30TACD2021

BETWEEN/

APPELLANT

Appellant

AND

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against an assessment to Capital Gains Tax (CGT) in the amount of €159,967 in respect of the year ended 31 December 2011.

2. This Appeal was determined by an oral hearing, which took place at the Tax Appeals Commission on 1 October 2020.

Background

3. The Respondent on 25 June 2018, by way of a notice of amended assessment to CGT issued an amended assessment to CGT for the year 2011. This amended assessment sought additional tax from the Appellant of €159,967.

4. The Appellant appealed the notice of assessment to the Tax Appeals Commission on 19 July 2018.

5. The amended assessment concerns transactions arising from the disposal of properties in 2011 by the Appellant (reflected in his 2011 tax return) to a company in which the Appellant at that time was the sole shareholder.

6. The Respondent made enquiries in the matter of the transaction on 5 December 2016 and sought the following information in respect of the transaction.

- Date of disposal
- Description of the assets disposed of
- Copies of transfer documentation
- Consideration received
- Cost of disposal
- Date of original acquisition
- Cost of acquisition
- Total indexed cost if relevant

7. The issues for the determination in this appeal concern;

a) Whether the Appellant was entitled to a deduction for enhancement expenditure incurred in 2008/2009 of €639,869 in respect of properties disposed of in 2011.
b) Whether the Appellant made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011 in his tax return for 2011.
c) Whether the Respondent was entitled to make an amended assessment in the matter on 25 June 2018.

Legislation

8. s.955 TCA 1997

(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.

(2)[(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be

made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return.]

(b) Nothing in this subsection shall prevent the amendment of an assessment —

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

(ii) to give effect to a determination on any appeal against an assessment,

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid [(notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made)] where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3).

(3) A chargeable person who is aggrieved by an assessment or the amendment of an assessment on the grounds that the chargeable person considers that the inspector was precluded from making the assessment or the amendment, as the case may be, by reason of subsection (2) may appeal against the assessment or amended assessment on those grounds and, if on the hearing of the appeal the Appeal Commissioners determine –

(a) that the inspector was so precluded, the Tax Acts shall apply as if the assessment or the amendment, as the case may be, had not been made, and the assessment or the amendment of the assessment as appropriate shall be void, or
(b) that the inspector was not so precluded, the assessment or the assessment as

amended shall stand, except to the extent that any amount or matter in that assessment is the subject of a valid appeal on any other grounds.

(4)(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.

(b) This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question.

(5)(a) In this subsection, "relevant chargeable period" means-

(i) where the chargeable period is a year of assessment for income tax, the year 1988-89 and any subsequent year of assessment,

(ii) where the chargeable period is a year of assessment for capital gains tax, the year 1990-91 and any subsequent year of assessment, and

(iii) where the chargeable period is an accounting period of a company, an accounting period ending on or after the 1st day of October, 1989.

(b)Sections 919(5)(b) and 924 shall not apply in the case of a chargeable person for any relevant chargeable period, and all matters which would have been included in an additional first assessment under those sections shall be included in an amendment of the first assessment or first assessments made in accordance with this section.

(c) For the purposes of paragraph (b), where any amount of income, profits or gains or, as respects capital gains tax, chargeable gains was omitted from the first assessment or first assessments or the tax stated in the first assessment or first assessments was less than the tax payable by the chargeable person for the relevant chargeable period concerned, there shall be made such adjustments or additions (including the addition of a further first assessment) to the first

assessment or first assessments as are necessary to rectify the omission or to ensure that the tax so stated is equal to the tax so payable by the chargeable person.

9. s.956 (1)(c) TCA 1997

(c)Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.

10. s.956 (2)(a)TCA 1997

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

11. s.552(1)(b) TCA 1997

(1) Subject to the Capital Gains Tax Acts, the sums allowable as a deduction from the consideration in the computation under this Chapter of the gain accruing to a person on the disposal of an asset shall be restricted to –

(a) the amount or value of the consideration in money or money's worth given by the person or on the person's behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to the person of the acquisition or, if the asset was not acquired by the person, any expenditure wholly and exclusively incurred by the person in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by the person or on the person's behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by the person in establishing, preserving or defending the person's title to, or to a right over, the asset, and……

12. s.886 (4) TCA 1997

(a)Subject to paragraph (b), linking documents and records kept in accordance with subsections (2) and (3) shall be retained by the person required to keep the records-

(i)for a period of 6 years after the completion of the transactions, acts or operations to which they relate, or

(ii)in the case of a person who fails to comply with section 951(1) requiring the preparation and delivery of a return on or before the specified return date for a year of assessment or an accounting period, as the case may be, until the expiry of a period of 6 years from the end of the year of assessment or accounting period, as the case may be, in which a return has been delivered showing the profits or gains or chargeable gains derived from those transactions, acts or operations.

(b)Paragraph (a) shall not-

(i)require the retention of linking documents and records in respect of which the inspector notifies in writing the person who is required to retain them that retention is not required, or

(ii) apply to the books and papers of a company which have been disposed of in accordance with section 305(1) of the Companies Act, 1963.

Submissions

Appellant

13. The Appellant submitted that he disposed of a number of Irish properties to a company in which he was the 100% shareholder. All of these property disposals were reported on the Appellant's 2011 Irish income tax return, which was submitted to the Respondent by the due filing date.

14. The Appellant submitted that a CGT notice of assessment for the year 2011, issued on 20th of November 2012, reflecting the amounts declared by the Appellant in his 2011 Irish tax return.

15. The Appellant submitted that the Respondent raised an aspect query requesting a copy of the CGT computation declared in the 2011 return of income on 5 December 2016. The Respondent sought documentation in relation to the 2011 tax return at this time.

16. The Appellant submitted that his agent provided the Respondent with the requested computation and a copy of the sales contract. The Appellant submitted that following this correspondence, a number of further enquiry letters were sent by the Respondent to the Appellant requesting further or additional information with regard to the various property disposals.

17. The Appellant submitted that despite providing the Respondent with supporting invoices and very detailed and comprehensive explanations, the Respondent has disallowed the claim for enhancement expenditure amounting to €639,869.

18. The Appellant submitted that the costs incurred were part of the base costs of properties disposed of at Main Street REDACTED and REDACTED.

19. The Appellant submitted that he had advised the Respondent that the property at REDACTED was sold for €1m and he had claimed enhancement expenditure incurred in 2008 /2009 of €639, 869 in relation to this property.

20. The Appellant submitted that some of the enhancement expenditure did however relate to enhancement expenditure on a property in REDACTED that was also transferred in 2011. In effect, the entire enhancement expenditure was set against the REDACTED property in the computation provided to the Respondent rather than against both properties. The Appellant submitted that this did not lead to any over claim of enhancement expenditure in terms of the total disposals in 2011 or on the accuracy of the figures returned for CGT purposes in his 2011 tax return.

21. The Appellant submitted that on acquiring the property at REDACTED in 2007, a complete internal fit-out of the property was undertaken in order to make the property suitable for REDACTED Ltd, as tenants, to operate a REDACTED shop.

22. The Appellant submitted that around the same time, internal fit-out works were also being undertaken at another property owned by Appellant, also in REDACTED, which was acquired in 2008. REDACTED engaged a contractor to carry out these works on both properties on the Appellant's behalf.

23. The Appellant submitted that as REDACTED Ltd had coordinated and overseen the works being carried out on the Appellant's behalf, the contractor raised invoices in relation to these works in the name of REDACTED Ltd rather in the name of Appellant. The total amount paid by REDACTED Ltd to the contractor, for these works, amounted to €383,856 in respect of the REDACTED property and €304,577 in respect of the REDACTED property.

24. The Appellant submitted that to reimburse REDACTED Ltd for settling the enhancement costs on behalf of the Appellant, it was agreed that the Appellant would dispose of his beneficial interest in another property he owned (also in REDACTED), which REDACTED Ltd operate from.

25. The Appellant submitted that REDACTED Ltd continue to own this property obtained by them by way of barter/exchange agreement. REDACTED Ltd lease out the property to third parties, have received all rental income on the property, and have been responsible for the payment of all rates since the barter transaction.

26. The Appellant submitted that the barter/exchange agreement was not evidenced by way of written document, rather, the beneficial interest transferred from Appellant to REDACTED Ltd and the property rested on contract.

27. The Appellant submitted that at the time of the Appellant disposing of his beneficial interest to REDACTED Ltd in 2008, this type of arrangement was commonplace due to the significant stamp duty exposure REDACTED Ltd would have occurred, should the legal title of the property have been transferred.

Respondent

28. The Respondent submitted that this is an appeal against an assessment to CGT in the amount €159,967 in respect of the year ended 31 December 2011.

29. The Respondent submitted that the main issue for determination in the matter is whether the Appellant was entitled to a deduction for enhancement expenditure in the amount €639,869 on the disposal of a property located at Main Street, REDACTED, to REDACTED (now REDACTED) in 2011.

30. The Respondent submitted that on 2 December 2011, an application for a certificate under Section 980(8) of the Taxes Consolidation Act 1997 was made on behalf of the Appellant in respect of the disposal of 11 properties, including a property described as REDACTED Ltd, Main Street, REDACTED, to REDACTED Limited for a total consideration of €8,136,000.

31. The Respondent submitted that at the time of the transaction, the sole shareholder of REDACTED REDACTED Limited was REDACTED Ltd and the directors were APPELLANT'S NAME REDACTED and REDACTED.

32. The Respondent submitted that on 20 November 2012, a return of capital gains in respect of the year ended 31 December 2011 was filed on behalf of the Appellant.

33. The Respondent submitted that on 5 December 2016, Revenue sent an enquiry letter to the Appellant seeking a CGT computation for 2011. The Appellant was asked to provide the information in respect of each disposal as set out in paragraph 6 above.

34. The Respondent submitted that the Appellant's agents replied by letter dated 3 January 2017. The letter included the following information in relation to the disposal of a property located at Main Street, REDACTED:

    Acquired: 2007, Proceeds: €1,000,000, Cost €2,694,869, Loss: (€1,694,869)

35. The Respondent submitted that a breakdown of the cost in the amount €2,694,869 was not provided.

36. The Respondent submitted that by letter dated 4 January 2017, it wrote to the agents seeking the following information in relation to each property disposed of:
    - Description of the property, e.g. commercial, residential, etc.;
    - Acquisition consideration;
    - Incidental costs of acquisition (e.g. solicitor's fees, stamp duty);
    - Disposal consideration;
    - Incidental costs of disposal (e.g. solicitor's fees, auctioneer's fees); and

- Costs of additions, if any.

37. The Respondent submitted that the agents replied by letter dated 6 March 2017. A breakdown of the cost in the amount €2,694,869 in respect of the REDACTED property was not provided.

38. The Respondent submitted that there followed further correspondence between Revenue and the agents in relation to the transaction between the Appellant and REDACTED REDACTED Limited.

39. The Respondent submitted that by letter dated 22 August 2017, the agents furnished Revenue with a copy of a loan agreement between the Appellant and REDACTED dated 22 November 2007 for a loan in the amount €2,055,000. The agents indicated that the loan was made available for "the sole purpose of financing the purchase of a commercial property at REDACTED costing €1,670,000 together with associated transaction costs including stamp duty, legal fees, and VAT totalling €385,000".

40. The Respondent submitted that by letter dated 13 October 2017, Revenue wrote to the agents seeking a copy of supporting documentation in respect of the €2,694,869 in costs claimed in relation to the REDACTED property, e.g. Contract for Sale, purchase invoices, etc.

41. The Respondent submitted that the agents replied by letter dated 13 November 2017, enclosing a copy of the Contract for Sale in respect of the acquisition of the REDACTED property in 2007. It is stated in the contract that the consideration was €1,675,000 and that the transfer was in respect of two premises: (1) The hereditaments and premises in REDACTED (copy map included with letter) and (2) The lands, hereditaments and premises known as the REDACTED (copy map not included with letter).

42. The Respondent submitted that the agents stated; "the other records are proving difficult to locate given the passage of time, but efforts are continuing in this regard".

43. The Respondent submitted that it wrote to the agents on 23 November 2017 in relation to the costs claimed on the disposal of the REDACTED property and noted:
    - It is stated in the Contract for Sale in relation to the acquisition of the property in 2007 that the consideration was €1,675,000; and

- It is stated in the REDACTED loan letter dated 22 November 2007 that €2,055,000 was loaned to the Appellant in respect of his acquisition of the property and that this figure was comprised of €1,670,000 (consideration) and €385,000 (stamp duty, legal fees and VAT).

44. The Respondent submitted that it asked the agents whether copy documentation could be provided in support of the other costs amounting to €639,869.

45. The Respondent submitted that the agents replied by letter dated 21 December 2017. They explained that the additional costs referred to in Revenue's letter in the amount €639,869 related to enhancement expenditure incurred on the property over a period of time between 2007 and 2008. They stated that, given the passage of time, it had proven difficult to retrieve full records of the expenses incurred. They attached to their letter copy invoices totalling €383,856, which they said represented 60% of the total amount.

46. The Respondent submitted that these invoices do not contain detailed descriptions of the expenses incurred. The agents noted in their letter that the invoices were addressed to REDACTED Ltd. They explained that this was because the company paid the supplier and the payment of the expenses and other recharges related to this property was recorded in their client's director's loan account, which has since been repaid in full. They stated that they would continue to search for the rest of the records.

47. The Respondent submitted that it replied by letter dated 29 December 2017, asking the agents to provide the following:

    - A schedule of the enhancement expenses incurred, including date, amount and description; and
    - Copies of their client's director's loan account for the relevant financial years, indicating where the expenses were initially recorded and later repaid.

48. The Respondent submitted that the agents replied by letter dated 23 March 2018. They did not provide a schedule of the enhancement expenses incurred and they did not provide copies of their client's director's loan account for the relevant financial years. They explained that in 2003, the Appellant acquired a property also located on Main Street, REDACTED (across the road from the property in question) for €671,516, from which REDACTED Ltd operated. They said that in 2008, the Appellant disposed of his beneficial interest in the property to REDACTED Ltd in exchange for the carrying out of

fit-out costs in relation to the REDACTED property (€383,856) and a property owned by the Appellant in REDACTED (€304,577). They enclosed invoices in respect of the fit-out costs incurred in respect of the REDACTED property.

49. The Respondent submitted that these invoices do not contain detailed descriptions of the expenses incurred.

50. The Respondent submitted that by letter dated 27 April 2018, Revenue wrote to the agents seeking a copy of the Contract for Sale between their client and REDACTED Ltd in respect of the disposal of the second REDACTED property in 2008. Revenue also sought a copy of any contemporaneous documentation between their client and the company, which confirmed the terms of exchange referred to in their letter of 23 March 2018. Revenue noted that the 2008 property transfer was not reflected in their client's tax returns for 2008 and asked the agents to furnish a completed CGT return in relation to the year 2008.

51. The Respondent submitted that the agents replied by letter dated 12 June 2018. They explained that there was no contract in place in relation to the property transfer and that while the transaction should have been reported on their client's 2008 income tax return, it was not done so due to a genuine oversight. They did not provide any documentation to confirm the terms of exchange referred to in their letter dated 23 March 2018 and they did not furnish Revenue with a completed capital gains tax return on behalf of their client for 2008.

52. The Respondent submitted that based on the explanations, information and documentation provided by the Appellant's agents in this matter, Revenue was not satisfied that the Appellant was entitled to a deduction for enhancement expenditure in the amount of €639,869 on the disposal of the REDACTED property to REDACTED REDACTED Limited in 2011. In particular, it was not established that any enhancement expenditure was incurred on the REDACTED property either by or on behalf of the Appellant. Rather, REDACTED Ltd incurred such expenditure. In addition, details of the enhancements carried out on the property were not provided and the invoices provided in support of the enhancement expenditure totalled only €383,856.

53. The Respondent submitted that accordingly, Revenue disallowed the enhancement expenditure in the amount €639,869 by raising an amended assessment to CGT on the Appellant dated 25 June 2018 in respect of the year ended 31 December 2011. The tax due in respect of the amended assessment is €159,967 and is the subject of this appeal.

Appeal Hearing

Appellant

54. The Agent for the Appellant gave some background to the business activities of the Appellant and his associated companies. He pointed out that the business had grown rapidly in the early years of this century. This involved incurring significant capital investment through the purchase of a number of business premises. Some of these purchases were made by the Appellant and some by the associated trading company wholly owned by the Appellant.

55. The Agent explained the background to the barter transaction involving the exchange of a shop for the enhancement expenditure incurred by the trading company.

56. The Agent explained that there was an element of sloppiness to the submission of the Appellant's tax returns that created some of the issues that instigated the Respondent's enquiries in the matter under appeal.

57. The Agent advised that the enterprise conducted in the trading company had hundreds of shops and compared its operation to that of a franchise with regular expenditure required for those sort of enterprises.

58. The Agent explained the background to the decision to transfer a portfolio of properties to the corporate umbrella in 2011. This involved the sale of various properties and the consideration in that transaction and the allowable costs were accurately reflected in the Appellant's return of income for 2011.

59. The Agent advised that the Appellant is not currently tax resident in Ireland and explained the context of his residency both in REDACTED and in REDACTED .

60. The Agent repeated the arguments contained in the written submissions, essentially that the return made by the Appellant for 2011 was fully accurate and complete, and he contested the basis on which the Respondent had deemed it appropriate in raising an assessment post the four-year statutory limit set out in s.995 TCA 1997.

61. Finally, the Agent repeated the assertions from the Appellant's submissions that the expenditure (as denied by the Respondent) was incurred by the Appellant and paid for by way of the transfer of the property at REDACTED. He also pointed to the issue of the enhancement expenditure being allowable even if paid for by the trading company on

behalf of the Appellant. He pointed out that due to the sloppiness of the of the tax return, the expenditure and the barter transaction were not exactly matched insofar as the Appellant should have claimed €690,000 expenditure.

Respondent

62. Counsel for the Respondent pointed out that the submissions by the Appellant and the summary presented at the Appeal of the transactions involving the capital expenditure paid for by way of a barter transaction involving the transfer of a property by the Appellant was not supported in evidence in any way, by the Appellant. The occurrence of these transactions at all is merely hearsay without evidence.

63. Counsel for the Respondent pointed out that the invoices presented by the Appellant in support of the capital expenditure incurred in 2008 or 2009 do not specify the works undertaken as enhancement, as required under legislation.

64. Counsel highlighted the acknowledged fact that the enhancement expenditure was not reflected in the Appellant's tax returns in 2008 and 2009.

65. Counsel for the Respondent also opined that the return for 2011 was inaccurate from the fact that it declared the sale of 13 properties and it seemed to him that in fact the transaction reflected only 11 properties.

Further Submissions

66. In advance of making my determination in this appeal, I sought further submissions from both parties in relation to the entitlement of the Respondent to amend the assessments the subject of this appeal.

67. There were three grounds of appeal in the notice of appeal, being: -

    a) The *vires* for raising an amended assessment taking the time limits into account;
    b) The tax deductibility of enhancement expenditure;
    c) The valuation/inappropriate one-sided adjustment

68. These issues are interrelated and the Respondent addressed them in its further submission whilst the Appellant responded and elaborated somewhat in his further submission to me.

Analysis and findings

Time limits

69. The Respondent in its legal argument in relation to time limits suggests that the time limit is measured from the time that the assessment is made, not from the date of its service or any later date calculated by reference to the 30-day period for an appeal. The Respondent has opined that it was entitled to make enquiries in accordance with s.955 (2) (a) within the four-year time limit commencing at the end of the chargeable period and this four-year period commenced on 1 January 2012 and ceased on 31 December 2016.

70. The Respondent in its query letter dated 5 December 2016 sought information in respect of the transaction.
    - Date of disposal
    - Description of the assets disposed of
    - Copies of transfer documentation
    - Consideration received
    - Cost of disposal
    - Date of original acquisition
    - Cost of acquisition
    - Total indexed cost if relevant

71. The Respondent contended that it then became aware that there was no transfer of the beneficial ownership of the original REDACTED property from the Appellant to his trading company or that the trading company incurred the costs of the fit-out the subject of this appeal.

72. The Respondent considers that there are still lacunae in the information furnished by the Appellant including documentary evidence of transfers, movements in the Appellant's capital/current accounts with the trading company and how the expenditure on behalf of the Appellant was treated in the records of the trading company.

73. The Respondent has opined that it was entitled to make enquiries in accordance with s.955 (2)(a) within the four-year time limit commencing at the end of the chargeable period.

74. S.955 TCA 1997 provided for the amendment of, and time limit for, assessments. It prohibited Revenue from making assessments where a full and true disclosure was made of all material facts necessary for the making of an assessment for the chargeable period. An assessment for that period or an amendment of such an assessment could not be made on the chargeable person after the end of 4 years.

75. Conversely, it permitted the amendment of an assessment where a relevant return did not contain a full and true disclosure of the facts referred to above.

76. S.955 (3) TCA 1997 provided an opportunity for chargeable persons to appeal against an assessment or amended assessment on the grounds that the inspector was precluded from making that assessment or amendment by reason of the four year provision provided in s.955 (2) TCA 1997. In order to avail of the protection of s.955 TCA 1997 in relation to time limits, the chargeable person must display that the relevant return contained a full and true disclosure and also make such an appeal against the inspector's entitlement to raise or amend such an assessment.

77. S.956 (1)(c) prohibited Revenue from making enquiries after the expiry of four years from the end of the chargeable period of the return.

78. S.956 (2)(a) provided an opportunity for the chargeable person aggrieved by an inspector making such enquiries to make an appeal to the TAC against the making of such enquiries.

79. The Appellant has opined that the return for 2011 is a full and true disclosure and has appealed against the inspector's entitlement to amend the assessment issued on 20th of November 2012, reflecting the amounts declared by the Appellant in his 2011 Irish tax return.

80. The Respondent submitted that its enquiries had commenced within the time limits set out in s.955 TCA 1997 on 5 December 2016 and therefore s.956 TCA 1997 does not apply to this appeal.

81. The Appellant submitted that the Respondent made an initial enquiry on 5 December 2016 but at that time the Respondent could not have had any grounds for believing that the 2011 return was insufficient due to its having been completed in a fraudulent or negligent manner.

82. Justice Clarke in the Supreme Court considered the matter of s.955 and s.956 in the case of the *Revenue Commissioners v Droog* [2016] IESC at paragraphs 4.4 to 4.6 as follows:

> *4.4 However, it is ss.955 and 956 of the TCA which are at the heart of the issue which arises on this appeal. Section 955(1) allows an inspector "at any time" to amend an assessment notwithstanding that tax "may have been paid or repaid" in respect of the assessment previously issued. The purpose of that provision would appear to be to ensure that a tax payer could not argue that the fact that they had made a return and had paid tax in accordance with an assessment raised on foot of that return might mean that their tax affairs for the fiscal period concerned were irrevocably finalised.* ***However, s.955(1) is expressly stated to be subject to subs.(2) which is in the following terms:-***
>
> ***"(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 4 years commencing at the end of the chargeable period in which the return is delivered and –***
>
> *(i) no additional tax shall be payable by the chargeable person, after the end of that period of 4 years, and*
>
> *(ii) no tax shall be repaid to the chargeable person after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*
>
> ***By reason of any matter contained in the return.***
>
> ***b) Nothing in this subsection shall prevent the amendment of an assessment—***
>
> ***(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),***
>
> ***(ii)*** *to give effect to a determination on any appeal against an assessment,*
>
> ***(iii)*** *to take account of any fact or matter arising by reason of an event occurring after the return is delivered,*
>
> ***(iv)*** *to correct an error in calculation, or*

(v) *to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,*

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3)."

The substance of that provision is to protect a tax payer who makes a "full and true disclosure" of all relevant "facts". In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return. ***There are, of course, the exceptions contained in subs(b)*** *but none of these apply in the circumstances of this case.*

4.5 It is easy to understand the reasoning behind that provision. Where a tax payer has made a "full and true" disclosure of all relevant facts, the Oireachtas must have considered that it would have been significantly unfair to allow Revenue to reopen the amount of tax due after the relevant four year period. It is also of some relevance to note the provisions of subs.(4) which allows for the expression of doubt where a tax payer is unsure as to the law in any particular relevant regard but makes a return to the best of their ability while expressing doubt. Unless that expression of doubt is found to be ungenuine then the person will be regarded as having made a "full and true disclosure" even though it may turn out that their view of the law was wrong. Thus a person who makes an incorrect return, but expresses what is found to be a genuine doubt, will be held to have made an appropriate return thus triggering the time limit but, equally importantly, that facility cannot be abused by ungenuine expressions of doubt.

4.6 Section 956 is also of relevance. Section 956(1)(b) allows an inspector to make inquiries or take action necessary to verify the accuracy of a return. Section 956(1)(b)(ii) allows the inspector, presumably as a result of discoveries which might arise from such inquiries or actions, to amend an assessment but, importantly, that power is expressly stated to be subject to s.955(2) to which reference has already been made and which provides for the time limit. Consistent with that provision is subs.(3) which imposes a time limit on inquiries and actions outside the four year period unless the inspector has reasonable ground "for

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

[Emphasis Added]

83. S.955 (1) allows an inspector *"at any time"* to amend an assessment, but is expressly subject to subsection (2) which prohibits the making or amending of an assessment outside of the four year time limit except **"***where a relevant return does not contain a full and true disclosure of the facts".*

84. The Respondent requested further details in relation to the computations in seeking more information after its initial enquiries on 6 December 2016. The Respondent in fact submitted that it is still not satisfied and claimed that there remains a lacuna in the matter of the disclosure in the 2011 return.

85. S.955 imposes no time limit in making or amending an assessment in the absence of a full and true disclosure. The Appellant has appealed against the assessment in accordance with s.955 (3) TCA on the basis that the inspector was precluded from amending the assessment.

86. Counsel for the Respondent went to great lengths to emphasise that the Respondent's enquiries were conducted without the assistance of s.956 TCA 1997 and consequently the Respondent did not have to establish reasonable grounds for believing the 2011 return to have been *"insufficient due to its having been completed in a fraudulent or negligent manner"* before making enquiries. The following is an extract from the supplemental submission in this:

"3.0 **The Right of Revenue to make Enquiries**

3.1 Section 956 dealt with the making of enquiries by Revenue and at 956 (l)(c) provided that :

"Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time

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

3.2 The Appellant's return was filed on 15 November 2012 - section 956(1)(c) provides that Revenue has *"…4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period..."* within which to make its enquiries. The period therefore commences from 31 December 2012 and runs for the 4 years to the 31 December 2016. Revenue's enquiry commenced within this time period permitted on 5 December 2016 and therefore (and very importantly), **section 956 does not apply to this appeal**.

3.3. Counsel for Revenue highlighted at the hearing of the appeal that there was no objection from the Appellant to Revenue making enquiries into the Appellant's 2011 return. As a matter of law, since the enquiries were made within the four-year period, there *could not have been a valid objection*.

3.4. Given this, Revenue did not have to establish reasonable grounds for believing the 2011 return to have been *"insufficient due to its having been completed in a fraudulent or negligent manner"* before making enquiries.

4.0. The Amended Assessment

4.1. As noted above, Revenue made an amended assessment on 25 June 2018.

4.2. Section 955 and 956 are different sections and Revenue does not have to conduct enquiries under section 956 or its successor, to make an assessment under section 955, or its successor. As the Supreme Court pointed out in *Revenue Commissioners -v- Droog, (at para. 4.6.) "(s)ection 956(1)[b)[ii) allows the inspector, presumably as a result of discoveries which might arise from such enquiries or actions, to amend an assessment but, importantly,* ***that power is expressly stated to be subject to section 955(2)****..."* (emphasis added)

4.3. In any event, section 956 was not engaged in this case."

87. The amended assessment in this appeal was made on the basis that the returns are *not "full and true"*. The Respondent has engaged s.955 TCA 1997 and has made an amendment without raising enquiries under s.956 TCA 1997. In doing so, the Respondent, in effect,

has by-passed the need first, to demonstrate that it believes that the return was completed in a fraudulent or negligent manner.

88. In order to permit the amendment of the assessment or to allow the appeal it is necessary to determine whether the return contained a full and true disclosure of all material facts necessary for the making of an assessment.

89. The Appellant has consistently stood over the 2011 return as fulfilling the requirements necessary and submitted that he:

> *"has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period"*

90. The Respondent has taken the view that the CG 50 application made by the applicant in 2011, the return itself, subsequent correspondence and the information gleaned by Revenue from its enquiries are contradictory. These contradictions prompted the Respondent to make an amended assessment on the Appellant on 25 June 2018.

91. Following the detailed and entrenched enquiries, the Respondent amended the assessment on the basis that the return did not contain *a full and true disclosure of all material facts.* The Respondent concluded in the absence of documentary evidence confirming that the enhancement expenditure was actually incurred or if incurred was not on behalf of the Appellant.

92. The Respondent accordingly concluded that the enhancement expenditure reflected in the 2011 return and allegedly incurred by the Respondent over a period of time during the years 2008 and 2009 was not an allowable deduction.

93. S.886 (4) TCA 1997 sets out the obligations of a chargeable person to keep records for a period of 6 years after the completion of the transactions, acts or operations to which they relate. In this case, the relevant transactions in relation to the enhancement expenditure occurred in 2008 and/or 2009 and thus the Appellant had no requirement to retain the supporting records after 2015.

94. The Appellant provided some invoices in relation to the enhancement expenditure incurred. The Appellant claimed that these invoices represented approximately 60% of the total expenditure. The Appellant also claimed that the expenditure was discharged on his

behalf by his associated trading company and paid by him by transferring a property to his associated trading company.

95. These transactions occurred in 2008 and/or 2009. The Appellant has submitted and accepted that there was confusion in the matter because the records of the Appellant referred to the expenditure as being applicable to REDACTED only, whereas in fact it related to both REDACTED and REDACTED.

96. The Appellant, in support of his assertion that his 2011 return did contain *a full and true disclosure of all material facts*, advised that the person who had assembled the records was not available to assist as that individual had unfortunately passed away.

97. The matters required to be inserted into the return are provided for in the prescribed Form 11 for 2011. The form requires a description of the assets disposed of. The form required the Appellant to enter the number of disposals of all properties. The Respondent has pointed to the different versions of this in the Form 11, and in the CG 50 application. However, I have accepted the explanation of the Appellant in this insofar as the number of properties disposed of can include overhead apartments when disposing of a commercial premises.

98. The Form 11 also requires the amount of the net gain. The net gain is the sum received for all disposals, less any disposal costs, less the total of the relative acquisition costs plus any enhancement expenditure, appropriately indexed. The Respondent has never contended that the sales proceeds, indexed costs or personal exemptions were incorrect. That requirement does not mean that this figure must coincide with the figure that Revenue in due course considers to be the correct figure, but is simply the amount which the Appellant honestly believed was the amount of the net gain.

99. The next step in completing the Form 11 was to include the Net Chargeable Gain. The amount entered here should be the net gain after all losses, including spouse losses, if applicable, and personal exemptions have been applied. In this, the Appellant has computed the net gain based on his views in the matter, at the time of completing the return.

100. S.886 (4) TCA 1997 sets out the obligations of a chargeable person to keep records for a period of 6 years after the completion of the transactions, acts or operations to which they relate. In this case, the relevant transactions in relation to the enhancement expenditure

occurred in 2008 and/or 2009 and thus the Appellant had no requirement to retain the supporting records after 2015.

Conclusion

101. Even though the Respondent considers that, there remains a lacuna in the matter of the disclosure in the 2011 return, the amended assessment the subject of this appeal is based entirely on restricting the value of the enhancement expenditure.

102. There was no contract in place in relation to the property transfer used to pay for the enhancement expenditure and that transaction was not reported on the Appellant's 2008 tax return. The enhancement expenditure and the barter transaction were not exactly matched due to the acknowledged sloppiness of the tax return in 2011.

103. I agree with Counsel for the Respondent that the occurrence of these transactions at all is merely hearsay without evidence.

104. The Agent for the Appellant was hampered in proving that the expenditure was incurred on enhancement, by the passage of time, the death of the key person who maintained the records and the Appellant's own failure to give evidence at the Appeal hearing.

105. The Respondent is within the time limits to amend an assessment in accordance with s.955 TCA 1997, if the Appellant had not made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011. However, the Appellant has contended that the return included a full and true disclosure of all material facts. The Appellant did not or cannot and is not legislatively obliged to provide sufficient evidence to satisfy the Revenue's concerns in the matter of whether or not the enhancement expenditure claimed in the return is correct.

106. The Appellant has made what he believed to be a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011.

107. The issues posed for the determination in this appeal at paragraph 7 above were:

a) Whether the Appellant was entitled to a deduction for enhancement expenditure incurred in 2008/2009 of €639,869 in respect of properties disposed of in 2011.

b) Whether the Appellant made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011 in his tax return for 2011.
c) Whether the Respondent was entitled to make an amended assessment in the matter on 25 June 2018.

108. I find that, the provisions of s.886 TCA 1997 did not require the Appellant to retain the requested information in relation to the only item – enhancement expenditure, on which the Respondent amended the assessment. The Appellant has accordingly complied with ss.534 and 552 of the TCA 1997 as regards the disposal of assets and the computation of the net gain chargeable to CGT.

109. I find that the Appellant has completed the Form 11 for 2011 to the best of his knowledge, information, and belief, and in circumstances where the persons with responsibility for maintaining certain relevant records had passed away. The Appellant has accordingly made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011.

110. I find that the Respondent was not entitled to make an amended assessment in the matter on 25 June 2018.

Determination

111. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, I am satisfied that the Respondent is incorrect in amending the assessment for 2011 and the Appeal is allowed.

112. The appeal is hereby determined in accordance with Section 949AK TCA 1997.

CHARLIE PHELAN
APPEAL COMMISSIONER
10 NOVEMBER 2020

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