118TACD2021

BETWEEN/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments to the domicile levy under section 531AH Taxes Consolidation Act 1997 (TCA 97) made on the Appellant in respect of the tax years 2011, 2012 and 2013 inclusive, on 10th August 2015. The Appellant appealed the assessments made by letter dated 14th August 2015.

2. The Appellant did not file domicile levy returns or pay domicile levy in respect of any of the tax years in issue - 2011, 2012 and 2013 inclusive, having been requested to do so by notice in writing dated 19th June 2015 (section 531AF(1A) TCA 1997).

3. The appeal was heard by remote oral hearing over 5 days on the following dates:

Day 1: [redacted] April 2021
Day 2 [redacted] April 2021
Day 3: [redacted] May 2021
Day 4: [redacted] May 2021
Day 5: [redacted] June 2021

4. Prior to the hearing, the Appellant was challenging three issues relating to the assessments.

These were:

i) the Appellant's Agent contended that the Appellant, now deceased, had world-wide income for each relevant tax year of not more than €1 million worldwide, as "income" under section 531AA(1) TCA should be reduced to take account of capital allowances;

ii) the Appellant asserted that his share of the profits in the [redacted] Hotel Partnership was not "*Irish property*" as defined and therefore the Appellant did not meet the asset test (section 531AA(1) TCA);

iii) The Appellant did not meet the asset test (section 531AA(1) TCA) as his Irish assets were less than €5M;

5. Following discussions between the parties, issue i) was dropped by the Appellant and the only issues for decision put before me at the hearing were ii) and iii) above.

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Background

6. The Appellant is and always has been Irish tax resident and Irish tax domiciled.

7. The business and the hotel, known in 2011-2013 as the [redacted] Hotel Partnership, had in earlier years been acquired and developed by the Appellant in his sole name. The Appellant expanded the hotel in 2006, spending €20million on the property, financed by bank borrowings.

8. On 1 December 2006, the Appellant entered into the [redacted] Hotel Partnership with his two sons, at which time he gifted 2.5% of his interest of the business and hotel to each son.

9. During 2011, 2012 and 2013, the Appellant held a 94.5% (2011) / 95% share in the [redacted] Hotel Partnership.

10. The Appellant entered into a new partnership agreement dated 28 December 2012 in which his sons became the "controlling" partners and he became a "restricted" partner with limited control over the operation of the [redacted] Hotel Partnership.

11. The Appellant asserts that his assets - including his interest in the [redacted] Hotel, [redacted], which comprises a partnership interest in a trade – do not meet the asset test for 'relevant individual' within section 531AA TCA 1997. The Appellant argues that his partnership interest in a trade comprises 'shares in a company which exists wholly or mainly for the purpose of carrying on a trade or trades' (section 531AA TCA 1997). As such his Partnership interest should be excluded when calculating his Irish property for the purposes of the levy.

12. The Respondent disputes the Appellant's submission that any alleged partnership interest in a trade comprises 'shares in a company'.

13. Secondly, the parties disagreed on the value of the Hotel / Partnership Share at the relevant valuation dates in 2011, 2012 and 2013. Both parties provided expert valuation reports which supported their respective valuations. The Appellant argued that the relevant asset was his partnership interest whereas the Respondent argued it was the Appellant's Hotel property share that should be taken for domicile levy purposes.

14. Thirdly, the Appellant argued that in valuing the Appellant's interest in the hotel partnership that any borrowings of the partnership should first be deducted to arrive at the asset value of the Appellant's partnership interest for the purposes of the domicile levy. The Respondent argued that no allowance for borrowings should be made in the calculation of the value of the Appellant's interest in the hotel.

Legislation

Statutory provisions being relied on:
Part 18C of the Taxes Consolidation Act 1997-Domicile Levy
Section 531AA-531AH TCA 1997

Section 2 of the Partnership Act 1890
Section 20 of the Partnership Act 1890
Sections 22 Partnerships Act 1890
Section 23(2) Partnership Acts 1890
Section 24 Partnership Acts 1890
Section 44 Partnership Acts 1890

Section 150 of the Finance Act 2010

Section 2 Companies Act 1963
Section 155 Companies Act 1963

Section 3 Interpretation of Income Acts, TCA 1997
Section 4 Interpretation of Corporation Tax Acts, TCA 1997
Section 5 Interpretation of Capital Gains Tax Acts, TCA 1997

Irish Case law

AG v Jameson [1905] 2 IR 218
Re Christie [1917] 1 IR 17
O'Dwyer v Cafolla & Co [1949] IR 210 (SC) at 242 per Black J
Dillon v Minister for Posts and Telegraphs [1981] WJSC1589
Inspector of Taxes v Kiernan [1981] 1 IR 117
Allied Irish Bank PLC v Galvin Developments (Killarney) Ltd [2011] IEHC 314
Hynes v The Appeal Tribunal of the Chartered Accountancy Regulatory Board & Anor [2013] IEHC 220
O'Flynn Construction Ltd v Revenue [2013] 3 IR 533

Gaffney v Revenue Commissioners [2013] IEHC 651
O'Rourke v Appeal Commissioners [2016] 2 IR 615
Bloxham & Companies Act [2017] IEHC 664
Dunnes Stores v Revenue Commissioners [2019] IESC 50
Bookfinders Ltd v Revenue Commissioners [2020] IESC 60

UK Case law

In re Stanley, Tennant v Stanley [1906] 1 Ch 131
Rodriguez v Speyer Bros [1919] AC 59 at 68 per Finlay LJ
Bourne (H.M Inspector of Taxes) v Norwich Crematorium Ltd [1967] 2 ALL ER 576
Zim v Proctor [1985] STC 90
Barton v Morris [1985] 2 ALL ER 1032

Other Authorities

Twomey on Partnership, Michael Twomey, 2019 IESC 60
Twomey 2nd Edition – Para 16.40
Hay, Words and Phrases Defined – "Company"
Jowitt, Dictionary of English Law 4th Edition – "Company"

Osborn's Concise Law Dictionary – "Company"
Lindley, The Law of partnership, 5th Edition

Witness Testimony

Sworn witness testimony was given by [redacted], from [redacted], for the Appellant ('Appellant's Agent'). The Appellant's Agent provided accountancy services to the Appellant over a number of years.

Expert witness valuation testimony was given by [redacted] from [redacted], ('Appellant's Valuation Expert') for the Appellant. The Appellant's Valuation Expert is a director and proprietary shareholder in [redacted].

Expert witness testimony on the valuation of the hotel was given by [redacted] ('Respondent's Valuation Expert'), for the Respondent. The Respondent's Valuation Expert is a partner in [redacted], and an expert in valuing financial assets.

Valuation Methodologies adopted by the Valuation Experts.

Appellant's Valuation Expert Report

15. On the basis of the argument presented by the tax agent for the Appellant, that the Appellant is beneficially entitled in possession to his share in the net assets of the partnership and that any 'rights' in the hotel itself are derived from this share, the Appellant submits that a partner's share of a partnership is his or her proportion of the joint assets after the realisation and conversion into money and payment of joint debts and liabilities.

16. On that basis the Appellant's Valuation Expert Report values the Appellant's share in the partnership for the tax years 2011, 2012 and 2013, after calculating the market value of the Hotel trade as a going concern and deducting the Partnership joint debts and liabilities, including a latent CGT liability that would arise on the conversion of the Hotel trade into money.

17. As it is a trading partnership, the earnings valuation method was used to ascertain the market value of the Hotel trade as a going concern. The Financial Statements for the relevant years were used to calculate the Earnings before Interest, Tax, Depreciation, and Amortisation (EBITDA). To obtain a valuation for the Hotel trade the EBITDA was increased by a multiple of 8 to 9, which is broadly in line with the multiples used for the hotel industry. Acquisition costs of 4.46% were deducted from this gross value, as per the 2014 [redacted] Valuation report (This was a report undertaken in 2014 for the Appellant and his wife for a different purpose).

18. The joint debts and liabilities, including working capital (current assets less current liabilities) and long term bank debt were then deducted from this Hotel valuation to calculate the Net Partnership Valuation. The debt was calculated based on the balances in the Financial Statements, adjusted for an additional bank fee which is set at the higher of €3 million or 50% of the equity in the property.

19. Finally the Appellant's share of the 'Net Partnership Valuation' was calculated on the basis that he had a 95% share of the partnership. The valuation of the Appellant's 95% share in 2013 was discounted by 15% as the Appellant was a 'restricted partner', per the 2012 Partnership deed.

Respondent's Valuation Expert Report

20. The Respondent's Valuation Expert report is prepared on the basis that partnerships do not have any legal personality separate from the individual partners and therefore the property in a partnership is owned by the individual partners personally, as a group. The report submits that the Appellant is beneficially entitled in possession to his share of the hotel property itself. In establishing the Market Value, the report notes that, pursuant to S.531AA (5), no deduction should be made for any debt or encumbrances when estimating the market value of the property in question.

21. The Respondent's Valuation Expert report also uses the earnings valuation method to ascertain the market value of the hotel trade as a going concern. However in calculating the EBITDA, it uses the weighted average over 4 years, of the most recent years' actual earnings and also estimates of future maintainable profits. These estimates show an increase in profits to 2016 and therefore the EBITDA arrived at is higher than that arrived at by the Appellant's Valuation Expert report. To calculate the gross Hotel asset value, the Respondent's valuation increases the EBITDA by the same multiples as the Appellant's Valuation Expert report.

22. Having calculated the Hotel Asset Value, the Respondent's report multiplied this amount by 95%, which is the Appellant's share in the property. The Respondent's

valuation report values the Appellant's interest in the Hotel directly and not the Appellant's interest in the net assets of the partnership. The Respondent's report did not value the Appellant's proportion of the joint assets after the realisation and conversion into money and payment of joint debts and liabilities. As a result there is no addition of working capital or deduction of long term debt. The Respondent's report also considered that the deduction for a latent CGT liability is unwarranted when calculating the market value of the Hotel trade.

23. The valuation also does not provide for any 'restricted partner' discount.

MATERIAL FINDINGS OF FACT

24. Based on the credible sworn testimony of the Appellant given at the hearing held on 30/31 March 2021, coupled with the documents and submissions presented before me by both the Appellant and the Respondent, I have established the following material findings of fact;

- The [redacted] Hotel Partnership was formed in December 2006 by the taxpayer and his two sons, [redacted], but the partnership agreement was not formalised until 22 June 2007. The Appellant's partnership share in 2007 was 94.5%. On 28th December 2012, the partners entered into a new partnership agreement whereby restrictions were placed on the Appellant's rights while his partnership share was 95% under that agreement.
- The Hotel property was held in the names of the individual partners, with 95% belonging to the Appellant and the other partners in proportion to their share in the partnership.

25. **SUBMISSIONS– Appellant**

Extracts from submission made in October 2019

THE FACTS

…
On 1 December 2006, the Appellant entered into the [redacted] Hotel Partnership with his two sons, in which he gifted 2.5% of his interest of the business and hotel to each son.

During 2011, 2012 and 2013, the Appellant held a 95% share in the [redacted] Hotel Partnership.

The Appellant entered into a new partnership agreement dated 28 December 2012 in which his sons became the controlling partners and he became a restricted partner with limited control over the operation of the [redacted] Hotel Partnership…

LEGISLATION AND CASE LAW

Section 531AB TCA states that a levy, known as a *"domicile levy"* shall be charged, levied and paid annually by every *"relevant individual"*. For the purposes of this section a *"relevant individual"* is defined under Section 531AA TCA as an individual who satisfies all of the following conditions:

- The individual must be Irish tax domiciled in the relevant tax year,
- He/she must own Irish property the market value of which exceeds €5,000,000 on the valuation date in the tax year (31st December),
- The individual must be in receipt of worldwide income which exceeds €1,000,000 in the tax year, and
- The individual must have an Irish income tax liability which is less than €200,000 in the tax year.

The Appellant is of the opinion that the charge to this levy does not arise as he is not a "relevant *individual"* on the basis that the market value of his Irish property in 2011, 2012 and 2013 was not in excess of €5,000,000.

We have outlined below all the sections of the legislation which are relevant to this appeal.

Section 531AA TCA provides that:

> *"With effect from 1 January 2010 a levy, to be known as "domicile levy", shall be charged, levied and paid annually by every relevant individual and the amount of such levy shall be €200,000."*

Under Section 531AA TCA a *"relevant individual"* for the above purpose is defined as an individual:

> *"(a) who is domiciled in the State in the tax year,*
> - *whose worldwide income for the tax year is more than €1,000,000,*
> - *whose liability to income tax in the State for the tax year is less than €200,000, and*
> - *the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000"…*

Irish property for the definition at 3.3 is defined in Section 531AA(1) as:

> *"all property, situate in the State, to which the individual is beneficially entitled in possession on the valuation date, but does not include-*
>
> *(a)Shares in a company which exists wholly or mainly for the purpose of carrying on a trade or trades,*
>
> *(b)Shares in a holding company which derive the greater part of their value from subsidiaries which wholly or mainly carry on a trade or trades;"*

Market value of property is defined in Section 531AA(1) as:

> *"the price which such property would fetch if sold on the open market on the valuation date in such manner and subject to such condition as might reasonably be calculated to obtain for the vendor the best price for the property"*

This open market value test assumes a hypothetical willing seller and a hypothetical willing buyer in a hypothetical open market where the property hypothetically sold is sold in the condition in which it is in and where evidence of actual sales around the date of valuation may be persuasive evidence: see *AG v Jameson* [1904] 2 IR 644 at 683 per Palles CB, at 699 per Kenny J and on appeal [1905] 2 IR 218 at 226/7 per Lord Ashbourne C, at 235 per Walker LJ and at 230/1 per Fitzgibbon LJ: *Smyth v Revenue Commissioners* [1931] IR 643: *McNamee v Revenue Commissioners* [1954] IR 214 at 219 and 228 per Maguire J.

SUMMARY OF ARGUMENTS

The Appellant's arguments in support of his position that the domicdoes not apply for the years in question is set out below:

The [redacted] Hotel Partnership is not Irish Property (see below).

The Appellant is not a "relevant individual" as the market value of his Irish property was not in excess of €5,000,000. (see below)…

THE [redacted] HOTEL PARTNERSHIP IS NOT "IRISH PROPERTY"

The domicile levy is a charge to tax which arises for *"relevant individuals".* As outlined above a *"*relevant *individual"* for a tax year is defined under Section 531AA TCA as an individual:

> *"(a) who is domiciled in the State in the tax year,*
> *(b) whose worldwide income for the tax year is more than €1,000,000,*
> *(c) whose liability to income tax in the State for the tax year is less than €200,000, and*
> *(d) the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000"*

… However, the Appellant does not satisfy condition (d) on the basis of our interpretation of the relevant legislation as outlined below…

The [redacted] Hotel Partnership exists for the purposes of carrying on the trade of owning and running the [redacted] Hotel in [redacted]. The definition of *"Irish property"* in Section 531AA(1) excludes *"shares in a company which exists wholly or mainly for the purposes of carrying on a trade or trades".*

The word *"company"* is not defined generally for the purposes of the Tax Acts in Section 2(1), or for the Income Tax Acts in Section 3(1) though it is defined for the purposes of the Corporation Tax Acts and the Capital Gains Tax Acts in Sections 3(1) and 4(1) respectively, neither of which definitions apply to Domicile Levy. The word "company" is not defined in Section 531AA for the purposes of the Domicile Levy or in the Schedule to the Interpretation Act 2005 and the word therefore bears a meaning that is not confined to bodies corporate but has its natural meaning of an association of persons.

- The defining quality of a company in excluding it's shares from the definition of "Irish property" is not that it is a body corporate but that it "exists wholly or mainly for the purposes of carrying on a trade or trades".

- In its general meaning, a "company" is "an association formed to carry on some commercial or industrial undertaking" (Oxford English Dictionary 2nd ed Vol II p. 589 [7a]). This derives from the primary meaning of the word which is "companionship, fellowship, society" and appears to come from the old French word "compaignie" meaning a body of soldiers …and more generally, "a body of persons combined or incorporated for some common object or for the joint execution or performance of anything" …

- That definition is reflected in law dictionaries including Black 10th ed. p.339 "A corporation – or less commonly an association, partnership or union – that carried on a commercial or industrial enterprise" and Jowitt 4th ed Vol 1 p 503. "Historically a company was an association of persons formed for the purpose of some business or undertaking carried on in the name of the association. This earlier usage survives in the practice of using "& Co" in the business names of a

partnership or sole trade which is not in law a corporation and so does not enjoy corporate personality"

- [redacted] Hotel Partnership was at each of the valuation dates "an association formed to carry on some commercial or industrial undertaking" to borrow the words of the Oxford Dictionary and on those dates existed "wholly or mainly for the purposes of carrying on a trade or trades" in the words of Section 531AA(1). It was accordingly a "company".

- The first rule of statutory construction is that a literal construction must be made so that the clear and natural meaning of the words deployed is used (see *Cork CC v Whillock* [1993] 1 IR 231 (SC)). A construction must not be adopted which defeats the legislative intention as discovered from the statutes (see *Thomas Delaney v Judge John Coghlan* [2012] IESC 40).

- There are no reasons here to give to the word "company" any meaning other than its general meaning given that the word has not been defined and there is nothing in the language of the provision that the legislative intention was to deprive partners of the exclusion of their share from the definition of Irish property where the partnership existed "wholly or mainly for the purposes of carry on a trade or trades".

  Section 531AA(a) does provide definitions for the expressions "close company", "holding company" and the word "subsidiary" which are used for specific purposes in the legislation. In the case of "holding company" and "subsidiary" those are referable to arrangements specifically pertaining to relationships specific to registered companies and are used to expand the meaning of the general word "company" to those relationships. In the case of the expression "close company" that definition is used in Section 531AA(4) in relation to foreign incorporated companies. The use of such defined expressions cannot, in the taxpayer's submission, confine the clearly general word "company" simply to registered companies or even to bodies corporate.

Accordingly, the Appellant is of the opinion that the word "company" includes the [redacted] Hotel Partnership so that the Appellant's partnership share is excluded from the definition of "Irish property" for the purposes of Domicile levy.

THE MARKET VALUE OF THE PARTNERSHIP SHARE AND OTHER PROPERTY IS NOT IN EXCESS OF €5,000,000

The [redacted] Hotel Partnership was formed on 1st December 2006 by the taxpayer and his two sons, [redacted]. The Appellant's partnership share was at each valuation date 95%. On 28th December 2012, the partners entered into a partnership agreement but the partnership shares remained the same, though restrictions were placed on the Appellant's position in the partnership despite his 95% share. The legal title of the hotel building and land was at all valuation dates vested in the three partners in their respective partnership shares and was not an asset of the partnership.

Under clause 14.2 of the Partnership Agreement of 28th December it is provided that this asset is held in trust for all the partners which also reflects the position prior to the agreement being entered into.

Under Section 531(AA)(1) it is of the essence of "Irish property" that the individual "is beneficially entitled in possession" to the property which falls to be valued on the valuation date. To be beneficially entitled in possession to anything the individual must either own absolutely for his own benefit the legal and equitable title to the property or own absolutely for his own benefit the equitable title to the property so that individual can call for the legal title under the so called rule in *Saunders v Vautier* (1841) Cr & Ph 240.

The property, in relation to the [redacted] Hotel Partnership to which the taxpayer is "beneficially entitled in possession" is his partnership share or

interest in that partnership. He is not beneficially in possession to his share of the legal title of hotel building and land. This he holds for the partnership.

A partner's share in the partnership is his or her proportion of the joint assets after the realisation and conversion into money and after payment of joint debts and liabilities (see *Stuart v Ferguson* (1832) Hayes Ex R 452 at 472 per Joy CB: *Garbett v Veale* (1843) 5 QB at 414 per Lord Denman CJ: *Marshall vs Maclure* (1885) 10 App Cas 325(PC) at 334; *Rodriguez v Speyer Bros* [1919] AC 59 at 68 per Finlay LJ)..

That partnership share is determined in this case by the agreement between the partners (see sections 24 and 44 Partnerships Act 1890) with the consequence that as between themselves partners are not entitled to exercise beneficial rights over any of the partnership assets. The interest of a partner is an interest in personality (see section 22 Partnership Act 1890) which is capable of being charged (see Section 23(2) Partnership Acts 1890). In effect the tax legislation recognises this partnership share (see part 34 and O'Dwyer v Cafolla & Co [1949] IR 210 (SC) at 242 per Black J.)

As outlined in Section 2, the value of the Appellant and his spouse's interest in the [redacted] Hotel Partnership was €1.22 million and €1.2 million respectively in August 2014 i.e. a total of €4.22 million. The economy was in a significantly stronger position in 2014 when compared to 2011, 2012 and 2013 (subsequent to the economic downturn in 2008). As such, the value of the Appellant's share in the [redacted] Hotel Partnership was significantly less than €4.22 million in these tax years.

The debt attaching to the [redacted] Hotel was approximately €25 million during 2011, 2012 and 2013. Due to the general downturn of the economy, the value of the [redacted] Hotel during such tax years was approximately €22 million, as ascertained by independent parties.

The valuation of the Appellant's share in the partnership will show that together with his other assets, the Appellant was not on any of the valuation dates beneficially entitled to Irish property in excess of €5,000,000…

CONCLUSION

At the risk of repetition the Appellant submits as follows:

(i) The [redacted] Hotel Partnership is not Irish Property…

(ii) The Appellant is not a "relevant individual" as the value of his Irish property did not exceed €5,000,000 in 2011, 2012 or 2013)…

The Appellant submits that his appeals should be upheld…

26. **SUBMISSIONS- Respondent**

Extract from Initial Outline of Arguments

"…

The Appellant concedes that he would be a 'relevant individual' for the purposes of the domicile levy but for the asset test (s.531AA(1) TCA). The Respondent disputes the contention that the asset test excludes the Appellant as a 'relevant individual'.

The Appellant alleges that his assets - including his interest in the [redacted] Hotel, [redacted] - which he alleges comprise a partnership interest in a trade – do not meet the asset test for 'relevant individual'. The Appellant is on full proof in relation to all matters the subject of the appeal and is required to adduce evidence of each and every fact relating to the subject matter of the appeal.

Without prejudice, the Respondent disputes the Appellant's submission that any alleged partnership interest in a trade is within the exception to Irish Property for the purposes of the asset test for 'relevant individual'. The Respondent disputes the Appellant's submission that any alleged partnership interest in a trade comprises 'shares in a company which exists wholly or mainly for the purpose of carrying on a trade or trades' (s.531(1) AA TCA).

The use of the word 'company' does not point to the inclusion of a partnership as posited by the Appellant. Furthermore, in modern usage, the word 'company' generally refers to a company formed under the Companies Acts or earlier enactments (Re Stanley, Tennant v Stanley (1906) 1 Ch 131 at 134 per Buckley CJ, Hay, Words and Phrases Legally Defined, Jowitt, Dictionary of English Law, 4th Edition, Vol 1. p.503 and Osborn's Concise Law Dictionary).

Without prejudice, the contextual principle *noscitur a sociis* applies so that a word or phrase is not to be construed as if it stood alone but in the light of its surroundings (*Bourne (Inspector* of *Taxes) v Norwich Crematorium Ltd* [1967] 2 All ER 576 at 578 per Stamp J, *Dillon v Minister for Posts & Telegraphs* [1981] WJSC 1589 at 1595 per Henchy J and *Hynes v The Appeal Tribunal of the Chartered Accountancy Regulatory* Board [2013] IEHC 220 per Hogan J).

Further, the 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 (Inspector of Taxes v Kiernan [1981] 1 I.R. 117 at 121 per Henchy J, and the general principles of statutory interpretation of tax legislation most recently espoused in the Supreme Court in O'Flynn Construction Limited v The Revenue Commissioners [2013] 3 IR 533).

The ordinary meaning of 'shares in a company' refers to shares as a unit of ownership in a company. The Respondent submits that 'shares in a company' is incapable of extending to an interest in a partnership as it does not have an

existence separate to and distinct from its partners. This is underlined by the reference to 'holding company' and 'subsidiary' in the same paragraph and the reference to 'company' in the context of a 'close company' in a later sub-section (s.531(4) TCA). Further support is found in the definition of 'ordinary share capital' which is defined by reference to 'company' for the purposes of the Tax Acts (s.2(1) TCA).

Domicile levy was introduced by s.150(1) Finance Act 2010 to impose a minimum charge to tax on individuals domiciled in the State who have very significant worldwide income and Irish property. The Respondent submits that its interpretation effectuates the clear scheme and purpose of domicile levy. If the legislative intention had been to remove trading assets from the definition of Irish property it would have been a simple matter to so provide. It has not done so. On the contrary, it is clear that trading assets are not so excluded so that, for example, the trading assets of a sole trader are not excluded…"

Extracts from Supplemental Outline of Arguments submitted in January 2021

"**…**OVERVIEW

This Outline of Arguments supplements the Outline of Arguments dated 1st July 2016 and filed on behalf of the Respondent…

The Respondent will rely on the generally accepted principles of statutory interpretation and most recently espoused in the Superior Courts in *O'Flynn Construction Limited v Revenue Commissioners [2013] 3 IR 533, O'Rourke v Revenue* Commissioners [2016] 2 IR 625, *Gaffney v Revenue Commissioners and Bookfinders v Revenue Commissioners* unreported Supreme Court, 29th September 2020. The point is succinctly put by Charlton J in *O'Rourke v Revenue Commissioners* [2016] 2 IR 625 Charlton J.

> *"A statute is to be construed according to its plain meaning and that such emerges from the text of the provision, considered within its proper context."*

IRISH PROPERTY

The Appellant says that he is not a 'relevant individual' because the market value of his Irish property is not in excess of €5,000,000. At issue in this appeal is the Appellant's property which is a hotel called the [redacted] Hotel situated just off [redacted] ("the Hotel"). The Hotel is valued well in excess of the threshold €5,000,000 for domicile levy purposes and the Appellant does not dispute this.

The Appellant asserts that it is his share in a partnership which is at issue in the appeal. The Appellant asserts that his share in a partnership does not meet the asset test because it is not "Irish Property" as defined and in any event its market value together with his other property is less than the threshold value of €5,000,0000 for domicile levy purposes. The Appellant asserts that he was not on any of the valuation dates beneficially entitled to Irish property in excess of €5,000,000. This is disputed by the Respondent.

The Appellant appended to the Outline of Arguments dated 1st July 2016 a Statement of Assets and Liabilities as at January 2012 and that Statements of Assets and Liabilities for each of the three valuation dates will be produced at the hearing … The Statements of Assets and Liabilities are documents on which the Appellant intends to rely at the hearing...

Property of the Partners

Irish property is defined in the first instance as all property, including rights and interests of every description, situated in the State and to which an individual is beneficially entitled in possession on the valuation date. The wide definition of property could encompass choses in action such as e.g., rights to compensation

or even a right to pursue a legal action may fall within its scope, *Zim v Proctor* [1985] STC90.

There is a distinction between partnership property and property which, although not partnership property, is co-owned by the partners. The Partnership Act 1890 recognises that partners may co-own property, but not as partners, yet share the profits therefrom as partners. Section 2(1) of the Act provides that co-ownership does not of itself create a partnership between the co-owners as to property so owned, even where the co-owners share the profits derived from the use of the property which is co- owned. Section 20(1) of the Partnership Act, 1890 defines partnership property as follows:

> *"All property and rights in property originally bought 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."*

This distinction is also clear in the opening clause of s.20(3) which states that:

> *"Where co-owners of an estate or interest in any land…not being itself partnership property, are partners as to profits made by the use of that land or estate…"*

Per O'Connor MR in *Re Christie* [1917] 1 IR 17 at 32,

> *"As I understand the law of partnership it does not necessarily follow from the carrying on of a business by two or more persons in partnership on certain premises, the property of the partners, that these premises become partnership property."*

This distinction was referred to by Finlay Geoghegan J in *Allied Irish Bank plc v Galvin Developments (*Killarney*) Limited* [2011] IEHC 314 where she noted that the parties had agreed to proceed with their plans for property development using a co-ownership structure in which each party would *acquire* a 50% interest and would be liable for 50% of the liabilities, rather than using a partnership structure in which 'each side of the joint venture would have been liable for the entire debts of the partnership'.

Twomey (Second Edition at para 16.40) opines that in order to find that co-owned property is partnership property, there must be something more than mere co-ownership. In other words, there must be evidence of an intention by the partners that the property will become part of the partnership stock. The mere use of co-owned property is not sufficient in itself citing the decision in *Barton v Morris* [1985] 2 All ER 1032.

The onus of proving that property is partnership property is upon the person who alleges it. It is for the Appellant to adduce evidence to support the contention advanced behalf of the Appellant. The Appellant is the legal owner of the property and as such there is a presumption that as legal owner, the Appellant also has beneficial entitlement to that property. In so far as the property is used for the purposes of a partnership of which he is a partner, he is both entitled in possession and is exercising his right of possession by permitting the partnership to trade from the property.

The Appellant accepts the Hotel has a value far in excess of the threshold value for the asset test of €5,000,000. The Appellant argues that his interest is a partnership interest, and that partnership interest is valued below that asset test threshold. Strictly without prejudice to the foregoing submissions, should the Commission find that Appellant has a partnership interest for any of the years in issue, the Respondent submits that the Appellant is a relevant individual, the market value of whose Irish property on the valuation date is in excess of €5 million.

The valuation of Irish property as defined is central to triggering the charge to domicile levy. To this end, the domicile levy code in Part 18C expressly provides for its valuation in section 531AA which provides for the manner in which market value is to be calculated as follows:

> *"market value", in relation to property, means the price which such property would fetch if sold on the open market on the valuation date in such manner and subject to such conditions as might reasonably be calculated to obtain for the vendor the best price for the property;"*

Section 531AA further directs that:

> *"In estimating the market value of any property for the purposes of this Part, no deduction shall be made from the market value of any debts or encumbrances".*

It is submitted that this express direction could not be clearer in its terms and consonant with the well-established principles of statutory interpretation it means precisely what it says – there is a prohibition on the deduction of any debts or encumbrances in estimating market value of any property. The prohibition applies to "any property" – it is submitted that had it been intended to exclude partnerships or any other assets this could have been done but was not. By way of contrast, the same section makes provision to exclude certain shares in a company in the context of defining Irish property.

Under the specific statutory valuation rules that apply for domicile levy, the Appellant is prohibited from deducting any debts or encumbrances in estimating the market value of a partnership interest such as any partnership debts or any restrictions attaching to the interest.

Without prejudice to the foregoing, the onus is on the Appellant to prove the factual matters asserted by him including that there exist partnership debts and restrictions.

The Appellant filed a valuation report dated 8th January 2021 in support of its valuation of the partnership share. This is in dispute. The Respondent reserves the right to call expert evidence in this regard…"

ANALYSIS & CONCLUSIONS

27. There are a number of key issues for decision in this appeal as follows:

- Does the hotel partnership, in which the Appellant is a partner, come within the definition of a "company" as defined for the purposes of the domicile levy?
- Is the Hotel Partnership a true business partnership or a "Partnership of will" as asserted at the hearing by the Respondent?
- Is the Hotel owned by the partners, in the Hotel partnership, as individuals or is it an asset of the partnership. In other words, is the hotel inside or outside of the partnership?
- What is the value of the Hotel?
- Is it correct to deduct the Hotel related bank borrowings in valuing the hotel for domicile levy purposes?

Is a partnership a "company" for the purposes of the domicile levy?

28. For the purposes of calculating Irish property assets for the Irish domicile levy, there is an exclusion for shares in a company which exists wholly or mainly for the purpose of carrying on a trade or trades.

29. The Appellant argued that the Hotel Partnership was, at each of the valuation dates, "an association formed to carry on some commercial or industrial undertaking" (borrow the words of the Oxford Dictionary); that on those dates that association existed "wholly or mainly for the purposes of carrying on a trade or trades" in the words of Section 531AA(1). It was accordingly a "company".

30. Counsel for the Appellant correctly argued that the term "company" used in domicile levy legislation is not defined as it is for other purposes of taxation in the TCA. He cited the 1889 UK authority Lindley's "a Treatise on the Law of Companies as a Branch of the law of Partnership" and the page headed "the Law of Companies Introduction, Nature of a Company"

> *"by a company is meant an association of many persons who contribute money or monies worth to a common stock and employ it in some trade or business and who share the profit or loss, as the case may be, arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contributed or to whom it belongs are members. The proportion of capital to which each member is entitled is his share. Shares are always transferable, although the right to transfer them is often more or less restricted. A company which is neither incorporated nor privileged by the Crown or the legislature is substantially a partnership and although the transferability of it's shares considerably modifies the application to it of the ordinary law on partnership, still the company, like an ordinary firm, is not in legal point of view distinguishable from the members composing it."*

to argue for defining a partnership as a company and by extension, the Appellant's share in the Hotel partnership, as being share in a company exempted from calculation of assets for the domicile levy. The Appellant argued that the use of such defined expressions cannot confine the clearly general word "company" simply to registered companies or even to bodies corporate.

31. Counsel for the Respondent argued that you can only have a share in a partnership rather than shares in a partnership (similar to shares in a company); that the ordinary meaning of the word "partnership" would not include it being classified as a company.

Counsel for the Respondent opened a definition of a company from the respected commentary by Haye. "*Words and Phrases Legally Defined,* where the term "company" is defined in the following terms:

> *The general sense of the word "company" the note and association of individuals form together for some common purpose. The word is defined for the strict purposes of the Companies Act 2006 to mean a company that has been formed and registered under the Act… although it may include companies formed and registered under earlier enactments.*
> *In a legal context, it has been said that the word "company", while having no strict technical meaning, involves two ideas(Re Stanley, Tenant v Stanley (1906) 1 Ch 131 and 134 per Buckley J) namely (1) that the members of the association are so numerous that it cannot aptly be described as a firm partnership; and(2) that a member may transfer his interest in the association without the consent of all the other members(14 Halsbury's Laws of England (5th Edn)(2016 para 1 and para 1 n 1)*

32. The Respondent argued that the ordinary meaning of 'shares in a company' refers to shares as a unit of ownership in a company. The Respondent submitted that 'shares in a company' is incapable of extending to an interest in a partnership as it does not have an existence separate to and distinct from its partners. This is underlined by the reference to 'holding company' and 'subsidiary' in the same paragraph and the reference to 'company' in the context of a 'close company' in a later sub-section (s.531(4) TCA). Further support is found in the definition of 'ordinary share capital' which is defined by reference to 'company' for the purposes of the Tax Acts (s.2(1) TCA).

33. On how to Interpret Taxation statutes, Counsel for the Respondent cited the 1981 Irish Supreme Court case of *Inspector of Taxes v Kiernan* and important dicta cited by Judge Henchy:

> *"There's no doubt that, at certain stages of English usage and in certain statutory contexts, the word 'cattle' is wide enough in its express or implied significance to include pig…*

A word or expression in a given statute must be given a meaning and scope according to its immediate context, in line with the scheme and purpose of a particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein.

Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the provision, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in Unwin-V - Hanson at page 119 of the report:-

'if the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business or transaction, and words were 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 a particular meaning, though it may differ from the common or ordinary meaning of the words.

The statutory provisions we are concerned with here are plainly addressed to the public generally, rather than to a select section thereof who may be expected to use the words in a specialised sense. Accordingly, the word 'cattle' should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily…

> *Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question has passed".*

34. Counsel for the Respondent then opened the decision of *Bookfinders v Revenue* (2020) which cited with approval the dicta of Judge Henchy in *Inspector of Taxes v Kiernan*. In *Bookfinders*, Mr. Justice O'Donnell cited the dicta of Mr. Justice McKechnie in *Dunnes Stores v Revenue Commissioners* (2019) as follows:

> *"54. It will be noted that, at para. 68, McKechnie J. suggests that he will come back to the question of s. 5 of the Interpretation Act, but in the event, the judgment does not do so. I think it is to be inferred that he would not have considered it appropriate to have recourse to that section in the interpretation of taxation statutes. In any event, for the reasons set out above, I am satisfied that s.5 of the Interpretation Act should not be applied in the interpretation of taxation statutes. However, the rest of the extract from the judgment is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute seeking ambiguity.*
>
> *Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability,that the principle against*

> *doubtful penalisation should apply and the text contained given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language…*
>
> *The present case is a good illustration of the distinction. The case is not, in my view, a contest between a simple requirement of clarity on the one hand and a broad purposive approach on the other. Instead, the approach of the Appellant depends not merely on strict statutory language, but on an artificial interpretation of the words used, to produce an unrealistic reading of the Act. I should add that I do not consider it necessary to consider if the principle of doubtful penalisation applies with the same force - or at all - to indirect taxation. Nor does it appear to me that it is necessary to rely on the principle of conforming interpretation to resolve this case. It is not clear that the interpretation of the Schedules would or could lead to an interpretation at odds with the Directive. For present purposes, I am prepared to approach this case on the basis that the traditional canons of interpretation as set out above apply."*

35. The Appellant argued that "The defining quality of a company in excluding it's shares from the definition of "Irish property" is not that it is a body corporate but that it "exists wholly or mainly for the purposes of carrying on a trade or trades".

36. The Appellant argued that in its general meaning,

> "a *"company"* is *"an association formed to carry on some commercial or industrial undertaking" (Oxford English Dictionary 2nd ed Vol II p. 589 [7a]). This derives from the primary meaning of the word which is "companionship, fellowship, society" and appears to come from the old French word "compaignie" meaning a body of soldiers (ibid[1]) and more generally, "a body of persons combined or* incorporated *for some common object or for the joint execution or performance of anything" (ibid[6]).*

> *That definition is reflected in law dictionaries including Black 10th ed. p.339 "A corporation – or less commonly an association, partnership or union – that carried on a* commercial *or industrial enterprise" and Jowitt 4th ed Vol 1 p 503. "Historically a company was an association of persons formed for the purpose of some business or undertaking carried on in the name of the association. This earlier usage survives in the practice of using "& Co" in the business names of a partnership or sole trade which is not in law a corporation and so does not enjoy corporate personality"*
>
> *… Hotel Partnership was at each of the valuation dates "an association formed to carry on some commercial or industrial undertaking" to borrow the words of the Oxford Dictionary and on those dates existed "wholly or mainly for the purposes of carrying on a trade or trades" in the words of Section 531AA(1). It was accordingly a "company".*

37. The Respondent disputes the Appellant's submission that any alleged partnership interest in a trade comprises '*shares in a company which exists wholly or mainly for the purpose of carrying on a trade or trades*' (s.531(1) AA TCA).

38. The use of the word 'company' does not point to the inclusion of a partnership as posited by the Appellant. Furthermore, in modern usage, the word 'company' generally refers to a company formed under the Companies Acts or earlier enactments (Re Stanley, Tennant v Stanley (1906) 1 Ch 131 at 134 per Buckley CJ, Hay, Words and Phrases Legally Defined, Jowitt, Dictionary of English Law, 4th Edition, Vol 1. p.503 and Osborn's Concise Law Dictionary).

39. I am bound by the dicta of the superior Irish Courts. For that reason I support the contention of the Respondent that the ordinary meaning of the word "company" and its context with section 531AA TCA1997 would not extend to include a partnership.

40. I conclude that a partnership is not a "company" in the ordinary meaning of that term. Neither in my experience has the term "company" ever been ascribed to a partnership.

Whatever about the merits of a nineteenth century UK definition of "a partnership" as being encompassed within the term "company", I am strongly of the belief that the Irish Courts would not agree that a partnership comes within the ordinary meaning of "company" within the Taxes Acts.

41. Having so concluded it is now necessary to look at the valuation of the Appellant's Irish property assets (as defined for purposes of domicile levy).

Valuation

42. Schedules of the Appellant's assets were prepared by the Appellant's Agent for the years 2011, 2012 and 2013. By far the most important and relevant asset for valuation purposes was the Hotel. This asset was used in a partnership with a business which was the running of the Hotel on a commercial basis and in which the Appellant had 95% share of ownership.

43. Two expert valuation reports were presented before me. The first valuation report, on behalf of the Appellant, was submitted by the Appellant's Valuation Expert. The second expert report was prepared by the Respondent's Valuation Expert.

Basis of valuation of hotel

44. The Appellant's Valuation Expert earnings basis valuation used a multiple (changing from 2011, to 2012, to 2013), based on industry norms for valuing shares, applied to the historic earnings before Interest, Tax, Depreciation, and Amortisation (EBITDA). The EBITDA was based on the financial statements of the hotel partnership, unaudited and prepared by the Appellant's Agent.

45. In contrast, the Respondent's Valuation Expert valued the hotel in part, based on the historic financial statements of the hotel partnership using the rule of 1/10, and in part on the future prospects for the hotel, based on a valuation report prepared in 2014 by a different valuer, for the benefit of the Appellant and his wife.

Adjustments to valuation of Hotel by Appellant's Valuation Expert.

46. In arriving at his valuation the Appellant's Valuation Expert took into account the following reduction adjustments in arriving at his valuation of the Appellant's partnership interest:

- bank borrowings owing to Ulster Bank where deducted
- a discount of 15% was applied due to restrictions in partnership agreement (2012 if applicable, 2013 only)
- latent capital gains tax owing by the Appellant upon a hypothetical sale of the hotel (2013 only)
- A contingent SIG fee payable to Ulster Bank in the event of certain future events transpiring (2012,2013)

Adjustments to valuation of Hotel by Respondent's Valuation Expert

47. In arriving at his valuation the Respondent's Valuation Expert rejected, as inappropriate, the following reduction adjustments used by the Appellant's Valuation Expert in arriving at his valuation of the hotel:
    - bank borrowings owing to Ulster bank
    - the contingent SIG fee payable to Ulster Bank in the event of certain future events transpiring.
    - A discount due to restrictions in partnership agreement (2013 only)
    - any latent capital gains tax owing by the Appellant upon a hypothetical sale of the hotel (2013 only)
    - Adjustment to EBITDA relating to costs incurred in respect of racehorses

48. In arriving at his valuation the Respondent's Valuation Expert argued the following adjustments in arriving at his valuation of the hotel:

- No adjustment for working capital

49. The Respondent's Valuation Expert ignored the bank borrowings in his valuation as he felt he was required to do so by the domicile levy provisions.

50. Aside from the issue of whether the bank borrowing should be deducted, which I will deal with later, I will comment on the various adjustments to the valuation of the Hotel as follows:

    The SIG fee payable was due in the event of the partnership changing bankers or upon the dissolution of the partnership. This was a contingency fee in respect of a future event. It related to partnership business. It was not a fee or expense in connection with the hotel asset itself when envisaging an open market sale between a willing buyer and a willing seller. The Appellant's Valuation Expert added this fee to the bank borrowings while the Respondent's Valuation Expert ignored it. I agree with the Respondent's position.

51. I believe there is no basis for a deduction for latent capital gains tax applicable to the Appellant when looking at valuing the Hotel, using an open market value basis. It is seldom a concern of the purchaser in valuing an asset, what the consequential capital gains tax of the vendor will be, arising from that transaction.

52. Whether a discount should be allowed for the partnership restrictions introduced on the Appellant in the 2012 partnership agreement, as allowed for by the Appellant's Valuation Expert in 2012 and 2013, is an uncertain and complex matter. The Respondent argued that the Partnership was a "partnership of will". As such, no discount should be allowed as the Appellant could simply terminate the partnership to avoid any restrictions before selling the property. However, as we shall see later I have concluded that, while the matter is not free from doubt, it is probable that the 2007 and 2012 partnership were not "partnerships of will" in the legal sense. Also as Counsel for the Appellant argued, the "open market value hypothesis" envisaged in the legislation requires you to determine the open market value taking account of the existing status of the property with all its restrictions and conditions. For that reason and given that the hotel valuations from both experts are EBITDA based, and although the matter is not free from doubt, I am prepared to accept that the 15% discount, advocated by the Appellant is not unreasonable.

53. During the hearing it was argued by the Respondent's Valuation Expert that an adjustment be made to the Appellant's Hotel valuation in respect of the costs associated with six racehorses only identified during the hearing during witness cross examination. These costs were not explicitly identified within EBITDA in the financial statements of the partnership. I accept, on the balance of probabilities, the Respondent's Valuation Expert's observation, that the estimated costs of circa €100,000 per annum, related to the racehorses, should be added back in arriving at the EBITDA to exclude these costs from the valuation of the Hotel. Using the valuation multiples adopted by both parties, this would increase the Hotel valuation adopted by the Appellant's Valuation Expert by €800,000, €850,000 and €900,000 for 2011, 2012 and 2013, respectively.

54. Strictly speaking, in comparing the two valuations, as regard to the racehorse costs, a comparable but different (due to the more complex methodology used) adjustment upwards should be made to the Respondent's Valuation but I have not done this for reasons of simplicity and because such an adjustment will not materially impact, either way, on my determination.

55. The Respondent's Valuation Expert did not take account of working capital (current assets less current liabilities) whereas the Appellant's Valuation Expert did. If it is excluded it actually works in favour of the Appellant. For that reason I have excluded it in my calculations below.

56. Taking my comments above into account this would mean that the valuation put forward by the Appellant's Valuation Expert would be adjusted as follows:

	2011	2012	2013
Valuation of Hotel per Appellant's Valuation Expert report, excluding borrowings	16,148,331	26,396,401	35,331,295
Latent CGT			-2,139,273
Current Assets	2,236,962	1,880,207	1,976,466
Current Liabilities	-442,843	-564,039	-698,496
	17,942,450	27,712,569	34,469,992

Adjustments required			
Add Back Latent CGT			2,139,273
Exclude working capital	-2,236,962	-1,880,207	-1,976,466
	442,843	564,039	698,496
Racehorses adjustment	800,000	850000	900000
	16,948,331	27,246,401	36,231,295
Appellant's % ownership	95%	95%	95%
Appellant's ownership value	16,100,915	25,884,081	34,419,730
Discount for Restricted Partner	0%	15%	15%
Final adjusted Appellant's Valuation	**16,100,915**	**22,001,469**	**29,256,771**

57. This valuation can then be compared to the Respondent's expert valuation:

	2011	**2012**	**2013**
Respondent's Valuation	**22,596,564**	**30,881,476**	**38,095,275**

58. As I am relying on the expertise of the valuers, I will, as a working assumption and on the balance of probabilities, accept that the valuation lies somewhere between the two valuations. So taking the average of the two valuations for each year, I will for the moment assume a value of the Hotel, before borrowings, for each year under appeal, to be as follows:

	2011	**2012**	**2013**
Commissioner's Valuation of Appellant's Hotel share	**19,348,739**	**26,441,472**	**33,676,023**

59. This means that if I determine that I should exclude borrowings in determining the Appellant's interest in the hotel for levy purposes, then the Appellant will exceed the €5 million asset threshold for each year, 2011 to 2013.

60. The borrowings for each year excluding the Sig Contingency Fee are as follows:

	2011	2012	2013
Debt per Financial Statements	(30,470,970)	(27,870,990)	(25,966,276)
Appellant's Share of Debt	95%	95%	95%
Discount for Restricted Partner	0%	15%	15%
Appellant's share of Debt	**(24,605,308)**	**(22,505,824)**	**(20,967,768)**

61. Using my valuation above, and assuming that I allow the borrowings, and ignoring his other Irish assets, the Appellant will exceed the asset threshold of €5million in year 2013 only as follows:

	2011	2012	2013
Commissioner's Valuation of Appellant's Hotel share	**19,348,739**	**26,441,472**	**33,676,023**
Appellant's share of Debt	**(24,605,308)**	**(22,505,824)**	**(20,967,768)**
Adjusted Net partnership Interest	**(5,256,569)**	**3,935,648**	**12,708,255**

62. So the key question remaining to be answered is whether the borrowing reflected in the partnerships financial statements should or should not be deducted in the valuation of the Appellant' assets for 2011, 2012 and 2013 (although, either way based on my calculations, the Appellant's assets will exceed €5Million in 2013).

63. One of the arguments used by the Respondent was that the Partnerships were not true business partnerships but were instead a "partnership of will"

Are the Hotel Partnerships in question true business partnerships or "Partnerships of will"?

64. The Respondent argued that the partnership deeds put before me were not true partnerships and that because of the clauses therein which allowed, in effect, the Appellant to unwind any restrictions imposed on him and as he was the dominant partner in all transactions, that the partnership should be classed as a "partnership of will". If I were to accept that the partnership is a partnership of will this would in the mind of the Respondent have two effects. Firstly, it would allow me ignore the discount 15% included in the Appellant's valuation. (I have already addressed this matter above). Secondly, the Respondent submitted that I should dispense with the Appellant's argument that for the purposes of the domicile levy, I am required to value the Appellant's interest in the partnership (not the Hotel), which the Appellant argues is after deduction of bank borrowings.

65. In the course of the Appellant's tax filings over the years the Respondent has accepted partnership returns in respect of this hotel partnership. This is *prima facie* evidence that the Respondent does regard the partnership as being real.

66. It was conceded by the Appellant's Agent that there were errors in the accounting treatment of the sons of the Appellant's as they were treated as employees of the partnership for a period after they had become partners in the partnership.

67. The Respondent pointed to a number of clauses within the partnership agreement which, they argued, meant that it was a partnership of will, in that any restrictions within the partnership impeding the Appellant could be superseded by the partner unilaterally terminating the partnership. However Counsel for the Appellant pointed to some of the clauses in the agreements which were *de facto* restrictions on the activities of the Appellant. On balance, while the matter is not free from doubt, having listened to the arguments from both sides, I am inclined to the view that the partnership created

in 2007, governing the year ended 2011 and the partnership created in December 2012 governing the years 2012 and 2013 were real and were not "partnerships of will".

Is it correct to deduct the borrowings from the bank in valuing the hotel?

68. In this appeal, the Appellant argued that the asset which needs to be valued for the purposes of the domicile levy, is his interest in the partnership which in turn holds the Hotel as an asset of the partnership. The Appellant argued that in valuing an interest in a partnership you must take into account the borrowings of that partnership. In other words the value of that interest in that partnership after all debts have been repaid. This was the approach taken by the expert on behalf of the Appellant in valuing the hotel business. The Appellant's Valuation Expert deducted the bank borrowings related to the hotel business in valuing the Appellant's partnership interest.

69. On the other hand the Respondent was of the view that the asset to be valued was the hotel business, excluding related bank borrowings. In other words, you value the hotel business conducted by the partnership separate from the means by which that business is financed. In addition, the Respondent argued that legally the property was in the ownership of the individual partners and was not retained legally within the partnership. This latter point was accepted by Counsel for the Appellant.

70. The evidence put before me showed that the Hotel property was held in the names of the individual partners in proportion to their share in the partnership. The deeds of ownership do not refer to the partnership as such but to individuals who were partners in the partnership. A partnership is a contractual agreement between the partners for the conduct of the business. In my view it is possible for a property be held in individual names of the partners and at the same time be also classified as an asset of partnership for accounting purposes.

71. I am persuaded by the commentary of Judge Michael Twomey, Judge of the High Court, in *"Twomey on Partnership"* opened by the Respondent. At 16.38 it states:

"Having considered the major presumptions regarding the status of property used by a partnership, it is useful to refer one of the more difficult distinctions to make, i.e. between partnership property and property which, although not partnership property, is co-owned by the partners. The 1890 Act recognises that partners may co-own property, but not as partners, yet shared the profit therefrom as partners opening clause of s 20(3) states that:

> *where co-owners of an estate or interest in any land… not being itself partnership property, are partners as to profit made by the use of that land or estate…*

16.39 In addition it has been noted previously in this work that s 2(1) of the 1890 Act recognises that co-ownership by persons of property does not imply that the persons sharing the profits thereof are partners:

> *joint tenancy, tenancy in common, joint property, common property, or part ownership does not itself create a partnership as to anything so held or owned, whether the tenant or owners do or do not share any profits made by the use thereof.*

One may, therefore, speak of property which is not partnership property although it is co-own by persons who happen to be partners, but it is not co-owned by them as partners…

16.40 In order to find that co-owned property is partnership property, there must be something more than mere co-ownership. In other words there must be evidence of an intention by the partners that the property will come part of the partnership stock…"

72. The Deeds of Assignment in April 2007 where the Appellant transferred a 2.5% interest in the Hotel to each of his sons makers no mention of the Partnership created at that time. The Bank correspondence relating to the Hotel-related borrowings in August 2007 state that the borrowers are the Appellant and his two sons. The same documentation describes the purpose of the borrowings as relating to the "completion of the extension and refurbishment" of the Hotel, without reference to a partnership.

73. The rollover of banking facilities dated 3 January 2013 shows the Appellant and his two sons as the borrowers. Again no mention is made of the Partnership.

74. It is my view that the partners as individuals are beneficially entitled in possession to their respect shares in the hotel property. Under clause 14.2 of the Partnership Agreement of 28th December 2012 it is provided that the Hotel asset is held in trust for all the partners which the Appellant's Counsel argued also reflects the position prior to the agreement being entered into.

75. Clause 14.2 of the 2012 partnership agreement requires that:

> *"All Partnership assets, including premises in which the Partnership business shall from time to time be carried on shall be Partnership property and shall (unless otherwise agreed) belong to the Partners jointly or shall if vested in any individual partner be held by in trust for all Partners and the other Partners shall indemnify such Partner against all liability which may arise whether directly or indirectly out of such ownership"*

76. This clause, in my view, shows the Appellant, separate from his interest in the Hotel, entering into certain contractual agreements with his partners, through the partnership agreements. In my view, this clause, to the extent it is effective, is a separate contractual obligation entered into by the Appellant and does not interfere with the Appellant's 95% entitlement in possession of the Hotel. For that reason I reject the Appellant's argument that he is not beneficially in possession to his share of the legal title of hotel building and land which the Appellant argued he holds for the partnership. I agree with Counsel for the Respondent when she asserts that in so far as the property is used for the purposes of a partnership of which the Appellant is a partner, he is both beneficially entitled in possession and is exercising his right of possession by permitting the partnership to trade from the property.

77. The provisions of section 531AA(1), section 531AA (5) and the charging section 531 AB, which govern the domicile levy, require the valuation of "*Irish Property* on *the valuation date in the tax year …in excess of €5,000,000... In estimating the market value of any property…no deduction shall be made for any debts or encumbrances".*

78. In my view, that under the statutory valuation rules that apply for domicile levy, the Appellant is prohibited from deducting any debts in estimating the market value of his Hotel interest, such as any partnership debts.

79. Accordingly the following sets out the Hotel value which, on the balance of probabilities, should be taken into account in determining the Appellant's assets and therefore liability to domicile levy for the years 2011 to 2013.

	2011	2012	2013
Appellant's share of Hotel Valuation	**19,348,739**	**26,441,472**	**33,676,023**

80. This means that the Appellant's assets, ignoring his other declared assets, for the purposes of the domicile levy exceed €5million for all years under appeal.

DETERMINATION

81. I determine that assessments to the domicile levy under section 531 Taxes Consolidation Act 1997 (TCA 97) made on the Appellant in respect of the tax years 2011, 2012 and 2013 inclusive, on 10th August 2015, in the amount of €200,000 for each year (in aggregate €600,000) should stand.

82. This appeal has been determined in accordance with section 949AK TCA 1997.

PAUL CUMMINS
TAX APPEALS COMMISSIONER
Designated Public Official

TAX APPEALS COMMISSION

9 July 2021

The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court under Chapter 6, Part 40A of the Taxes Consolidation Act, 1997.

Appendix 1

2011
Hotel and Hotel Partnership Valuation

		Appellant Expert 2011 €		**Respondent Expert 2011 €**
EBITDA Calculation				
Profit per accounts		1,252,498		1,252,498
Addback: Interest		860,273		860,273
EBITDA		2,112,771		2,112,771
Addback: Management Fees				
Adjusted EBITDA		2,112,771		2,112,771
EBITDA used for Valuation		2,112,771		3,112,029
Multiple used		8		8
Gross Hotel Asset Value		16,902,168		24,896,229
Less: Acquisition Costs	4.46%	(753,837)	4.46%	(1,110,372)
Hotel Valuation		16,148,331		23,785,857
Hotel Asset value		16,148,331		23,785,857
Latent CGT				
Current Assets		2,236,962		
Current Liabilities		(442,843)		
Debt		(30,470,970)		
Net Partnership Value		(12,528,520)		
[redacted] % ownership*		95%		95%
[redacted] ownership value		(11,902,094)		22,596,564
Discount for Restricted Partner		0%		0%
Final Valuation		**(11,902,094)**		**22,596,564**

*The Appellant's Valuation Expert used 95% although the Appellant's share was 94.5% in 2011

Appendix 2

2012
Hotel and Hotel Partnership Valuation

		Appellant Expert 2012 €		Respondent Expert 2012 €
EBITDA Calculation				
Profit per accounts		2,409,176		2,409,176
Addback: Interest		598,248		598,248
EBITDA		3,007,424		3,007,424
Addback: Management Fees		243,004		243,004
Adjusted EBITDA		3,250,428		3,250,428
EBITDA used for Valuation		3,250,428		4,002,859
Multiple used		8.5		8.5
Gross Hotel Asset Value		27,628,638		34,024,301
Less: Acquisition Costs	4.46%	(1,232,237)	4.46%	(1,517,484)
Hotel Valuation		26,396,401		32,506,817
Hotel Asset value		26,396,401		32,506,817
Latent CGT				
Current Assets		1,880,207		
Current Liabilities		(564,039)		
Debt		(30,870,990)		
Net Partnership Value		(3,158,421)		
[redacted] % ownership		95%		95%
[redacted] ownership value		(3,000,500)		30,881,476
Discount for Restricted Partner		0%		0%
Final Valuation		**(3,000,500)**		**30,881,476**

Appendix 3
2013
Hotel and Hotel Partnership Valuation

		Appellant Expert 2013 €		Respondent Expert 2013 €
EBITDA Calculation				
Profit per accounts		2,694,172		2,694,172
Addback: Interest		1,016,749		1,016,749
EBITDA		3,710,921		3,710,921
Addback: Management Fees		398,038		398,038
Adjusted EBITDA		4,108,959		4,108,959
EBITDA used for Valuation		4,108,959		4,663,584
Multiple used		9		9
Gross Hotel Asset Value		36,980,631		41,972,252
Less: Acquisition Costs	4.46%	(1,649,336)	4.46%	(1,871,962)
Hotel Valuation		35,331,295		40,100,290
Hotel Asset value		35,331,295		40,100,290
Latent CGT		(2,139,273)		
Current Assets		1,976,466		
Current Liabilities		(698,496)		
Debt		(30,648,785)		
Net Partnership Value		3,821,207		
[redacted] % ownership		95%		95%
[redacted] ownership value		3,630,147		38,095,275
Discount for Restricted Partner Discount		15%		0
Final Valuation		**3,085,625**		**38,095,275**