AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

127TACD2022

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeal Commission ("the Commission") pursuant to sections 933 and 945 of the Taxes Consolidation Act 1997, as amended ("TCA 1997") by [redacted] ("the Appellant") against an assessment made by the Revenue Commissioners ("the Respondent") to capital gains tax ("CGT") in the amount of €348,112, and against an alternative assessment made by the Respondent to income tax in the amount of €673,866.

2. Both assessments arise out of the same transaction, concerning the transfer of shares valued at €1,395.002 by the Appellant and his wife in 2011. The Appellant contends that the transactions should attract relief under the TCA 1997.

3. The appeal proceeded by way of a hearing on 21 June 2022.

Background

4. The Appellant, with his wife , founded a building company, in the early 1990s. The Appellant owned 11 ordinary shares of the

capital of [redacted] and his wife owned one share. The total issued share capital was 12 ordinary shares.

5. In 2011, the Appellant carried out the following transaction ("the transaction"):

   (i) On 1 November 2011, the Appellant's son, [redacted], incorporated a company 100% owned by him, [redacted] for the purpose of acquiring the share capital in [redacted]

   (ii) On 29 November 2011, the Appellant sold six of his shares in [redacted] to [redacted] for €700,000.

   (iii) Also on 29 November 2011, the Appellant sold his remaining five shares in [redacted] the consideration being five additional shares in [redacted] for a value of €583,335, and his wife sold her one share in [redacted] the consideration being one additional share in [redacted] for a value of €111,667.

6. The Appellant failed to disclose these transactions in his income tax return for 2011. In his income tax return for 2013, the Appellant claimed retirement relief pursuant to section 598 of the TCA 1997 on his sale of six shares in [redacted] to [redacted] for €700,000. Additionally, he claimed relief pursuant to section 586 of the TCA 1997 (company amalgamations by exchange of shares) in the amount of €583,355 on the exchange of his five shares in [redacted] to [redacted]

7. On 4 December 2018, the Respondent issued a Notice of Assessment to CGT for 2011 to the Appellant in the amount of €348,112. On 5 December 2018, the Respondent issued a Notice of Amended Assessment to Income Tax for 2011 to the Appellant in the amount of €673,866.

8. On 21 December 2018, the Appellant appealed the assessments to the Commission.

9. The Appellant had originally appealed additional assessments in relation to rental income, and had raised objections regarding the timing of the relevant assessments, but the Appellant's counsel confirmed at the hearing herein that those aspects of the appeal were withdrawn.

Legislation and Guidelines

10. Section 584(3) of the TCA 1997 states that

> *"Subject to subsections (4) to (9), a reorganisation or reduction of a company's share capital shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it; but the original shares (taken as a single*

asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired."

11. Section 586 of the TCA provides *inter alia* that

"

(1) Subject to section 587, where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, section 584 shall apply with any necessary modifications as if the 2 companies were the same company and the exchange were a reorganisation of its share capital.

[…]

(3)(b) This section shall not apply to the issue by a company of shares in the company by means of an exchange referred to in subsection (1) unless it is shown that the exchange is effected for bona fide commercial reasons and does not form part of any arrangement or scheme of which the main purpose or one of the main purposes is avoidance of liability to tax."

12. Section 598 of the TCA 1997 provides *inter alia* that

"(2)(a) Subject to this section, where an individual who has attained the age of 55 years disposes of the whole or part of his or her qualifying assets, then –

(i) if the amount of value of the consideration for the disposal does not exceed €750,000, relief shall be given in respect of the full amount of capital gains tax chargeable on any gain accruing on the disposal;

[…]

(8) This section shall not apply to a disposal of qualifying assets unless it is shown that the disposal is made for bona fide commercial reasons and does not form part of any arrangement or scheme of which the main purpose or one of the main purposes is the avoidance of liability to tax."

13. Section 817 of the TCA 1997 provides *inter alia* that

"

(1)(c) For the purpose of this section, the interest of a shareholder in a trade or business shall not be significantly reduced following a disposal of shares, or the carrying out of a scheme or arrangement of which the disposal of shares is a part, only if at any time after the disposal, the percentage of –

(i) *the ordinary share capital of the close company carrying on the trade or business at such time which is beneficially owned by the shareholder at such time,*

(ii) *any profits, which are available for distribution to equity holders, of the close company carrying on the trade or business at such time to which the shareholder is beneficially entitled at such time, or*

any assets, available for distribution to equity holders in a winding up, of the close company carrying on the trade or business at such time to which the shareholder would be beneficially entitled at such time on a winding up of the close company, is not significantly less than the percentage of that ordinary share capital or those profits or assets, as the case may be, of the close company carrying on the trade or business at any time before the disposal –

(I) which the shareholder beneficially owned, or

(II) to which the shareholder was beneficially entitled …

[…]

(1)(ca) For the purposes of this section, following a disposal of shares in a close company by a shareholder of the carrying out of a scheme or arrangement of which the disposal is a part, the interest of the shareholder in any trade or business which was carried on by the close company shall be deemed-

(i) To include the interest, or interests as the case may be, in that trade or business of one or more persons connected with the shareholder, if increasing that interest of the shareholder by such interest, or interests as the case may be, would result in the interest of the shareholder in the trade or business not having been significantly reduced…

[…]

(2) This section shall apply for the purpose of counteracting any scheme or arrangement undertaken or arranged by a close company, or to which the close company is a party, being a scheme or arrangement the purpose of which, or one of the purposes of which, is to secure that any shareholder in the close company avoids or reduces a charge or assessment to income tax under Schedule F by directly or indirectly extracting, or enabling such extracting of, either or both money and money's worth from the close company, for the benefit of the shareholder,

without the close company paying a dividend, or (apart from subsection (4)) making a distribution, chargeable to tax under Schedule F.

(3) Subject to subsection (7), this section shall apply to a disposal of shares in a close company by a shareholder if, following the disposal or the carrying out of a scheme or arrangement of which the disposal is a part, the interest of the shareholder in any trade or business (in this subsection referred to as "the specified business") which was carried on by the close company at the time of the disposal, whether or not the specified business continues to be carried on by the close company after the disposal, is not significantly reduced.

[…]

(7) This section shall not apply as respects a disposal of shares in a close company by a shareholder where it is shown…that the disposal was made for bona fide commercial reasons and not as part of a scheme or arrangement the purpose or one of the purposes of which was the avoidance of tax."

14. The Respondent's Tax and Duty Manual Part 19-06-03, last reviewed March 2022, states at para. 3.1

"Section 598 relief is commonly referred to as retirement relief, however, a taxpayer does not have to retire (in the popular sense of the word) in order to qualify for this relief; he or she has merely to dispose, by way of sale or gift, of qualifying assets on or after the date on which he or she attains the age of 55 years. Differing levels of relief are granted to individuals who are 66 years or over when they make a disposal."

Submissions

15. At the oral hearing the Commissioner heard evidence from witnesses for the Appellant and the Respondent as well as submissions from counsel for the Appellant and for the Respondent.

Appellant's Evidence

[redacted] ("the Appellant")

16. The Appellant gave the following evidence:

17. He stated that he was [redacted] years old. He had spent 20 or 30 years working for a [redacted] building company, and in 1980 had become contracts director. In 1990, the company closed down and the Appellant set up [redacted] He mostly did contract work for local

authorities and councils. For the first five to seven years, the Appellant carried out all the site visits, and worked long hours when required.

18. Around 1997, the Appellant's son [redacted] ("the Appellant's son") started working for [redacted] as right-hand man to the foreman. When the foreman retired around 2004 or 2005, the Appellant's son took over as foreman. The Appellant was still in charge of [redacted] but his son handled more of the meetings with clients.

19. Around 2007, the Appellant was [redacted] and his health was declining. He suffered from diabetes which affected his sight as well as his general health. As a result he was not able to continue to work at the same rate and he was trying to get his son "*to run the show*" to allow him (i.e. the Appellant) to retire. The Appellant's son's wife, [redacted] was also acting as [redacted] office secretary, which reduced the administrative burden for the Appellant.

20. By 2011, the Appellant's son was running the business and the Appellant decided to retire. He spoke to his accountant about the best way to go about it. One of the options was to liquidate [redacted] but the Appellant did not want to do this as there were a number of employees working for the company. While the recession at that time was difficult for [redacted] the Appellant believed that it was still solvent and viable although "*we were subsidising it a bit.*"

21. As he did not want to liquidate [redacted] the Appellant stated that "*I just continued but at a much slower pace.*" He decided to enter into the transaction to reduce his shareholding in [redacted] which would allow his son [redacted] to take over the business and let him retire. The Appellant has three other children and was anxious that provision would be made for them to also get some of the proceeds of [redacted] this was the reason for him retaining a shareholding in the company. He stated that he retained 51% of the shares; the Commissioner considers that the Appellant's evidence was rather confused on this point, and based on the evidence of his son, set out below, and the positions of the parties, he is satisfied that the Appellant, together with his wife, retained 50% of the shares in [redacted] following the transaction.

22. The Appellant stated that he acted as a mentor for his son following his retirement in 2011. He accepted that he continued as a director of [redacted] and that he signed the annual accounts: "*I signed everything they came in, sure I signed, I'd the postman coming in the door, anything that came in was signed by me because I was on hand to do it…* [redacted] *was out on a site and I was in the office we'll call it*." The office was in the Appellant's home, which he stated was originally set up there for "*the convenience of it*." He agreed that he continued to sign cheques, and stated that he would do this when his son was unavailable.

23. After 2011, the Appellant stated that he went onsite a few times but only because his son had asked him to provide his opinion on something. He stated that he rarely left the house due to his health. He stated that his involvement with [redacted] continued to only consist of being a mentor to his son.

24. On cross-examination, the Appellant agreed that he and his wife had been and continued to be the only directors of [redacted] He agreed that when one retires, they normally hand over the mantle of the business to another person. He was asked why he had continued, with his wife, to be the sole directors of [redacted]

    A. I can't come up with a proper reason except that we were handing over and we went, but it wasn't a cut and dried, like it just continued, but the handover was

    [Appellant's counsel]: Sorry, could you say that again, [redacted]

    A. The handover wasn't cut and dried.

    [Respondent's counsel]: I'm sorry, what do you mean by that?

    A. Well I mean, for instance, if I was doing it up to Thursday say, I wouldn't cut him off the following week and say, I'm not going to do it of a Thursday any more. I mean, there was more to the hand over than just that.

    Q. Well, I suppose let's go back?

    A. I only mean I was trying to help.

25. The Appellant was asked why, given that his son was now around [redacted] years old, he had not been made a director of [redacted] He stated that his son was running the business and that there was no particular reason he was not a director. He was asked why he retained a shareholding in [redacted] [as stated above, the Commissioner is satisfied that the Appellant and his wife retained 50%, via [redacted] rather than 51%]:

    Q. And why was it your understanding that 51% was held back?

    A. Just to make sure that the control wasn't changed, or anything.

    Q. So that you still had control of the company, is that right?

    A. No, no, but I would be listened to more. I mean, if I had an upset I wouldn't let the company go just like that if [redacted] *decided to go AWOL and go off somewhere. I didn't want anything like that to happen. That's why it was the 51% for a while.*

    […]

Q. But isn't it fair to say, and I think you've been quite fair in your evidence, you wanted to retain control of the company, isn't that right?

A. Well, I wouldn't say control of it but I didn't want anything to happen to it.

Q. Well the only way you could prevent anything from happening to it would be to control it, isn't that right?

A. Maybe

26. The Appellant agreed that [redacted] was incorporated in 2011 and was a holding company, and that the trading company was [redacted] He agreed that his wife and his son were directors of [redacted] which was 50% owned by his son and 50% owned by the Appellant and his wife.

27. The Appellant accepted that he had attended an audit meeting with the Respondent in 2018 on behalf of [redacted] together with his accountant and his son's wife, in respect of the year 2016, but stated that he could not remember why he had attended. He stated that his son was not available and had been on site, but agreed that his son could have organised the meeting for a time that suited him to attend. When it was put to him that he was still in charge of strategic matters, he replied, "*Not really, not really now, it wasn't quite like that at all. But what it would be was, I was there and wasn't going anywhere. So, if they were asking questions I would have been answering them as best I could.*"

28. The Appellant agreed that he and his wife had continued to take salaries from [redacted] after 2011, in total approximating €150,000 between 2011 and 2013. He accepted that he was not paid for his shares until 2013, and suggested that this "*might have something to do with leaving in a balance in the bank account for the bonds and stuff.*" He also stated that "*The money* [i.e. [redacted] financial position] *must have been tight or I wouldn't have left the money in the account*."

29. The Appellant was asked about a statement that he had allegedly made to the Respondent's inspector at an audit meeting, to the effect that "*nothing had changed*" in terms of his role in [redacted] post-2011. The Appellant called it a "*mean quote*" and contended that it had been taken out of context.

30. It was put to the Appellant that his salary from [redacted] was reduced after he received the payment of €700,000 in 2013, and that this was because he saw the €700,000 as effectively being paid to him in respect of his services. He stated he had no comment to make "*to be honest with you because I don't remember much of that but I'll take your word for it.*"

31. He accepted that he had delisted himself as an employee of [redacted] following the meeting with the Respondent in 2018. He also agreed that he had had a director's loan from [redacted] that he had discharged following the 2018 meeting. He was asked about his involvement in 2019 and 2020 in [redacted] paying €852,298 to the Respondent, and it was suggested that he had dealt with this matter notwithstanding his claim to be retired. He accepted that he had written a letter about the matter to the Respondent in January 2020, and had appointed agents to act on [redacted] behalf in 2019.

32. The Appellant agreed that he owned a house in [redacted] Dublin, and stated that he did not know why [redacted] had discharged utility bills for the house in 2016. He also did not know why [redacted] had discharged a parking ticket by way of cheque signed by him in November 2016. He accepted that he had signed cheques for subcontractors in 2016, but denied that this meant he controlled the finances of [redacted] However he accepted that he and his wife had given directions in October 2018 to [redacted] bank to transfer large sums of money between accounts. He also accepted that he had authorised his son's wife to discuss payroll issues with the Respondent in November 2020.

33. On re-examination, the Appellant agreed that the disclosure to the Respondent concerned the years 2004 – 2011 and stated that there was nobody else in [redacted] who could have engaged with the Respondent as a result. He stated that he had paid personal expenses through the director's loan provided to him by [redacted] He stated that the meeting with the Respondent in 2018, concerning the audit of [redacted] could not have gone on without his son's wife as she had relevant information that he would not have had to hand.

34. Regarding the comment that "*nothing had changed*" in the Appellant's involvement in [redacted] since 2011 (which it was contended had occurred at a meeting with the Respondent regarding the Appellant's personal tax affairs, not [redacted] the Appellant stated that it had arisen out of a general conversation: "*Sure, we were talking about football before that, or hurling.*" He agreed that they had asked about his son taking over [redacted] "*Well they might have mentioned that all right, yes and that's where I said there wasn't any great changes, but I probably got that wrong*."

[redacted] ("the Appellant's son")

35. The Appellant's son gave the following evidence:

36. He has been working for [redacted] (the trading name of [redacted] for 25 years. He started in 1997 as an assistant to the main foreman. His wife started a year later in the office, helping the Appellant with accounts and administrative matters. When the main foreman retired in 2005, the Appellant's son became contract manager, which involved

site visits, talking to the foremen, going to meetings and getting more involved with the Appellant "*at the office level*".

37. Around 2007, the Appellant was still going to meetings but due to his health he was starting to slow down. So the Appellant's son would go to some meetings in place of his father. In 2011, the Appellant was moving towards retirement. One of the options was to liquidate [redacted] but the Appellant's son was keen to keep the company going, and in order to do this it was necessary for him to be given control.

38. The Appellant's son confirmed that [redacted] was incorporated around this time, and stated that he and his mother (i.e. the Appellant's wife) were shareholders and directors. The Appellant was also a shareholder in [redacted] [redacted] owned [redacted] in full, so in his view, there was no need for him to be made a director of [redacted] He did not agree that the Appellant had control of [redacted] *"[The Appellant] had no hand in the day-to-day or control of the business*." He stated that he (i.e. the Appellant's son) made all the decisions on tendering and would go to all the meetings. He stated that he would ask the Appellant for advice, and that the Appellant loved the business; "*It was his main interest in life was work*."

39. He stated that the office was kept in the Appellant's house for cost and convenience reasons. He stated that there would be occasions when the Appellant would sign cheques, but that he was not involved in the administration of the company post 2011/2012. He stated that the Appellant was incorrect to say that he held 51% of the shares in [redacted] and that the correct figure was 50%.

40. The Appellant's son believed that [redacted] was viable in 2011, given that there were shareholders' funds of €1.2 million available. He stated that builders would have to raise a bond in order to get a job, and it was necessary to have money in the bank before raising the bond. He believed that the reason the payment of €700,000 was not made to the Appellant until 2013 was because there would have been concern in 2011 and 2012 as to whether or not the bonds could be supported.

41. The Appellant's son agreed with the Appellant that [redacted] work post-2011 was predominantly for public sector bodies and authorities. He stated that the work changed from building schemes of houses to doing renovations. He stated that he believed there was zero impact from the Appellant being director of [redacted]

42. On cross-examination, the Appellant's son accepted that in principle a director would have control of a company. But he stated that, in terms of [redacted] the Appellant was "*a paper Director maybe…[the Appellant] had retired and wasn't doing any of the day-to-day*." He accepted that the Appellant and the Appellant's wife were directors of [redacted] and signed the

company accounts, and that he (i.e. the Appellant's son) did not sign the company accounts. When asked why he was never made a director of [redacted] he stated "*I don't know, I didn't think it was an issue."*

43. The Appellant's son contended that he had day-to-day control of [redacted] although he accepted that he was an employee of the company, rather than a director. He accepted that his parents, as directors, had control of the company and that he was answerable to them. When asked about the audit meeting with the Respondent, he denied "*leaving it to [the Appellant]*" and stated that he knew his wife (i.e. [redacted]) had the figures and that this was what the Respondent was going to discuss; "*Well if anything,* [redacted] *does the accounts.* [redacted] *would have been the main person sort of to deal with that. She would have been there for the company*." He accepted that in hindsight he should have attended the meeting.

44. The Appellant's son denied that the Appellant remained the point of contact for [redacted] When asked why the Appellant's name and contact details were still on www.constructionireland.ie and www.nationalguild.ie, he stated that they should not have been but that "*I wouldn't really make a big deal out of that. None of our business ever comes through those advertising sites*."

45. He agreed that the payment of €700,000 was not made in 2011 because it would not have been in the interests of the company, and stated that it was not done because liquidity was a problem at the time. He agreed that the company would not be given a bond if there were no cash reserves to show the bank. He understood that the payment was made in 2013, and when asked if he had any role or function in that, he stated:

    A. No, I just knew it was

    Q. No, because you didn't have any control over [redacted]*?*

    A. Well I just knew it was being made, you know, between the accountant and

    Q. You were informed that it was happening?

    A. Well, I didn't say, we'll make it now, or anything like that.

    Q. Oh no, because it was your father's call?

    A. Well, it was part of the retirement package, okay, so I will admit that, that was going on at that time.

    Q. Well, it was your father's call to pay the monies at that point in time, isn't that right?

A. It may have been, yeah.

46. When asked about the payments of salaries to the Appellant and the Appellant's wife, the Appellant's son said that these were directors' salaries, although he agreed that he had stated that they did not really do anything as directors. He agreed that, as the Appellant and the Appellant's wife held 50% of the shares and were the company directors, they could make the decision to pay themselves salaries. He did not accept counsel's suggestion that the Appellant's share purchase was in fact remuneration.

47. The Appellant's son was questioned by the Commissioner about the signing of cheques. He stated that he signed about three or four cheques a week. He agreed that there would have been many more cheques to sign in 2011 and 2012. He stated that he signed them then as well but that the Appellant would sign "*if there was a cheque that had to be pushed out.*"

Appellant's Submissions

48. Counsel for the Appellant stated that it was the Appellant's case that he satisfied the requirements for retirement relief set out in section 598 of the TCA 1997, that the transaction as a whole was made for bona fide commercial reasons and was not one of which the main purpose was to avoid a liability to tax.

49. She stated that there were two steps to the transaction. In relation to the cash consideration, [redacted] purchased six shares in [redacted] from the Appellant for €700,000. In relation to the share-for-share part of the transaction, the Appellant swapped his remaining five shares in [redacted] for five shares in [redacted] and the Appellant's wife swapped her one share in [redacted] for one share in [redacted] Therefore [redacted] became the 100% owner of [redacted] The directors of [redacted] were the Appellant's son and the Appellant's wife, and the directors of [redacted] remained the Appellant and his wife.

50. Counsel stated that there was no requirement in the legislation that the Appellant had to retire as a director of [redacted] and furthermore there was no requirement that he had to retire in order to avail of relief. She referred to a previous decision of the Commission, 22TACD2017, which concerned different statutory provisions but which she stated was helpful in putting in context the nature of the application of retirement relief. She submitted that it showed there was no bar on the Appellant not reducing his shareholding if he could satisfy the bona fide commercial test. She also drew attention to the Commissioner's finding in that case that it was not necessary to cease being a director in order to satisfy the requirements for relief.

51. Counsel referred the Commissioner to *Revenue Commissioners v Doorley* [1933] IR 50 and to *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60. She also referred to *Commissioners of Inland Revenue v Brebner* [1967] 2 AC 18, where Lord Upjohn held that

> *"Where there are two ways of carrying out a genuine commercial transaction, one by paying the maximum amount of tax, and the other by paying less, it would be wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects was, for the purposes of the section, avoidance of tax."*

She submitted that it cannot be inferred from the Appellant availing of relief that he was seeking to avoid tax.

52. Regarding the alternative assessment raised by the Respondent under section 817 of the TCA 1997, she contended that the test was consistent with those under sections 584/586 and 598, and she submitted that the transaction in question was governed by those sections. She contended that the transaction was carried out for bona fide commercial reasons because the Appellant was [redacted] years old in 2011 and in ill health, and was not in a position to continue the business as he had done. She stated that the Appellant's son was the natural successor and that retirement relief facilitates a natural successor taking over a business and allowing the original proponent of the business to retire.

53. She stated that the Appellant's son's evidence was clear that he, rather than the Appellant, had day-to-day control of the company. She stated that both the Appellant and the Appellant's son were clear that the succession was gradual and that both see the Appellant as a mentor to his son. She stated that the Appellant's son was a director of [redacted] and held a 50% shareholding in [redacted] and therefore the evidence was that the question of why he had not been appointed a director in [redacted] had never arisen.

54. Regarding the section 817 assessment, she stated that in order to uphold this assessment the Commissioner would need to find that the transaction was nothing but a cash extraction and that this would require disregarding all of the evidence of the Appellant and his son about the future of the company and the reasons for the transaction. She submitted that such findings would be extreme based on the evidence heard.

Respondent's Evidence

[redacted]

55. Mr [redacted] gave the following evidence:

56. He is a Principal Officer of the National Anti-Avoidance, Branch One, in Large Cases – High Wealth Individuals Division of the Respondent.

57. He attended a meeting with the Appellant on 16 May 2018. The Appellant had been notified in advance that it was in relation to an audit and of the tax heads under consideration, but not the specific reason for the meeting. He stated that, along with a colleague from the Respondent, the Appellant, his accountant and the Appellant's son's wife were present.

58. Mr [redacted] stated that the primary purpose of the meeting was to inquire into the transaction that was the subject of this appeal. He denied that he had asked general questions of the Appellant, and stated that they were very specific questions about his role in the business. He stated that he asked the Appellant about the difference between the business in 2011 compared to 2018, and that the Appellant responded that nothing had changed.

59. He stated that the Appellant admitted signing cheques and tenders. He stated that the Appellant said that the purpose of the payment of €700,000 was to be a pension for him. He stated that the receipts and invoices for personal payments to the Appellant made by [redacted] were provided in the books and records for [redacted] which was under audit for the year 2016.

60. Regarding the director's salary paid to the Appellant, Mr [redacted] stated that, in his experience, "*99, if not a hundred percent of small companies*" do not distinguish between employee pay and remuneration pay for directors. When asked why he did not believe that the bona fide commercial test had been met in this instance, he stated

> *Primarily the individual stayed on as an employee post the alleged retirement or sale of shares. He never appointed another Director in the company. His wife* [redacted] *stayed on as an employee until the present day, or up to that point in 2018 at the time of making the assessment. There was no real explanation as to a change of ownership. I couldn't see anything material looking at the ERTC records, which we've furnished today and updated, there was no establishing of that. The individual signed cheques. He represented himself at a* [redacted] *Audit, which is, in my experience, unusual for somebody, who has stepped back from the business. There is admission of signing tenders. And there was quotes said to me in a meeting on the day about 'nothing has changed', 'a bit of a pension for himself'. So from looking at all that it appeared to me that this was not a bona fide commercial reason.*

61. Mr [redacted] stated that he believed an inconsistent narrative was being put forward regarding the financial standing of [redacted] in 2011, as he could not reconcile the contention that the future was uncertain in 2011 with the decision to make the payment of €700,000. He stated that the delay in payment until 2013 confirmed his suspicion that in 2011 the company did not have the funds to make the payment, and that it implied that the Appellant

was going to stay on in a capacity to authorise the payment. He stated that, given the drop in director's salary after the payment was made in 2013, "*one could form a view that there's a connection between the dropping of salary and income substitution in the form of taking 700,000 from the company*."

62. On cross examination, it was put to Mr [redacted] that he had failed to ask the Appellant at the meeting in 2018 about wider aspects of the day-to-day running of [redacted] apart from the signing of cheques and tenders. He replied that he established sufficient information for the purpose of the meeting. He stated that when the Appellant told him that nothing changed post-2011, "*the need then to ask further questions to establish the fact that nothing changed dropped off*."

63. Mr [redacted] agreed that the Respondent's position on retirement relief was that one does not have to actually retire. When asked why the Respondent was so concerned that the Appellant had not retired, he stated that it formed part of the "*basket of evidence*" to establish that the transaction was not for bona fide commercial reasons. He also accepted that the legislation did not require someone to retire as a director.

64. Regarding the audit meeting of 2018, it was put to Mr [redacted] that the Appellant had attended because it concerned a disclosure from before he had retired in 2011. He replied that, "*I think it's surprising that an individual, who has retired eight years ago allegedly, is the person who is authorising the payment of nearly a million euros and is the person representing the company on a tax liability of, as you said 2004 to 2011, it's an unusual set of circumstances*."

Respondent's Submissions

65. Counsel for the Respondent stated that the practice of alternative assessments was accepted in circumstances where it is possible that two alternative positions could be adopted, and he stated that it was a matter for the Commissioner to decide which assessment to uphold, if any. However, he submitted that the section 817 assessment for income tax should be considered first, before if necessary considering the CGT assessment under sections 584/586 and 598.

66. Counsel stated that section 817 was an anti-avoidance measure introduced to prevent proprietors of close companies from taking monies out of companies under the guise of capital transactions where it ought rightly to be considered as a Schedule F distribution subject to income tax. He stated that the Appellant fell within the scope of section 817 subject to the saving subsection (7), and that the Commissioner would therefore have to consider if the transaction in question was a bona fide commercial transaction, having

regard to the evidence heard. The Commissioner would also have to consider if the transaction was part of a scheme or arrangement the purpose or one of the purposes of which was the avoidance of tax. Counsel submitted that this was a greater hurdle for the Appellant to get over compared to the equivalent provisions in sections 586 and 598, which referred to the main purpose or one of the main purposes being the avoidance of tax.

67. In respect of whether the transaction was made for bona fide commercial reasons, counsel submitted that the evidence suggested that when the transaction was entered into in 2011, [redacted] was not in a financial position to enter into such a transaction. Consequently, there was a deferral in the payment until 2013. Counsel submitted that this demonstrated that the transaction was not in the interests of the company because it was not in a position to fulfil its side of the agreement.

68. It was further submitted that the transaction was not in the interests of the company in 2013, because the evidence demonstrated that the Appellant never relinquished control of [redacted] he continued with his wife as sole directors of [redacted] and the Appellant's son continued as an employee of [redacted] Counsel argued that the company gained nothing from paying €700,000 to the Appellant, as the position regarding control and the Appellant's son's employment status continued unchanged.

69. Regarding sections 586 and 598, counsel submitted that for similar reasons the transaction was not made for bona fide commercial reasons and that it had a main purpose of avoiding liability to CGT.

70. In response to the Appellant's reliance on 22TACD2017, counsel stated the facts between the two cases were very different. In that case, the appellant had been left with a shareholding of 30% which he intended to divest within six years; he had ceased taking a salary from the company; while he remained as chairperson, he was one of a number of directors and did not have control of the company; there was no question about the company's ability to pay the amount for the appellant's shares to him and the monies were paid over on the date of the transaction.

71. Counsel referred the Commissioner to *Snell v HMRC* [2006] EWHC 3350 (Ch). He also referred to *Commissioners of Inland Revenue v Brebner* which had been relied upon by counsel for the Appellant. He drew attention to the *dictum* of Lord Upjohn, on p. 30, that

> *"…the question whether one of the main objects is to obtain a tax advantage is subjective, that is, a matter of the intention of the parties…"*

Counsel stated that this was something the Commissioner would need to consider in the context of the evidence heard.

Material Facts

72. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

    71.1 The Appellant received payment of €700,000 for his six shares in [redacted] in 2013. [redacted] believed that it would not have been in its interests to make the payment in 2011.

    71.2 The Appellant retained effective control of [redacted] post-2011, through his 50% shareholding (with his wife) of [redacted] which owned 100% of [redacted] and through him and his wife remaining sole directors of [redacted]

    71.3 In particular, the Appellant retained financial and strategic control of [redacted]

    71.4 The Appellant reduced but did not cease his day-to-day involvement with [redacted] post-2011.

Analysis

73. In the High Court case of Menolly Homes Ltd v. Appeal Commissioners [2010] IEHC 49, Charleton J. stated at para. 22: *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable."*

74. Section 584 and 586 of the TCA 1997 provide that a share-for-share exchange shall not be treated as a disposal but as a reorganisation of share capital. Section 598 of the TCA 1997 provides for relief from CGT on the disposal of all or part of the chargeable business assets from an individual's business by way of retirement relief. Section 586(3)(b) and section 598(8) provide similar anti-avoidance measures, so that the relevant relief is not unavailable unless it is shown that the transaction is (1) made for bona fide commercial reasons and (2) does not form part of any scheme or arrangement of which the main purpose or one of the main purposes is avoidance of liability to tax.

75. Section 817 of the TCA 1997 is an anti-avoidance measure to counteract schemes to avoid liability to income tax in close companies. Section 817(7) provides that section 817 will not apply where (1) the disposal was made for bona fide commercial reasons and (2) not as part of a scheme or arrangement the purpose or one of the purposes of which was the avoidance of tax.

76. The Respondent raised alternative assessments against the Appellant, in respect of CGT under sections 584 and 586, and in respect of income tax under section 817. It was not disputed by the Appellant that the Respondent was entitled in law to raise alternative assessments. It was accepted by the Respondent that it was for the Commissioner to determine which, if either, of the assessments should be upheld, and it was further accepted that the Respondent could not recover on foot of both assessments.

77. The Commissioner considers that the appropriate way to proceed is to consider one of the assessments first. If he determines that this assessment should be upheld, then he does not need to proceed to consider the other assessment. However, if he finds that the first assessment should not be upheld, then he should consider the alternative assessment.

78. Therefore, the first question to determine is which assessment should be considered first. The Commissioner notes that the assessment under sections 584 and 586 to CGT was raised first (4 December 2018 compared to 5 December 2018 under section 817). Additionally, he considers that the transaction in question was, at the very least, *prima facie* a capital transaction. Therefore, the Commissioner is satisfied that it is appropriate to consider the CGT assessment first, before if necessary proceeding to consider the income tax assessment.

Assessment to CGT

79. The Appellant contended that the transaction in 2011 was made for bona fide commercial reasons as he wanted to retire from the company, and that the transaction allowed him to do this while preserving the company as an ongoing concern, as well as maintaining an interest for his three children who were not involved in the company. The Respondent denied that the transaction was made for bona fide commercial reasons as it contended that the Appellant continued to have an active role in the running and operation of the company and did not demonstrate that he was passing the business on to his son.

80. Both parties referred the Commissioner to *Commissioners of Inland Revenue v Brebner* [1967] 2 AC 18. In that case, the House of Lords held that the question of whether a transaction was made for bona fide commercial reasons "*was one of pure fact*".

81. In this instance, the Commissioner notes that, following the transaction in 2011, the Appellant's son owned 50% of [redacted] the Appellant owned 41.67%, and the Appellant's wife owned 8.33%. [redacted] owned 100% of [redacted] which continued as the trading company. The Appellant's son and the Appellant's wife were the directors of [redacted] and the Appellant and his wife continued as directors of [redacted] The Commissioner understands that this continues to be the position to the current day.

82. The Commissioner is satisfied that the evidence demonstrated that the Appellant continued to retain effective control of [redacted] following the transaction in 2011. The Appellant accepted that he had retained a shareholding in [redacted] in order "*to make sure that the control wasn't changed, or anything.*" The Appellant's son also accepted on cross-examination that his parents, as directors of [redacted] had control of the company and that he was answerable to them. As sole directors of [redacted] the Appellant and his wife were responsible for signing the company accounts.

83. The Appellant's son contended that his father was "*a paper Director maybe*." However, the Commissioner is satisfied that the evidence demonstrated that the Appellant continued to exercise control of [redacted] at a financial and strategic level. In coming to this view, the Commissioner has had particular regard to the following evidence:

    i. The Appellant's son accepted that it had been the Appellant's decision to make the €700,000 payment to himself in 2013, and that he (i.e. the Appellant's son) had no role in that decision.

    ii. The Appellant accepted that he and his wife had given directions in October 2018 to [redacted] bank to close certain accounts and transfer large sums of money (over €1.5 million) between accounts.

    iii. The Appellant and his wife had continued to be paid salaries by [redacted] in total approximating €150,000 between 2011 and 2013. The Appellant contended that these were directors' remuneration whereas the Respondent submitted that they were paid to them *qua* employees. The Commissioner is of the view that there was insufficient evidence to form a view as to how these payments should be classified; however he considers that if they did constitute directors' remuneration, they suggest that the Appellant was significantly more than simply a "paper director".

    iv. The Appellant did not deny that [redacted] had discharged utility bills for his house in [redacted] in 2016, or that it had discharged a parking fine incurred by him (by way of a cheque signed by him).

    v. The Appellant had represented [redacted] in relation to the Respondent's audit of [redacted] in 2018-2020, which led to a payment by [redacted] to the Respondent of €852,298 in September 2019. He authorised his son's wife to discuss payroll issues with the Respondent in November 2020.

84. The Commissioner accepts the submission of the Appellant that it is not a requirement under the TCA 1997 that he cease to be a director in order to avail of relief. However, the Commissioner would expect that if the Appellant had genuinely wished to step back from

the business, he would have relinquished control to a much greater degree than the evidence suggested had occurred; indeed, it appeared to the Commissioner that there had been no effective relinquishing of control by the Appellant at a strategic and financial level. It was not clear to the Commissioner why the Appellant's son had not been made a director of [redacted] if the intention of the Appellant was to hand the business over to him. The Appellant's son was a director of [redacted] but this was simply a holding company; the trading company was [redacted]

85. The Commissioner considers it significant that the Appellant represented [redacted] (together with his accountant and his son's wife) in [redacted] dealings with the Respondent for the audit meeting in May 2018 and subsequently. The Commissioner accepts the Appellant's evidence that the disclosure to the Respondent concerned the years 2004 to 2011, i.e. before the Appellant's purported retirement. However, this was clearly a matter of importance to [redacted] and therefore the Commissioner considers it significant that the Appellant's son was not involved in the engagement with the Respondent. If the Appellant had retired from the business in 2011, one would not expect him to be so directly involved in the dealings with the Respondent seven years later.

86. The Commissioner considers that the evidence suggested that the Appellant did continue to have some day-to-day involvement in the business post-2011, albeit he accepts that this decreased over time. The Appellant accepted that he signed cheques on behalf of [redacted] he explained this on the basis that if someone was looking to be paid and he was available, why would he not do so? The Commissioner accepts this as far as it goes; however, he considers it significant that the company office continued to be in the Appellant's house. The Appellant's son's argument that this was done for convenience and cost reasons is understandable; however, the Commissioner considers that it further demonstrates that the Appellant had not fully stepped back from the business.

87. In particular, it is surprising that the Appellant continued to be the point of contact for [redacted] on www.constructionireland.ie and www.nationalguild.ie. The Appellant's son stated that [redacted] did not receive business through these sites. However, one would expect that someone who was retired from a business would not want to be listed as its principal contact on an industry website. The Commissioner notes that the Appellant continued to be listed on these websites as of the date of hearing, over ten years since he contended that he had stepped back from the business.

88. The Respondent put considerable significance on the comment of the Appellant at the audit meeting in 2018 that "nothing had changed" since the transaction in 2011. The Appellant accepted that he had made the statement but disputed the circumstances

surrounding it and denied that it meant that he had accepted that there had been no change in his involvement in the business. The Commissioner does not consider the statement to be of particular significance in itself; he accepts that the Appellant did decrease his day-to-day involvement in the business, but he is satisfied that there was sufficient evidence to demonstrate that the Appellant continued to exercise effective control of the business. The Commissioner considers that the statement, while not factually correct in terms of the day-to-day running of [redacted] may well have been indicative of the Appellant's state of mind in terms of his retaining control post-2011. Additionally, the Commissioner considers that the Appellant's expressed belief at the hearing that he retained 51% of the shareholding in [redacted] rather than the 50% stake held with his wife, was also factually incorrect, but also indicative of the Appellant's understanding of who had control of the company. The Appellant accepted on cross-examination that he did not want "*anything to happen*" to the company post-2011, and did not dispute counsel's suggestion that the only way to prevent such a scenario was to have control of it.

89. At this juncture, it should be noted that the Appellant does not in fact own 50% (or indeed 51%) of [redacted] by himself; rather, he owns 41.67% and his wife owns 8.33%. However, the Commissioner is satisfied that the evidence of both the Appellant and his son suggested that the Appellant effectively controlled 50% of [redacted] both spoke in terms of him having a 50% shareholding and there was no evidence to suggest that the Appellant's wife acted as a counterweight to him or provided an independent perspective on the business.

90. Furthermore, the Commissioner accepts the submission of the Respondent that the evidence demonstrated that the transaction was not in the bona fide best interests of [redacted] in 2011, because the money was not paid to the Appellant until 2013. Counsel for the Appellant stressed that the company had sufficient funds in 2011 to make the payment. However, both the Appellant and the Appellant's son accepted that [redacted] financial position was tight in 2011, and that it was necessary to have sufficient monies in the company bank accounts in order to be able to arrange bonds for tenders, and that this was the reason the monies were not paid until 2013.

91. Therefore, in all the circumstances, the Commissioner finds that the transaction in 2011 was not effected in order to enable the Appellant to retire from the business, as contended by him. The Commissioner finds that the Appellant continued to be involved in the day-to-day business of the company, albeit at a reduced level. More significantly, the Commissioner finds that the Appellant retained effective control of [redacted] and in particular retained financial and strategic control. Consequently, the Commissioner is satisfied that

the Appellant has not demonstrated that the transaction was carried out for bona fide commercial reasons.

92. As a result, the Commissioner is satisfied that the Appellant falls foul of the anti-avoidance provisions of sections 586(3)(b) and 598(8) of the TCA 1997, and that the assessment for CGT should be upheld. As it has been found that the transaction was not carried out for bona fide commercial reasons, it is not strictly necessary to consider the second limb of the relevant test, i.e. that the transaction did not form part of any scheme or arrangement of which the main purpose or one of the main purposes is avoidance of liability to tax. However, for the avoidance of doubt, the Commissioner finds that, given the transaction was not in the interests of [redacted] in 2011 and that the Appellant continued to effectively control the company afterwards, the transaction did form part of a scheme or arrangement of which the main purpose or one of the main purposes was avoidance of liability to tax.

93. As the Commissioner has found that the assessment to CGT should be upheld, it follows that it is not necessary to consider the alternative assessment to income tax.

Determination

94. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the assessment to capital gains tax for the year 2011 in the amount of €348,112 should stand.

95. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
20/07/2022