Ref: 275TAC/17 & 517/16

BETWEEN/

Appellant

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

1. The matter for consideration in this appeal is the identification of the person to be assessed and pursued for the collection of the capital gains tax pursuant TCA, section 571 arising on the forced sale by a French Bank with an Irish Branch (the Bank) of Appellant's shares (the Shares) in a French listed company (the Company). The Appellant submitted that TCA, section 571(5) placed an onus on the Bank as the *"accountable person"* to discharge the capital gains tax arising on those disposals while the Respondent was of the view that the Appellant, as the chargeable person, was accountable for the capital gains tax on the forced sale. Amended Notices of assessments to capital gains tax for the years 2008, 2010 and 2011 were raised and appealed accordingly. The additional capital gains tax liabilities arising on those assessments are as follows:

Year	Amount Assessed
2008	€ 554,353
2010	€ 201,431
2011	€ 905,498
Total	€1,661,282

TAX APPEALS COMMISSION

Legislation

2. The charge to capital gains tax as set out in TCA, section 28 (1) provides that:

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

3. TCA, section 29(2) provides that '*Persons Chargeable'*:

   "shall be chargeable to capital gains tax in respect of chargeable gains accruing to such person in a year of assessment for which such person is resident or ordinarily resident in the State."

4. TCA, section 31 is entitled '*Amount chargeable'* and provides:

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

   (a) any allowable losses accruing to that person in that year of assessment"

5. TCA, section 532 defines assets as all:

   "All forms of property shall be assets for the purposes of the Capital Gains Tax code whether situate in the State or not."

6. TCA, section 537 is entitled '*Mortgages and charges not to be treated as disposals'* and provides:

   (1) The conveyance or transfer as security of an asset or of an interest or right in or over an asset, or the transfer of a subsisting interest or right as security in or over an asset (including a retransfer on redemption of the security), shall not be treated for the purposes of the Capital Gains Tax Acts as involving any acquisition or disposal of the asset.

   (2) Where a person entitled to an asset as security or to the benefit of a charge or incumbrance on an asset deals with the asset for the purpose of enforcing or giving effect to the security, charge or incumbrance, such person's dealings with the asset shall

be treated for the purposes of the Capital Gains Tax Acts as if they were done through such person as nominee by the person entitled to the asset subject to the security, charge or incumbrance, and this subsection shall apply to the dealings of any person appointed to enforce or give effect to the security, charge or incumbrance as receiver and manager or judicial factor as it applies to the dealings of the person so entitled.

(3) An asset shall be treated as having been acquired free of any interest or right as security subsisting at the time of any acquisition of the asset, and as being disposed of free of any such interest or right subsisting at the time of the disposal and, where an asset is acquired subject to any such interest or right, the full amount of the liability thereby assumed by the person acquiring the asset shall form part of the consideration for the acquisition and disposal in addition to any other consideration."

7. TCA, section 571 provides that any "*referable capital gains tax*" on a disposal of a secured asset is "*assessable on and recoverable from the accountable person*", which includes a receiver or a mortgagee and provides *inter alia*:

(1) In this section –

"accountable person" means –

(a) a liquidator of a company, or

(b) any person entitled to an asset by means of security or to the benefit of a charge or encumbrance on an asset or, as the case may be, any person appointed to enforce or give effect to the security, charge or encumbrance;

"the company" has the meaning assigned to it by subsection (6);

"the debtor" has the meaning assigned to it by subsection (5);

(2) .....
(3) ....
(4) .....

(5) Where section 537(2) or 570 applies in respect of the disposal of an asset in a year of assessment by an accountable person, then, notwithstanding any provision of the Capital Gains Tax Acts –

> (a) *any referable capital gains tax in respect of any chargeable gains which accrue on the disposal shall be assessable on and recoverable from the accountable person,*
>
> (b) *the referable capital gains tax shall be treated as a necessary disbursement out of the proceeds of the disposal and shall be paid by the accountable person out of those proceeds, and*
>
> (c) *referable capital gains tax paid by the accountable person shall discharge a corresponding amount of the liability to capital gains tax, for the year of assessment in which the disposal is made, of the person (in this section referred to as "the debtor") who apart from this subsection is the chargeable person in relation to the disposal.*

(6) ...

(7) Notwithstanding any provision of the Capital Gains Tax Acts or of the Corporation Tax Acts, the amount of referable capital gains tax or referable corporation tax, as the case may be, which under this section is assessable on an accountable person in relation to a disposal, shall be recoverable by an assessment on the accountable person to income tax under Case IV of Schedule D for the year of assessment in which the disposal occurred on an amount the income tax on which at the standard rate for that year of assessment is equal to the amount of the referable capital gains tax or referable corporation tax, as the case may be.

(8) Where tax is paid by an accountable person under this section and it is established that the amount of tax paid is excessive, appropriate relief by means of repayment or otherwise shall be given to the accountable person.

(9) Subject to subsections (5)(c) and (6)(c), nothing in this section shall affect the amount of chargeable gains on which –

> (a) *the debtor is chargeable to capital gains tax, or*
>
> (b) *the company is chargeable to corporation tax."*

8. Prior to 2012, the rules governing the payment of tax were governed by TCA, section 958. The definition of the assortment of phrases are set out in TCA, 958(1)(a) as follows:

""tax payable for the initial period" in relation to a chargeable period which is—

(I) a year of assessment for capital gains tax (being the years of assessment 2003 to 2008 inclusive), means the tax which would be payable by the chargeable person if the year of assessment ended on 30 September in that year instead of 31 December in that year, or

(II) a year of assessment for capital gains tax (being the year of assessment 2009 or any subsequent year of assessment), means the tax which would be payable by the chargeable person if the year of assessment ended on 30 November in that year instead of 31 December in that year;"

"tax payable for the later period", in relation to a chargeable period which is a year of assessment for capital gains tax (being the year of assessment 2003 or any subsequent year of assessment), means the tax payable for the year of assessment less the tax payable for the initial period in relation to that year of assessment"

9. TCA, section 958(3)(a)(v) provides that the tax payable by a chargeable person for a chargeable period shall be due and payable:

"*where the chargeable period is a year of assessment for capital gains tax (being the year of assessment 2003 for capital gains tax or any subsequent year of assessment for capital gains tax) and an assessment has not been made on the chargeable person for the year of assessment –*

(I) as respects tax payable for the initial period—

(A) where the initial period falls in the years of assessment 2003 to 2008 inclusive, on or before 31 October in the year of assessment, and

(B) where the initial period falls in the year of assessment 2009 or any subsequent year of assessment, on or before 15 December in that year of assessment, and

(II) as respects tax payable for the later period, on or before 31 January in the next following year of assessment"

Material findings of Fact

10. The Appellant, an Irish Resident, and a shareholder in the Company, entered into a loan agreement with the Bank, by way of loan agreement dated 26 October 2007 to borrow

€4,362,000 to purchase additional shares in the Company by way of his taking up the Shares in a rights issue by the Company. Article 15 of that agreement provides for a Guarantee of 155,000 Shares held as security. A mandatory Deed of Pledge was completed by the Appellant on 27 October 2007.

11. By Loan Agreement dated 27 May 2008, a further loan was negotiated by the Appellant from the Bank to borrow €7.7m of which €7.4m was drawn down using a special overdraft current account.

12. Article 14.1 of the 2008 Loan Agreement included a guarantee of 366,512 Shares held as security for all sums due by way of the 2007 Loan and the 2008 Loan.

13. A mandatory Form of Deed of Pledge was completed by the Appellant on 27 May 2008 ("the Security Agreement"). This provided at Section IV ("Taxes and Fees") that: *"All fees, taxes, penalties, and charges (including registration fees if applicable), to which this pledge and its execution may give rise, shall be payable by the client."*

14. The 2007 and 2008 Loan Agreements provided that in the event of a drop in value of the secured assets, the Appellant was obliged to execute a supplementary guarantee, in default of which the entire loan would become due. Clause 13.1 of the 2007 loan agreement and Clause 12.1 of the 2008 loan agreement provide that all sums payable to the Bank "*must be made out of any net tax".*

15. In the period from October to November 2008, the Bank commenced enforcement of their security pursuant to the Security Agreement and sold a total of 214,992 shares at prices ranging from €16.97 to €20 a share, realising total sale proceeds of €4,058,283, giving rise to an Irish capital gains tax liability.

16. These sales were enforced by the Bank in execution of the Security Agreement, and the sales proceeds were used to repay the 2007 loan, with the balance used as a part repayment towards the 2008 loan. The Appellant was not in agreement with the sales.

17. In May 2009, the Appellant received a scrip dividend issue from the Company instead of a cash dividend of 23,473 shares, which were placed as further security against the 2008 loan. The same action was taken for the following year's dividend and further script dividend shares received of 18,885 were placed as security, bringing the total shareholding held as security against the 2008 Loan to 408,870 shares.

18. On 5 August 2009 additional security was provided by the Appellant and a further Deed of Pledge was completed on 4 August 2009 ("the 2009 Security Agreement"). This again provides at Section IV:

    "*All fees, taxes, penalties, and charges (including registration fees if applicable), to which this pledge and its execution may give rise, shall be payable by the client.*"

19. In 2010, the Bank forced the sale of a further 64,000 shares under the security it held realising total sales proceeds of €1,318,379, realising a liability to Irish taxation on the gain crystallised. The sales proceeds were used by the Bank to partly repay Loan 2.

20. On 25 February 2011, a demand to repay the entire loan and interest was issued by letter delivered to the Appellant. On 21 April 2011, the Bank activated the guarantee attached to the 2008 Loan and sold a total of 248,082 shares realising total sales proceeds of €5,531,448, giving rise to a capital gains tax liability of €933,713. The entire proceeds were used to repay the balance outstanding of Loan 2 in full.

21. Clause 13.1 of the 2007 Loan Agreement and Clause 12.1 of the 2008 Loan Agreement provided that all sums payable under the loan agreements were net of taxes due by the Borrower.

22. The Appellant's Tax Agent (Agent) was not aware of the circumstances of the enforcement of security in 2008 and 2010. Accordingly, capital gains tax was paid on the disposal of the 2008 and 2010 sale of the Shares. However, the original computation was calculated using the 'last in last out' (LIFO) method rather than the 'first in first out' (FIFO) method. Overall, the Appellant paid capital gains tax of €122,340 in 2008 and €73,764 in 2010, resulting in total capital gains tax paid of €196,104. This sum was retained by the Respondent pending the outcome of this appeal.

23. The sales of the Appellant's Shares were made solely by the Bank being the person entitled to the Shares by means of the security documents and to the benefit of the charges over the Shares and therefore entitled to enforce sales of the Shares to give effect to their security and charges. This has been confirmed as a matter of French Law as set out in the opinion of a French Law Firm of 15 March 2021.

24. On 23rd June 2015, the Agent wrote to the Respondent to impress that the provisions of TCA, section 571 mandated that the capital gains tax on the forced sales should be assessed on and collected from the Bank. The Agent also sought a refund of the capital gains tax paid by the Appellant in respect of the earlier forced disposal of the Shares in 2008 and 2010

which it was asserted had been paid in error and requested the Respondent to issue amended notices of assessment in respect of the relevant tax years.

25. The Respondent disagreed with the Appellant's position by letter dated 3rd December 2015 and Amended Notices of assessments to capital gains tax issued for the years 2008 and 2010 issued on 4th January 2016 and were appealed accordingly. An Amended Notice of assessments to Capital Gains Tax for the year 2011 issued on 15 August 2016 and was also appealed.

26. There is no dispute between the parties as to the calculation of the amount of the relevant capital gains tax liability. The sole matter in dispute is whether the Appellant is liable for the capital gains tax, or whether it is a sole liability of the Bank in light of TCA, section 571.

Appellant's Submissions

27. The documents adduced in evidence are consistent with forced sales of the Appellant's Shares. This was further supported by evidence that the Bank as the "*accountable person*" sold the Shares, and did so as the person entitled to enforce and give effect to security over the Shares.

28. TCA, Part 19 addresses the taxation of capital gains. The Bank is the *"accountable person"* liable for capital gains tax on the disposal of the Shares in 2008, 2010 and 2011. TCA, section 537 provides that the transfer of an asset as security does not amount to a disposal.

29. The use of the phrase "*shall be treated*" in TCA, section 537 means there is no discretion as to who is liable under this section. The Appellant asserted that the Bank comes within the definition of *"accountable person"* as defined by TCA, section 571(1) and that the Bank was empowered and entitled to the sell the Shares.

30. TCA, section 571(5) places an onus on the *"accountable person"* irrespective of any other provision of the Capital Gains Tax Acts where TCA, section 537(2) applies. Furthermore TCA, section 571(5)(c) shifts the liability to the *"accountable person"* who is the person liable to pay the tax. It is also relevant that TCA, section 56, Finance Act 1983 (now Section 571 of the TCA) was introduced to remedy the defect acknowledged in *Bank of Ireland Finance Limited v The Revenue Commissioners* IV ITR 217 that the liability should rest with the person who has control of the sale proceeds, in this case the Bank as it is the accountable person for the purposes of the legislation and liable for the payment of the capital gains tax to Revenue. That case highlighted the deficiency in TCA, section 537 and necessitated the introduction of section 571 which made the Bank the "*accountable person*". In her judgment, Carroll J. observed:

"Section 8 of that Act (section 537 TCA 1997) made special provision as to liability arising when property was sold by a mortgagee (as happened in this case). Subsection (5) provided:

> *Where a person entitled to an asset by way of security or to the benefit of a charge or incumbrance on an asset deals with the asset for the purpose of enforcing or giving effect to the security, charge or incumbrance, his dealings with it shall be treated for the purposes of this Act as if they were done through him as nominee by the person entitled to it subject to the security, charge or incumbrance....*

The legal position when the disposal of the property in this case took place (a position which, incidentally, was subsequently altered by FA 1983) was that the "disposal" of the property was made by Hyperion (the Debtor), that the plaintiffs (the Bank) were deemed to be merely its nominees, that the liability to bear any capital gains tax arising rested on Hyperion, that the plaintiffs (the Bank) when enforcing their power of sale were neither liable to pay the tax or to account to the Revenue Commissioners in respect of it.

….

It goes without saying that if the plaintiffs had obtained the certificate none of this would have happened and the Revenue would have had to look (presumably in vain) to Hyperion for payment of the entire tax. Now the plaintiffs only remedy (and it, presumably is also a hollow one) is to seek reimbursement from Hyperion"

31. The Respondent argued that TCA, section 571(9) means the taxpayer remains liable even where there is an *"accountable person"*. The Appellant rejects this argument and points to the fact that the concept of *"accountable person"* for taxation purposes is not unique to TCA, section 571.

32. In other taxes the use of the term an *"accountable person"* places the obligation on such persons to discharge the tax as follows:

   - The Stamp Duties Consolidation Act 1999, section 1 defines an accountable person in accordance with a table for the various types of instruments.

- Capital Acquisitions Tax Act 2003 (CATCA) states the person who is responsible for payment of tax by virtue of CATCA, section 45 which defines the persons who are primarily and secondarily liable to that tax.

33. It can be seen the above referenced taxation legislation is quite exact – if a person is accountable for a particular tax, absent a specific provision to the contrary, it is taken as an absolute liability without qualification. It cannot be extrapolated that a liability is primary or secondary unless it is specifically provided in the legislation.

34. The Respondent asserted that the liability of the Appellant is primary per TCA, section 571(9). It was argued that the Respondent is not correct in this assertion as the term *"accountable person"* as used in TCA, section 571 is not qualified by reference to being a primary or a secondary liability.

35. The Respondent has also argued that:

    "whilst the liability to CGT is always that of the Debtor only, section 571 affords the respondent a secondary mechanism whereby at its discretion it may seek to make an Accountable Person liable for some of the debtors CGT liability as a discretionary remedy."

36. It is unclear how this interpretation can be made as TCA, section 571 states that the person liable to pay the CGT "*…shall be the "accountable person""*". The use of the word *"…shall…"* means that the use of TCA, section 571 to recover from the *"accountable person"* is obligatory and no discretion applies as argued by the Respondent. The Respondent could have assessed the Bank to income tax in accordance with TCA, section 571 (7) but did not do so.

37. Thus, where the *"accountable person"* does not have a choice regarding its status, it is liable to the payment of taxes if it realises a capital gain on the forced sale of assets. Failure to do so renders the *"accountable person"* liable for any underpaid tax. TCA, section 571 provides that any chargeable gains realised by the *"accountable person"* are assessable on and recoverable from the *"accountable person"*.

38. TCA, section 571(9) states that:

    "Subject to subsections (5)(c) and (6)(c), nothing in this section shall affect the amount of chargeable gains on which –

    (a) the debtor is chargeable to capital gains tax, or

(b) *the company is chargeable to corporation tax."*

39. The Respondent asserted that the relevance of subsections (5)(c) and of (6)(c) is to ensure that liability for capital gains tax of the debtor is maintained. If this argument is taken literally it would mean that TCA, section 571 is unnecessary and renders the requirement to have an *"accountable person"* meaningless. Whereas the use of the words "*Subject to*" as a precondition to subsection (9), clearly requires and assumes that if TCA, section 571 applies and there is an *"accountable person"*, that the Respondent will recover from the *"accountable person"* rather than the debtor.

40. The Respondent's argument contradicts its own Notes for Guidance on the Taxes Consolidation Act 1997 as published in its website which states the following on TCA, section 571:

"This section imposes a liability to pay capital gains tax or, where appropriate, corporation tax on chargeable gains, on persons designated in the section as "accountable persons", that is, liquidators, receivers (whether appointed under a fixed or a floating charge), mortgagees or any other persons entitled to assets by means of security. The liability affects tax on any disposal made by an accountable person where section 537(2) (or section 78(8) or 570 in the case of a liquidator) would make a different person (who might have no funds to pay the tax) chargeable on the disposal by the receiver, mortgagee, liquidator, etc. The accountable person is assessable to the tax referable to the chargeable gain and that tax is recoverable from the accountable person. The tax must be paid by the accountable person out of the proceeds of the disposal in priority to charges and encumbrances on the property."

41. The Respondent failed to follow proper procedure in relation to the capital gains tax liability in this case as laid down in Respondent's Internal Revenue Inspectors Instructions regarding the use of section 571. These Instructions are as follows:

"Section 571 imposes liability on "accountable persons", viz. receivers (whether appointed under a fixed or a floating charge), liquidators, mortgagees or any person entitled to an asset by way of security. The liability imposed on them is to pay the capital gains tax (or, as the case may be, corporation tax on chargeable gains) on any chargeable gains accruing on disposals made by them.

In order to ensure that all referable tax is collected promptly, the following action should be taken in any case where an inspector becomes aware that a liquidator or receiver

(including a " receiver and manager") is appointed or a mortgagee becomes entitled to an asset by way of security:-

Unless the case is entered in the Section 980 register (see Par.11 above) relevant details of the case should be recorded to ensure that the case is identifiable as being within the scope of Section 571.

A letter should be issued without delay to the accountable person and should include material on the following lines:-

"re Section 571 of the Taxes Consolidation Act 1997 – Capital Gains Tax/Corporation Tax

I am writing to you in your capacity as liquidator/receiver/mortgagee in the case of AB/XY Ltd. because of the possible relevance of the provisions of the above-mentioned Section to you. Referable capital gains tax [referable corporation tax on chargeable gains] accruing on the disposal of an asset by an accountable person (within the meaning of the section) is assessable on and recoverable from the accountable person, shall be treated as a necessary disbursement out of the proceeds of the disposal and shall be paid by the accountable person out of those proceeds. If you require any assistance in the matter, particularly as regards the computation of referable tax on chargeable gains accruing on any disposals made by you, please let me know."

42. None of the above steps were undertaken by the Respondent and as a result the Respondent failed to raise an assessment on the correct person who is the *"accountable person",* the Bank.

Conclusion

43. The Appellant has established as a matter of fact that the sale of the Shares fell within the parameters of TCA, section 537. TCA, section 571 rendered the Bank to be the *"accountable person"* and liable to pay capital gains tax in the disposals. *De facto* as is evidenced from the documentation provided that the sales of the Shares were in accordance with the Guarantee and Pledge. The loan agreement provided that the Bank would withhold any Irish taxation due in respect of income or gains derived from the sale of the Shares.

Respondent's Submissions

44. The essence of this appeal under TCA, section 945 relates to the 3 amended assessments for the years 2008, 2010 and 2011 and whether the amended assessments properly reflect the statutory charge to tax imposed on the taxpayer.

45. The issue to be determined is whether the combined effect of the TCA, sections 537 and 571 is to shift the liability for capital gains tax from the debtor to the secured creditor such that the taxpayer, the debtor, is relieved of liability for capital gains tax. It was accepted that the Bank comes within the definition of *'accountable person'* within the meaning of TCA, section 571.

46. Therefore the disposal and the sale or dealing of a secured asset by a secured creditor or any receiver or liquidator is treated as a disposal by the debtor and no more. It is not creating any liability on the part of the secured creditor. It is simply reciting that when a secured creditor enforces a security or deals with the asset for the purposes of giving effect to that security, then in doing so they are treated as nominee of the debtor, the person who owns the asset.

47. TCA, section 537 provides that in selling on the Shares in 3 tranches, the Bank was acting for the purposes of the capital gains tax code as the Appellant's nominee and it was selling on his behalf and disposing on his behalf. So in effect, the provisions of the code which imposed a charge to tax on a disposal on the person who owns the asset are not altered by virtue of the fact that the asset is sold by the secured creditor.

48. The basic principle governing the construction of tax legislation is the literal rule. This has recently been re-affirmed by the Supreme Court in *Dunnes Stores v Revenue Commissioners* [2019] IESC 50. McKechnie J said at para 63:

> *"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reason to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail."*

49. If, on a literal reading, a provision is imprecise or ambiguous, or results in absurdity, further rules of construction come into play. These further rules may include a purposive construction. Per McKechnie J in *Dunnes Stores*, paragraph 65:

> *"When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."*

50. O'Donnell J reviewed and summarised this approach in the recent decision of the Supreme Court in *Bookfinders Ltd v Revenue Commissioners*, delivered on 29 September 2020. At paragraph 54 he states:

> *"It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."*

51. In this regard, TCA, Part 19 addresses the taxation of capital gains. TCA, section 537 provides that the transfer of an asset as security does not amount to a disposal for the purposes of capital gains tax.

52. TCA, section 571 considers the disposal of assets in the enforcement of a security. It addresses "*accountable persons*", which it defines as follows in subsection (1) to include, *inter alia*, "*any person entitled to an asset by means of security or to the benefit of a charge or encumbrance on an asset or, as the case may be, any person appointed to enforce or give effect to the security, charge or encumbrance".*

53. TCA, section 571 on its own express terms cannot change the amount of capital gains tax to which a taxpayer is liable. In effect, the gateway to TCA, section 571 is the status as a nominee of the taxpayer under TCA, section 537.

54. TCA, section 571(5) provides that where TCA, section 537 applies, any referable capital gains tax as defined in section 571 in respect of any chargeable gains which accrue on the disposal shall be assessable on and recoverable from the "*accountable person"*. There is no obligation to assess the "*accountable person"*, but there is a power to do so. However the provision does not impose a charge on the "*accountable person*" but imposes the responsibility to recover the tax from that person. That obligation is mandatory on the "*accountable person*" in that it uses the term "*shall*" but does not prevent the Respondent from pursuing the *"debtor*", the Appellant for the collection of tax.

55. TCA, section 571(7) provides for recovery of the amount of referable capital gains tax by way of assessment on the "*accountable person"* to income tax in the same amount.

56. TCA, section 571(8) sets out the machinery for recoverability and provides for an assessment to tax under Case IV, Schedule D and states:

> *"Where a tax is paid by an accountable person under this section and it is established that the amount of tax is...appropriate relief by means of repayment or otherwise shall be given to the accountable person."*

57. If there were any doubt at all as to the limited import and meaning of TCA, 571(5), it is put to rest by TCA, section 571(9) which is absolutely key to the interpretation of the section in its context and as a whole and provides:

> *"Subject to subsections (5)(c) and (6)(c), nothing in this section shall affect the amount of chargeable gains on which –*
>
> *(a) the debtor is chargeable to capital gains tax, …."*

58. TCA, 571(9) therefore provides that the section does not affect the amount of chargeable gains on which the debtor is chargeable to capital gains. Therefore TCA, 571(9) is not subject to the entire of TCA, section 571(5) as it only permits the right of set off. The subsection does not create any kind of hierarchy of obligation in terms of the "*accountable person"* and the taxpayer. On the contrary, it is an enforcement and a collection mechanism and no more. If it is not utilised or if the secured creditor does not comply with its obligations under the section, it does not in any way undermine or limit the extent of the chargeability of the taxpayer.

59. For avoidance of doubt, the relevance of TCA, section 571 (5)(c) and (6)(c) is that they provide for the reduction of the liability to capital gains tax of the debtor, being the chargeable person, if an amount of referable capital gains tax is actually paid by the accountable person:

> "*referable capital gains tax paid by the accountable person shall discharge a corresponding amount of the liability to capital gains tax, for the year of assessment in which the disposal is made, of the person (in this section referred to as "the debtor") who apart from this subsection is the chargeable person in relation to the disposal."*

60. The statutory scheme is clear and unambiguous. Where a security is enforced, and an asset thereby disposed of, the charge to capital gains tax applies under TCA, section 537(2) to the debtor who secured the assets, and not to the creditor who enforced the security. The primary charge to tax applies to the debtor.

61. That said, there is a secondary mechanism whereby the Respondent may, at its discretion, seek to make an "*accountable person"*, as defined, liable for some of the debtor's capital gains tax liability. A charge to "*referable capital gains tax*", as defined, can also thereby arise, under TCA, section 571, against the person who enforces, referred to as the accountable person. Nothing in TCA, section 571, however, affects the charge to tax against the debtor, except in so far as a payment is made by the accountable person creditor, in which case the payment must be credited against the debtor's tax liability. The secondary liability is only that, a secondary liability.

62. Irish Tax Review 2016 Issue 2 – Tom Power and Justin McGettigan:

> *"Another example of such a provision might be s571. This is CGT provision that relates to disposals of assets by persons other than the owner of the assets, such as receivers and liquidators. It imposes an obligation to pay over CGT to the Revenue Commissioners from the proceeds of sale in priority to all other disbursement. Unlike s52, s571 is not a charging section as such. It does not impose a charge to tax on a taxpayer; it is merely a collection mechanism. The charge to tax remains on the owner of the asset. In order for s571 to apply, it is necessary that the disposal come within one of another number of sections in the Act relating to disposals by receivers and/or liquidators."*

63. Based on the wording of the TCA, section 571 as interpreted in accordance with the dictum of McKechnie J. as approved in *Bookfinders*:

    (i) TCA, section 571 is not a charging section and does not impose a charge to tax on the secured creditor or on the "*accountable person"*. The charge to tax is imposed on the party that owns the asset, in this case the debtor, in this case the Appellant. That charge to tax arises from the operation of the TCA, sections 28, 29, 31 and 532;

    (ii) TCA, section 571 is a recovery and collection section, in other words, it confers power on Revenue to collect and recover the tax from the nominee "*accountable person"* because it is the secured creditor who sold the asset who has in his hands the proceeds of sale;

    (iii) It is quite clear that the section does not relieve or exempt the taxpayer from liability for the charge to tax. That charge to tax and liability is undisturbed and it is preserved expressly by the terms of the section, and

    (iv) TCA, section 571 does not postpone liability or render the liability of the debtor, the taxpayer secondary to that of the "*accountable person"*.

64. Therefore the issue of assessing and recovering the capital gains tax from the Bank is to some extent a distraction as at all times the Appellant was partially liable for the capital gains tax. No exemption or relief was conferred on the Appellant by virtue of TCA, section 571. The purpose of that section is to confer on the Respondent a power to collect that capital gains tax by means of assessing the "*accountable person*". TCA, section 571 did not impose any obligation on the Respondent to do so, nor did it in any way dilute, undermine or reduce the Appellant's chargeability to tax on the 3 assessments which are now appealed.

65. The obligation on the Appellant pursuant to the Pledge Agreement was to pay any taxes resulting from the forced sale of the Shares. The Appellant as opposed to the Bank, paid the tax and the Respondent was unaware of the forced sale. The Respondent only became aware of the forced sale by the Bank on receipt of notification from the Appellant's agent of the series of disposals and associated obligations imposed by TCA, section 537 and 571.

66. Finally, there is only one charge to tax and the person who is charged to tax is always liable for the collection of it under different, separates provisions of the Taxes Acts. While it is acknowledged that the capital gains tax is recoverable from the Bank, there is nothing to prevent the Respondent from recovering the tax from the Appellant.

Overview

67. The dispute between the parties is whether the combined effect of the TCA, sections 537 and 571 made the Bank, as the secured creditor, solely accountable for the discharge of the Appellant's capital gains tax liability arising from the forced sale of the Shares.

68. The Appellant asserted that the Bank comes within the definition of *"accountable person"* as defined by TCA, section 571(1) and therefore solely responsible to discharge the tax as the obligation not only to be assessed but also to be accountable for the capital gains tax is expressly provided for in TCA, section 571(5)(a). It was therefore argued by the Appellant that the Respondent should have assessed and recovered income tax from the Bank in accordance with TCA, section 571(7) but declined to do so.

69. The Respondent argued that the Bank, pursuant to TCA, section 537(2) was acting as the Appellant's nominee when disposing of the Shares. However the charge to capital gains tax still remained with the Appellant in accordance with TCA, sections 28(1), 29(2), 31 532 and 537. The Respondent also submitted that TCA, section 571 does not impose a charge on the "*accountable person*" but imposes the responsibility to recover the tax from that person.

That obligation, according to the Respondent, is mandatory on the "*accountable person*" in that it uses the term "*shall*" but does not prevent the Respondent from pursuing the *"debtor*", the Appellant, for the collection of tax.

Analysis

70. The Appellant's Agent was not aware of the enforcement of the security by the Bank in 2008 and 2010 and as a consequence, the Appellant paid capital gains tax on the forced disposal of the Shares for those years in the amounts of €122,340 and €73,764 respectively. However and notwithstanding such payments, the original computation was calculated using the 'last in last out' (LIFO) method rather than the 'first in first out' (FIFO) method and therefore the correct liability for capital gains for the years 2008 and 2010 was €554,353 and €201,431 respectively. Furthermore, it does not appear that any capital gains tax was paid for the year 2011.

71. There is no disputing the Respondent's assertion that the statutory scheme is clear and unambiguous. Where a security is enforced resulting in the disposal of an asset, a charge to capital gains tax applies to the debtor and not to the creditor who enforced the security. However as agreed by the parties, the matter for consideration in this appeal is the identification of the person to be assessed and pursued for the collection of the capital gains tax pursuant TCA, section 571.

72. For the years under appeal, TCA, section 958(3)(a)(v) placed an obligation on a taxpayer to discharge the correct liability to capital gains tax on most disposals within the year of assessment even if "*an assessment has not been made on the chargeable person for the year of assessment".* However in relation to forced sales of an asset by an "*accountable person*", TCA, section 571(5) explicitly states that:

    "notwithstanding any provision of the Capital Gains Tax Acts –

    (a) any referable capital gains tax in respect of any chargeable gains which accrue on the disposal shall be assessable on and recoverable from the accountable person"

73. Furthermore TCA, section 571(7) provides that:

    "<u>Notwithstanding</u> any provision of the Capital Gains Tax Acts …. the amount of referable capital gains tax …. which under this section is assessable on an accountable person in relation to a disposal, shall be recoverable by an assessment on the accountable person to income tax under Case IV of Schedule D for the year of assessment in which the

disposal occurred on an amount the income tax on which at the standard rate for that year of assessment is equal to the amount of the referable capital gains tax …" [Emphasis added]

74. The Respondent submitted that TCA, section 571 does not impose a charge to capital gains tax on the "*accountable person*" but places the responsibility to recover the tax from that person. Furthermore and in the absence of any statutory authority, the Respondent argued that it was not prevented from pursuing the Appellant for the collection of the tax. However I cannot accept such an argument without the express statutory mechanism that assesses and thereafter imposes the obligation on the Appellant to pay the "*referable capital gains tax"* on gains made on the disposal of assets governed by TCA, sections 537 and 571.

75. Furthermore, the primacy quality of the preposition *"notwithstanding*" in TCA, section 571(5) expressly requires the Respondent to assess and recover the "*referable capital gains tax"* solely from the Bank. It is also relevant that TCA, section 571(7) mandates that the tax "*shall be recoverable by an assessment on the accountable person".* I therefore agree with the Appellant that the combined effect of TCA, section 571(5) & (7) leaves no ambiguity and imposes the statutory obligation on the Respondent to assess and thereafter recover the "*referable capital gains tax"* from the Bank acting in its capacity as *"the accountable person".*

76. Moreover and as acknowledged by the Respondent, the Bank derived the proceeds of sale from the forced disposal of the Shares and therefore was in a position to discharge the "*referable capital gains tax"* on behalf of the Appellant.

77. It is also relevant that unlike the provisions in the Capital Acquisitions Tax Consolidation Act 2003, there is no provision in TCA, section 571 or indeed any other legislative provision opened by the Respondent that permits the Appellant to be pursued for a secondary liability to the capital gains tax on the forced sale of the Shares.

78. Therefore in this appeal, the Appellant sought to be relieved of the obligation to be assessed and more importantly to discharge the "*referable capital gains tax"* arising on the forced disposal of the Shares by the Bank. The presence of the words "*notwithstanding*" and "*shall*" in TCA, section 571(5) not only imposes the obligation on the Respondent to raise an assessment on the Bank but also the obligation to recover the tax from the Bank.

79. On this basis and "*Notwithstanding any provision of the Capital Gains Tax Acts",* it is incumbent on the Respondent to raise Case IV assessments on the Bank and to pursue that entity for the "*referable capital gains tax"* arsing on the forced disposal of the Shares in respect the years 2008, 2010 and 2011 pursuant to TCA, section 571(7). It is therefore a

decision for the Bank whether it intends to pursue the Appellant for the reimbursement of the "*referable capital gains tax"* in accordance with the contractual undertakings specified in the pledge agreements.

Determination

80. Where a security is enforced resulting in the disposal of an asset, a charge to capital gains tax applies under TCA, section 28(1), 29(2), 31 and 537(2) to the debtor and not to the creditor who enforced the security. However as agreed by the parties, the matter for consideration in this appeal is the identification of the person to be assessed and pursued for the collection of the "*referable capital gains tax"* pursuant to TCA, section 571.

81. In this regard, TCA, section 571(5) mandates that that the "*referable capital gains tax"* arising from a forced sale by the Bank of the Shares "*shall be assessable*" and recoverable solely from the Bank. Furthermore, TCA, section 571(7) imposes the obligation on the Respondent to raise assessments to capital gains solely on the Bank acting as the "*accountable person*" for the years 2008, 2010 and 2011 and thereafter seek to recover that tax solely from the Bank. Therefore in the event of a forced sale falling within the provisions of TCA, section 571 and *"notwithstanding any provision of the Capital Gains Tax Acts"*, the responsibility to be assessed and to account for the "*referable capital gains tax"* moved from the Appellant to the Bank.

82. In this regard and in accordance with TCA, section 949AK, the amended assessments raised on the Appellant in respect of the years 2008, 2010 and 2011 should be reduced to nil.

Conor Kennedy
Appeal Commissioner
21st May 2021

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 Taxes Consolidation Act 1997.