which subsection (1) applies must, to be valid, indicate each assessment appealed against.*

(3) *Pending the determination of an appeal against any one or more of such assessments as are referred to in subsection (1), an amount of tax being a portion of the one sum referred to in that subsection shall be payable on the due date or dates and shall be the amount which results when the appropriate personal reliefs are deducted from the assessments not under appeal or allowed from the tax charged in those assessments (as may be appropriate).*

(4) *The tax stated in one sum under subsection (1) or the amount payable under subsection (3) shall for the purposes of sections 550, 551, and 552, be deemed to be tax charged by an assessment to income tax.*

(5) *If for any of the purposes of this Act, other than subsection (3), it becomes necessary to determine what amount of the tax charged is applicable to any one or more assessments referred to in subsection (1)-*

(a) a certificate from the inspector indicating the manner in which the deductions, allowances or reliefs were allocated and stating the separate amounts of tax, if any, and the instalments thereof applicable to any one or more assessments or to each assessment shall be sufficient evidence of the charge to tax in and by each such assessment,

(b) where an assessment to which that certificate relates is made under subsection (1) (b), the inspector may further certify that portion of the amount of the tax charged in and by that assessment is applicable to any of the annual or assessable value, and for the purposes of this Act that portion shall be deemed to be tax charged in and by an assessment.

(6) *Notwithstanding the making of one assessment pursuant to subsection (1) (b), the provisions of this Act, other than this section, relating to assessments under Schedule A and B (as the case may be) shall continue to apply as if the tenements or rateable hereditaments had been assessed separately.*

(7) *In this section "personal reliefs" has the meaning assigned to it by section 193(6).*

96. The above section facilitated the aggregation of assessments on the one notice of assessment. Appeals had to stipulate the Schedule being appealed. Other than the appeal of the tax is otherwise available for collection.

97. The current legislation in relation to years to 2012 is found in section 921 TCA 1997. It provides for aggregation as follows:

> *(2) Where 2 or more assessments to income tax are to be made on a person under Schedule D, E or F or under 2 or more of those Schedules, the tax in the assessments may be stated in one sum, and the notice of assessment may be stated correspondingly.*
>
> *(3) A notice of appeal in a case in which subsection (2) applies shall, to be valid, indicate each assessment appealed against.*
>
> *(4) Pending the determination of an appeal against any one or more assessments referred to in subsection (2), an amount of tax (being a portion of the one sum referred to in that subsection) shall be payable on the due date or dates and shall be the amount which results when the appropriate personal reliefs are deducted from the assessments not under appeal or allowed from the tax charged in those assessments, as may be appropriate.*
>
> *(5) The tax stated in one sum under subsection (2) or the amount payable under subsection (4) shall for the purposes of sections 1080 and 1081 be deemed to be tax charged by an assessment to income tax.*
>
> *(6) Where for any purposes of the Income Tax Acts other than subsection (4) it becomes necessary to determine what amount of the tax charged is applicable to any one of 2 or more assessments referred to in subsection (2), a certificate from the inspector indicating the manner in which the deductions, allowances or reliefs were allocated and stating the separate amounts of tax, if any, and the instalments of tax applicable to any one or more assessments or to each assessment shall be sufficient evidence of the charge to tax in and by each such assessment.*

APPEALS

98. Section 933(1) provides for appeals against an assessment:

> *(a)* A *person aggrieved by an assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving within 30days after the date of the notice of assessment, notice in writing to the inspector or other officer.*
>
> *(b) Where on an application under paragraph (a) the inspector or other officer is of the opinion that the person who has given notice of appeal is not entitled to make such an appeal, the inspector or other officer shall refuse the application and notify the person in writing accordingly, specifying the grounds for such a refusal.*

99. As can be seen from above, it falls to the inspector or other officer to admit or refuse the appeal application. The Appellant appealed against the amendment to his assessment on the 24th of July 2015. The appeal was admitted by the inspector on the 14th of August 2015.

Self-Assessment Part 41 TCA 1997

100. Self-assessment was introduced to Ireland by the Finance Act 1988. For years up to and including 2012 the appropriate legislation is contained in Part 41 TCA 1997, sections 950 to 959.

101. Section 950(2);

Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Taxes Acts or the Capital Gains Tax Acts. (Emphasis added).

102. Part 41 introduced a new concept of 'chargeable person'. Section 950 (1) provides:

"*Chargeable person" means, as respects a chargeable period, a person who is chargeable to tax, for that period, whether on that person's own account or on account of some other person but, as respects income tax, does not include a person-……."*

103. Both the Appellant and the Respondent accept that the Appellant is a chargeable person for the purpose of Part 41.

"appeal" means an appeal under section 933 or, as respects capital gains tax, an appeal under section 945.

"tax" means income tax, corporation tax, or capital gains tax, as the case may be.

104. Section 957(1) provides:

No right of appeal lies against:

(a)….

(b) The amount of any income, profits or gains or, as respects capital gains tax, chargeable gain, or the amount of any allowance, deduction or relief specified in an assessment or an amended assessment made on a chargeable person for a chargeable persons, where the inspector has determined that amount by accepting without alteration of and without departing from the statement or statements or the particular or particulars with regard to income, profits or gains or, as respects capital gains tax, chargeable gains, or allowances, deductions or reliefs specified in the return delivered by the chargeable person or

(c) The amount of any income, profits or gains or as respects capital gains, tax, chargeable gains, or the amounts of any allowance, deduction or relief specified in an assessment or an amended assessment made on a chargeable person for a chargeable period, where that amount had been agreed by the inspector and the chargeable person, or any person authorised by the chargeable person in that behalf, before the making of the assessment or the amendment f the assessment, as the case may be.

105. The above legislation limits a taxpayer's right of appeal where the assessment reflects the return made by the taxpayer or agreed with the inspector.

106. Section 957 (3) provides:

Subject to subsections (1) and (2), where an assessment or is amended under section 955 (not being an amendment made by reason of the determination of an appeal), the chargeable person may appeal against the assessment as so amended and the notice of assessment as so amended were a notice of assessment, except that the chargeable person shall have no further right of appeal, in relation to matters other than additions to, deletions from, or alterations in the assessment, made by reason of the amendment, than the chargeable person would have had if the assessment had not been amended. (Emphasis added)

107. Subsection (4)

Where an appeal is brought against an assessment or an amended assessment made on a chargeable person for any chargeable period, the chargeable person shall specify in the notice of appeal-

(a) Each amount or matter in the amended assessment with which the chargeable person is aggrieved, and
(b) The grounds in detail of the chargeable persons appeal as respects each such amount or matter

108. By letter dated 23rd of June 2015 the Inspector Mr Farren informed the Appellants' agent that "*it is Revenue's intention to assess the Appellant personally on the practice profits previously returned under the registration of the unlimited company*".

109. Notice of amended assessment issued on the 25th of June 2015. The only amendment made was to add a new Schedule D assessment in respect of the practice income already returned by the Appellant's company. By letter dated 24thof July 2015 the appellant appealed against this amendment as it infringed on his "right to trade within a company". The letter set out extensively the matters with which he was aggrieved.

110. Section 959 (3) Provides as follows:

> *"An assessment which is otherwise final and conclusive shall not for any purpose of the Tax Acts and the Capital Gains Tax Acts be regarded as not final and conclusive or as ceasing to be final and conclusive by reason only of the fact that the inspector has amended or may amend the assessment pursuant to section 955 and, where in the case of a chargeable person the inspector elects under section 944(4) not to make an assessment for any chargeable period, the Tax Acts and the Capital Gains Tax Acts shall apply as if an assessment for that chargeable period made on the chargeable person had become final and conclusive on the date on which the notice of election is given*."

111. The above legislation confirms that matters in an assessment which are not amended or appealed are final and conclusive.

Schedule F

112. By Email dated 13th of May 2020 Revenue stated –

> *"as is evident from, correspondence, The statement of Case and Outline of Legal Argument, will alternatively be seeking the Appeal Commissioner to amend the assessment to include under Schedule E the total of tax free withdrawals made from the company over and above the value, if any, properly attributable to goodwill".*

113. Section 130 (3) (a) provides as follows;

> *"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 difference"*

114. As can be seen from the above it is market value that applies. This is regardless of the accountancy treatment or whether the acquisition is recognised for accountancy purposes.

115. Section 20 TCA is the charging provision for Schedule F. Section 20(2) provides;

> *"No distribution chargeable under Schedule F shall be chargeable under any provision of the Income tax Acts."*

116. It is therefore not possible to amend the Schedule E assessment as requested above. There is no Schedule F assessment.

Statutory Interpretation

117. In the recent Supreme Court decision in *Bookfinders Ltd v The Revenue Commissioners* [2020] IESC 60 the court revisited the issue of statutory interpretation of tax statutes. The court also clarified the question of whether section 5 of the Interpretation Act 2005 applies to tax statutes. O'Donnell J. commented:

> 39. *This case shows that these broad arguments about the approach to interpretation are perhaps best pursued when not conducted in the abstract, but rather should be addressed by reference to the words of a particular statute and the facts of a particular case. This case also illustrates the fact that there is often a mismatch between the lofty principles that are said to be in conflict and the reality of the*

dispute. It is worth emphasising that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation.

40. *In O'Flynn, I delivered a judgment with which Fennelly and Finnegan agreed. McKechnie J., with whom Macken agreed, dissented in part. The case dealt with the very specific anti-avoidance provisions contained in s. 86 of the Finance Act 1989, which provided that, in certain circumstances, the Revenue Commissioners were entitled to look to the substance of a transaction if it was considered to be a transaction entered into solely for taxation purposes. In this regard, it is clear that the provisions of s. 86, although complex in themselves, were intended to reverse the effect of the decision of this court in McGrath, which had held that it was not possible to adopt such an approach without statutory authorisation. However, the Appeal Commissioner, in the decision which was the subject matter of appeal in O'Flynn, had refused to accept the Revenue Commissioners' interpretation of s.86, observing, in part, that it was "not open to them to adopt a purposive approach in the light of the decision in McGrath". It seemed clear that, whatever the correct outcome of the application of s. 86 in the context of the O'Flynn transaction, that observation was misplaced, since s.86 was enacted to reverse the effect of the decision in McGrath.*

41. *It would have been sufficient in that case, and might have been preferable, if I had limited myself to that observation, since that case did not raise any more general issue of the correct approach to interpretation. However, I also observed that the decision in McGrath "itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive". I also stated that McGrath implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters, and that it was acknowledged, at least implicitly, in McGrath that the same principles of statutory interpretation apply to tax statutes as to other legislation, and that this same principle was acknowledged explicitly in the provisions of the Interpretation Act "which embodies a purposive approach to the interpretation of statutes other*

than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes"

42. *It is clear that my observations on the issue of statutory interpretation in the O'Flynn case were obiter. On reflection, they were, I think, unnecessary, incautiously expressed, and made without the benefit of opposing arguments. In particular, I think it was wrong to use the loaded word "purposive" and to further suggest that the Interpretation Act mandated such an approach in respect of taxation legislation. There has been a tendency to set the debate as one between two rather extreme positions: one, a purposive or teleological approach akin to that employed in the field of European law, and in which words and text are of lesser importance than the apparent objective of the legislation; and, at the other extreme, an approach where the only focus of the inquiry, and the question of interpretation, is conducted almost by microscopic analysis of words set upon a transparent slide and stripped of all their context and where, if any ambiguity can be detected, the provision must be given an interpretation favourable to the taxpayer, however unrealistic that interpretation may be.*

43. *It is open to doubt that s. 5 of the Interpretation Act permits quite the wide-ranging purposive interpretation to give effect to the presumed objective of the drafters or those who adopted the legislation that is sometimes advocated. Rather, it refers to a construction "that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole". To that extent, s. 5 is more rooted in the statutory text than the most liberal teleological interpretive approaches. But even so, s. 5(2) undoubtedly distinguishes between general legislation and that which relates to "the imposition of a penal or other sanction", to which the approach in s. 5 does not apply. It appeared noteworthy that the Act did not refer to penal or revenue statutes. That is a common phrase in the law generally, and particularly in the context of statutory interpretation. Thus, in Kiernan, Henchy J. at p. 122 of the report, stated the then-applicable principle in this way:-*

> *"[i]f a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language." (Emphasis added).*

.....

47. *However, that should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision in particular, or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.*

48. *It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the purpose of the provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes. Thus, in Doorley, Kennedy C.J. in his dissenting judgment, relied upon by the appellants in this case, quoted the passage in the speech of Lord Cairns in Partington v. Attorney General (1865) L.R. 4 H.L. 100, 122, to the effect that if Revenue, seeking to recover the tax, could not bring the subject within the letter of the law, then the subject was free, however apparently within the spirit of law the case might otherwise be. However, Kennedy C.J. continued immediately to say that "this dictum does not mean, however, that the ordinary rules applied to the interpretation of statutes are not to be applied to the interpretation of taxing statutes, as has often been pointed out". He quoted the judgment of Lord Russell of Killowen L.C.J. in Attorney General v. Carlton Bank [1899] 2 Q.B. 158:-*

> *"In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part, I do*

not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as the intention is to be gathered from the language employed, having regard to the context in connection with which it is employed."

49. *Kennedy C.J. also quoted with approval the judgment of Horridge J. in Newman Manufacturing Company v. Marrable [1931] 2 K.B. 297, that the judge was entitled to, and ought to, "look at the object of the section" (emphasis added) when construing the provision. At p. 765, Kennedy C.J. concluded that:-*

> *"[t]he duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred". (Emphasis added).*

Indeed, the decision in Doorley is itself a good illustration of the sometimes nuanced nature of statutory interpretation and a warning against seeking to reduce that process to a small number of selected quotations from judgments, taken in the abstract. There, the majority (Fitzgibbon and Murnaghan JJ.) took a literal reading of the statutory language, while Kennedy C.J. adopted an interpretation which required reading the statutory language subject to an implied limitation to Ireland, which he considered was implicit in the structure of the Act.

…..

51. *In this regard, it is worth noting dicta on the matter from a number of different cases. In Kiernan, Henchy J. at p. 121 said that:-*

> *"[a] word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein". (Emphasis added).*

> *In McGrath, Finlay C.J. said at p. 276 that:-*

> *"[t]he function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it.". (Emphasis added).*

> *In Texaco (Ireland) Ltd v Murphy [1991] 2 I.R. 449, 456, McCarthy J. said that:*

> *"[w]hilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning". (Emphasis added).*

52. *The task of statutory interpretation in any context is the ascertainment of meaning communicated in the highly formal context of legislation. But some degree of uncertainty or lack of clarity is almost inevitable, and the principles of statutory interpretation are designed to assist in achieving clarity of communication. As long ago as 1964, in C.K. Allen, Law in the Making, (Oxford: Oxford University Press, 7th ed., 1964), the 7th edition of a textbook which had spanned the golden age of strict literal interpretation, Professor C.K. Allen observed at p. 349 that:-*

"common experience tells us that it is impossible to devise any combination of words, especially in the form (which all laws must take) of a wide generalisation, which is absolutely proof against doubt and ambiguity. So long as men can express their thoughts only by the highly imperfect instrument of words, an automatic, irrefragable certainty in the prescribed rules of social conduct is not to be attained".

It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed "strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".

53. *In the relatively recent case of Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., 4th June, 2019), McKechnie J. (who, it might be observed, was the author of the dissenting judgment in O'Flynn) delivered a judgment in relation to the application of difficult to construe provisions of the Tax Acts. I agree fully with what he said there, and which merits an extensive quotation (para. 62):-*

> 62. *In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation*

involved, those provisions, when construed and interpreted appropriately, are still capable of giving rise to the liability sought, then such should be so declared.

63. *As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet &Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*
64. *Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.*
65. *When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the*

enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.

66. *Another general proposition is that each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. Therefore, every word or phrase, if possible, should be given effect to. (Cork County Council v. Whillock [1993] 1I.R. 231). This however, like many other approaches may have to yield in certain circumstances, where notwithstanding a word or phrase which is unnecessary, the overall meaning is relatively clear-cut. However, it is abundantly clear that a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate: therefore, if on the only interpretation available the provision in question is ineffectual, then subject to the Interpretation Act 2005, that consequence must prevail.*
67. *....*
68. *....*
69. *Aside from the provisions of s. 5 of the 2005 Act, but in a closely related context, there is the case, cited by both parties of Inspector of Taxes v. Kiernan [1981] I.R. 117. It is a case of general importance, where the Court was called upon to determine whether the word "cattle" in s. 78 of the Income Tax Act 1967, could be read as including "pigs". Henchy J. in his judgment made three points of note. The first of these he stated as follows: "A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."*

    The learned judge went on to discuss when and in what circumstances a word should be given a special meaning, in particular a word or phrase which was directed to a particular trade, industry or business. At pp. 121 and 122 he quoted the words of Lord Esher M.R. in Unwin v Hanson [1891] Q.B. 115 at 119, who said :-

"If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

The other interpretative rule which Henchy J. also referred to is the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-

"Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation."

70. *The point first made is of common application: a provision should be construed in context having regard to the purpose and scheme of the Act as a whole, and in a manner which gives effect to what is intended. The second point does not appear relevant in that although the Regulations refer to "any shop, supermarket, service station or other sales outlet", those even with an intimate knowledge of the business conducted therein, including of course the goods and products on offer would not necessarily, indeed not at all, have an understanding of what a plastic bag is for the purposes of the Regulations. In any event, the phrase is statutorily defined and effect must be given to that. The third is designed to prevent the fresh imposition of a liability where such a burden could only be achieved by an interpretation not reasonably open, by the standard principles of construction above mentioned.*
71. *Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in*

the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected. An example is Kellystown Company v. H. Hogan, Inspector of Taxes, [1985] I.L.R.M. 200, a case involving potential liability for corporation profit tax: Henchy J. speaking for this Court at p. 202 of the report, said:-

> *"The interpretation contended for by Kellystown, whilst it may have the merit of literalness, is at variance with the purposive essence of the proviso. Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company. I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail."*

72. *Finally, could I mention the following passage from McGrath v. McDermott, [1998] I.R.258, at 276:*

> *"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it."*

Respondent's Submissions

118. The Appellant has treated patients from a premises in [redacted], County [redacted], and he has done so in partnership, since January 2005, with a second GP, Dr [redacted].

119. By written partnership agreement, dated 1 January 2005 (the "2005 Partnership Agreement"), the Appellant and [redacted] agreed as follows:

- The parties agreed to conduct a GP practice as partners under the style and title "[redacted] and [redacted]";
- The partnership was for a period of 5 years, and then to renew from year to year;
- The partnership practice was to be carried on at the Surgery and Consulting Rooms at [redacted] and [redacted] Dispensary;
- The partners agreed to enter into a lease of the Surgery and Consulting Rooms for a period of 10 years (from [redacted] and his spouse, the owners).

120. The partnership capital was set out in the 2005 Partnership Agreement at Clause 6, which provided that the "partnership assets shall consist of" the leasehold premises, the lease, the present stock of surgical instruments, equipment, medicines, drugs, dressings, fittings and furniture in the surgery, with a further provision for sale of [redacted]'s "furniture, fittings, medical and surgical instruments and fixtures" in [redacted] at a valuation to be agreed, and a provision that this is to be partnership capital, to be held by each partner in proportion to his profit share. No other partnership assets were listed.

121. After providing for practice expenses and a practice bank account, the 2005 Partnership Agreement addressed partnership income. In relation to partnership income, it expressly provided at Clause 9 that the partnership income "*shall include all files, allowances and remuneration paid to The Partnership or any one of The Partners arising out of the practice…*" (emphasis added).

122. At Clause 14(b), the partners were prohibited without the consent of all parties from working as GPs outside the partnership.

123. Each partner was responsible for their own medical indemnity insurance and medical registration.

124. At Clause 19, it was agreed that both parties may at any time agree to dissolution of the partnership by mutual consent. It was further agreed that "*at least 6 (six) months[']* *notice should be given to the other party if this is to be the case*."

125. The partnership contemporaneously executed a lease of the property comprising [redacted] from the owners, being [redacted] and his spouse.

126. Separately, by written agreement between the Appellant and the Health Service Executive ("HSE"), dated 14 April 2005 (the "GMS contract"), the Appellant agreed to provide services to patients under section 58 of the Health Act 1970. The terms on which he did so, and the way in which he was personally remunerated by the HSE for doing so, are considered in further detail below. In summary, the Appellant agreed to provide the treatment services as a personal obligation, normally to provide them personally and to retain clinical responsibility when they were occasionally provided by someone else on his behalf. In return, the HSE agreed to remunerate him personally for providing the treatment services.

127. On 20 September 2011, the abovementioned private unlimited company, named '[redacted]' was incorporated upon the initiative of the Appellant (hereinafter, "the unlimited company"). The unlimited company, the Appellant claims, commenced trading on 1 November 2011.

128. On 15 December 2011, the Appellant made a Capital Gains Tax ("CGT") payment, but no return was filed. The unlimited company filed a corporation tax return for the year ending 31 October 2012 on 13 February 2013 and for the year ending 31 October 2013 on the 9th October 2014.

129. The Appellant was, by letter dated 23 October 2013, notified that he had been selected for a Revenue audit for all taxes for 2011. This was later formally extended to cover the years include 2012 and 2017 inclusive, by letter dated 29 October 2019, although only 2012 and 2013 are at issue in the present appeal.

130. In or about November 2014, the Appellant signed an employment contract with the unlimited company.

131. The Respondent in the course of the audit asked for evidence that the business of the Appellant had been transferred to the unlimited company in November 2011, as alleged by the Appellant, but no evidence was made available. Ultimately, the Respondent assessed the Appellant to income tax personally on his share of the partnership income for 2012 and 2013 by way of the amended assessments issued on 25 June 2015.

132. The Appellant has appealed those assessments.

133. Throughout the appeal, the Respondent has made it clear that its primary position is that no legally effective transfer of the business took place in 2011, and, therefore, that the subsequent income from patients and the HSE remained personal to the Appellant (as his share of the partnership income) and is chargeable to income tax in his hands. Without prejudice to this, the Respondent contends that, if a transfer of the business took place, no or very little goodwill in the business was transferred to the unlimited company, and, therefore, the business was transferred at a significant overvalue. Consequently, the subsequent payments in excess of the actual value made to the Appellant in 2012 and 2013 by the unlimited company are chargeable to tax as income of the Appellant. In other words, if a transfer took place, then there was an overvaluation of goodwill resulting in payments being withdrawn via the director's current account which should have been subjected to PAYE/PRSI.

134. On a date around 1 November 2017, a partnership agreement ("the [redacted] Health Partnership Agreement") was entered into between [redacted], the aforementioned [redacted], the Appellant, the unlimited company and a further unlimited company connected to [redacted] called Dr [redacted] [redacted]. Its terms are set out in further detail

below. A key provision, at Clause 23.6, addressed the transfer of [redacted]'s patients, including his GMS list, to another partner or associate at the election of [redacted]. The [redacted] Health Partnership Agreement falls to be read in conjunction with an acquisition agreement ("the [redacted] Health Acquisition Agreement"), which on its cover page is dated 21 September 2017 and which expressly provided, through the definition of "The Equity" at Clause 2.2, that, in addition to the practice assets, [redacted] Health Primary Care Limited was purchasing the goodwill, custom and connections of both [redacted] and (supposedly) that of the unlimited company of the same name, described in the agreement as "DPH", in the "Practice", which is defined in Clause 1.1 as meaning "*the medical practice and business carried on by the Practitioner which said practice has been, up to the Completion Date, carried out from the Existing Premises and the* [redacted] *Premises*".

135. It appears that, by a document bearing the date 1 November 2017 on its cover page but which bears no date on its execution page, the Appellant, [redacted], the unlimited company and the unlimited company known as Dr [redacted] J. [redacted], executed what is described as a "*Deed of Dissolution of Partnership*" ("the 2017 Deed of Dissolution"), which purports (see clause 2 on 'Retirement and Admission') retrospectively to "*confirm and ratify*" both the admission of the unlimited company and the unlimited company known as Dr [redacted] [redacted] to the 2005 Partnership Agreement with effect from what is described as the "Admission Date" (which is defined in clause 1.1 simply as "November 2011"), and then to record the purported retirement of the Appellant and [redacted] from the said purportedly retrospectively amended 2005 Partnership Agreement from the said "Admission Date", viz from an unspecified date in November 2011. Clause 3 then proceeds to provide for the dissolution of the purportedly thusly retrospectively amended 2005 Partnership Agreement from "the Dissolution Date" (which is defined in clause 1.1 simply as "the date hereof"). No specific partnership assets were identified in Appendix 2, and the purchase price was left blank.

The issues that arise:

136. The two core issues that arise in the appeal are those set out in the Respondent's Outline of Legal Argument of 29 October 2019. They remain the central issues in this appeal, and are as follows:

(a) Was the purported transfer of the Appellant's GP medical practice in November 2011 to the unlimited company legally effective?

(b) If it was, were the parties justified in ascribing a value in that year of €416,773 to purchased goodwill?

137. On the first question, the Respondent accepts that the unlimited company was incorporated prior to November 2011 with the Appellant as 99% shareholder, and the Appellant and his spouse as directors thereof. The issue, however, is that: (a) the Appellant's business consisted almost in its entirety of assets that by their nature could not be transferred to a company; (b) there is no evidence that assets making up the business were actually transferred to the unlimited company; and (c) there is no evidence that the practice income after the purported transfer, in the years at issue, being 2012 and 2013, was earned by the unlimited company in partnership with another unlimited company, namely that connected with [redacted], rather than by the Appellant and [redacted] personally pursuant to the ongoing and unaltered 2005 Partnership Agreement. If there was no transfer of the business, then the business was in fact conducted by the said original partnership pursuant to the 2005 Partnership Agreement in 2012 and 2013. Consequently, the Appellant is chargeable to income tax on his profits as a partner. The purported attempt by the Appellant and [redacted], in and around November 2017, by way of the 2017 Deed of Dissolution, retrospectively to alter the terms of the 2005 Partnership Agreement with effect from November 2011 can have no effect on the appropriate tax treatment of the Appellant's income in 2012 and 2013.

138. If there was no transfer of the business, there can be no transfer of the goodwill. It is only if the Appeal Commissioner finds that a legally effective transfer of the business occurred pursuant to the asserted oral agreements between him and the unlimited company that the Appellant appears now to seek to rely upon, that the second question would then arise; viz. as to whether business goodwill was transferred with the other

assets of the business, and, if so, what the value of that business, including goodwill, was. The Respondent's position is that, even if the Appeal Commissioner finds that the business was transferred with full legal effect in November 2011 further to the oral agreements relied upon and in the absence of any contemporaneous alteration to the Partnership Agreement, given the absence of a non-compete clause, of any employment contract until November 2014 and of a structure for transferring, securing and monetising the Appellant's GMS contract, no effective transfer of business goodwill from the Appellant to the unlimited company occurred in November 2011.

139. In the further alternative, if some goodwill were contained (*quod non*) in the transfer price, the value recorded in the accounts of the unlimited company as being the price it allegedly paid to the Appellant for such goodwill (by way of a supposed orally agreed loan from the Appellant, i.e. €416,733, which created a balance of the same amount on the director's current account) and which was repaid (according to the unlimited company's accounts over the following two years) by it to the Appellant was far in excess of the market value in 2011 of the Appellant's said GP medical business, including goodwill. If the transfer is found to be effective, it is Revenue's contention that the value of any such goodwill transferred is overstated and that, accordingly, a tax liability attaches to the amount of the cash drawn down on the director's account over and above the amount correctly attributable to the value of the goodwill.

Burden of Proof in a Tax Appeal

140. As a matter of law, the burden of proof in a tax appeal rests with the taxpayer as espoused in *Menolly Homes Ltd v Appeal Commissioners*,[2010] IEHC 49 where the High Court (per Charleton J.) held, in the context of a VAT appeal, at paragraph 20 that:

> "*Under the Value Added Tax Act, 1972 the burden of proof "that the amount due is excessive" rests on the taxpayer. This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland. Powers are given to the inspector to be present, to produce evidence and to give reasons in support of the assessment. The Appeal Commissioners, if the taxpayer proves over- charging, must*

abate or reduce the assessment accordingly, but otherwise an order must be made that the assessment shall stand. The Appeal Commissioners are also given the power to charge the taxpayer to tax in an amount exceeding that contained in the assessment. So, their powers indicate that the amount due may go up or down or remain the same. Where a power is given to appeal a ruling, such as registration for V.A.T. purposes, the person "aggrieved", the relevant appeal jurisdiction in that case, may have that decision reversed on appeal. That, to my mind, is part of the necessary modification of the appeals procedure introduced in dealing with V.A.T. liability. It is what the legislature had in mind is setting the parameters of the jurisdiction. Appeals as to the "amount assessed" only arise where a V.A.T. assessment is raised. This is another necessary modification of the jurisdiction of the Appeal Commissioners on hearing an appeal."

141. Charleton J proceeded to state, at paragraph 22, of his judgment, that

"… The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in T.J. v. Criminal Assets Bureau, [2008] IEHC 168."

142. The Respondent thus, respectfully submit that the legal position is that the burden of proof in a tax appeal is on the taxpayer. The burden of proof in this appeal lies with the Appellant to demonstrate that he disposed of his medical business to the unlimited company with effect from November 2011, as he claims, and that the provision of medical services to public and private patients was thereafter done by and through that company, and not personally by the Appellant, in 2012 and 2013. Secondly, if the Appellant meets that burden and establishes to the satisfaction of the Appeal Commissioner the actuality of the asserted transfer with effect from 1 November 2011, the burden rests on the Appellant to establish that assets in the form of goodwill to the value of €416,773, as claimed, were transferred to the unlimited company on that date by the Appellant.

LEGAL AND TAXATION ISSUES ARISING

143. The case made on behalf of the Appellant on appeal was wide-ranging. It is therefore useful to set out the legal, taxation and factual context in which the two issues set out above arise.

The charge to Income Tax

144. It is axiomatic that income tax is charged and assessed on the person who earns income, profit or gains. The charge arises as a result of the earning of the income, not as a result of personally receiving it. If a chargeable person earns income, but assigns the payment to another person, or organises for it to be paid to another person, the chargeable person remains liable to tax on the income; it is a profit or gain for the purposes of section 12 of the Taxes Consolidation Act 1997 ("TCA"), the charge to income tax provision of the TCA.

The Law of Partnership

145. The taxation of partnerships provides an exception to the above rule. A partnership is "*the relation which subsists between persons carrying on a business in common with a view of profit"* (as per section 1 of the Partnership Act 1890). A partnership is just the aggregate of its members acting together. It is axiomatic that a partnership, in contrast to a company, has no distinct legal existence, separate from the partners. A partnership has no right of survivorship: a partner cannot transfer their share in a partnership to a third party. The partnership (having no separate legal existence) does not possess assets, rather the partners themselves do, sometimes jointly. This does not mean that partnerships do not have legal existence, but it does mean that they do not have an existence separate to the partners themselves. A partnership is simply the relationship between the partners.

146. The partnership is a contractual relationship governing how the income and profits of a business are to be shared, and the Tax Acts respect that relationship. Sections 1007 to

1013 TCA address the tax treatment of partnerships. For the purposes of income tax, the partnership is first treated as a separate tax entity, and the relevant taxable profits, charges and allowances of the partnership are calculated. Those profits, charges and allowances are then apportioned to each of the partners in accordance with the partnership agreement for the purpose of assessing the liability of each of the partners to income tax.

147. In the business of a medical practice run on a partnership basis, the individual doctor partners each generate income from patients under personal agreements with each patient. They also generate income from the HSE in relation to GMS patients under their personal contract with the HSE. Although the partnership has no separate legal existence, and although each partner earns income personally under the relevant agreements, for tax purposes the agreement to pool the income is respected: partnership profits are calculated, and the individual partner is then liable to tax on his/her contractual share (here, under the 2005 Partnership Agreement, at 50% each between the Appellant and [redacted]). For the avoidance of doubt, both in theory and in practice here under the 2005 Partnership Agreement, this is how the individual doctors' (Appellant and [redacted]) income was treated for tax purposes.

148. A partnership can "own" assets in the colloquial sense, but given that the partnership has no legal existence itself separate from that of its partners, the partnership may do so only in the sense that the partners can jointly own property (real or personal), jointly execute a lease and agree between themselves that certain personal property will be "partnership" property. Thus, in the 2005 Partnership Agreement, Clause 6, as noted above (paragraph 7), provided that [redacted]'s "*furniture, fittings, medical and surgical instruments and fixtures*" in [redacted] would be partnership assets.

149. It is common case that the Appellant's medical business was carried on until November 2011 by way of partnership with [redacted] pursuant to the 2005 Partnership Agreement, which, as summarised above, was tendered in evidence by the Appellant. As per the evidence given, the partners each individually had contractual relationships with the HSE for payments to be made to them under the GMS scheme by the HSE, and payments were made to each individually. They had, however, agreed that those payments,

earned individually, would be partnership income (as per Clause 9). There is nothing problematic in this, from a legal or tax perspective. The individual partners each has a personal contract with the HSE with remuneration earned by the partner and paid by the HSE, and each has the benefit of the remuneration from treatment of private patients. The two doctors agreed to work together as partners, and to share the income and profits of the business. They can do so without transferring or assigning their personal GMS contract to the partnership, since a partnership is not a separate legal entity. From a legal perspective, the HSE pays the relevant partner (under the GMS contract) and the patient pays the relevant partner (in the case of private patients). This is not an assignment or transfer of any underlying asset, merely an agreement that the income generated by the partners at the location of the business will be partnership income. The income tax liabilities of the partners are, in turn, calculated in accordance with the aforementioned sections 1007 to 1013 TCA, which do not in and of themselves accord separate legal personality to the partnership, but allow it to be treated as such for tax purposes. A specific choice has, thus, been made in this respect by the Oireachtas.

150. For present purposes, the salient points are that: (a) carrying on the business of the [redacted] practice as partners is completely consistent with the GMS contract being personal and unassignable, and the fact that the business was carried on by partners is not in any way indicative that the partners' interest in the contracts could be transferred to separate legal entities like companies; and (b) that, even if this business was transferable, a series of transactions would have to be entered into in order for each partner to transfer his business into a company and for the companies to then form a partnership.

Goodwill in a Medical Practice

151. When the parties refer to "the business", to the "medical practice", and to "the goodwill", it is important that they be clear to which business, medical practice and goodwill they are referring, as these terms can have different meanings in different contexts. The "business" is the medical practice, providing GP services at [redacted]

[redacted], Co. [redacted], carried on by way of partnership by the two doctors, as set out above. To provide that service, each of the doctors has a personal contract with the HSE, personal contracts with each patient they treated (both in the long term, on the retention and protection of records, and in the short term, providing treatment in exchange for payment). As partners, for the life of the partnership, they each had a share in the business. The assets of the business would be the partners (and their personal contracts, contacts and personal goodwill), plus tangible assets and intangible assets as listed in the 2005 Partnership Agreement. The business could have goodwill, due to its location and reputation, giving it a value above the value of its tangible assets, and, although such goodwill is not alienable as a sole asset, it could be transferred to a third party with the business itself. This business goodwill is only alienable in so far as it attaches to the business itself, and not to the doctors themselves. It cannot be transferred as a sole asset, but is the name given to the excess value of a transferred business above the value of the constituent parts of the business that are transferred.

152. The doctor partners themselves, the Appellant and [redacted], could have personal or professional goodwill, but that is not goodwill in the business, as it is not an asset that can be transferred to a third party, separable from the doctors themselves. When reference is made herein to the alleged sale or transfer of the "business", this is the business in question, and when reference is made to goodwill, it is the goodwill in the business that is at issue. It is the value of the business goodwill that is at issue if the Appeal Commissioner finds that the business was actually sold to the two unlimited companies. This distinction between business goodwill and personal/professional goodwill is key to understanding what might have been transferred in 2011, what could not be transferred, and the value of what might have been transferred.

Business Goodwill

153. From an accounting perspective, goodwill is defined as the difference between the price paid for a business and the value of its individual assets and liabilities.

154. There is no statutory definition of the term "goodwill" in the tax code. The Oxford English Dictionary (3rd ed., December 2014) entry for goodwill is as follows:

> *"Business. The privilege, granted by the seller of a business to the purchaser, of trading as the recognized successor of the seller; (now usu. more generally) the established reputation of a business regarded as a quantifiable asset and calculated as part of its value when it is sold."*

155. In a legal context, judicial consideration of what constitutes goodwill reaches back at least two hundred years, yet there remains no conclusive definition. Halsbury's Laws of England, 4th ed., Vol.35, p. 1206 states as follows:

> *"The goodwill of a business is the whole advantage of the reputation and connection with customers together with the circumstances whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any business or business product the value of the attraction to the customers which the name and reputation possesses."*

156. The leading legal authority on the issue of goodwill is arguably the decision of the House of Lords in *Inland Revenue Commissioners v Muller & Co.'s Margarine Ltd.* [1901] AC 217. In an oft-cited passage, Lord MacNaughten at pp. 223-224 stated as follows:

> *"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. […] It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various*

substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

For my part, I think that if there is one attribute common to all cases of good will it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again"

157. In seeking to synthesise the various authorities and provide a working definition of goodwill, Jowitt's Dictionary of English Law (3rd ed., at 1029-1030) provides a distillation of the legal principles underlying the definition:

"The goodwill of a business is the benefit which arises from its having been carried on for some time in a particular house, or by a particular person or firm, and from the use of a particular trade mark or trade name […] Its value consists in the probability that old customers will continue to be customers notwithstanding a change in the firm or place of business.

A form of intangible personal property that attaches to a business or trade name and which gains protection under the common law tort of passing off. "The attractive force which brings in custom […] and which distinguishes an old-establishment business from a new business at its first start."

158. Goodwill or added value is inherently inseparable from that whence it derives so that it has no independent existence (*Muller & Co.'s Margarine Ltd*). The sale of a business will include the goodwill of that business, if any, and a payment for the business goodwill is essentially capital in nature.

159. The recent *English case of Primus International v Triumph Controls* [2020] EWCA Civ 1228 is useful in providing an overview of the judicial approach to the interpretation of the term "*goodwill*", albeit it would not be especially instructive factually in the present case, which is concerned with the market value of a business. In *Primus*, an exclusion

clause in a share purchase agreement excluded claims by Triumph against Primus "*in respect of lost goodwill*". The question that, therefore, arose was what the term "*goodwill*" meant in the context of such an exclusion clause in a commercial contract. Primus argued, quite ingeniously but ultimately unsuccessfully, that because goodwill was the difference between the share value and asset value, if something caused the share value to drop without the asset value dropping, a claim on this basis must be a claim on the basis of "*lost goodwill*". Triumph argued that in such a clause, what is excluded is a claim based on the reputation, brand recognition and good name of the business in question. The Court of Appeal of England and Wales agreed. It ultimately found, at paragraph 39 per the judgment of Coulson LJ, that:

> *"In summary, therefore, I am satisfied that the authorities point overwhelmingly to the conclusion that 'goodwill' in a contract for the sale of a business refers to a type of proprietary right representing the reputation, good name and connections of a business, and is different to the particular or specific meaning attributed to the term by accountants" (emphasis added).*

160. The Appellant in his written submissions has included the above extract which introduces substantial extracts from the judgment and puts emphasis therein on paragraph 39 of the judgment, but the submissions misquote paragraph 39 by claiming that the Court of Appeal there described "'goodwill', in the context for the sale of a business". This is incorrect. As set out above, Coulson LJ, instead, defined what is meant by the term 'goodwill' when used in a contract for sale of a business (and did so in the context of an exclusionary clause).

161. The analysis of goodwill by Coulson LJ in paragraphs 30 to 38 is instructive, and his conclusion is, it is submitted, supportive of the Respondent's case – it is the proprietary rights of the business (not its employees) that make up goodwill. However, two notes of caution should be sounded. First, Coulson LJ was defining the term when used in a commercial contract to exclude liability for loss. Second, this case, by contrast, is about the value of a business, including its goodwill, and it would not be an accepted or valid method of valuation to calculate the assets of a business, value the goodwill, and add them together. Rather, the market value of a business is determined by considering for

what sum a theoretical third-party stranger acting at arms' length would purchase the business. If that market value is higher than the net asset value, it is because the business has goodwill that such a third party would also be acquiring. Talking discretely about the valuation of goodwill puts the cart before the horse.

Professional or Personal Goodwill

162. Just as a business may have an attractive force or reputation as an intangible asset, so may individual employees of the business. From both a legal and accounting perspective, this "personal" or "professional" goodwill is not an extrinsic capital asset of the business, as it is generally inalienable. If an entity purchases a business, it may then have the use of the personal contacts or personal contracts of employees of the business, if there is an employment contract in place, but they cannot "own" those personal connections, only exploit them, and only exploit them for as long as the employee is willing to remain in the business. In the present case, insofar as the medical practice itself ("[redacted]") had a reputation and attractive force that was external to the Appellant and [redacted], that could form the basis for goodwill in the business. Insofar as the doctors were themselves the source of the reputation or attractive force, that is a personal or professional goodwill that the doctors themselves enjoy, that they can exploit for income, but that they cannot sell to another party as a capital asset (see *Villar v Revenue & Customs* [2019] UKFTT 0117 (TC)).

163. The new owner does not own the employees, but merely remunerates them for their services. Insofar as a business exploits that personal goodwill for payment, the payment is income in nature. It may be that an employee continues to work for the business, and, through the provision of his or her services, continues to attract customers based on his or her qualifications, reputation and experience (i.e. of the person not of the business). Any payments to that employee, whether lump sum or not, are not payments for the goodwill of the business, but, rather, are payments to that employee for the exploitation of his/her labour, his/her qualifications, and his/her reputation (see, for example, *Villar v Revenue & Customs* [2019] UKFTT 0117 (TC)).

164. Any goodwill intrinsically linked with the reputation, personal skill and expertise of the Appellant, in his capacity as a doctor is incapable of alienation. Insofar as a purchaser made payments to him in relation to this "professional goodwill", they are emoluments for his services rather than capital payments. Insofar as the market value of the business of the practice is concerned, that market value cannot include the value of professional goodwill, since that is not an asset that is alienable or transferable as a capital asset.

165. The Appellant did not sign a non-compete agreement, and, therefore, was free to set up a new practice, for example from neighbouring or nearby premises: this is incompatible with a transfer of the business goodwill (Kirby v Thorn EMI [1987] STC 621 at 628). If he was unable or unwilling to work, he could not be compelled to do so. Therefore, there was no effective transfer of business goodwill.

Valuation – Business or Goodwill?

166. As set out above, goodwill is a derivative of the valuation of a business. A valuer establishes the market value of a business, considering the market, similar sales, accepted methods of valuation. The difference between the market value of the business of a whole, and the market value of the business' tangible and intangible assets, is the value of the business' goodwill. In the absence of a market transaction between strangers at arms' length, the valuation of the business should be ascertained by looking at comparable transactions and at all available market data.

167. This appeal is therefore not about whether goodwill was transferred, and what the goodwill was worth. It is about whether a business was transferred, and, if so, what the business was worth. If, having calculated the market value of the business, that value exceeds the net asset value, then the difference is goodwill. Professional valuers do not value goodwill, they value businesses and assets.

The Assignment of Income

168. The charge to income tax applies on income earned by a party, even if that income is paid or redirected to a third party (as per section 112 TCA: see e.g. *MacKeown*

(Inspector of Taxes) v [redacted] *J Roe* ITR Vol 1 214). Emoluments arising or deriving from a person's efforts in their employment or office, even if they are redirected, still fall to be taxed on the person who earned the income (unless a partnership agreement is in place, as sections 1006 to 1013 TCA would then apply). Profits and gains fall to be taxed on the person who made them, irrespective of to whom the relevant money is paid or through whose bank accounts they are paid. Thus, the fact that the Appellant's payments from the HSE and, possibly also those he received from his private patient patients, were paid into the bank account of the unlimited company from some point in November 2011 onwards does not alter their nature for tax purposes, as income of the Appellant.

Status of Expert Evidence

169. An expert's evidence is persuasive but not conclusive, even if it is not contradicted by an expert. The Appeal Commissioner must bring his own critical faculties to the expert's evidence. An expert's evidence should be considered and weighed up in light of all the other factual evidence available to the Commissioner, and with regard to the reasoning of the expert, the correctness of the underlying assumptions and factual premises, and having regard to the expert's qualifications, expertise, and reputation. The Commissioner is here faced with evidence from an independent expert called by the Respondent and no such evidence of the Appellant, who has relied on his own valuation, prepared by his own agents on his behalf. An expert's evidence is persuasive, but not conclusive even when uncontradicted by an opposing expert. The Appeal Commissioner must bring his own critical faculties to the expert's evidence. An expert's evidence should be considered and weighed up in light of all of the other factual evidence available to the Commissioner, and with regard to the reasoning of the expert, the correctness of the underlying assumptions and factual premises, and having regard to the expert's qualifications, expertise, and reputation (see McGrath on Evidence, 3rd Edition, Round Hall, 2020, at pages 501 to 504).

170. As Charleton J., in the High Court decision of J*ames Elliott Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269, stated at paragraph 12, the judge, or in the present matter the Appeal Commissioner, "has to attempt to apply common sense and logic to the views of

an expert as well as attempting a shrewd assessment as to reliability". In his decision, Charleton J. proceeded to approve the following passage from Stewart-Smyth L.J. in *Loveday v. Renton* [1989] 1 Med. L.R. 117:

> *"The mere expression of opinion or belief by a witness, however eminent… does not suffice. The Court has to evaluate on the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witnesses' opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence… there is one further aspect of a witness's evidence that is often important; that is his demeanour in the witness box. As in most cases where the court is evaluating expert evidence, I have placed less weight on this factor in reaching my assessment. But is not wholly unimportant; and in particularly in those instances where criticisms have been made of a witness, on the grounds of bias or lack of independence, which in my view are not justified, the witnesses' demeanour has been a factor which I have taken into account".*

171. In the present case, no independent valuer gave evidence in support of the Appellant's agents' own valuations of the business allegedly transferred by the Appellant to the ultimate company, despite the onus of establishing the value resting on the Appellant. The independent experts called by Respondent gave compelling and convincing evidence, uncontroverted by experts, as to the methodology to be applied in valuing a business, their conclusions on the value, and on the accounting principles to be applied.

Appealing Assessments

172. Counsel for the Appellant has made the submission that the Appeal Commissioner is limited to considering only one schedule on appeal. Revenue submits that this contention is unfounded.

173. It seems to be common case that for the 2013 tax year, section 959C TCA, as amended by section 92 of the Finance Act 2013, applies. This provides for the making of an assessment by Revenue of the amount of the income, profits or gains arising to the person (section 959C(4)(a)) and the amount of tax chargeable (section 959C(4)(b)) and the amount of tax payable section 959C(4)(c)). The entirety of an income tax liability, under all schedules, is thereby assessed, but the Notice of Assessment may include details of the Case or Schedule under which an amount of income, profits or gains has been charged in the assessment (section 959E(6)(a)). An appeal of such an assessment, or an amended assessment, is clearly an appeal of the amount assessed, and an Appeal Commissioner can determine that the assessment be reduced or increased, or stand, accordingly. For 2013, there is clearly no issue that may plausibly be raised by the Appellant about an Appeal Commissioner being confined to only considering a sole Schedule.

174. Regarding 2012, Counsel for the Appellant submits that assessments under section 918 TCA "under Schedules D, E and F" are technically separate assessments that they may be aggregated (under section 921), that, when aggregated, the Notice of Assessment to be valid must indicate each assessment appealed against, and that, on appeal, the Appeal Commissioner may abate or reduce the amount of the assessment. Counsel for the Appellant contends that the Appeal Commissioner's jurisdiction is confined to considering only the income tax charged under that particular assessment, so that, in the within matter, if the Appeal Commissioner concludes that the excess over the market value paid by the unlimited company to the Appellant in 2012 and 2013 is assessable under Schedule F, rather than Schedule E, the assessment may not be amended, as *"[t]here is no Schedule F assessment*".

175. The Respondent disagrees that, if the Appeal Commissioner finds that a transfer of some sort occurred, any overpayment of the value thereof to the Appellant would constitute a

dividend payment by the unlimited company to him for Schedule F purposes. The earning at issue in 2012 and 2013 were earned by the Appellant personally on an 80:20 basis from his personal contracts with the HSE and those with his private patients. That the earnings may have been channelled into the unlimited company's bank account does not alter their nature as income of the Appellant. Nor does the fact that they were remitted to the Appellant by way of payments drawn from the directors' loan account allegedly as repayments for a loan agreed orally between him and the unlimited company linked with the supposed provision by the Appellant of the financial means to the unlimited company (which has no independent financial means) to pay the purchase price for the transfer of goodwill alter the reality that the funds came from income earned by the Appellant paid into the unlimited company's accounts.

176. Alternatively, were the Appeal Commissioner, none the less, to conclude that Schedule F is applicable, there are two difficulties with the Appellant's position. The first is factual. Even if the interpretation being proffered by the Appellant were correct, he appealed the entirety of the amended assessment, which assessed the Appellant under schedules C, D, E and F, albeit the amended Schedule F assessment for 2012 was zero. The Appeal Commissioner is referred in this respect of his agent's letter to Revenue of 24 July 2015, which made an unqualified appeal against the Notices of Amended Assessment for 2012 and 2013 of 25 June 2015. Thus, even if the Appeal Commissioner were to exercise his discretion to consider this novel ground of appeal, articulated at the initial hearing in June 2021 and in the Appellant's Submissions of 10 July 2021, notwithstanding its inconsistency with the unqualified appeal brought against the amended assessment back in July 2015, the Respondent submits that, given the breadth of the appeal and the appellate jurisdiction of the Appeal Commissioner, the latter can determine the income chargeable, and the assessment to income tax, of the Appellant in relation to each of the Schedules in the amended assessment so as to determine whether they should be reduced, abated, increased or allowed to stand as they are.

177. The second is that his interpretation fails to take into account an Appeal Commissioner's statutory power on appeal. Even if the Appellant had only appealed an assessment under Schedule E (which is clearly not the case here as the increase at issue, which the Appellant recognises in his Submissions, arose from the addition of "a new Schedule D

assessment in respect of the practice income already returned by the Appellant's company"), an Appeal Commissioner is not confined only to increasing the amount charged under Schedule E.

178. In this regard, section 934(4) TCA provides, just as it did also in 2012, that:

> *"Where on any appeal it appears to the Appeal Commissioners that the person assessed ought to be charged in an amount exceeding the amount contained in the assessment, they shall charge that person with the excess".*

179. The person shall be charged with the excess, irrespective of Schedule. This can be contrasted with the preceding subsection, section 934(3), which provides (also just as it did in 2012) that, when it appears to the Appeal Commissioners that the person has been overcharged by an assessment, it is that assessment that shall be abated or reduced:

> *"Where on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand."*

180. This power in not circumscribed, as the Appellant appears to submit, by the requirement stipulated in section 20(2) TCA that distributions chargeable under Schedule F shall not be chargeable under other provisions of the Act.

THE EVIDENCE

181. It is both useful and appropriate to consider the oral evidence given. Furthermore, providing a detailed summary of same may assist the Appeal Commissioner in reviewing the transcripts and in carrying out his aforementioned required evaluation of the expert evidence.

The Appellant's evidence

182. In examination-in-chief, the Appellant gave the following factual evidence:

(a) He verified the 2005 Partnership Agreement, and put particular emphasis on Clause 9 (the Partnership income), under which income from the HSE to each of the partners was to be partnership income;
(b) He confirmed that he earned his way to a 50% share over four years;
(c) He confirmed that the partnership leased the premises from [redacted] and his wife under a ten-year lease commencing in 2005;
(d) He confirmed the contents of the GMS Contract, and confirmed that as well as him personally treating patients, he could arrange for his partner [redacted] to treat them, or a locum, as long as they were a registered medical practitioner;
(e) He confirmed that the HSE paid the moneys under his GMS Contract into a partnership bank account;
(f) He stated that he incorporated an unlimited company in 2011 to develop his practice, to purchase property, and to improve pension planning;
(g) He claimed that patients and bodies with whom they had contracts were aware that a new company had been formed
(h) He stated that the 2005 Partnership Agreement was not resolved and was not changed at the time;
(i) He claimed that the F45 (withholding tax certificates) were in the name of the Unlimited Company
(j) Under the 2017 [redacted] Health Partnership Agreement, [redacted] purchased an option to purchase the Appellant's share in the business when he reaches 60 (in 2029) for €453,517, to be paid on a phased basis, on condition that he continue to work for the practice at a reduced rate;
(k) In 2017, by a deed of Dissolution, the Appellant and [redacted] dissolved their 2005 partnership;
(l) The Appellant paid €103,875 capital gains tax for the 2011 tax period on a returned gain of €416,773, with no base costs and no reliefs claimed.

183. In cross-examination, the Appellant gave the following evidence:

(a) He confirmed that the number [redacted] was his personal GMS number;
(b) He agreed in reference to the GMS Contract that:
    (i) this was the only GMS contract that he had signed
    (ii) it was also signed by the Chief Executive of the HSE
    (iii) he personally agreed "to provide services in accordance with the terms and conditions in the schedule to this agreement to persons entitled under section 58 of the Act" from Monday to Friday
    (iv) he gave his date of birth of [redacted]
    (v) he signed it
    (vi) he understood his obligation as the medical practitioner to make sure that patients signed up to his panel get proper and due care either from himself as medical or someone else
    (vii) he accepted that it was unusual for patients to be assigned to a list;
(c) He accepted that there was no written agreement between the unlimited company and himself for the purchase of the practice;
(d) He accepted that he and his spouse were both directors of the unlimited company;
(e) He accepted that no formal board meeting of the unlimited company took place to discuss the purchase, or the potential purchase price, of the business;
(f) He accepted that there were no minutes of any board meeting of the unlimited company discussing the purchase, or the potential purchase price, of the business;
(g) He was not able to point to any independent advice taken by the unlimited company in relation to the purchase price;
(h) He accepted that the Financial Emergency in the Public Interest Legislation applied in 2011, and reduced GP incomes;
(i) He alleged that the purchase was agreed orally, but could not point to any term of the oral agreement except the valuation of the goodwill;
(j) He accepted that there was no non-compete clause in the agreement;
(k) He claimed to have notified the HSE of the transfer, but the letter he put in evidence to the Contracts Section of the HSE referred to "payments due to me", "my tax clearance certificate" and "my correct details";

(l) The only element of the letter he could point to as referring to the unlimited company was that the tax reference number of the company was used, but, even then, he accepted that the letter did not disclose that this was the company's tax reference number and not his own; His third letter used his personal GMS panel number, and stated that: "I confirm that our bank account details" have changed for payment purposes, and again he confirmed that nothing in it indicated that it referred to the unlimited company rather than to him personally;

(m) He confirmed that the P45s, filed by the Chief Executive of the HSE, after November 2011, were filled out with his personal GMS number, with his personal name, broken down between surname ([redacted]) and first name [redacted] in contrast to a company or firm which has a title;

(n) He accepted that it was not obvious to private patients from the headed paper or the receipts that they were now dealing with a company;

(o) He never informed patients that their sensitive medical data was being transferred to a company;

(p) He acknowledged that there was no change in his indemnity insurance, that he held it personally;

(q) He accepted that he personally would be liable to patients if they were treated negligently;

(r) He claimed that he, [redacted] and the two unlimited companies agreed that the 2005 Partnership Agreement would continue to apply, but to the unlimited companies, without amendment to the document itself;

(s) He acknowledged that he himself was personally a party to the 2017 [redacted] Agreement, to prevent him moving with his GMS list to another practice;

(t) He confirmed that the goodwill allegedly acquired for €416,773 the previous November was amortised in full in the following year's accounts, that the accounts stated that this was the decision of the directors, but could not explain why he as a director took that decision;

(u) He confirmed that according to the accounts of the partnership and then of the unlimited company, he had earned €201,543 personally in 2011, but he only received €80,000 plus pensions in emoluments from the company in 2012, and had also received a repayment of a purported director's loan in the amount of €160,000 from the company in relation to the goodwill;

(v) He stated that he was happy to only receive €80,000 on the basis that he now had a company with "equity" or "value" in it, but was unable to point to any assets of the company;
(w) He accepted that the only assets listed in the 2012 accounts of the unlimited company were trade debtors and cash;
(x) He stated that the lease was only amended in 2015;
(y) He disclosed that he now has a role with [redacted] Health;
(z) He agreed that under the [redacted] Health Agreement, it was his further involvement in the practice which was being purchased;
(aa) He agreed with the analysis of the [redacted] Health Partnership Agreement that on the exercise of the option to purchase, he would continue to work in the practice, but would do so for a salary of just €150,000 a year (€12,500 a month), his share of the practice profits would be 2%, and the payments to the unlimited company would be reduced to zero, and that is what [redacted] Health were paying for;
(bb) He stated that he cannot sell his GMS list, but that a transition can be managed when someone retires, subject always to patient choice.

184. On re-examination, the Appellant:

(a) Was unclear as to whether he had been advised that incorporation would require a disposal and an acquisition;
(b) He confirmed that he did not need the approval of the HSE to enter into the Partnership Agreement in 2005;
(c) He confirmed that under the partnership, each partner provided and used their own motor vehicle.

Mr [redacted]'s evidence

185. In examination-in-chief, [redacted] [redacted] gave the following evidence:

(a) He confirmed that he was the commercial director of [redacted] Health, which has a network of 60 medical practices in Ireland;

(b) He stated that the majority of the practices were acquired as existing businesses;
(c) He stated that [redacted] Health does not purchase practices outright, but "acquires" the goodwill over a period of time by forming a partnership with GPs in the practice;
(d) He gave an example of a four-year period for the migration of the goodwill
(e) He confirmed that there are always two agreements, being the acquisition agreement and the partnership agreement;
(f) He stated that the price is negotiated at arms' length, and cash flow as well as a multitude of other factors go into it, including the revenue per patient and the potential for specialist services;
(g) He stated that they operate by way of partnership, so that if there are three doctors in a partnership, they will put in place a new partnership with four partners, governed by a partnership agreement, which registers for tax as a new partnership, and provides new contracts of employment to the employees of the previous partnership;
(h) He confirmed that "having taken over the practice" the GMS income was partnership income;
(i) He stated that he was not involved in the acquisition of [redacted] in 2017;
(j) He confirmed that it was acquired by way of standard acquisition and partnership agreements;
(k) He confirmed that such agreements provide for a four-year rollout period because patients very often have a relationship with their doctor, not with a particular practice, and this period allows [redacted] Health to transfer the goodwill that exists between the doctor and the patient to one between the patient and [redacted] Health over time;
(l) The value of the relationship between doctor and patient is central to the engagement;
(m) He stated that the GMS contract that exists is one between the doctor and the HSE and it cannot be easily manoeuvred or transferred to another doctor as this requires time and patient consent, and the four-year timeframe reflects that.
(n) He acknowledged that the cash-flow of a practice is generated by those personal relationships between doctor and patient;
(o) He confirmed that a GMS list is attached to a particular doctor, even when care is provided by the practice, and the payment is made to the partnership practice account;

(p) He confirmed that as far as he knows, associate doctors can get a GMS Contract;
(q) He confirmed that, if a doctor is retiring, their GMS patients can be transferred at a rate of 8% a month, over one year, to another doctor, subject to patient consent, but that it can be done en bloc where there is an established partnership between the retiring and the acquiring doctors;
(r) He confirmed that the four-year period was required to manage the transfer of the goodwill and the transfer of public patients;
(s) He confirmed that [redacted] Health entered a partnership agreement with the Appellant and an acquisition agreement with [redacted];
(t) He confirmed that withholding tax addressed through the personal tax claims of the partners, and addressed within the partnership through offsets and reconciliations;
(u) He stated that the goodwill in a practice is based on the value that [redacted] Health believes the practice can generate over time in terms of cash flow;
(v) He confirmed that there was goodwill in [redacted] Health's acquisition of [redacted]

186. In cross-examination, Mr [redacted] gave the following evidence:

(a) He confirmed that only seven or eight acquisitions were made by [redacted] Health to 2014/2015, and that the bulk of its acquisitions have been since then, due to a change in direction of the business;
(b) He confirmed that it would never enter into oral agreements to purchase a practice;
(c) He confirmed that the 2017 the [redacted] Health Acquisition Agreement re [redacted] practice was for the purchase of a practice, including goodwill, while the partnership agreement governs the ongoing management of the partnership;
(d) He was unable to explain why under the 2017 [redacted] Health Partnership Agreement, [redacted] was only entitled to remuneration at 60% of what Dr [redacted] was remunerated (€12,500 vs €7,500 a month), despite working the same hours per week;
(e) He later confirmed that under the 2017 [redacted] Health Partnership Agreement, [redacted] would during this four-year period receive a payment of €115,000 followed by 15 individual quarterly payments of €22,333;

(f) He confirmed that, under the 2017 [redacted] Health Acquisition Agreement, it was the equity of "the practitioner" which was acquired as well as that of the unlimited company, and that the equity of the practitioner included "the benefit of all patient custom, patient lists, records and work in progress in the practice", and he confirmed that these agreements are personal to the doctor, and that GMS lists are a core component of the goodwill value;
(g) He confirmed that it is retention of the list over 10 or 15 years that generates the value for [redacted];
(h) He confirmed that the additional payments under the 2017 [redacted] Health Partnership Agreement (€115,000 followed by 15 individual quarterly payments of €22,333) are structured to ensure the transfer of the goodwill over the four years;
(i) The 2017 [redacted] Health Acquisition Agreement also includes a non- compete clause, which he explained is because they are protecting the goodwill in relation to relationships with patients;
(j) Patients from the GMS list cannot be transferred to another doctor without a consent form. After transfer the patient will get a new medical card with the name of the new doctor, and the monthly calculation of payments per doctor will change, even if the movement is between two doctors in partnership in the same practice;
(k) He confirmed that the staged payments under the 2017 [redacted] Health Partnership Agreement were conditional on the completion of certain actions, like the transfer of GMS lists;
(l) He further confirmed that [redacted] Health insures the life of the partner to the value of the payments outstanding;
(m) He also confirmed that there are penalties for a drop in revenues after acquisition.

187. In re-examination in chief, Mr [redacted] gave the following further evidence:

(a) He confirmed that the contract for the acquisition of [redacted]'s practices is stamped;
(b) He stated that asking about valuations for practices was like asking about how long is a piece of string;
(c) He stated that while you can calculate the value of a practice as a proportion of turnover, just to get a financial metric from it, it would never be the starting point and it would generally not be a consideration of what [redacted] Health was doing;

(d) The driver was the cash-flow, the earnings generated from the practice, not the turnover;
(e) He gave detailed evidence on how GMS contract lists might have different values, depending on the previously untapped revenue- generation potential.

Mr [redacted]'s evidence

188. In examination in chief, Mr [redacted] gave the following evidence:

(a) He confirmed he was the Appellant's accountant in 2011;
(b) He confirmed that the partnership profit in the year to October 2011 was €399,000 shared 50/50 between the two partners;
(c) He confirmed the accounts of the unlimited company;
(d) He confirmed that those accounts showed that acquired goodwill was written off in the year of acquisition, and he claimed that that the directors did so because otherwise they would have had to value it every year;
(e) He valued the goodwill at €416,773;
(f) He stated that there was no point in which they could reflect fixed assets in the accounts;
(g) He disclosed that he was aware of [redacted] Health in 2011;
(h) He claimed that the business was purchased in 2017 from the unlimited company;
(i) He stated that goodwill is an intangible asset that can be purchased and can be owned.

189. In cross-examination, Mr [redacted] gave the following evidence:

(a) He admitted that he was aware of the original 2005 Partnership Agreement, but not familiar with it;
(b) He stated that after 2011 accounts were prepared for the two unlimited companies separately, but not for any partnership between them;
(c) He was unable to explain the drop in turnover between 2010 and 2011, which even after credit given for the difference in the length of each accounting year, was over €100,000, approximately €120,000;

(d) He stated that he was not aware that there had been such a drop;
(e) He was not aware of the FEMPI reductions, and had carried out a valuation of the business simply on the 2008, 2009 and 2010 accounts;
(f) He confirmed that for accounting purposes the fixed assets were worth virtually nothing by 2011, and there were no intangible assets;
(g) He confirmed that it was the partners and their advisor as vendors who asked him to provide the valuation, and he could not remember if he was first asked to do so before or after the unlimited company was incorporated;
(h) He stated that Paul [redacted] was brought in specifically to advise on the transfer of the business from the partners to the unlimited companies;
(i) He confirmed that his valuation of the business was based on the performance of the business in 2008, 2009 and 2010;
(j) He stated that he wrote to the Revenue Commissioners about the proposed transaction, and that he might have received the standard response, which stated "it is not Revenue policy to offer an opinion on the outline valuation in advance of any transaction";
(k) He had valued the goodwill at €416,773, which was 50% of his valuation of the goodwill of the business;
(l) He claimed that it was within accounting policy to amortise the goodwill in full in one year;
(m) When asked what accounting standards supported writing off goodwill within one year, he stated that FRS 10 or FRS 11 referred to goodwill, prescribed the period, and said that it can be done up to 20 years, and does not say you cannot do it within one year;
(n) He confirmed that the purchase was made by way of director's loan, and that the accounts showed that €160,235 was withdrawn from the company in 2012 and €74,606 in 2013;
(o) He confirmed that the valuation was not based on an accounting standard, but was based on an industry or market standard;
(p) He claimed that he was aware that [redacted] Health were acquiring GP practices in 2010 and 2011, and was not aware that this contradicted Mr [redacted]'s own evidence;

(q) He stated that he was not familiar with the 2017 [redacted] Health Acquisition and Partnership Agreements;
(r) He was not aware that the practice income was 80% GMS payments;
(s) He was not aware of the decline in GMS payments when he provided his valuation;
(t) He was not aware that the GMS contract was a personal relationship of the Appellant with the HSE;
(u) He compared the sale in 2011 to the [redacted] Health transfer in 2017, but did not understand the importance to [redacted] Health of the structures put in place to allow them to get control of and monetise the GMS lists and the patient lists over time after acquisition;
(v) He stated that he failed to understand the relevance of a question about the importance to [redacted] Health of the securing the transfer of the lists;
(w) He said that the question of whether the lists remained with the individuals or the partnership were technical aspects not within his remit.

Mr [redacted]'s evidence

190. In examination-in-chief, Mr [redacted] gave the following evidence:

(a) He confirmed that he is an accountant and tax adviser;
(b) He had suggested in 2011 that a company structure be put in place in relation to the practice;
(c) He assisted in the formation of the two unlimited companies;
(d) He stated that if the transfer of the practice into the unlimited companies had been done by way of written contract, it would have attracted stamp duty;
(e) He stated that it was normal not to have a non-compete clause when the parties were connected;
(f) He thought that the Revenue Commissioners in 2015 were challenging the existence of the unlimited company;
(g) He stated that there was ample evidence of the existence of the company;
(h) He stated that the GMS payments were made to the companies, and that the PSWT forms used by the HSE used the company tax reference numbers;

191. In cross-examination, Mr [redacted] gave the following evidence:

(a) The evidence that a business transferred in 2011 was that income was subsequently channelled through the company bank accounts, and expenses were subsequently discharged through the company bank accounts;
(b) His understanding was that there was no written transfer agreement, but an agreement that the existing partnership would continue in spirit but between the corporate companies;
(c) He confirmed that the partnership income, being the income of the two partners, was before 2011 paid into a partnership bank account;
(d) He said he was somewhat familiar with the partnership agreements, which provide that the partners work together and their respective incomes will be shared in a certain way;
(e) He was aware that the GMS contract was a personal contract between the Appellant and the chief executive of the HSE;
(f) He confirmed that all elements of that agreement referred to personal service by the Appellant and payment for those services to the Appellant;
(g) He stated that he never gave any advice to the Appellant in relation to the GMS contract;
(h) He confirmed that the HSE was never advised that the practice had purportedly transferred to the unlimited company;
(i) He stated that he was not aware that there was an obligation to advise the HSE of the transfer;
(j) He stated that the income of the practice transferred in 2011, and that that is different from the practice itself transferring;
(k) He could not recall if he advised the Appellant to advise the patients that they were being transferred to an unlimited company;
(l) He stated that it was only the income of the two doctors that became the income of the companies;
(m) He stated that after 2011, the income from each of the two doctors would have been reflected in their companies, and their expenses apportioned accordingly;
(n) He confirmed that it was just the income which transferred;

(o) He stated that there was no contract in place between the Appellant and the unlimited company as they were connected parties.

Mr [redacted]'s Evidence

192. In examination-in-chief, Mr [redacted] [redacted] of [redacted] [redacted] gave evidence as follows:

(a) He confirmed that he was a qualified chartered accountant, FCA, who trained in KPMG in Dublin, then worked for a multinational in Paris buying and selling companies, of which valuations was a large part. He returned to Ireland to work in valuations for BDO Simpson Xavier. He then moved to Deloitte, where he set up their regional advisory department in 2002. He then established [redacted] [redacted], and is an advisory partner involved for 15 years in transaction type work, and for the last 5 years in valuation work. He also gave personal information on his knowledge of the medical sector. He confirmed that he was aware of his duty to give an independent opinion.
(b) He confirmed that he prepared a report looking at the market value of the business in 2011, and focusing on the goodwill;
(c) He spoke to his report;
(d) He provided a breakdown of the partnership accounts prior to 2011;
(e) He explained why the corporate structure of having two separate companies each owned by one of the two doctors, which then go into partnership together, is unusual, does not make sense, and is overcomplicating matters;
(f) He explained how, if this was an arm's length transaction, one would expect to see a business sale document, which would be a lengthy legal document covering all eventualities, and setting out the terms of the transfer;
(g) He said the lack of documentation was unusual on one level, but that he was not surprised by it;
(h) He set out how goodwill is the excess value in a business above the value of the fixtures and fittings;

(i) He set out how goodwill is not an "asset" in and of itself that can be transferred, but is the difference between the market value of a business and that of the net assets/liabilities;
(j) He set out how they therefore valued the business. He explained how one-times turnover can sometimes be a useful indicator of the value of a cash business, and he used the example of a pub with fixed costs, but that even then it is only the opening calculation and a lot of other factors will change the value;
(k) He stated that in 2011 every normal business structure was broken, including GPs.
(l) He was of the opinion that there was not a strong market for GP practices in 2011;
(m) He also factored in that this was a regional, non-urban location;
(n) He could not see any evidence to justify a one-times turnover valuation of the business;
(o) His opinion was that there would be some market for a regional GP practice in Co. [redacted] in the market in 2011, but it was not conceivable that someone would pay over €800,000 for such a practice;
(p) Such purchases were not happening in 2011;
(q) He gave an example of a 2016 transaction at arm's length, of a GP practice with €400,000 turnover, in an urban location, where the goodwill was valued at €60,000;
(r) He set out why the [redacted] practice was an unattractive prospect;
(s) He set out why the market in 2011 was particularly bad;
(t) He set out why the market for rural practices is weaker than that for urban practices, and illustrated how almost all the [redacted] Health practices are in urban areas;
(u) He then gave detailed evidence using a table in his report to give a break-down of what [redacted] Health are actually "purchasing" when they acquire practices, including the cash-flows, which involve the use of "goodwill" capital payments to the practitioner to balance against an agreement by the practitioner to accept wages in the following years far lower than what he was previously earning as an owner-practitioner;
(v) In summary, he stated, it was not a normal business sale for €450,000;

(w) He stated that for [redacted] Health, it is not actually as clean as just buying a business, they are making payments to the GP into the future to secure that business;
(x) He agreed that [redacted] Health does not just buy a business, it also secures, through its partnership agreement, the patient lists and the ongoing services of the doctor to secure those lists;
(y) He then gave evidence of his fair market valuation of the business goodwill in the relevant transaction as being €45,000, and set out his reasoning for this, including his knowledge of the market, and lack of a market, in 2011, and the lack of available financing for such purchases; He explained that the problem with starting from turnover is that it ignores the cost of employing the doctors themselves: the doctors in the pre- 2011 partnership are paying themselves €200,000 each and a pure turnover calculation does not factor in the cost of retaining them to carry on working, or paying a similar doctor(s) to do the work that one or both of them did;
(z) He states that basically such a valuation ignores the cost of the work that creates the value, and, therefore, is not the correct starting point; He explained that is why in reality partnerships now work by earn-in rather than buy-in.

193. In cross-examination, Mr [redacted] [redacted] of [redacted] [redacted] gave evidence as follows:

(a) He clarified that his role was to provide a valuation for the business in 2011;
(b) He clarified that he was looking at the market value of the medical practice at the time of purported transfer;
(c) He clarified that the market value is the open market arm's length value of the practice, and that is what he focused on;
(d) He clarified that he was an expert in valuation, not an expert in goodwill, and that goodwill arises from a transaction;
(e) He explained that goodwill itself is not valued; rather, it is derived from the value of a business;
(f) He explained the difference between urban areas like [redacted], on the one hand, and [redacted] in Co. [redacted] on the other;

(g) He explained the difference between the scale and services of [redacted] Health's practices in [redacted], on the one hand, and [redacted] on the other;
(h) He explained that the [redacted] transaction also involved a property deal, and rent;
(i) He then talked through the valuation of the [redacted] practice goodwill, in terms of size and opportunity, and showed how it actually justified a valuation of €90,000 for the [redacted] one;
(j) He clarified that the unlimited companies did not purport to purchase the premises of the practice;
(k) He set out in detail the issues with the sale of consultancy practices in Ireland, in contrast to the US where the clinics have a brand;
(l) He explained in detail two reasons why [redacted] Health might structure the €115,000 and further payments as capital rather than income payments;
(m) He explained that, in a normal business transaction, if assets including goodwill have been purchased, the vendor can of course just walk away. Even where there is a version of clawback, it would be at a maximum of 10% to 15%, and he gave an example. He explained that that happens to allow the purchaser to make sure that they bought what they thought they bought;
(n) In contrast, he stated, the [redacted] Health purchase is the most aggressive you can imagine;
(o) He clarified that the whole point of the [redacted] Health acquisition is that it is not an arm's length payment for a business, with the goodwill or value, and the vendor walks off. They are not doing that. It is a very complicated transaction, which involves the [redacted] Health Acquisition Agreement and the Partnership Agreement and involves four years of full performance. In the [redacted] example, Doctor A worked pretty much full-time, the same as the Appellant, and got paid [when you include the "goodwill" payments] the same amount;
(p) He stated that, while he found the evidence on how [redacted] health acquires practices to be fascinating, and smart, it would not cause him to make the leap to valuing the [redacted] practice at €900,000, now or in 2011;
(q) He explained the [redacted] Health accumulated losses and lack of viability as a going concern without serious financial backing, and how high risk their business is;
(r) He confirmed that nobody else in the market was doing what [redacted] Health is doing;

Professor [redacted]'s Evidence

194. In examination-in-chief, Professor [redacted] [redacted], gave evidence as follows:

(a) He confirmed his extensive qualifications and expertise in financial reporting, and set out where he had summarised his instructions in the matter;
(b) By way of introductory remarks:
  (i) he clarified that the audited financial accounts of the unlimited company were produced under a set of rules known as Financial Reporting Standards for Smaller Entities ("FRSSE");
  (ii) his initial observation was that it was unclear to him that a business had been acquired, and that accounting rules state that you have to acquire a business in order to think about accounting for goodwill;
  (iii) he further observed that on the basis of common control, from an accounting perspective there was no transfer of a business;
  (iv) he also observed that there was an absence of evidence to support the purported valuation, if a transfer did take place;
  (v) in particular, he noted the lack of observable market data from the two purported valuers;
  (vi) finally, he noted that the writing off of goodwill within one year was not in accord with FRSSE, or with generally accepted accounting principles ("GAAP") more generally;
(c) He noted that from an accounting point of view, there was a prohibition on the recognition of internally-created goodwill;
(d) Purchased goodwill should be recognised;
(e) This goodwill is a residual, the difference between the fair value of the assets and liabilities acquired on the one hand and the cost of acquisition on the other;
(f) In relation to this purported purchase, he noted that the written down value of the assets being zero in November 2011 was irrelevant – if furniture and fittings were acquired, they are identifiable and they should be fair-valued;
(g) Intangible assets, such as patents, intellectual property and most relevantly in the current context, things like customer lists, would be next. A customer list would be

a separately identifiable intangible asset that would be recognised for the purposes of booking goodwill;

(h) Here the big asset would have been the GMS list;

(i) Ultimately, for such an asset to be recorded on the balance sheet, the entity must control the future economic benefits of the asset – it would be necessary that those rights or other access to future economic benefits are controlled by the entity as a result of past transactions or events;

(j) He then explained that goodwill can only attach to a business, it cannot just attach to an asset/assets;

(k) Under accounting rules, an assignment of income to another entity does not constitute a sale of a business to the entity

(l) He was of the opinion, now confirmed by the evidence he had heard in the case, that no business was sold to the unlimited company, but merely that the assignment of income had occurred

(m) He gave the definition of a business, and explained how it had to be more than the assignment of income, and explained how the definition had been adopted under international accounting standards;

(n) He explained the underlying rule that the recognition of goodwill is likely to be inappropriate in the case of a transaction that does not alter the relative rights of the ultimate shareholders;

(o) He was in no doubt that this was a common-control transaction, and that, therefore, accounting for goodwill was inappropriate;

(p) In relation to goodwill, he set out how goodwill is the difference between the fair value or the consideration given and the fair value of the assets of the entity acquired;

(q) He set out why the initial consideration received in 2011 from the unlimited company was an undated, unwritten, promise to pay approximately €400,000, with no interest and no security, and, therefore, something of little or no value;

(r) He stated that the purported valuation report of Mr [redacted] did not meet the requirements of a valuation report, as it fails to rely on market data; The [redacted] valuation also started from the wrong point, as it purported to value goodwill, rather than to value the business, value the assets, and then calculate the difference;

(s) The [redacted] valuation also seemed to just take turnover and multiply it by 100%;
(t) He set out that what seems to have been done is that, instead of considering assets such as the GMS list, the [redacted] valuation is based on the idea that one can place income streams into a shell company and use a sort of multiple applied to those income streams, in some way, to determine goodwill and that this did not make sense;
(u) From Mr [redacted]'s evidence, he understood the value was in the GMS list, and that key was the 2017 [redacted] Health Partnership Agreement, whereby a successful transfer of that intangible asset from one doctor to a second doctor nominated by [redacted] could be ensured. The Appellant's valuation here did not consider the GMS list;
(v) He was of the opinion that the purported 2011 transaction and the 2017 acquisition were entirely different. It had taken him two or three hours just to understand what was being done with the 2017 [redacted] Health Acquisition and Partnership Agreements;
(w) These agreements comprised a very sophisticated form of contracting to ensure the successful transition of a GMS list from one individual to another, which contrasted with Mr [redacted]'s evidence that, in 2011, they just put two income streams of the doctors into two shell companies;
(x) He explained why the measurement of goodwill in a related transaction without observable market data is too unreliable;
(y) In relation to amortisation and writing off, he set out that, under FRS10, where goodwill and an intangible asset are regarded as having limited useful economic lives, they should be amortised on a <u>systemic basis over those lives</u> [emphasis added];
(z) He set out that under FRSSE "th*e period chosen for depreciating goodwill and reasons for choosing that period must be disclosed*".
(aa) He emphasised that, having heard the evidence of Mr [redacted] and Mr [redacted], his views had not changed;
(bb) He remained of the opinion that the consideration paid by the unlimited company for the goodwill in 2011 was zero;

195. In cross-examination, Professor [redacted] gave evidence as follows:

(a) He stated again that [redacted] Health did not just acquire a business, it entered a partnership too, and it involved very, very sophisticated financial arrangements and contractual arrangements, and that there was an element of performance by the doctor involved;
(b) It was very different to the purported 2011 purchase;
(c) He explained what observable market data is;
(d) He explained that the relevant parties could have gone to a valuer with lots of experience in sales of GP practices, you would make sure that they were comparable;
(e) The directors could have sought two valuations so that they could be assured that they were acting in the best interests of the unlimited company's shareholders;
(f) He noted that [redacted] Health in their own accounts used amortisation periods of 20 years in some accounts, 10 years in others;
(g) He remained clear that no business was, in his opinion sold; rather, simply, income streams were moved to new bank accounts.

Mr [redacted]'s Evidence

196. In examination-in-chief, Mr [redacted] gave evidence as follows:

(a) He explained the nature of the GMS contracts that the HSE enters into with doctors under s 58 of the Health Act 1970 ("the medical card scheme");
(b) He confirmed that the HSE contracts are with natural persons, with individual registered medical practitioners. The 2012 Act introduced a requirement that every holder of a GMS contract had to be on the specialist register with the Medical Council as a GP practitioner;
(c) He confirmed that the HSE does not have contracts under the GMS with either partnerships or entities, and never had. Although the HSE recognised partnerships, its contracts are with the individual doctors in a partnership;
(d) The only exception for them being held individually was where one contract was held jointly by two part-time GPs on a combined full-time basis;

(e) He confirmed that he was not aware of the HSE ever entering a contract with a corporate entity, and that the contractual and legislative framework was based on an individual, a medical practitioner;
(f) He contrasted this with a community pharmacy contractor agreement, where the applicant can be a body corporate;
(g) He confirmed that, from a contractual perspective, the fact that payments were made into a company bank account would not change in any way the Appellant's contractual arrangements with the HSE;
(h) He confirmed that similarly, in relation to partnerships, the HSE pays moneys into partnership bank accounts, but the HSE does not go behind this and it does not change the contractual relationship with the relevant individual GPs;
(i) He did clarify that, if the HSE was aware that the bank account did not belong to the person with whom they had contractual relations, it would not change the details, but change could be facilitated without an examination trying to get behind who is the actual owner of the bank account.

197. In cross-examination, Mr [redacted] gave evidence as follows:

(a) He confirmed that there were approximately 3,000 GPs who hold contracts with the HSE, about 2,500 of whom are GMS contract- holders;
(b) He confirmed that Clause 12 of the GMS contract states:

> *"The medical practitioner shall themselves normally provide in person services in this agreement but may do so through a deputy who shall be a registered medical practitioner."*

(c) He stated that this was not intended to be a carte blanche;
(d) He explained the advantage in registering a partnership with the HSE for the purposes of list retention;
(e) He confirmed that the expectation is that the GP with the contract would ordinarily see the patient for their normal routine treatment;
(f) He stated that the list belongs to the doctor;
(g) He set out the advantage in partnerships for succession to lists;

(h) He confirmed that section 4 of the 2012 Act does not mean that the list is held by the partnership;
(i) He confirmed again that the HSE does not have any contractual relationship with entities;
(j) He emphasised that where a GP enters into a partnership, the HSE's contractual relationship remains with the individual GP;
(k) He stated that any change to the current model would require a policy change and then legislative amendment.

198. On re-examination he confirmed that, under Clause 26 of the GMS contract, payments are made to the medical practitioner in return for the services provided, or to whomsoever the medical practitioner elects that the payments be made to on his/her behalf.

A LEGALLY EFFECTIVE TRANSFER OF THE BUSINESS?

199. As noted above, until November 2011 both the Appellant and [redacted] carried on the business of the [redacted] medical practice as partners. The question of who was trading in 2012 and 2013 is a question of fact. There seems to be no dispute between the parties that, if the Appellant was personally carrying on the business, he is personally liable to tax on the profits for those years, while if the unlimited company were carrying on the business, then it would be liable to tax on the profits while the Appellant is only liable to pay income tax on emoluments of office or employment received from the unlimited company.

200. The question of whether that partnership was actually dissolved in November 2011, whether the assets of each of the former partners were transferred by the former partners into the two unlimited companies, and whether a partnership then formed by the two unlimited companies, are questions of fact to be determined on the evidence.

201. It is worth briefly considering what would be involved in such a series of transactions. First, the partnership based on the 2005 Partnership Agreement, executed on 1 January

2005 (the signatures are accompanied by clear dates on the execution page of that agreement) itself would have to be dissolved. Then, the partnership tangible assets, such as any property, real or personal, including any funds in partnership bank accounts, held jointly by the partners would have to be returned to each of the individual partners in accordance with their agreed share. Next, any intangible assets jointly held, such as leases, would also have to be severed or assigned (if assignable), so that everything was divided and held individually. The partners would then each have to have transferred the assets, previously held individually into their own respective company (if transferable). The companies, in turn, would then have to have entered into a partnership agreement for the new business. None of this, as is clear from the evidence, of course occurred in 2011. There is merely the quite crude attempt, by way of the 2017 Deed of Dissolution, retrospectively to admit the unlimited companies to the partnership in November 2011, while simultaneously 'retiring' the Appellant and [redacted] therefrom also retrospectively from November 2011 date so as, retrospectively, to purport to create a new partnership that ran from then until November 2017 supposedly compromising the unlimited companies. Whatever might be the civil-law effects, if any, of the legal stratagems resorted to in the 2017 Deed of Dissolution, they cannot affect the appropriate tax treatment under the TCA of the Appellant's income in 2012 and 2013.

202. Furthermore, the impossibility of such a transfer becomes clear when one considers what the purported business assets of the partnership were. There seems to have been little or nothing in the way of partnership equipment or partnership fixtures and fittings. The partners each had their GMS contract with the HSE, which was not assignable. The partners each had their own personal goodwill, which was non-transferable. The partners also had their ability to generate income from treating private patients.

The GMS Contract

203. By contract dated 14 April 2005, the Appellant entered into an agreement with the HSE to treat patients and accept remuneration from the HSE in relation to that treatment. The agreement is clearly, on its terms, one entered into personally by the Appellant qua medical practitioner, under which he, as the medical practitioner, has agreed to provide

services to eligible persons in exchange for remuneration from the HSE. The Appellant was given the GMS number [redacted] The Appellant agreed to be routinely available to treat patients at the Surgery Practice from 8am to 6pm, Monday to Friday (signature page and Clause 10). The Appellant agreed to provide to eligible persons, on behalf of the relevant health board, all proper and necessary treatment of a kind usually undertaken by a general practitioner, at his surgery or at his home (Clause 11). The Appellant agreed that he "shall normally provide in person services under this agreement" but could do so through a deputy (Clause 12). It provides for the transfer of patients' records when a person is transferred to the list of another GP (but only with the written consent of the patient) (Clause 23). It was agreed that the health board (now HSE) will pay the fees of the Appellant to the Appellant at agreed rates.

204. The continuing legal relationships thereby created are, it is submitted, clear and unambiguous. When the Appellant treated patients pursuant to this contract, it was he personally who was remunerated by the HSE for that work. The benefit of this contract would only be transferable as an asset of the business if the unlimited company could thereby become the contracting party. No evidence to support such a contention was produced by the Appellant, and the evidence of Mr [redacted] from the HSE was that such a direct substitution was legally impossible.

205. It was therefore submitted that the vast majority of the business of each of the two partners was not capable of being transferred into a company by way of simple transfer. In brief, what occurred was correctly characterized in evidence by Professor and in substance accepted by [redacted] as an assignment of income.

The evidence summarised – the transfer

206. The evidence produced does not support a transfer of an entire business occurring. That evidence may, it is submitted, be summarised as follows:

(a) The Appellant and [redacted] operated in partnership from 2005 under the Partnership Agreement and earned approximately €200,000 per annum each in profits. The 2005 Partnership Agreement provided for the pooling of income from

their public and private patients. They each had personal contracts under which the HSE agreed to pay them personally for services to public patients.

(b) They each incorporated unlimited companies in 2011.

(c) They did not dissolve or amend the 2005 Partnership Agreement in 2011 (or in 2012 or 2013, or at all until 2017).

(d) The Appellant claims they transferred "the business" of the partnership to individual companies which then entered into a partnership, but this transfer was agreed orally, at an undisclosed time and location, with undisclosed terms, and agreed between him as director and him as partner.

(e) No documentary agreement was executed or recorded, and no contemporaneous record exists of any aspect of the agreement, or even of the existence of the agreement.

(f) No formal board meetings of the unlimited company were held, and no minutes were taken of any board meetings.

(g) All of the assets of the business were purportedly transferred, but, besides the alleged goodwill, no witness could state what those assets were, or what they were worth, and no assets besides the alleged goodwill were detailed in the unlimited company's accounts.

(h) The GMS contract cannot be assigned and, in any event, cannot be held by an unlimited company.

(i) The lease on the premises held by the partnership (with [redacted] and his spouse who owned the premises) created under the 2005 Partnership Agreement was not amended in 2011 (or in 2012 or 2013, or at all until, it appears, 2015).

(j) No employment contracts with the unlimited company for the post- November 2011 period were put in evidence and the Appellant merely claimed that he entered into an employment agreement with the unlimited company in 2014.

(k) No moneys were paid by the alleged purchaser, the unlimited company, at the time of the alleged transfer by the Appellant of his business to it. In relation to the alleged director's loan, no moneys were advanced to the unlimited company.

(l) After the purported transfer, the Appellant continued to treat patients privately and publicly. He treated patients publicly in accordance with the GMS contract, and took payment in accordance with that contract. He told the HSE that his payment details had changed and asked it to use a new bank account for him, which it did.

He also asked them to use a different tax reference number for PSWT, which it did (Letter of 28 October 2011 refers – "due to me" and "my" correct details). He allowed the HSE to believe that it was still making payments under the GMS contract to him personally.

(m) He continued to receive private patient payments, and issue receipts etc, on paper headed in a way that would leave any patient dealing with him with the clear impression that they were dealing with two doctors in partnership, and that they were contracting personally with him and none of their personal data was being transferred to any third party.

(n) No patients, public or private, were informed that their medical records had been transferred to a new legal entity, viz. the unlimited company, and were now being held and used by that entity. No consent to such data transfers was sought and/or obtained from the said patients.

(o) From an accounting perspective, no business transferred. There was no transfer of any income producing capital asset into the unlimited company.

(p) Contrariwise, there was just, at most, a diversion or assignment of income into it from the Appellant.

Weighing up the evidence

207. The Appellant and the witnesses he called to give evidence on his behalf have consistently stated that a "business" transferred to the unlimited company in November 2011. However, they have not identified any asset other than the alleged goodwill which was thereby purportedly transferred to the unlimited company. Goodwill cannot be transferred alone; it arises from the transfer of tangible and intangible assets.

208. Against the overwhelming evidence set out above, the only supporting evidence of the Appellant are the subsequent accounts and tax returns of the unlimited company. In Determination 79TACD2021, Commissioner O'Mahony had to determine whether a lease had been entered into orally between the Appellants therein and a company. He found that entries in a company's financial statements and the inclusion in the Appellant's tax returns of sums received were persuasive (but not conclusive) contemporaneous evidence that the lease had been entered into orally. In the absence

of any contradictory evidence, he was satisfied that the lease had been granted orally. While the Appellant seeks to rely on this finding, this was merely a finding of fact on the basis of the evidence in that case, and that case is clearly distinguishable from the present case. This is for at least the following reasons.

209. Thus, here, (i) the business consisted of significant elements that were not transferable to a third party, (ii) the Appellant himself could not identify what assets were actually transferred, and (iii) very significant evidence that the business was not transferred is before the Commissioner, for example the receipt of income under a personal contract from the HSE by the Appellant throughout 2012 and 2013. Contrariwise, in Determination 79TACD2021, the evidence was merely persuasive, not conclusive: if the Appellants had claimed to have leased the land, but it had transpired (to render the facts more akin to those here) that the land was held by them subject to a covenant that prevented them from leasing it, and if it transpired that they personally but not the company sold the produce grown on the land, then the outcome would, it is submitted, have been different.

210. For the reasons set out above, Revenue submits that no transfer of the business occurred in 2011, and that in 2012 and 2013 the Appellant was receiving payments from the HSE and from private patients personally, and, accordingly, he is liable to income tax on those payments.

211. It is further submitted that the account provided by the Appellant and his agents does not even make sense on its own terms. If a transfer had taken place as alleged, and if the 2005 Partnership Agreement had somehow without amendment, come to be applied to the two unlimited companies as alleged, that agreement as amended would apply to the income of the two partners (now companies) in full. The “partnership” income after 2011 would be all of the income of each of the companies, not just the profits of each of the companies. The company partnership would have been preparing partnership accounts from 2012 if the transfer as alleged had taken place.

212. Finally, the reasons given by the Appellant for incorporating his business in the manner it was done are neither consistent nor credible. Section 600 TCA provides a mechanism

whereby a business may be transferred as a going concern into a company, in exchange for shares issued by the company, without a charge to capital gains tax. It only applies where the whole of the assets of the business are transferred, and where it can be shown that the transfer is made for bona fide commercial reasons. The fact that this section was not availed of by the Appellant provides a further clear indication that no business, or at the very least not all the assets of the business, were transferred.

213. Insofar, however, as the Appeal Commissioner finds that a transfer of a business did actually occur, the Respondent would further respectfully submit that, even if a "business" was transferred, the GMS contract provides for personal service by the Appellant, and for remuneration for same. This contract cannot be assigned to a third-party corporate entity and was not therefore assigned with any transfer of the practice that the Appeal Commissioner might find occurred in or around November 2011. Even if the income is assigned by the Appellant to a third party corporate entity, it is still income that he has earned personally under the contract, and therefore remains income in respect of which he remains liable to income tax.

214. Only the minority private element of practice was even in theory transferable, but, as noted above, the Appellant: (a) did not in 2011 execute a written agreement to sever the personal partnership; (b) did not execute a written agreement in 2011 to transfer this element of the practice to the unlimited company; and (c) clearly continued to deal with patients, and accept payment from them, on the basis that he was doing so personally. The patients continued to contract with him personally, and to pay him personally. They were not informed of the transfer and neither asked to, nor in fact did they, consent to the transfer of their personal sensitive medical data to any third party, like the unlimited company. On that basis, this income remained personal, and did not transmogrify or even transmute into income or earnings of the unlimited company.

THE VALUE OF THE BUSINESS?

215. If the Appeal Commissioner finds that the entire business was transferred, he will then have to ascertain the value of the business that was transferred, given that the excess

payments in 2012 and 2013, which were treated as director's loan in the accounts, are then payments for the performance of his role in 2012 and 2013.

The Valuation of the Business

216. In summary, the evidence revealed that the Appellant's own agents and advisers came up with the valuation of the business, on his behalf and his behalf alone, based solely on turnover. The unlimited company never sought and never received an independent valuation, and nor was it even advised so to do, whether by the Appellant and/or his agents or advisers. No expert witness appeared to support the valuation given by the Appellant's agents.

217. That valuation failed to consider what element of the business might be transferable, failed to consider the net assets or lack of them, failed to consider the state of the market in 2011, failed to consider comparable market transactions, and failed to factor into the valuation the potential cost to a third- party owner of the business of providing the relevant services (which were approximately €200,000 per medical practitioner per year in 2010 and 2011).

218. The uncontroverted evidence of the independent expert witness was that the market value in 2011 of this business as a whole was at best €90,000.

219. The Appellant's valuation sought to rely on the 2017 Acquisition and Partnership Agreements involving [redacted], and the payments labelled as "goodwill" under those agreements, to support, retrospectively, a contention that, if goodwill was transferred in 2011, it was worth a similar amount. With all due respect, this is about as clear a case of apples and oranges as the Appeal Commissioner is likely to come across.

[redacted] *Health model as an indicator of value*

220. It is neither necessary nor appropriate, I the Respondent's respectful submission, for the Appeal Commissioner to determine whether the "goodwill" payments in the 2017 [redacted] Health Acquisition Agreement model with [redacted] are all in respect of a capital

asset, or, instead, are in part the payment for the performance of employment or partnership obligations in the following four years. However, the Appellant has introduced the [redacted] Health model as evidence of the value of "goodwill" in a medical business and is asking the Commissioner to find that what was purchased in 2011 by the unlimited company is identical to what was purchased by [redacted] Health in 2017, and that, therefore, the two assets are of identical value. This falsely equates the "business" which was purportedly bought in 2011 with the range of obligations, in matters relating to the GMS contract, relating to the private patients, relating to non-competition, relating to reduced remuneration, and relating to other matters purchased by [redacted] Health in 2017. [To use an analogy, in 2011 at most the unlimited company bought the chassis of a car that could be used as a taxi; in 2017 [redacted] Health bought a car, with wheels and tires, and an agreement that the owner who had a taxi plate would continue to drive the car as a taxi, and would do so for four years at a reduced wage, with the balance of the passengers fees to be given to the purchaser, and the driver also agreed to organise for the purchaser's nominee to acquire his plate in due course over the four years.] It is submitted that the price paid for the second very different arms-length transaction on the open market in 2017 gives no indication of the value of the first in 2011 between related parties.

221. [redacted] Health, by way of a very complex transaction (as aptly observed by Professor [redacted]) with obligations and staged payments over four years, were "purchasing" the cooperation of the partner over four years to allow [redacted] Health get control of and monetise the public and private patients and professional goodwill of the individual doctor. Its representative, Mr [redacted], was very clear in his evidence that, on the acquisition date, [redacted] Health had not actually acquired the assets that it values, that it has been acquiring them over the four (ongoing) years that followed, that it insured against the death of the medical practitioner for that reason, that in the related 2017 [redacted] Health Partnership Agreement the ongoing involvement of [redacted] over the said four-year period from November 2017 following the date of the two agreements has been key, and that the value for [redacted] Health lies in the performance by him over those four years of his contractual and partnership obligations, in particular in relation to the GMS contract. In short, [redacted] Health had found a way, by putting in place an intricate contractual structure and applying it over four years, of releasing and

transferring value from what would otherwise be the personal rights and obligations of the medical practitioner (in this instance [redacted]). Part of the value involved the same medical practitioner working for remuneration far lower than what he was previously earning. It could be questioned whether, under this intricate arrangement, the upfront payment of €115,000 and the subsequent payments that in total reach €450,000 over the four years are in fact a purchase of business goodwill, or a contract for four years' service of [redacted], but the Appeal Commissioner does not need to determine that issue here. Even if there were a purchase of a "business" in 2011, it would not be comparable to what [redacted] Health was purchasing in 2017. In 2011, there were no such ancillary partnership and acquisition terms and conditions. The unlimited company was not purchasing or acquiring in 2011 what [redacted] Health was purchasing or acquiring in 2017 and reaping the benefits of for the next four years. They are simply and plainly not comparable.

222. In other words, [redacted] Health "purchases" a guaranteed four-year structured relationship with the medical practitioner and uses that relationship over four years to leverage value through detailed and structured partnership agreements and acquisition agreements with that medical practitioner, and other medical practitioners it can partner with in the four years. Mr [redacted] was very clear that the value for [redacted] Health lies not in the acquisition of the business but in the four-year personal relationship involving legally secured structured steps with the medical practitioner who is locked into the purchase. [redacted] Health in its acquisition and partnership in 2017 is acquiring value over the following four years from the practitioner, in situ [redacted], not from [redacted]'s unlimited company, and is paying a premium for that to [redacted].

223. Two conclusions flow from this – (1) that personal goodwill value is not available and not transferable from a medical practitioner to a purchaser on a simple acquisition agreement, as it arises from the subsequent performance obligations of the medical practitioner; and (2) [redacted] Health acquisition and partnership arrangements obtain for [redacted] a range of personal obligations from the doctor concerned that are far in excess of what a purchaser of a GP business will obtain if s/he/it purchases the business without including the ancillary personal obligations on the medical practitioner. Accordingly, the range of obligations purchased under the [redacted] Health model is far

more valuable. It is not necessary for the Appeal Commissioner first to analyse the tax implications of the purported "goodwill" value in the [redacted] Health model before he can come to the above conclusion.

224. Although both transactions use the label "goodwill" for what was allegedly being acquired, the 2017 transactions saw significant payments made for (a) the control of the GMS list through an intricate legal structure, including four years of partnership, (b) the performance over four years of obligations under that structure to allow the GMS list be controlled, but never owned, by [redacted] Health, and (c) the medical practitioner accepting a partnership income payment during the four years that is far lower than what he previously earned as a partner.

225. It is submitted that, if the Appellant's share of the entirety of the business was transferable to the unlimited company, which it was not, and if it was actually transferred, which it also was not, then the value of his share was a maximum of €45,000. The subsequent payments in 2012 and 2013 were director's emoluments, and liable to tax as such.

CONCLUSION

226. The Appellant has not established that any business was transferred to the unlimited company in 2011. Most of the business (GMS) was untransferable, and the rest (private patient) was untransferable without the consent of the patients.

227. Even if the business was transferred, there is no contemporaneous evidence that a transfer of a business took place.

228. Goodwill cannot transfer without a business. Professional or personal goodwill is not transferable (and if it is "purchased", the price paid is income rather than capital, since it is, in reality, a payment for services).

229. On the basis that no such business was transferred, all payments made by the HSE and the private patients to the Appellant in 2012 and 2013 were monies paid to him and

received by him as personal income. The amended assessments under appeal should, therefore, be upheld.

230. If the Appellant, none the less, succeeds in satisfying the Appeal Commissioner that the business as a whole transferred, Revenue submits that the value of that business, including business goodwill, was at most €45,000. The 2017 [redacted] Health Partnership and Acquisition Agreements' model, which provides for control of the destiny of the medical practitioner's GMS contract by [redacted] Health and for four years' performance by the medical practitioner of his medical duties, as well for four years' performance of his duty to ensure the transition of the GMS patients over time, all at a reduced headline income to that medical practitioner, is not comparable to the transfer of a business.

231. On that basis, the balance of payments made by the unlimited company to the Appellant in 2012 and 2013, purportedly for goodwill, were income payments for the Appellant sourced from his own earnings and taxable as such.

Analysis

232. The Appellant was advised by a tax practitioner to set up the Company to acquire his interest in a medical practice partnership for which he received €416,773 in or around November 2011. There was no document to effect the transfer and as a consequence no Stamp Duty arose. It is the Appellant's contention that he disposed of goodwill and as a consequence declared the gain and paid capital gains tax of €103,875 to the Respondent.

233. The Company registered for corporation and payroll taxes and the HSE was notified that any future payments payable to the Appellant under his GMS contract were to be paid into a new bank account. The Company commenced to trade on 1st November 2011.

234. The Respondent asserted that the incorporation of the Appellant's GP practice was ineffective and raised amended income tax assessments for 2012 and 2013 in the amounts of €65,032 and €29,907 respectively on the basis that any income assigned to the Company was assessable directly on the Appellant. The Respondent also disputed the valuation of the practice goodwill of €416,773.

235. The assessments under appeal relate to the years 2012 and 2013 whereby the Respondent has assessed the income paid to the Company directly on the Appellant. As such, the issue of whether the Appellant disposed of goodwill on the transfer of his interest in the medical practice partnership to the Company in 2011 is not specifically before me. However to determine whether the Respondent has an entitlement to raise income tax assessments on the Appellant for 2012 and 2013, the 2011 arrangements must be considered to establish whether there was a disposal of an interest in the medical partnership and associated goodwill to the Company.

Goodwill

236. The difficulty in ascribing a meaning to goodwill was highlighted in the following extract opened by the Appellant in *Commissioner of Taxation of the Commonwealth of Australia V Murry* [1998] HCA 42, where the Court opined:

> ..*"[g]oodwill'' is notoriously difficult to define'. One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business. Its existence depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business."*

237. The Court continued to observe on the same page that the understanding of goodwill by:

> *"accountants and business persons …. differs from that of lawyers. That has added to the difficulty of achieving a uniform legal definition of the term, particularly since accounting and business notions of goodwill have proved influential in the valuation of goodwill for legal purposes."*

238. As such and as confirmed by Lord MacNaughten in *Inland Revenue Commissioners v Muller & Co.'s Margarine Ltd.* [1901] AC 217 at 224:

> *"For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business.*

239. Furthermore the same principle was established in *Commissioner of Taxation of the Commonwealth of Australia V Murry* [1998] HCA 42 at paragraph 30:

> *"Goodwill, as property, is "inherently inseverable from the business to which it relates"."*

240. Having considered the jurisprudence, the evidence and the submissions of the parties, I have difficulty in accepting the Appellant's argument that he disposed of his goodwill as the GMS contract, comprising 80% of the medical practice income remained and could only remain in his name. Furthermore, all of the witness evidence, with the exception of Professor [redacted] whose evidence focused on business valuation and goodwill, confirmed that the GMS list is a personal contract and remains with the doctor. It is also relevant that the Appellant explicitly confirmed that he does not own the GMS list nor could he sell that list as it was a patient's choice whether he or she wished to be treated by a new doctor under a different GMS number. As such it was not possible for the Appellant to transfer the substantial income generating GMS contract to the Company.

241. Therefore in accordance with the authorities in *Inland Revenue Commissioners v Muller* and *Commonwealth of Australia V Murry* and contrary to the Appellant's submissions, goodwill cannot be separated from the asset to which to relates, namely the GMS contract.

242. Notwithstanding that finding, it is also necessary to consider the Appellant's assertion that when medical practitioners form a partnership, the GMS list which attaches to each partner moves to the partnership and on dissolution of the partnership reverts back to the individual practitioner. In support of that argument, the Appellant relied on section 4 of The Health (Provision of General Practitioner Services) Act 2012 which provides:

> *"Notwithstanding any relevant agreement, a relevant medical practitioner who has entered into an agreement with the Executive (whether before, on or after the commencement of this section) to provide relevant services shall be entitled, on the dissolution (by whatever means) of any partnership of relevant medical practitioners in which he or she is a partner, to retain, on his or her list of patients, any eligible person who was on the list immediately before the dissolution, unless the Executive is advised that the eligible person does not wish to be retained on that list."*

243. However, my understanding of that provision permits a doctor, in the event of a dissolution of a medical partnership, to retain a GMS patient on his or her GMS list, unless a patient elects otherwise, notwithstanding that another doctor or locum may

have previously treated that patient. Therefore I disagree with the interpretation as impressed upon me by the Appellant.

[redacted] *Contract*

244. The Appellant also relied on the contract between his colleague [redacted] and [redacted] as objective evidence to support the assertion that the disposal of the Appellant's interest in the practice in 2011 was also a disposal of goodwill. However as submitted by the Respondent, the "*business*" which was purportedly sold in 2011 differed from the range of obligations and commitments provided to [redacted] in 2017.

245. As observed by Professor [redacted], the expert witness for the Respondent, the arrangement with [redacted] was a complex transaction with obligations and staged payments over 4 years at the end of which [redacted] *, with the cooperation of [redacted], would ultimately control and monetise the public and private patients of [redacted].

246. Mr [redacted], the expert witness for the Respondent, observed that the arrangement between [redacted] and [redacted] resulted in a reduction in [redacted]'s annual income from €184,000 to €90,000. Furthermore in the performance of medical services, Mr [redacted] was unable to explain why [redacted] had an annual drawing entitlement of €90,000 while the Appellant was entitled to €150,000.

247. Therefore and as submitted by the Respondent, it could be argued that the upfront payment of €115,000 and the subsequent payments totaling €450,000 over the four years were consideration for a contract under which [redacted] would provide medical services for 4 years and also undertake to cooperate in the transfer of his GMS list to a doctor nominated by [redacted]. As such [redacted] acquired a guaranteed 4 year structured relationship with [redacted] from which it would leverage value through detailed and structured partnership agreements and acquisition agreements whereby the GMS list would ultimately be under its control.

248. While the introduction of [redacted] as a partner to the [redacted] medical practice in 2017 relieved the Appellant and [redacted] of an assortment of administrative responsibilities, it

came at a cost of approximately 10% of the practice turnover and a share of profits where those profits exceeded €300,000. Therefore and as observed by Mr [redacted], [redacted] had acquired an income source from which it could substantially fund the acquisition of [redacted]'s services and his cooperation to transfer the GMS list from its share of practice income.

249. As such [redacted] acquired the administrative function of the [redacted] medical practice from [redacted] and the Appellant notwithstanding that the option to acquire the Appellant's interest in the medical practice was exercisable by [redacted] when the Appellant reaches his 60th birthday sometime in [redacted] I therefore agree with the Respondent that the arrangements with [redacted] are fundamentally different to the arrangement that took place in 2011.

250. I also agree with the Respondent's submission that the income generating asset, the GMS list, could not be transferred to a company and as such the contract remained with the Appellant. As such, the instruction to the HSE to transfer the Appellant's payments under his GMS contract to a different bank account with effect from 1st November 2011 was an assignment of income to the Company. Therefore the Appellant's argument cannot succeed, specifically as the GMS contract remained in the Appellant's name and as such there was no disposal of goodwill but an assignment of income from the Appellant to the Company. However and as acknowledged by the Respondent, there appears to be no contractual impediment that prevented the Appellant from transferring his private patients to the Company.

Assignment of Income

251. The evidence of Professor [redacted] was particularly relevant when opining that there was no disposal of a business but the assignment of the Appellant's income into a shell company in 2011. It is also significant that the evidence of Mr. [redacted], the professional advisor who advised the Appellant to set up the Company, confirmed that there was a difference between transferring the practice and transferring the income. Mr [redacted] also confirmed that only the income of the practice transferred to the Company.

252. Therefore as considered above, the income generating asset, the GMS list, could not be transferred to the Company and as such there was no disposal of goodwill but an assignment of the GMS income from the Appellant to the Company.

253. The assignment of income doctrine is a judicial doctrine developed in United States in *Lucas v. Earl* 281 US 111, 115 (1930) where the US Supreme Court sought to preserve the progressive rate structure of the US tax code by prohibiting the splitting of income among taxable persons. In that case, a husband and wife entered into a binding contract whereby all the husband's earned salary and professional fee income would be divided equally between them. The taxpayers argued that half of the income should be taxed equally on the husband and wife, who was ostensibly in a lower tax bracket. However, the Court rejected this argument and made the following conclusion at 114-115:

> *"There is no doubt that the statute could tax salaries to those who earned them, and provide that the tax could not be escaped by anticipatory arrangements and contracts, however skillfully devised, to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us, and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."*

254. Furthermore in the Supreme Court judgment in *Dolan v K* [1944] IR 470, a case in which taxpayer was a professed nun and a member of the Order of the Sisters of St Louis, Rathmines, as well as being a primary school teacher. Under the rules of her Order, she was obliged to hand over her salary from her teaching post to the Order, which she did. She was assessed to income tax under Schedule E on her salary which she appealed on the grounds that she had divested herself of the income and was not therefore assessable on it. The High Court and subsequently the Supreme Court held that the taxpayer was the holder of an office or employment with the contractual right to receive remuneration from the Department of Education and that the application or destination of that remuneration had no binding force on the income tax code. In the High Court, [redacted] P. at 475, quoted from the judgement in *Mersey Docks and Harbour Board v Lucas* 8 AC 891 to confirm that "*there is nothing in the words of the Act , to say that*

when an income has actually been earned . . . by any person or Corporation . . . Her Majesty's right to be paid the tax out of it, in the least depends upon what they are to do with it afterwards"

255. Thus, simply mandating or directing a payment, to which the holder is personally entitled by contract to another person or entity, does not in any way alter the taxability of the payment in the hands of the person contractually entitled to such income.

256. The Appellant sought to distinguish *Dolan* on the basis that the taxpayer was assessable to tax under Schedule E whereas in this appeal the default charging provisions potentially applicable to the Appellant are in accordance with Schedule D. However I do not accept that submission as in *Dolan*, Maguire P. applied the judgement in *Mersey Docks,* a case in which a corporation formed for the purposes of owning and maintaining docks and harbours, was held to be liable to income tax in respect of the surplus of its revenue over its expenses notwithstanding that it was required to apply such surpluses in forming a sinking fund for the purpose of extinguishing the debt which had been incurred in constructing the docks.

257. In light of such jurisprudence, it can only be concluded that the assignment of the GMS income by the Appellant to the Company was the "*fruit of the tree*" as the income generating asset, the GMS contract or to use the analogy of "*the tree*" in *Lucas,* could only vest in the Appellant or indeed a suitably qualified medical doctor approved by the HSE.

258. Therefore as the Appellant was obliged and did in fact perform medical services to a significant number of patients under a contract with the HSE, it is appropriate that the Appellant be assessed to income tax on the proportion of income derived from his personal GMS contract for the years 2012 and 2013 pursuant to TCA, section 18(1)(a)(ii) in respect of "*any trade, profession, or employment, whether carried on in the State or elsewhere*". The assignment of such income to a shell company does not remove such a charge to tax.

259. However as there was no impediment on the transfer of Appellant's private patients to the Company, the proportion of income derived therefrom is assessable only on the Company.

Miscellaneous Matters

Disposal of goodwill

260. Notwithstanding that the issue of the disposal of goodwill for capital gains tax purposes is not directly before me, I have concluded that the Appellant did not dispose of goodwill certainly in relation to the element of his practice relating to his HSE contract comprising 80% of his medical fee income.

261. Furthermore while it would appear that there was no legal impediment to prevent the Appellant from disposing of his private patient list, it is possible that there could have been a disposal of goodwill associated with his private patients to the Company in 2011.

262. It is also relevant that while the Respondent did not raise a capital gains tax assessment for 2011, there was no evidence of the market value of any goodwill associated with the private patient list. Therefore it is incumbent on the parties to resolve the issue of goodwill associated with the private practice list between themselves or if necessary to have the matter resolved by way of an assessment appealed to the Tax Appeals Commission.

Entitlement to raise an assessment

263. The Appellant argued that in the event that I find that there was a disposal of goodwill in 2011 for an amount in excess of the market value of that asset, a potential charge to income tax could arise under Schedule F on that excess as a deemed distribution. It was submitted that in the event of such a finding, it was incumbent on the Respondent to have raised a Schedule F assessment and therefore is now precluded from having the assessment amended to reflect such income. The Appellant also submitted that if the

Respondent is seeking to impose a charge to tax on the deemed distribution, a new Schedule F assessment would need to be raised. Furthermore and as highlighted by the Appellant, there are time limits in raising such an assessment.

264. However as I have found that there was no disposal of goodwill specifically in relation to the HSE contract, the issue of a charge to Schedule F does not arise and as a consequence there is no requirement to consider such a charge to tax. Therefore and as acknowledged by the Appellant, there is no statutory constraint preventing me from increasing, reducing or directing that the Schedule D assessment should stand.

265. I therefore agree with the Respondent's submission that no legally effective transfer of the Appellant's GMS contract took place in 2011 and therefore the subsequent income from the HSE remained personal to the Appellant and is therefore chargeable to income tax for the years 2012 and 2013 on such income.

266. Therefore as determined above, the Appellant was properly assessed to income tax on the proportion of income derived from his personal GMS contract for the years 2012 and 2013 pursuant to TCA, section 18(1)(a)(ii) in respect of "*any trade, profession, or employment, whether carried on in the State or elsewhere*".

Determination

267. The contract with the HSE to treat the GMS patients was the income generating asset and could not be transferred to the Company and as such remained with the Appellant. I have also found that the instruction to the HSE to transfer the Appellant's payment entitlement under his GMS contract to a different bank account with effect from 1st November 2011 was an assignment of income to the Company. Therefore there was no disposal of goodwill but an assignment of the GMS income by the Appellant to the Company. However and as acknowledged by the Respondent, there appears to be no contractual impediment that prevented the Appellant from transferring his private patients to the Company.

268. I have also found that as the Appellant was contractually obliged and actually performed or arranged for medical services to be performed to a significant number of patients under a contract with the HSE, it is appropriate that the Appellant be assessed to income tax on the proportion of income derived from his personal GMS contract for the years 2012 and 2013 pursuant to TCA, section 18(1)(a)(ii) in respect of "*any trade, profession, or employment, whether carried on in the State or elsewhere*" comprising 80% of his medical practice income. The assignment of such income to a shell company does not remove such a charge to tax.

269. As there was no impediment on the transfer of Appellant's private patients to the Company, the proportion of income derived therefrom comprising 20% of his medical practice income is assessable only on the Company.

270. Therefore in accordance with TCA, section 949AK, the assessments to income tax for the years 2012 and 2013 should be reduced by 20% thereby assessing the proportion of medical practice income comprising 80% of the income derived by the Appellant under his GMS contract with the HSE.

Conor Kennedy
Appeal Commissioner
29th October 2021

While the Tax Appeals Commission had 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, the Appellant's request has now been withdrawn.