**Ref:** [redacted]

**Between/**

[redacted]

**Appellant**

**-and-**

**THE REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

## *A. Matter under Appeal*

**1.** This matter comes before the Tax Appeals Commission as an appeal against an Amended Assessment issued by the Respondent on the 3rd of November 2016, assessing the Appellant to an additional Capital Acquisitions Tax liability of €147,416.40 for the period from the 1st of September 2012 to the 31st of August 2013, together with interest thereon and a penalty.

**2.** The parties agreed that the question to be determined in this appeal is whether certain assets of [redacted] Limited (hereinafter referred to as "**the Company**") are excepted assets within the meaning of section 100 of the Capital Acquisitions Tax Consolidation Act 2003 (hereinafter "**CATCA**") for the purpose of calculating the Appellant's entitlement to business relief under section 92 of CATCA.

**3.** The appeal proceeded by way of an oral hearing before me. Evidence was given by the Appellant's father, [redacted], who was the donee of shares in the Company to the Appellant and was for many years the Managing Director of the Company. I was further assisted by the helpful oral and written legal submissions made by both parties.

## *B. Background to the Appeal*

**4.** On the [redacted] of [redacted] 2012 the Appellant received a gift from her father, [redacted], of a 12.5% shareholding in the Company. This transaction is referred to hereinafter as "**the Share Transfer**".

**5.** The Appellant completed and filed a gift tax return (Form IT38) in respect of the share transfer and claimed business relief under sections 90 to 102 CATCA in respect of assets of the Company valued at €2,195,085.00. As set forth in greater detail hereunder, this relief allows part of a gift attributable to the value of "*relevant business property*" to have its taxable value reduced by 90 per cent. On the basis of this return, the Respondent assessed the Appellant as having a liability of €99,588.00. This sum was duly paid by the Appellant.

**6.** On the 30th of June 2016, the Appellant received notification of an audit of her capital gains and capital acquisitions tax transactions for the years 2011 to 2015 inclusive. This entailed an inquiry into whether certain assets of the Company in respect of which business relief was claimed were in fact eligible for the same. These assets comprised **(a)** cash at bank in the amount of €3,379,849, **(b)** investment assets of €1,210,019 recorded on the balance sheet as fixed assets, **(c)** investment assets of €661,600.00 recorded on the balance sheet as current assets, and **(d)** three properties situate at [redacted].

**7.** The key question was whether they were "*excepted assets*" within the meaning of section 100(2) of CATCA, *i.e.* assets that were not used wholly or mainly for the purpose of the Company's supermarket business throughout the two years prior to the share transfer. During the audit, the Revenue Inspector and the Appellant's tax agents engaged in extensive correspondence on this question.

**8.** It was accepted by both sides that a company's accumulated cash reserve was an excepted asset unless it could be shown to have a specific use for the purpose of its business. For example, profits which would not be reinvested in the Company because they were to be paid as a dividend to its shareholders would be ineligible for relief.

**9.** The Appellant's tax agents submitted that in the instant appeal the Company's cash at bank had a variety of specific uses for the Company's business. A portion of it was necessary for the running of the Company's supermarket business on an ongoing day-to-day basis and for the imminent upgrading of plant, primarily refrigeration equipment. The Appellant's agents submitted that the remainder of the cash, the investment assets and the properties at [redacted] were held by the Company as part of a project to expand and develop the supermarket premises

(hereinafter referred to as "**the Development Project**"). Planning permission for the Development Project was granted by [redacted] Council in [redacted] of 2015, which permission was amended in 2017 following the submission of revised plans.

**10.** The foregoing explanations in relation to the uses of the assets in issue were not accepted by the Revenue Inspector and an Amended Capital Acquisitions Tax Assessment issued on the 3rd of November 2016 which, as stated above, assessed the Appellant to an additional liability of €147,416.40 for the period from the 1st of September 2012 to the 31st of August 2013.

**11.** The Respondent made this Amended Assessment on the basis that the investment assets and the three properties on [redacted] were all excepted from claims for business relief as they were, contrary to the requirements of section 100(2), used for purposes other than the business of the Company for the whole of the two years prior to the share transfer. In support of this, the Revenue Inspector referred in correspondence to, *inter alia*, the letting of numbers [redacted] to residential tenants between 2000 and 2013. He also made reference to the fact that the Development Project had not received planning permission by the time of the share transfer. These grounds of argument are considered in greater detail hereunder.

**12.** In relation to the cash at bank, the Revenue Inspector determined that €2,196,853 was used for the purpose of the business. This figure was arrived at by deducting the amount in the Company's accounts relating to "creditors and debtors", which left a balance of €1,557,328. Of this, 25% could, in his view, be attributed to the Company's business for liquidity purposes. This left €1,182,996.00 which he felt could not be so attributed, and was therefore ineligible for business relief.

**13.** In summary, the assets identified by the Respondent as "*excepted assets*" for the purposes of the Amended Assessment were:-

**(i)** €1,182,996.00 cash at bank;

**(ii)** €1,210,109.00 investment assets recorded on the Company's balance sheet as fixed assets;

**(iii)** €661,600.00 investment assets recorded on the Company's balance sheet as current assets; and,

**(iv)** The three properties at [redacted], valued by the Respondent at €945,000 in total.

**14.** These assets are hereinafter collectively referred to as "**the Disputed Assets**".

**15.** The Amended Assessment of the 3rd of November 2016 was appealed by the Appellant on the 29th of November 2016.

## C. ***Relevant Legislation***

**16.** Sections 90 to 102 inclusive of CATCA contain the provisions governing business relief. Section 90 defines a "*business*" as including a business *"... carried on in the exercise of a profession or vocation, but does not include a business carried on otherwise than for gain".*

**17.** Section 92 provides that:-

> *"Where the whole or part of the taxable value of any taxable gift or taxable inheritance is attributable to the value of any relevant business property, the*

*whole or that part of the taxable value is, subject to the other provisions of this Chapter, treated as being reduced by 90 per cent."*

**18.** Section 93 defines the "*relevant business property*" referred to in the preceding section. Section 93(1) provides that it comprises any one or more of the following:-

*"(a) property consisting of a business or interest in a business.*

*(b) unquoted shares in or securities of a company whether incorporated in the State or otherwise to which paragraph (c) does not relate, and which on the valuation date (either by themselves alone or together with other shares or securities in that company in the absolute beneficial ownership of the donee or successor on that date) give control of powers of voting on all questions affecting the company as a whole which if exercised would yield more than 25 per cent of the votes capable of being exercised on those shares,*

*(c) unquoted shares in or securities of a company whether incorporated in the State or otherwise which is, on the valuation date (after the taking of the gift or inheritance), a company controlled by the donee or successor within the meaning of section 27;*

*(d) unquoted shares in or securities of a company whether incorporated in the State or otherwise which do not fall within paragraph (b) or (c) and which on the valuation date (either by themselves alone or together with other shares or securities in that company in the absolute beneficial ownership of the donee or successor on that date) have an aggregate nominal value which represents 10 per cent or more of the aggregate nominal value of the entire share capital and securities of the company on condition that the donee or successor has been a full-time working officer or employee of the company, or if that company is a*

*member of a group, of one or more companies which are members of the group, throughout the period of 5 years ending on the date of the gift or inheritance,*

*(e) any land or building, machinery or plant which, immediately before the gift or inheritance, was used wholly or mainly for the purposes of a business carried on by a company of which the disponer then had control or by a partnership of which the disponer then was a partner and for the purposes of this paragraph a person is deemed to have control of a company at any time if that person then had control of powers of voting on all questions affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised on all such questions,*

*(f) quoted shares in or securities of a company which, but for the fact that they are quoted, would be shares or securities to which paragraph (b), (c) or (d) would relate on condition that such shares or securities, or other shares in or securities of the same company which are represented by those shares or securities, were in the beneficial ownership of the disponer immediately prior to the disposition and were unquoted at the date of the commencement of that beneficial ownership or at 23 May 1994, whichever is the later date."*

**19.** It is worth recording at this juncture that it was common case between the parties that the *shares* gifted to the Appellant by her father fall within the definition of relevant business property under section 93(1) of CATCA.

**20.** Section 93(3) CATCA is relied upon by the Respondent and it provides that:-

*"A business or interest in a business, or shares in or securities of a company, is not relevant business property if the business or, as the case may be, the business*

*carried on by the company consists wholly or mainly of one or more of the following, that is, dealing in currencies, securities, stocks or shares, land or buildings, or making or holding investments."*

**21.** Section 100 is headed "*Exclusion of value of excepted assets".* Subsections (1) to (3) thereof provide as follows:-

*"(1) In determining for the purposes of this Chapter what part of the taxable value of a gift or inheritance is attributable to the value of relevant business property, so much of the last-mentioned value as is attributable to—*

*(a) any excepted assets within the meaning of subsection (2), or*

*(b) any excluded property within the meaning of subsection (8)*

*is disregarded.*

*(2) An asset is an excepted asset in relation to any relevant business property if it was not used wholly or mainly for the purposes of the business concerned throughout the whole or the last 2 years of the relevant period; but where the business concerned is carried on by a company which is a member of a group, the use of an asset for the purposes of a business carried on by another company which at the time of the use and immediately prior to the gift or inheritance was also a member of that group is treated as use for the purposes of the business concerned, unless that other company's membership of the group is to be disregarded under section 99.*

*(3) The use of an asset for the purposes of a business to which section 93(3) relates is not treated as a use for the purposes of the business concerned."*

**22.** Section 100(6) of CATCA defines "*relevant period"* as follows:-

*"For the purposes of this section the relevant period, in relation to any asset, is the period immediately preceding the gift or inheritance during which the asset or, if the relevant business property is an interest in a business, a corresponding interest in the asset, was comprised in the disposition (within the meaning of section 94) or, if the business concerned is that of a company, was beneficially owned by that company or any other company which immediately before the gift or inheritance was a member of the same group."*

**23.** Section 100(7) further provides that:-

*"For the purposes of this section an asset is deemed not to have been used wholly or mainly for the purposes of the business concerned at any time when it was used wholly or mainly for the personal benefit of the disponer or of a relative of the disponer."*

### *D. <u>Evidence on behalf of the Appellant</u>*

**24.** At the hearing of this appeal, evidence was given on behalf of the Appellant by Mr. [redacted], the Appellant's father. I found his evidence to be truthful and credible.

**25.** The witness testified that the Company operates [redacted] Supermarket, a family-run, non-affiliated business which has been in existence since 19[redacted]. Since the 1950s, it has operated from its [redacted] [redacted] premises in [redacted] and over the years the business has grown to the point that, at the time of the share transfer, it had 125 employees and a turnover of approximately €20m.

**26.** At various times the Company sought to expand its [redacted] supermarket premises. In 199[redacted], it demolished two adjacent houses it had acquired previously, namely [redacted] for this purpose. In 1995, the Company purchased [redacted] and applied unsuccessfully for permission to further expand the premises and improve its facilities.

**27.** In 199[redacted], [redacted] were re-zoned by [redacted] Council from zoning objective Z1 (general) to Z3 (neighbourhood centres). This allowed the Company to obtain planning permission to convert half of the gardens of these houses to spaces for the supermarket car park. Permission for this work was obtained in 2007 and it was commenced and completed in 2009.

**28.** The witness testified that in or about 2006, prior to the car park expansion, the engineering firm [redacted] identified substantial structural flaws in the supermarket building that needed to be remedied. This led to the purchase by the Company of [redacted] in 2011, as that property allowed for road access to the part of the supermarket in need of remedial work.

**29.** The witness further gave evidence that in 2011, the Company held consultations with various firms of architects for the purpose of exploring the options for the further expansion and modernisation of the supermarket premises. The Company ultimately settled on [redacted] Architects to carry out this task and the first planning meeting with [redacted] Council occurred in 2012. The plans included the demolition of the remainder of [redacted] and their full incorporation into the supermarket premises.

**30.** After concluding the process of consultation with [redacted] Council, the Company lodged a planning application in [redacted] 2014. Permission, which included the

demolition of numbers [redacted] was granted in [redacted] 2015 despite some objections.

**31.** I further heard evidence that not long after this permission was granted, the Company's plans for the site changed because of the unexpected success of a temporary initiative, implemented to facilitate the development, whereby warehousing was moved from the premises in [redacted] to a remote site elsewhere. This freed up space, which had previously been considered unsuitable by the Company, and made it available for supermarket retail use. Consequently, an amended application for permission was submitted in 2016 and this was granted in 2017. The witness testified that work began on the new development in 2018 and that it involved the construction of a fresh food emporium. The works had not been completed at the time of the hearing before me.

**32.** The witness gave evidence that €885,000.00 was expended by the Company in connection with the original plan to develop the supermarket site in respect of which permission was granted in 2015. I also heard evidence that the original expectation was that the works would be of a scale that meant they could be funded from the Company's own funds without resort to loan finance; the estimated cost was projected to be in the region of €2.5m to €3m. This proved not to be the case, however, and costs increased to the point that the estimated cost of the construction works commenced in 2018 was some €6.5m, excluding the cost of fit-out and new refrigeration equipment. This resulted in the Company making enquiries in 2016 about obtaining a loan facility of €5 million from Ulster Bank, Bank of Ireland and AIB.

**33.** From about the year 2000, [redacted] were occupied by staff of the supermarket, who paid rent to the Company to live there. The witness testified that the Company began this arrangement in order to obtain the services of staff at a

time when it was not easy to do so. The arrangement continued in relation to [redacted] until March 2013, at which point the houses were vacated pending the anticipated grant of planning permission for the development of the supermarket premises. Number [redacted] was occupied by staff until the end of June 2011, at which point it too was vacated and thereafter remained unoccupied.

**34.** In cross-examination, the witness testified that these were not properties bought for the purpose of generating rental income. He emphasised that they had never been advertised on the market and, but for the failure of the planning application in 1995 and the difficulty in finding staff, the Company would have sought to demolish them sooner. He said that the Company's intention was always that they would be part of the expansion of the premises. While this had been on hold for a time, by 2006 plans were being made for their incorporation into the supermarket. As evidence of this being their primary use to the Company, the witness pointed to the works in 2009 in which a portion of their gardens became part of the carpark. This was, he said, consistent with their use in the more substantial development in respect of which planning was given in 2015 and amended in 2017. The witness confirmed that the properties had been demolished in November and December of 2017 as part of the development of the supermarket premises.

**35.** The cash at bank held by the Company on the 30th of June 2012 amounted to €3,379,849. The witness gave evidence that its purpose was partly to finance the day-to-day operation of the supermarket, which he said had a significant need for available funds. He testified that, in addition to needing to cover creditors of over €1m, the Company required available cash to fund repairs and to purchase fixtures, fittings, equipment and plant. In this respect he referred me to the Company's accounts for the year 2012 and said that the fixtures, fittings and equipment described therein, which amounted to €2,437,288, partly comprised costly

refrigeration equipment that was nearing the end of its life and needed to be replaced imminently.

**36.** The balance of the cash at bank was, the witness stated, to be directed to the development. So too was the €1,871,619 worth of investment assets, which the witness emphasised could be turned into cash in a short period when needed to finance development work. The witness testified that the €1.21 million recorded on the Company's balance sheet for the relevant period as fixed assets related to a cash fund managed by the financial services firm, [redacted]. This fund permitted access to monies within two working days. The €661,000 worth of investments recorded on the balance sheet under current assets were held in an account with [redacted] Stockbrokers, which again permitted their sale and realisation to cash within a number of weeks.

## *E. Submissions of the Appellant*

**37.** The Appellant submitted that the Disputed Assets were used "*wholly or mainly*" for the purpose of the Company's supermarket business throughout the two years prior to the share transfer. Consequently, the Respondent's amended assessment, based on the determination that the Disputed Assets were excepted business assets, was in error.

**38.** The Appellant provided written submissions about the correct method of statutory interpretation in relation to taxation legislation and referred me to, *inter alia,* passages in the well-known cases of ***Inspector of Taxes –v- Kiernan*** **[1981] IR 117**, ***McGrath –v- McDermott*** **[1988] IR 258**, ***Texaco (Ireland) Ltd –v- Murphy*** **[1991] 2 IR 449**, ***Revenue Commissioners –v- Doorley*** **[1933] IR 750** and the judgment of the

Supreme Court in ***Revenue Commissioners –v- O'Flynn Construction Company Ltd*** **[2011] IESC 47.**

**39.** This appeal was heard prior to the delivery by the Supreme Court of its judgments in the cases of ***Dunnes Stores –v- The Revenue Commissioners*** **[2019] IESC 50** in June 2019 and ***Bookfinders Ltd –v- The Revenue Commissioners*** **[2020] IESC 60** in September 2020. In ***Bookfinders***, O'Donnell J clarified that *obiter* comments he had made previously in ***Revenue Commissioners –v- O'Flynn*** did not mean that section 5 of the Interpretation Act 2005, which permits resort to a purposive construction where the meaning of legislation is obscure or ambiguous on a literal reading, applied to taxation or revenue statutes. I consider both ***Dunnes Stores*** and ***Bookfinders*** in greater detail in the *Analysis & Findings* section hereunder; however, at this point it is appropriate to state my view that the Appellant's submissions regarding the correct method of statutory interpretation (with which the Respondent in fact broadly agreed) were consistent with these judgments. The core of the Appellant's argument in this regard was that in seeking to establish the ordinary meaning of the words in section 100(2) of CATCA, I had to take into account the surrounding provisions in that legislation governing business relief. This argument was summarised in the Appellant's written submissions in the following terms:-

> *"It is, of course, the case that the legal intent of the Oireachtas is to be derived <u>from the words used</u>* [the Appellant's emphasis] *in their context deploying all the aids of construction which are available in an attempt to understand what the Oireachtas intended."*

**40.** The Appellant submitted that if one took this approach, it was clear that, in making the Amended Assessment, the Respondent had adopted an excessively narrow view of what constitutes an asset excepted from eligibility for business relief pursuant to section 100(2). A core reason for the Respondent's decision in relation to the

Disputed Assets (namely that at the time of the share transfer, the development of the premises was only a contingent future use and therefore must be disregarded) did not reflect the natural and ordinary meaning of the words of section 100(2) "*gleaned in its context*".

**41.** The Appellant submitted that this context included section 100(7), which precludes an asset used "*wholly or mainly for the personal benefit of the disponer or a relative of the disponer*" from being considered a business asset. The Appellant argued that when section 100(2) was read in conjunction with section 100(7), it was clear that a key question was whether the assets at issue were being used for the benefit of the Company or whether they were being used for some other non-business purpose, such as for the personal benefit of the Appellant's father or any of the other shareholders.

**42.** The Appellant also submitted that in the event that there was ambiguity as to the true meaning of the exception provision, I should interpret it in her favour pursuant to the rule against doubtful penalisation (relying upon ***Texaco (Ireland) Limited –v- Murphy*** **[1991] 2 IR 449***).*

**43.** The Appellant further submitted that the true meaning of the excepting provision in section 100(2) was to:-

> "… *exclude certain assets from business relief such that private assets not used for business purposes will not obtain the benefit of business relief. Or put another way, non-business assets will not qualify for relief."*

**44.** In the Appellant's submission, all the evidence pointed to the use of the assets being directed to the maintenance and furtherance of the Company's business, whether that was spending cash at bank on upgrading equipment and paying creditors, or planning

to extend and develop its premises using cash, investments and [redacted]

**45.** Counsel for the Appellant referred me to the decision of the UK Upper Tax Tribunal in ***Revenue and Customs Commissioners –v- Personal Representatives of Maureen Vigne*** **[2018] UKUT 357 (TCC)**. In that case, the issue for determination was whether the deceased taxpayer's livery business consisted wholly or mainly of holding investments, in which case it would not constitute 'relevant business property' eligible for business property relief.

**46.** The facts of that case were that the deceased taxpayer had recommenced an equine livery business when a tenant handed back some 30 acres of land to the taxpayer. When the business was relaunched, it was decided that in a bid to give the business a competitive advantage, services over and above those which would usually be included in grass livery and/or DIY livery would be included in the package offered by the business. These additional services included the provision of worming products, the provision of hay during winter months, removal of horse manure and a daily check on the health of the horses.

**47.** The Upper Tribunal upheld the finding of the First Tier Tribunal that HMRC were incorrect in their view that the deceased's business consisted wholly or mainly of making or holding investments. The FTT decided that the reality of what took place on and in association with the land was the provision of enhanced livery, albeit stopping short of part livery, but nonetheless providing a level of valuable services to the various horse owners, which prevented it being properly asserted that the livery business had been mainly one of holding investments. Consequently, it held that the business qualified for business property relief.

**48.** Counsel for the Appellant submitted that this decision was authority for her submission that, when considering whether section 93(3) was applicable, the appropriate course was to look at the business carried on by the Appellant as a whole, and that it would be incorrect to try and break down the Company's business into individual elements, such as operating a supermarket, holding financial investments and holding real property. In essence, she submitted, the effect of section 93(3) was that only trading companies were entitled to business relief pursuant to section 92.

**49.** Counsel further submitted that it could not be the case that money or assets had to be committed to a particular business purpose at the time of a gift or inheritance before it could constitute relevant business property. She submitted that such an interpretation would go some way beyond the plain wording of the legislation and would, furthermore, be inconsistent with the Respondent's concession that some of the Company's cash holdings did constitute relevant business property in respect of which relief was available.

**50.** The Appellant further relied on the English tax case ***Barclays Bank Trust -v- Inland Revenue Commissioners*** **[1998] STC (SCD) 125**, which concerned the equivalent English statutory provisions in the Inheritance Tax Act 1984. In that case, a transfer had occurred upon the death of a shareholder in a bathroom fittings company. At the time of the death, the company had cash reserves of £450,000 and a yearly turnover of £600,000. The reserves had been increasing steadily relative to turnover for a number of years and the Inland Revenue determined that only £150,000 of the overall sum could be subject to business relief as the remainder was, in its view, not proven to be destined for the use of the company.

**51.** On appeal from this decision, it was argued by the taxpayer that the additional £300,000 should have been allowed. Section 112(1) of the Inheritance Tax Act 1984

permitted business relief in respect of part of a transfer attributable to the value of business property. Similar to the legislation in this jurisdiction, section 112(2) excepted assets that were not used "*wholly or mainly*" for the purposes of the business in the two years prior to the relevant transfer. However, unlike in this jurisdiction, the legislation also stated that an asset would not be excepted if it was *"....required at the time of the transfer for future use* [of the business]."

**52.** Relying on this provision, the taxpayer in ***Barclays*** pointed to a prior declaration by the company that cash reserves were to be held for appropriate future business use when the opportunity for such use arose. More specifically, it identified a prior expression of interest by the company in the purchase of showroom property. However, after the company received no response to this expression of initial interest, the matter of the showroom was pursued no further.

**53.** In refusing the Appeal, the Special Commissioner held at paragraph 10 that he could not accept that the legislation meant that the business relief was capable of being claimed in respect of the value of an asset where that asset *might* be required for a business purpose *if* an opportunity arose at some future point. What was needed, he said, was:-

> *"... some imperative that the money will fall to be used upon a given project or for some palpable business purpose."*

**54.** In relation to this authority, the Appellant argued, firstly, that the divergence between section 100(2) of CATCA and section 112 of the Inheritance Tax Act 1984 relating to future use was not relevant to this case in circumstances where there was evidence that the Disputed Assets had been set aside or earmarked long prior to the transfer for the re-development of the premises and for the running of the business. While the Appellant did not concede that future use was outside the scope of business relief

under CATCA, she stressed that her submission was that the advancement of development plans for the premises was a present use.

**55.** The Appellant contrasted the Company's development plans with the contingent nature of the suggested use in ***Barclays***. Counsel submitted that the question that I had to ask was whether the assets were to be used for a "*given project or some palpable business purpose."* She submitted that the clear answer to this was 'yes'. There had been a long-standing project to remedy defects in and upgrade the premises. In contrast to the tentative expression of interest in the showroom property in ***Barclays,*** definite steps had been taken to bring the project to fruition. These included the acquisition of property including [redacted] the drawing up of plans in conjunction with technical experts and the expenditure of funds to this end, consulting with [redacted] Council planners and ultimately, after objections and revisions, obtaining permission for the development of the supermarket premises and the aforesaid [redacted] properties in [redacted] 2015. While some of these events occurred after the share transfer, the planning of the Development Project was in train long before it had occurred.

**56.** The Appellant argued also that the Respondent's own CAT Manual supported her claim, in particular in relation to the cash and cash equivalent investment assets. In this regard she pointed to the example therein at paragraph 31, part 12 to a case in which business relief was granted in respect of cash that had been earmarked for the construction of a particular business's premises.

**57.** The Appellant argued that section 93(3) and section 100(3) of CATCA did not disqualify her claim for business relief in respect of the properties and investments. Section 93(3) of CATCA was enacted to exclude claims for business relief in relation

to certain types of business, included among which were businesses dealing wholly or mainly in "*land or buildings*" and "*stocks or shares*". She submitted that this was patently not the business of the Appellant. In relation to section 100(3), it was submitted that although the Disputed Assets were partly in the form of land and stocks or shares, they were used for the purpose of the supermarket business and, as such, were not excepted.

## *F. Submissions of the Respondent*

**58.** The company had cash at bank of €3,379,849 on the date of the share transfer. After accounting for the Company's debts, the Respondent took the view that it had 'excess' cash of €1,577,328. It accepted that of this, 25% might be needed by the Company for "liquidity purposes". It is apparent from the correspondence sent by the Respondent to the Appellant prior to the Amended Assessment that the decision in ***Barclays*** was something of a reference point for the Respondent in coming to this view.

**59.** In relation to the investment assets, the Respondent argued that they were ineligible for business relief because section 100(3) deems assets used wholly or mainly for the purpose of dealing in "stocks and shares" to be excluded from the definition of "relevant business property" capable of qualifying for business relief. In this respect, section 100(3) provides that:-

> "*The use of an asset for the purposes of a business to which section 93(3) relates is not treated as use for the purposes of the business concerned.*"

**60.** The Respondent submitted that even if it was wrong that the investments could not qualify for business relief for this reason, the Appellant had provided inadequate evidence that the investment assets were property used for the purpose of the supermarket business. The Respondent submitted that even though these assets were relatively easily convertible to available money – especially the cash investment with [redacted] –, the prospective development was only one of the possible reasons why convertibility would be of benefit to the Company. It was the Respondent's submission that the Company effectively had separate businesses aside from the supermarket business, including dealing in stocks or shares and the renting of property.

**61.** The Respondent submitted that the renting of numbers [redacted] until 2013, and [redacted] until 2011, meant that they were, *ipso facto*, not used wholly or mainly for the purpose of the Company's business in the two years prior to the share transfer. They therefore could not be an asset subject to a valid claim for business relief by the Appellant.

**62.** In relation to the submission by the Appellant that the properties, cash and investments were to be used for the development of the supermarket, the Respondent submitted that this amounted to a contingent future use of the assets, rather than their actual use in the two years up to the share transfer. It was emphasised that no planning had even been obtained prior to the share transfer. In particular, the Respondent challenged the Appellant's submission that the "actual" use of the [redacted] properties during the planning stage of the Development Project was for the purpose of the supermarket business.

**63.** The Respondent distinguished the parts of ***Barclays*** relied upon by the Appellant on the grounds that section 112 of the Inheritance Act 1984 did not except an asset from

business relief if it was "*required at the time of the transfer for future use* [for the purposes of the business concerned]." In its submissions, a plain reading of the text of section 100(2) of CATCA, which omits any reference to future use, had to lead to the conclusion that assets not already committed to be used for the business purposes of the Company in the two years prior to the transfer were excepted.

**64.** As noted above, the Respondent did not take issue with the general tenor of the Appellant's summary of the proper method of statutory interpretation in relation to taxation statues. This included the statement by Rowlatt J in ***Cape Brandy Syndicate –v- Inland Revenue Commissioners*** that:-

> *"…in a taxing statue one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

**65.** The Respondent argued that the Appellant's view of the meaning of section 100(2) was inconsistent with this principle of statutory construction, which was expressed in different terms by the Supreme Court in ***McGrath –v- McDermott***, when it held that when construing a statute a court has "*no jurisdiction to add or delete from the express statutory provisions."*

**66.** Moreover, the Respondent submitted that the Appellant was wrong to suggest that if there was any ambiguity in section 100(2) (which the Respondent did not accept), such ambiguity should lead to the adoption of the interpretation of the provision more favourable to the Appellant. This was because the provision being considered was *relieving* the taxpayer of a burden, rather than imposing one. In support of this, the Respondent cited ***Revenue Commissioners –v- Doorley***, where the Supreme Court stated that:-

*"The 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.*

*I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."*

**67.** As with the investments, the Respondent argued that even if the [redacted] properties rented to staff could *prima facie* be described as "*relevant business property*" capable of qualifying for business relief, section 100(3) excepted assets

used for the purposes of a business dealing in, *inter alia,* "*land or buildings*" and so these assets too had to be excluded from business relief.

## G. ***Analysis and Findings***

**68.** In my view, the Disputed Assets were relevant business property that were neither excluded from being "*relevant business property*" by virtue of section 93(3) nor excepted under section 100(2), and they therefore qualify for business relief under section 92. I so find for the following reasons.

**69.** Section 92 of CATCA provides that business relief applies to the value of a gift that is attributable to "*relevant business property*". It is not disputed that the shares transferred by [redacted] to the Appellant fall within the definition of same found in section 93(1).

**70.** However, section 93(3) excludes from the definition of *"relevant business property*" an interest in a business carried on by a company that *"consists wholly or mainly of dealing in currencies, securities, stock or shares, land or buildings, or making or holding investments".* The plain wording of this provision makes clear to me that the intention of the legislature was to exclude companies who are engaged mainly or exclusively in operating the aforesaid types of business. The Respondent submitted that the Company could in this context have operated several different types of business at the same time, and that any one of these could be excluded under this provision. In my view, the wording of the provision does not fit with this interpretation. The inclusion of the words "*wholly or mainly"* indicates that what the provision actually requires is the identification of the predominant business of the Company in order to

establish if it is one of the businesses or activities excluded from the definition of relevant business property. Moreover, the inclusion in the legislation of section 100(3), which expressly excepts individual assets of a non-excluded business, supports this interpretation.

**71.** I am satisfied, and find as a material fact that, notwithstanding the fact that the Company had assets in the form of stocks and shares and real property, its predominant and long-standing business at the time of the transfer was that of operating a supermarket. It was not carrying on a business that consisted wholly or mainly of dealing in stock, shares, land, buildings or investments.

**72.** This is not the end of the matter because section 100(1) provides, *inter alia*, that so much of the value of relevant business property that is attributable to an "*excepted asset*" is to be disregarded when calculating relief. Section 100(2) defines an excepted asset as one that was not *"…used wholly or mainly for the purposes of the business concerned throughout the whole of the last 2 years of the relevant period*" (*i.e.*, the two year period prior to the share transfer).

**73.** A significant source of disagreement between the parties in this regard concerned the true reading of this excluding provision. The Respondent argued that the plain meaning of section 100(2) was that an intention to use an asset for future development plans could not, as the Appellant put it, constitute an "*actual present use*" of that asset for the purpose of a business. The Respondent stressed that, while it was held in ***Barclays*** that plans for future use in a project could suffice as a relevant business purpose, the legislation in England and Wales, unlike in this jurisdiction, expressly referred to "…*an asset required at the time of the transfer for future use for those purposes."*

**74.** In considering the proper interpretation of the legislation relevant to this appeal, I have applied the judgment of the Supreme Court given by McKechnie J in ***Dunnes Stores -v- Revenue Commissioners***, he stated:-

> *"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 lawmaker' (Craies on Statutory Interpretation, 7th ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach '... it is natural to enquire 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.*
>
> *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 is 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.*

*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."*

**75.** The foregoing passage was cited with approval by O'Donnell J giving the Supreme Court's decision in ***Bookfinders*** where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54:-

*"However, the rest of the extract from the judgement* [of McKechnie J] *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 the statutory provision. It is only if, after the 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 construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."*

**76.** I do not believe that reading the business relief provisions as meaning that "*relevant business property*" can include an asset that is planned to be used for a future purpose involves adding to the express wording of section 100(2), which would be contrary to the decision of the Supreme Court in ***McGrath –v- McDermott***. Rather, I think that when section 100(2) is read together with the other provisions governing business relief, such an asset can in appropriate circumstances properly be classified as non-excepted relevant business property.

**77.** My view in this respect is informed firstly by the wide definition given to the word "*business*" in section 90 of CATCA, namely "*a business carried on in the exercise of a profession or vocation, but does not include a business carried on otherwise than for gain"*. Secondly, I believe it is also relevant that there was no doubt that the transferred shares were, *prima facie*, *"relevant business property"* under section 92 and were not precluded from being so defined by virtue of being one of the business activities described in section 93(3).

**78.** By applying the definition of "*business*" contained in section 90, what section 100(2) excludes from the scope of business relief are assets that are not "*used wholly or mainly*" for the purposes of a "*business carried on in the exercise of a profession or vocation".* I believe it is clear from the foregoing that the aim of the excepted asset exclusions contained in section 100 is to distinguish assets and earnings of a business that are destined to be applied to or re-invested in that business from those that are destined for a non-business use, such as for the personal gain of the business owners. The former can benefit from business relief, while the latter cannot. This accords in my view with the statement in the Respondent's Capital Acquisitions Tax Manual (2015 updated version, at page 24) that *"In view of the substantial nature of the relief, business people will have a strong incentive to disguise private assets as business assets*

*if they can"* and, perhaps more significantly, the statement on page 2 of the Manual that:-

> *"The relief was introduced for a variety of reasons viz.*
>
> *(i) to encourage and reward enterprise, thereby countering the perception that CAT is a punitive tax which penalises successful entrepreneurs and discourages expansion of businesses"*

**79.** I agree with counsel for the Appellant that the true meaning of the words in section 100(2) can be gleaned when considered in context with section 100(7), which excludes from relief any assets used wholly or mainly for the benefit of the disponer or a relative of the disponer.

**80.** I further note that the Respondent's CAT Manual accepted at page 45 that cash assets accumulated to fund a building project to further the interests of a business could constitute a relevant business asset. There does not seem to me to be any reason in principle why assets set aside for a building development that has not yet commenced but is at planning phase cannot qualify as an asset *"used for the purpose of the business*". What is crucial, however, is that this relevant business purpose is real and the asset genuinely used to that end.

**81.** Consequently, the next question which requires consideration is whether for the two years prior to the share transfer there was a real and definite plan to develop the supermarket premises that involved the setting aside of the Disputed Assets for that purpose.

*The Properties at* [redacted]

**82.** It is clear from the history described already that there was a long-standing project to expand and upgrade the premises. This was evident from, *inter alia*, the development of the properties on [redacted] in 1990, the purchase of [redacted] in 1995, the failed attempt to gain planning permission that same year, the works to the carpark section of the premises involving part of the aforesaid properties in 2009 and, subsequent to the share transfer, the development of the premises culminating in the works commenced in 2018.

**83.** It is also clear to me on the evidence that the main use of [redacted] for the two years prior to the share transfer was for the Development Project, rather than as rental properties, and I so find as a material fact. While it is true that they were rented to staff between 2000 and 2011/2013, I accept the evidence of [redacted] that this was of secondary importance to the Company and I do not agree with the Respondent's submission that their use as rented accommodation for staff disqualified them from being used "*wholly or mainly*" for the purposes of the supermarket business. As the wording of section 100(2) implies, it is possible for an asset to be used for two purposes at the same time, with one purpose being the main or dominant purpose.

**84.** As regards establishing the main use of the properties, I think it is significant that they were never offered for rent on the open market but were instead reserved for staff. Moreover, as noted above, part of them had already been incorporated into the supermarket carpark. This supports my finding that the main purpose or use of these assets throughout the relevant period by the Company was to enable the expansion and improvement of the premises, which was to the benefit of the business. Without these properties, the refurbishment and expansion works that were ultimately the subject of permission in 2015 and amended permission in 2017 could not have taken place.

*The cash and investment assets*

**85.** I find also that the cash and investment assets on the Company's balance sheet at the time of the share transfer were accumulated and held for the use of the business during the two years prior to the transfer. Part of the cash at bank was clearly needed to pay creditors. This was conceded by the Respondent, along with 25% of the balance of the cash at bank for "liquidity purposes". It appears from the correspondence that this percentage was arrived at by reference to the decision of the Inland Revenue in the ***Barclays*** case to allow the same percentage, which the Revenue Inspector described as "*very generous*" in email correspondence of the 18th of October 2016.

**86.** I appreciate that reference to what was allowed or conceded in other cases, even those in neighbouring jurisdictions, can be of some assistance. Ultimately, however, each case must be judged on its own facts and I think there are clear differences between the circumstances of the bathroom company in ***Barclays*** which, for example, operated no showroom, and those of the Company, which operates a highly cash-reliant business from a comparatively large premises. I accept the evidence of [redacted] that significant additional expenditure was foreseen as necessary in relation to the replacement of plant such as refrigeration equipment, which is evidenced in the company accounts, as well as fixtures and fitting, and that this expenditure goes beyond what was allowed by the Respondent in raising the Amended Assessment.

**87.** I further accept on the evidence before me that the history of the premises supports the Appellant's claim that the plans to undertake a development of the kind presented to [redacted] Council by [redacted] Architects in 2012 evolved over a lengthy

period of time and required the build-up of substantial funds to finance the necessary works. It is logical that this funding process was in train well before consultation began in 2011 and, given the history of the development of the premises, I am satisfied on the balance of probabilities that it began more than two years prior to the share transfer.

**88.** The project that actually commenced in 2018 was of such scale and cost that the Company needed to apply for substantial loan facilities. However, the evidence before me was that, from at least the mid-2000s, the premises was becoming dilapidated and outdated relative to its competitors and was in need of a major overhaul. It appears that the 2009 works may have addressed this to some degree, but they plainly did not address the more fundamental issues with the supermarket premises. Having carefully considered all of the evidence, I am satisfied and find as a material fact that the cash at bank in excess of what was needed to service the Company's liabilities to creditors and liquidity needs and the investment assets were earmarked for funding the Development Project for a period in excess of two years prior to the share transfer.

**89.** The Respondent suggested in its written submissions, furnished prior to the giving of oral evidence before me, that the Appellant had provided inadequate information to displace its view that the cash and investment assets were excepted. I believe that the evidence and information provided on behalf of the Appellant at the hearing before me is sufficient to overcome this submission. My finding that the cash and investment assets were used wholly or mainly for the purposes of the supermarket business is further supported by the fact that there was no evidence before me that those assets would be directed to the shareholders for their personal gain.

**90.** In relation to the investment assets, my finding is further supported by the fact that the investment funds were readily convertible at short notice into cash. I also believe it is relevant to record that other investments held by the Company (such as property in [redacted]) were not included in the Appellant's claim for business relief.

**91.** In summary, I find that the Respondent was in error in determining that the Disputed Assets in this appeal were excepted assets by virtue of section 100(2) of CATCA. I do so because I am satisfied that they were relevant business property used wholly or mainly for the purposes of the Company's business for at least the two year period prior to the share transfer.

**92.** Underpinning this decision is my agreement with the submission of the Appellant regarding the proper interpretation of the legislation governing business relief. In my view, the plain intention of section 100(2), gleaned from its ordinary meaning and read in context with section 100(7) and section 93(3), is that assets that are ostensibly relevant business property but which are actually used for non-business purposes or for the business purposes proscribed in section 93(3), are to be disregarded when calculating the business relief available to a taxpayer.

**93.** The specific business use of the Disputed Assets was the development and refurbishment of the supermarket premises in [redacted] I am satisfied that the assets were acquired and accumulated to enable this to occur. In the case of the properties at [redacted] although they were rented to supermarket staff as accommodation for a significant period of time, this was not their main use by the Company. Rather, they were purchased and retained for the purposes of enabling an expansion of the supermarket premises. I accept the evidence given for the Appellant that this would ideally have occurred at an earlier date but circumstances dictated otherwise. In any event, it was apparent long prior to the share transfer that

significant works would have to take place to keep the premises in a condition that would allow the Company's supermarket business to prosper, and the [redacted] properties were considered necessary to allow those works to take place.

**94.** In relation to the cash and investment assets in issue, I am satisfied the Appellant has shown on the balance of probabilities that both were accumulated and held for the purposes of funding the business. In relation to the cash, this was needed partly to pay suppliers and to upgrade fixtures, fittings and plant, and partly to finance the re-development of the premises. The investments totalling €1,871,619 were also held for the latter purpose. While it is not determinative of the issue, the fact that both the fixed and current investment assets could be converted to cash in a short period of time is consistent with the Appellant's account and is a factor in my decision.

## *H. Conclusion*

**95.** For the reasons set forth above, I consider that the Appellant has by reason of the Amended Assessment issued on the 3rd of November 2016 been overcharged to Capital Acquisitions Tax and determine pursuant to section 949AK(1) of the Taxes Consolidation Act 1997, as amended, that the Amended Assessment be reduced accordingly.

**Dated the 18th of August 2021**

**MARK O'MAHONY**
**APPEAL COMMISSIONER**