



78TACD2022

Between

[REDACTED]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“the TCA 1997”) by [REDACTED] (“the Appellant”) against a Notice of Assessment to Capital Gains Tax (“CGT”) raised by the Revenue Commissioners (“the Respondent”) in respect of [REDACTED] in the sum of €105,743.
2. On 6 June 2006, pursuant to a Court Order made on [REDACTED] under the Family Law (Divorce) Act 1996 (“the 1996 Act”), the deceased disposed of a property to an unrelated third party for the sum of [REDACTED]. The Appellant maintains that the Court Order was a Property Adjustment Order and consequently, there is no liability to CGT by reason of the provisions of section 1031(2) of the TCA 1997.
3. On 1 September 2014, the Appellant duly appealed to the Commission. The appeal proceeded by way of a hearing on 06 May 2022.

Background

4. On 27 April 2006, the Circuit Court, granted a [REDACTED] between the [REDACTED] pursuant to section 5(1) of the 1996 Act and various ancillary Orders ("the Order"). The Court granted *inter alia* the following ancillary Orders:-

"1. An Order that the property known as [REDACTED] be sold.

2. An Order that the Respondent pay to the Applicant the sum €700,000.00 regardless of the price received for the above property, with the balance of the proceeds of sale (net of costs of sale and tax liabilities) to be paid to the respondent.....

5. An order that the parties Solicitors hereto have joint carriage of sale....

11. An order that each party be responsible for their own tax:...."

5. On 6 June 2006, pursuant to Order 1 of the aforementioned Order, the deceased entered into a contract for the sale of [REDACTED] ("the property") with an unrelated third party, in the amount of [REDACTED]. The deceased's Solicitor sought a CG50 Certificate pursuant to section 980(8) of the TCA 1997 and the deceased was listed on the certificate as the sole vendor of the property.
6. On 2 August 2013, the Respondent raised an assessment to CGT in respect of the sale of the property, in the sum of €138,372. Following further representations, this amount was reduced and the CGT currently at issue is €105,743. The deceased did not file a return, as she maintained the effect of the Order was to transfer the beneficial interest in the property to the deceased's former spouse, who was responsible for the return and payment of any CGT liability.
7. The Appellant maintains that the deceased's estate has no liability to CGT by reason of section 1031(2) of the TCA 1997 and the consequence of the Order, was to divest the deceased's beneficial interest in the property, in her former spouse.
8. The Respondent maintains that the provisions of section 1031 of the TCA 1997 are clear and unambiguous and do not apply to the present circumstances. This is because the section requires an asset to be disposed of by one spouse to another spouse, which has not occurred. The deceased disposed of the property to an unrelated third party and not her former spouse. The Respondent maintains that the terms of the Order do not transfer the beneficial interest in the property, to the deceased's former spouse.
9. It is important to note that prior to the hearing of the substantive appeal, the Appellant argued that the Respondent was not permitted to raise the assessment, due to the

provisions of section 865 of the TCA 1997. The Respondent objected to the Appellant raising such an argument, as the Appellant had failed to include this as a ground of appeal in the Appellant's Notice of Appeal. The argument was dealt with as a preliminary matter and ventilated before Commissioner Cummins who determined the matter by consent under section 949U of the TCA 1997, in favour of the Respondent. Commissioner Cummins determined that *"....the statutory requirements of section 957(6) of the TCA 1997 have not been met that the Appellant shall not be entitled to reply on the additional grounds of appeal when the appeal on the substantive appeal is heard"*. Accordingly, this argument was not articulated nor is it dealt with by this determination.

Legislation and Guidelines

10. The legislation relevant to this appeal is as follows:

11. Section 532 of the TCA 1997, Assets, provides:-

"All forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not, including—

- (a) options, debts and incorporeal property generally,*
- (b) any currency other than Irish currency, and*
- (c) any form of property created by the person disposing of it, or otherwise becoming owned without being acquired"*

12. Section 534 of the TCA 1997, Disposal of Assets, provides:-

"For the purposes of the Capital Gains Tax Acts—

- (a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and*
- (b) there shall be a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and, generally, there shall be a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."*

13. Section 604 of the TCA 1997, Disposals of principal private residence, provides:-

(1) In this section, "the period of ownership"—

- (a) where the individual has had different interests at different times, shall be taken to begin from the first acquisition taken into account in determining the expenditure*

which under the Capital Gains Tax Acts is allowable as a deduction in computing the amount of the gain to which this section applies, and

(b) for the purposes of subsections (3) to (5), shall not include any period before the 6th day of April, 1974.

14. Section 980(8) of the TCA, Deduction from consideration on disposal of certain assets, provides:-

(a) A person chargeable to capital gains tax on the disposal of an asset to which this section applies, or another person (in this section referred to as an “agent”) acting under the authority of such person, may apply to the inspector for a certificate that tax should not be deducted from the consideration for the disposal of the asset and that the person acquiring the asset should not be required to give notice to the Revenue Commissioners in accordance with subsection (9)(a).

(b) If the inspector is satisfied that the person making the application is either the person making the disposal, or an agent, and that—

(i) the person making the disposal is resident in the State,

(ii) no amount of capital gains tax is payable in respect of the disposal, or

(iii) the capital gains tax chargeable for the year of assessment for which the person making the disposal is chargeable in respect of the disposal of the asset and the tax chargeable on any gain accruing in any earlier year of assessment (not being a year ending earlier than the 6th day of April, 1974) on a previous disposal of the asset has been paid,

the inspector shall issue the certificate to the person making the disposal or, as the case may be, the agent, and shall issue a copy of the certificate to the person acquiring the asset.

(c) Where an application is made under this subsection by an agent, it must include the name and address of the person making the disposal and where such person is resident in the State, that person’s tax reference number (within the meaning of section 885).

15. Section 1031 of the TCA 1997, Divorced persons: transfers of assets, provides:-

“(1) In this section, 'spouse' shall be construed in accordance with section 2(2)(c) of the Family Law (Divorce) Act, 1996.

(2) Notwithstanding any other provision of the Capital Gains Tax Acts, where by virtue or in consequence of an order made under Part III of the Family Law (Divorce) Act, 1996, on or following the granting of a decree of divorce, either of the spouses concerned disposes of an asset to the other spouse, then, subject to subsection (3), both spouses shall be treated for the purpose of the Capital Gains Tax Acts as if the asset was acquired from the spouse making the disposal for a consideration of such amount as would secure that on the disposal neither a gain nor a loss would accrue to the spouse making the disposal.

(3) Subsection (2) shall not apply if until the disposal the asset formed part of the trading stock of a trade carried on by the spouse making the disposal or if the asset is acquired as trading stock for the purposes of a trade carried on by the spouse acquiring the asset.

(4) Where subsection (2) applies in relation to a disposal of an asset by a spouse to the other spouse, then, in relation to a subsequent disposal of the asset (not being a disposal to which subsection (2) applies), the spouse making the disposal shall be treated for the purposes of the Capital Gains Tax Acts as if the other spouse's acquisition or provision of the asset had been his or her acquisition or provision of the asset.

16. Section 5 of the Family Law (Divorce) Act 1996, The Obtaining of a Decree of Divorce, provides:-

“(1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that—

(a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,

(b) there is no reasonable prospect of a reconciliation between the spouses, and

(c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family

the court may, in exercise of the jurisdiction conferred by Article 41.3.2 of the Constitution, grant a decree of divorce in respect of the marriage concerned.

(2) Upon the grant of a decree of divorce, the court may, where appropriate, give such directions under section 11 of the Act of 1964 as it considers proper regarding the welfare (within the meaning of that Act), custody of, or right of access to, any dependent member of the family concerned who is an infant (within the meaning of that Act) as if an application had been made to it in that behalf under that section.”

17. Section 14 of the Family Law (Divorce) Act 1996, Property Adjustment Orders, provides:-

(1) On granting a decree of divorce or at any time thereafter, the court, on application to it in that behalf by either of the spouses concerned or by a person on behalf of a dependent member of the family, may, during the lifetime of the other spouse or, as the case may be, the spouse concerned, make a property adjustment order, that is to say, an order providing for one or more of the following matters:

(a) the transfer by either of the spouses to the other spouse, to any dependent member of the family or to any other specified person for the benefit of such a member of specified property, being property to which the first-mentioned spouse is entitled either in possession or reversion,

(b) the settlement to the satisfaction of the court of specified property, being property to which either of the spouses is so entitled as aforesaid, for the benefit of the other spouse and of any dependent member of the family or of any or all of those persons,

(c) the variation for the benefit of either of the spouses and of any dependent member of the family or of any or all of those persons of any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the spouses,

(d) the extinguishment or reduction of the interest of either of the spouses under any such settlement.

(2) An order under paragraph (b), (c) or (d) may restrict to a specified extent or exclude the application of section 22 in relation to the order.

(3) If, after the grant of a decree of divorce, either of the spouses concerned remarries, the court shall not, by reference to that decree, make a property adjustment order in favour of that spouse.

(4) Where a property adjustment order is made in relation to land, a copy of the order certified to be a true copy by the registrar or clerk of the court concerned shall, as appropriate, be lodged by him or her in the Land Registry for registration pursuant to section 69 (1)(h) of the Registration of Title Act, 1964, in a register maintained under that Act or be registered in the Registry of Deeds.

(5) Where—

(a) a person is directed by an order under this section to execute a deed or other instrument in relation to land, and

(b) the person refuses or neglects to comply with the direction or, for any other reason, the court considers it necessary to do so,

the court may order another person to execute the deed or instrument in the name of the first-mentioned person; and a deed or other instrument executed by a person in the name of another person pursuant to an order under this subsection shall be as valid as if it had been executed by that other person.

(6) Any costs incurred in complying with a property adjustment order shall be borne, as the court may determine, by either of the spouses concerned, or by both of them in such proportions as the court may determine, and shall be so borne in such manner as the court may determine.

(7) This section shall not apply in relation to a family home in which, following the grant of a decree of divorce, either of the spouses concerned, having remarried, ordinarily resides with his or her spouse.

Submissions

18. Counsel for the parties confirmed that there were no witnesses to be called to give evidence in relation to this appeal and that it would be proceeding on the basis of legal submissions only. Counsel for the Respondent stated that the Appellant was not present at the hearing. However, Counsel for the Respondent confirmed that there was no objection to the hearing proceeding in his absence, but that the absence is noted by the Commissioner.

Appellant

19. Counsel for the Appellant made the following legal submissions:

- i. The deceased is not liable for the CGT liability arising in circumstances where she was divested of her beneficial interest in the property and there is no liability to CGT by reason of the provisions of section 1031 of the TCA 1997.
- ii. By way of background, the property was the family home of the deceased's father, which she acquired from him. On [REDACTED], the marriage of the deceased and [REDACTED] took place and on [REDACTED], a Decree of Divorce was granted in respect of the marriage. The deceased lived in the property after the separation, [REDACTED] and she remained there up until the disposal of the property.
- iii. The Appellant relies on paragraph 1, 2, 5 and 11 of the Order. As per ancillary Order 1, a contract of sale was entered into in June 2006 for the sale of the property in the sum of [REDACTED]. The deceased and her former spouse had joint carriage of the sale of the property.
- iv. There was no return made, as the effect of the Order was to divest the deceased of her interest in the property to her former spouse, who was responsible for making the return.
- v. The deceased died on [REDACTED] and the deceased had no opportunity herself to challenge the assessment to CGT. There were several other marital properties that do not form part of the Order and the Order was made with those properties in mind.
- vi. What took place here was a disposal of an asset between divorced persons. The meaning and intention of the legislation must be considered. Reference was made to section 1031 of the TCA 1997 which relates to the disposal of an asset to another spouse and to section 14 of the 1996 Act, which relates to property adjustments orders. The purpose of the legislation is to ensure that no CGT liability arises on assets divested from one spouse to another.

- vii. Reference was made to the decision of *Bookfinders v Revenue Commissioners* [2020] IESC 60, in particular to paragraph 51, 53 and 71 of the decision of Mr Justice O'Donnell which state

"51. In this regard, it is worth noting dicta on the matter from a number of different cases. In Kiernan, Henchy J. at p. 121 said that:-

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

In *McGrath*, Finlay C.J. said at p. 276 that:

"[t]he function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it.". (Emphasis added).

In Texaco (Ireland) Ltd v Murphy [1991] 2 I.R. 449, 456, McCarthy J. said that "[w]hilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning". (Emphasis added).

53. In the relatively recent case of Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., 4th June, 2019), McKechnie J. (who, it might be observed, was the author of the dissenting judgment in O'Flynn) delivered a judgment in relation to the application of difficult to construe provisions of the Tax Acts. I agree fully with what he said there, and which merits an extensive quotation (para. 62):-

"62. In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear

effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation involved, those provisions, when construed and interpreted appropriately, are still capable of giving rise to the liability sought, then such should be so declared.....

71. Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected.”

- viii. On consideration of *Bookfinders* it is clear that the function of interpreting a statute such as section 1031 of the TCA 1997 is to ascertain its object. Giving the words themselves a literal meaning might do this or it might be necessary to consider the purpose of the legislation by looking at its context. It depends on the particular circumstances of the case.
- ix. The question is what does the legislation intend to do, the clear purpose of section 1031 of the TCA 1997, is to ensure that a disposal of assets made between spouses upon their divorce does not generate a charge to CGT and that any transfer made on foot of a court order made under Part III of the Family Law (Divorce) Act 1996 is made on a no gain, no loss basis.
- x. The deceased had a number of other properties. However, the Order relates only to the property to be sold which extinguished the deceased's beneficial interest in the property. The deceased's former husband is deemed to have acquired the asset at the original cost and CGT liability would have been a matter for him. The deceased's beneficial interest in all other marital properties was extinguished at this point pursuant to section 14(1)(d) of the Family Law (Divorce) Act, 1996.
- xi. The property was to be sold and the deceased was to receive a lump sum. If the property was not sold for a sum in excess of the sum of

€700,000 then the deceased's former spouse was obliged to provide the balance to the deceased. It is on this basis that it is submitted that a disposal of the deceased's interest in the property to her former spouse took place for the purposes of section 1031 of the TCA 1997 and therefore, the transaction should be treated for the purposes of CGT as if the asset was acquired by the deceased's former spouse from the deceased for a consideration such that neither a gain nor a loss would accrue to the deceased.

- xii. If the deceased was liable for CGT on disposal of the property, then she would not have received what the Court envisaged and intended her to receive, which was a lump sum in lieu of any interest she had in any of the other properties.
- xiii. The deceased was at no stage aware that the CGT liability arose, if she had been, she would have been in a position to re-enter the divorce proceedings to compel compliance with same and this could not be done after her date of death.
- xiv. The property was in the deceased's name and she held the sole beneficial interest. However, by ordering that it be sold and she simply receive a lump sum, at that point, the interest transferred to the deceased's former spouse, because if the sale proceeds had not reached €700,000, it would have been his obligation to meet the balance of what was required.

Respondent

20. Counsel for the Respondent made the following legal submissions:

- i. There is no evidence that the deceased had accepted €700,000 in lieu of her interest in other properties. The suggestion that there is an inability to pay the liability is not a matter for the Commissioner.
- ii. The issue here is net and it relates to the transfer of an asset. If the executor of the estate can identify an asset having been transferred as part of this divorce, then the relief will apply.
- iii. The nature of interpreting tax statutes, in particular relieving provisions, is such that, when you look at a relieving provision or an exemption as

you have here where no CGT would arise, then that does have to be interpreted strictly.

- iv. The term “asset” is given its ordinary and natural meaning, but in the context of an executor of an estate, seeking an exemption from CGT, that does have to be interpreted strictly. What we are trying to find here is the asset and what asset was transferred. The Order is all we have and we do not have any of the background information because unfortunately the parties are deceased.
- v. The Order that the property be sold and the fact that this appears at number 1 almost immediately dismisses the argument being made by the Appellant because, if that is the first thing that happens, then what is left thereafter? It cannot be said that a transfer takes place of any interest in the property to the deceased’s former spouse, when the deceased had to sell the property in the first instance.
- vi. The second order is that the deceased’s former spouse has to pay €700,000 to the deceased. To ascertain whether there is an asset here and whether an interest has been transferred to the deceased’s former spouse, if the proceeds of sale were less than €700,000, it is quite clear that no asset transfers because the deceased’s former spouse only becomes entitled to something if the proceeds of sale exceed €700,000. At best, what he was entitled to was a right to receive a future sum, or the excess proceeds of sale. That is a different asset. The asset at issue here is the property, the deceased disposed of the property and is therefore liable to CGT.
- vii. Reference was made to the deceased being the sole vendor in the sale of the property, to the contract for sale, the “stamp duty” form and the CG50 form and that they clearly show that she was the sole owner of the asset at this time. We have no idea what the Judge intended and we cannot say whether the Judge knew that CGT was to come from the €700,000.
- viii. Reference was made to sections 534, 532, 604, 980 and 1032 of the TCA 1997.
- ix. Reference was made to the decision of Mr Justice McDonald in the High Court in *Perrigo Pharma International Activity Company v McNamara*,

the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General [2020] IEHC 552 ("Perrigo"). Reference was made to paragraph 74 which states

"74. Before addressing the competing arguments of the parties on the interpretation of s. 445, it is necessary to identify the approach which a court is required to take in relation to the interpretation of statutes. The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is selfevident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

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

Material Findings of Fact

21. The Commissioner makes the following material findings of fact:

- i. The deceased sold the property in June 2006 to an unrelated third party.

- ii. The deceased was the sole vendor in the sale of the property for the sum of €[REDACTED]. This is supported by the documentary evidence submitted namely the contract for sale and the CG50 form.
- iii. The Order dated [REDACTED], granting a Decree of Dissolution of Marriage, pursuant to section 5(1) of the 1996 Act and the ancillary orders made therein, was an order for the sale of the property and a direction as to how the proceeds were to be distributed thereafter between spouses.

Analysis

- 22. The deceased was granted a Decree of Divorce under the 1996 Act and various ancillary orders were made by the Circuit Court Judge on the same date. The Commissioner has considered the Circuit Court Order, which is helpfully submitted with the documentary evidence in this appeal. It is not in dispute that prior to the making of the Order, the deceased was the beneficial owner of the property. The question arises is what interest did the deceased have in the property, following the Order being made.
- 23. Before addressing the competing arguments in relation to the Order, the appropriate starting point is to consider section 1031 of the TCA 1997 and to identify the approach which the Commissioner is required to take in relation to the interpretation of taxation statutes. The principles are well settled and the Commissioner had the benefit of eloquent and learned submissions from both Counsel, on how the Commissioner should read, understand and apply the various authorities that were opened.
- 24. Section 1031 of the TCA 1997 provides that where a person who has obtained a Decree of Divorce under the 1996 Act, disposes to his/her former spouse certain assets pursuant to a Court Order under that Act, a charge to CGT does not arise. In order for the exemption to apply, an asset must have transferred between spouses on foot of an Order made under the 1996 Act.
- 25. The Commissioner has considered the helpful summary of the jurisprudence relating to the interpretation of taxation statutes as recently set out by McDonald J in *Perrigo* and the step-by-step considerations in statutory interpretation. The Commissioner is satisfied that this is the most recent decision of the Courts in this jurisdiction, in relation to the approach to be taken and as such, is authoritative in this regard.
- 26. The Commissioner also had regard to the dicta of McKechnie J, in *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50 in particular paragraph 63 where he states:-

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

27. In considering whether the circumstances of this appeal, satisfy the requirements for exemption, the Commissioner must also have regard to the decision of Kennedy CJ in *Commissioners of Inland Revenue –v Doorley* [1933] 1 I.R. 750, where he stated: -

“The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.”

28. With the aforementioned approach in mind, the Commissioner has considered the clear and cogent arguments of both parties. The critical question in this appeal, is whether an asset transferred between the spouses, thus permitting the application of the provisions of section 1031 of the TCA 1997. The Appellant firmly maintains that the Order transferred the beneficial interest in the property to the deceased's former spouse and the Appellant submits that *“the clear purpose of section 1031(2) of the TCA is to ensure that disposal of assets made between spouses do not generate a charge to CGT and that a transfer made on foot of a court order made under Part III of the Family Law (Divorce) Act 1996 is made on a no gain/no loss basis”*.

29. Nevertheless, the Respondent maintains that section 1031 is *“clear and unambiguous and that it requires an asset to be disposed of by one spouse to another, on foot of a Court Order”*. The Respondent argues that the terms of the Order are clear, that the property was to be sold with the deceased's former spouse being entitled to, at best, a future sum transferred. The Respondent submits that the terms of the Order do not transfer the beneficial interest in the property to the deceased's spouse and if the property was sold for €1.00 less than €700,000, then the deceased's former spouse was entitled to no benefit.

30. The Commissioner is satisfied that Section 1031 of the TCA is clear and unambiguous and that in order for the exemption to CGT to apply, the requirement that an asset be disposed of by one spouse to another on foot of a Court Order is met. The Commissioner has had regard to the principles set out in *Perrigo*, in particular principle (g) that states *“....if it is*

clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes..."

31. The Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach. Consequently, the expression "*disposes of an asset to the other spouse*" is to be afforded its ordinary and natural meaning. The Appellant argues that the spirit of the legislation is to ensure that CGT is not paid, following an Order being made under the 1996 Act. Moreover, it is argued that the Order must be read in context of the deceased's overall personal circumstances at the time. However, if the Appellant is making an argument that the Order should be understood in light of some extraneous circumstances that the Circuit Court Judge took into consideration at the time of making the ancillary Orders, there was no evidence presented to the Commissioner to support such an argument.

32. As with any tax appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated

"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".

33. The Commissioner cannot accept the Appellant's argument that the Order transfers an asset between the spouses and that this was in effect a property adjustment order. Applying the principles enunciated in *Perrigo*, the plain and ordinary meaning of section 1031 of the TCA 1997, is that in order for the exemption to apply, a transfer of an asset must take place between spouses. The Commissioner has had regard to the contract for sale, the CG50 form and the submissions in this appeal and is satisfied that the evidence does not support the position that a transfer of an asset took place between the spouses. The Commissioner cannot determine the appeal on mere inference or speculation as to the intention of the Circuit Court Judge at the time of making the ancillary Orders, but on the evidence presented in an appeal.

34. Accordingly, in all the circumstances, the Commissioner determines that on balance the Appellant has not shown that the Respondent was incorrect to refuse to apply the provisions of section 1031(2) of the TCA 1997.

Determination

35. Having regard to the documentation and submissions in this appeal, the Commissioner finds that the provisions of section 1031(2) of the TCA 1997 do not apply. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and has not succeeded in showing that the tax is not payable.

36. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax.

37. This appeal is hereby determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. 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.



Claire Millrine
Appeal Commissioner
16 May 2022