



Between:

████████████████████

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This appeal comes before the Tax Appeals Commission (hereinafter the “Commission”) against Notices of Amended Assessment to Capital Gains Tax (hereinafter “CGT”) raised by the Revenue Commissioners (hereinafter the “Respondent”) on 18 October 2022. The Notice of Amended Assessment was raised by the Respondent on foot of a decision to refuse the Appellant Revised Entrepreneur Relief provided for under section 597AA of the Taxes Consolidation Act 1997 (hereinafter the “TCA1997”).
2. The amount of tax in dispute is €42,918.33.

Background

3. Dr [REDACTED] (hereinafter the “Appellant”) is a medical doctor practicing as a General Practitioner (hereinafter a “GP”).
4. By way of a document entitled “[REDACTED]” (hereinafter the “Amendment Deed”), which was executed some time in 2016, the Appellant was admitted into the [REDACTED] (hereinafter the “Partnership”). The terms of the Amendment Deed are set out in full at **Annex 1** of this determination.
5. Clause 1.1.1 of the Amendment Deed states that the Commencement Date was 1 July 2015.
6. Clause 1.1.5 of the Amendment Deed states that the Vesting Date was 1 July 2019.
7. Clause 2 of the Amendment Deed is entitled “*Admission of the Incoming Partner*” and Clause 2.1 states as follows:

“2.1 *As and with effect from the Commencement Date and subject to the terms of this Agreement and the terms of the Partnership Agreements, the Incoming Partner shall be admitted as a fixed share partner in the Partnership with all the rights and obligations of an Existing Partner thereunder and so that her entitlement to share in the profits of the Partnership and her obligation to bear the proportionate share of any deficiency shall take effect from the Commencement Date but subject always to the following provisions.*”

8. Clause 3 of the Amendment Deed is entitled “*Transitional Arrangements*” which contains the following provisions:

“3.1 *As and with effect from the Commencement Date until the Vesting Date, the Incoming Partner’s share of the profits of the Partnership shall be a fixed at a*

rate equal to her current rate of remuneration share continuing on a PAYE basis for taxation purposes.

3.2 *In addition to her fixed profit share, the Incoming Partner shall receive until further reviewed on or before the Vesting Date, a net annual payment of €1,000 towards her motoring expenses and be entitled to eighteen (18) days annual leave and with effect from 1 January 2019, the Incoming Partner shall also be entitled to receive her proportionate share of the Practice's GMS pension scheme entitlement. She shall attend to six (6) half-day clinical sessions per week and six (6) out-of-hours- sessions per annum.*

3.3 *As and from the Commencement Date until the Vesting Date, the Incoming Partner shall be indemnified by the Current Partners and held harmless against any losses or liabilities of the Partnership arising prior to the Vesting Date and her fixed profit share shall be underwritten by the Practice.*

3.4 *As and with effect from the Vesting Date the Incoming Partner's share of the profits of the Partnership shall be 0.75% and her obligations in respect of the Partnership shall become joint and several thenceforward."*

9. The Partnership was sold in 2020 and the Appellant submitted her Form 11 tax return for 2020 to the Respondent on 4 November 2021 and in that return submitted that the amount relating to the sale of the Partnership and chargeable to CGT for 2020 was €186,601. The Appellant calculated her liability to CGT as being €18,660.

10. The Appellant's Form 11 tax return for 2020 contained an Expression of Doubt which stated that "*Our client has claimed entrepreneur relief on the 2020 CGT disposal*".

11. The Appellant further specified the Expression of Doubt on the Form 11 tax return as being:

"We understand to claim this relief an individual must have owned the "Chargeable Business Assets" for a continuous period of three years. Our client obtained all rights and obligations of being a partner as and from July 2015 which would meet this requirement. Our client became registered as self-employed in July 2019. We understand that July 2015 would be the relevant date for claiming entrepreneur relief as all partnership interests were acquired in 2015".

12. On 17 November 2021 the Appellant's Tax Agent submitted an enquiry to the Respondent seeking confirmation that the Appellant's understanding of her 2020 CGT position was correct and seeking confirmation that she met the requirement of ownership of a business asset for 3 years as required in section 597AA of the TCA1997.

13. The Respondent reviewed the Appellant's Expression of Doubt submission and on 18 October 2022 the Respondent informed the Appellant's Tax Agent that, as the business asset had not been owned by the Appellant for 3 years as required in section 597AA of the TCA1997, the Appellant was not entitled to Revised Entrepreneur Relief.
14. On foot of that decision, the Respondent amended the Appellant's tax return for 2020 and raised a Notice of Amended Assessment to CGT on 18 October 2022. The Notice of Amended Assessment to CGT determined the Appellant's liability to CGT for 2020 as being €61,578.
15. The Appellant appealed the Respondent's decision to the Commission by way of a Notice of Appeal submitted to the Commission on 13 November 2022.
16. The Ground of Appeal set out by the Appellant in her Notice of Appeal is as follows:
- "██████ was admitted to partnership on the 1st July 2015. The partnership was sold in 2020 and therefore she is entitled to entrepreneur relief."*
17. The oral hearing of this appeal took place on 2 May 2023.

Legislation and Guidelines

18. The legislation relevant to the within appeal is as follows:

Section 1 of the Partnership Act 1890 – "Definition of partnership"

(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

Section 2 of the Partnership Act 1890 – "Rules for determining existence of partnership"

"In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment

contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular -

(a)The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(b)A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(c)A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(d)The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(e)A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.”

Section 597AA of the TCA1997

“(1)(a)In this section—

“51 per cent subsidiary” has the same meaning as it has in section 9(1)(a);

“development land” has the same meaning as it has in section 648;

“group” means a holding company and all companies which are 51 per cent subsidiaries of the holding company;

“holding company” means a company whose business consists wholly or mainly of the holding of shares of all companies which are its 51 per cent subsidiaries;

“qualifying business” means a business other than—

(a) the holding of securities or other assets as investments,

(b) the holding of development land, or

(c) the development or letting of land;

“qualifying group” means a group, the business of each 51 per cent subsidiary (other than a holding company) in which consists wholly or mainly of the carrying on of a qualifying business;

“qualifying person” means an individual who is or has been a director or employee of a company (or companies in a qualifying group) who—

(a) is or was required to spend not less than 50 per cent of that individual’s working time in the service of that company (or those companies) in a managerial or technical capacity, and

(b) has served in that capacity for a continuous period of 3 years in the period of 5 years immediately prior to the disposal of the chargeable business assets of which the disposal of shares in the company (or one of those companies) forms the whole or part;

“relevant company” means a company (including a company in a qualifying group) the disposal of shares in which forms the whole or part of the disposal of chargeable business assets;

“relevant individual” means an individual who has been the beneficial owner of the chargeable business assets for a continuous period of not less than 3 years in the 5 years immediately prior to the disposal of those assets;

“working time” means any time that an employee or director is—

(a) at his or her place of work or, in the case of an employee, at his or her employer’s disposal, and

(b) carrying on or performing the activities or duties of his or her work.

(b)(i) For the purposes of the definition of ‘qualifying person’ in paragraph (a), any period during which the individual was a director or employee of—

(I) a company that was treated as being the same company, for the purposes of section 586, as a relevant company, or

(II) a company involved in a scheme of reconstruction or amalgamation under section 587 with a relevant company,

shall be taken into account in calculating the periods during which the individual was a director or employee.

(ii) For the purposes of the definition of 'relevant individual' in paragraph (a), any period during which the individual owned shares in—

(I) a company that was treated as being the same company, for the purposes of section 586, as a relevant company, or

(II) a company involved in a scheme of reconstruction or amalgamation under section 587 with a relevant company,

shall be taken into account in calculating the periods during which the individual was a beneficial owner.

(2)(a) Subject to paragraph (b), 'chargeable business asset' means an asset, including goodwill which—

(i) is, or is an interest in, an asset used for the purposes of a qualifying business carried on by an individual, or

(ii) is a holding of ordinary shares in—

(I) a company whose business consists wholly or mainly of carrying on a qualifying business, or

(II) a holding company of a qualifying group,

in respect of which an individual—

(A) has owned not less than 5 per cent of the ordinary shares for a continuous period of not less than 3 years at any time prior to the disposal of those shares, and

(B) is a qualifying person in respect of the company or, if the company is a member of a qualifying group, of one or more companies which are members of the qualifying group.

(b) "Chargeable business asset" does not include—

(i) shares (other than shares mentioned in paragraph (a)(ii)), securities or other assets held as investments,

(ii) development land,

(iii) assets on the disposal of which no gains accruing would be chargeable gains,

(iv) subject to subsection (8), goodwill which is disposed of directly or indirectly to a company, where, immediately following the disposal, the individual is connected with the company, or

(v) subject to subsection (8), shares or securities in a company which are disposed of directly or indirectly to another company, where, immediately following the disposal, the individual is connected with the first-mentioned company.

(3) Subject to subsection (4), the rate of capital gains tax chargeable on a chargeable gain or chargeable gains accruing in respect of a disposal or disposals of the whole or part of chargeable business assets made by a relevant individual shall be 10 per cent.

(4)(a) The rate of capital gains tax referred to in subsection (3) shall be chargeable only on so much, if any, of the chargeable gain or chargeable gains accruing, when added to the aggregate amount of any chargeable gain or chargeable gains accruing in respect of any previous disposal of the whole or part of chargeable business assets made by the relevant individual in the lifetime of that individual on or after 1 January 2016, that does not exceed €1,000,000.

(b) The rate of capital gains tax referred to in section 28(3) shall be chargeable on so much, if any, of the chargeable gain or chargeable gains accruing, when added to the aggregate amount of any chargeable gain or chargeable gains accruing in respect of any previous disposal of the whole or part of chargeable business assets made by the relevant individual in the lifetime of that individual on or after 1 January 2016, that exceeds €1,000,000.

(5) This section shall not apply, and section 597A shall apply, to a disposal of the whole or part of chargeable business assets made by a relevant individual where the amount of capital gains tax payable in respect of the disposal under this section is greater than the amount of capital gains tax payable in respect of the disposal were section 597A to apply.

(6) Subject to section 600 and subsection (8), this section shall not apply to such portion of the chargeable gain or gains accruing in respect of a disposal or disposals by a relevant individual of chargeable business assets which form part of a transfer to which section 600 applies as bears the same proportion to the total

of such gains as the value of the consideration received by the relevant individual out of the assets of the company in respect of the transfer bears to the value of the consideration received by the relevant individual other than by way of shares or securities in respect of such transfer.

(7)Where a relevant individual enters into arrangements, the main purpose, or one of the main purposes, of which is to secure that the relevant individual is not connected with a company for the purpose of either or both of subparagraphs (iv) or (v) of subsection (2)(b), this section shall not apply.

(8)Subsections (2)(b)(iv), (2)(b)(v) and (6) shall not apply in relation to a disposal of assets where it would be reasonable to consider that the disposal is made for bona fide commercial reasons and does not form part of any arrangement or scheme the main purpose or one of the main purposes of which is the avoidance of liability to tax'

Submissions

Appellant's Evidence

19. The Appellant gave the following direct evidence to the Commissioner at the oral hearing:
20. The Appellant stated that she was admitted to the Partnership in July 2015.
21. She stated that at the time she was admitted into the Partnership she understood that she took on the full rights and obligations of being a Partner in the Partnership.

Appellant's Submissions

22. It was submitted that the Appellant was admitted to the Partnership and obtained all rights and obligations in the Partnership in July 2015.
23. It was submitted that the Amendment Deed states that the Appellant was entitled to her share of the profits being fixed at a rate equal to her then current rate of remuneration share continuing on a Pay as You Earn (hereinafter "PAYE") basis for taxation purposes. It was submitted that for administration purposes the Appellant continued to pay her taxes at source through the PAYE system until 2019.
24. It was submitted that from 1 January 2019 the Appellant as Incoming Partner was entitled to receive her appropriate share of the Practice's General Medical Scheme (hereinafter "GMS") pension entitlement.

25. It was submitted that from 1 July 2019 the Appellant as Incoming Partner ceased to be entitled to a fixed remuneration and was from that date entitled to a share of 0.75% of the Partnership's profits.
26. It was submitted that a typical Irish partnership does not have shares and that section 1(1) of the Partnership Act 1890 defines a partnership as "... *the relation which subsists between persons carrying on a business in common with a view of profit.*"
27. It was submitted that the existence of a Partnership Agreement in and of itself is evidence of a relation which existed between the other partners and the Appellant.
28. It was submitted that section 2(3) of the Partnership Act 1890 provides that "*The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business...*".
29. It was submitted that Clause 3.1 of the Amendment Deed provided that with effect from the Commencement Date until the Vesting Date, the Appellant was entitled to her share of the Partnership's profits, being fixed at a rate equal to her then current rate of remuneration share continuing on a PAYE basis for taxation purposes.
30. It was submitted that the provisions of Clause 2.1 of the Amendment Deed effectively admitted the Appellant to the Partnership with the same rights and obligations as the existing partners. This, it was submitted, would reasonably include the ability of the Appellant to bind the Partnership pursuant to section 5 of the Partnership Act 1890.
31. It was submitted that the transfer of a partnership interest is not a chargeable asset and that when a partnership interest is transferred, there is a disposal of the transferor's interest in the chargeable assets of the partnership.
32. It was submitted that the underlying chargeable business asset which the Appellant would have disposed of is therefore the Goodwill of the Partnership.
33. It was submitted that Goodwill is an intangible asset recognised when a business is purchased as a going concern and it is said to reflect a premium that a buyer pays above the asset value of its other assets for the intrinsic ability to acquire and retain customers business.
34. It was submitted that whilst the Appellant was restricted from July 2016 to July 2019 in accessing her profit share, she had acquired her right to the goodwill of the practice upon admittance as a Partner in July 2015 when she was instated as a Partner with the rights and obligations of the existing partners.

35. It was submitted that a partnership cannot be created merely to create a loss and hence the application of a fixed remuneration to the Appellant demonstrated that a profit would be derived from the carrying on of the business of the partnership.

36. Therefore, it was submitted that the Appellant has satisfied the requirement to own the chargeable business asset for at least three years.

Respondent's Submissions

37. The Respondent did not adduce any witness evidence to the Commissioner at the oral hearing.

38. The Respondent submitted that the Amendment Deed at (B) contains words of limitation on the admission of the Appellant to the Partnership where it states:

"The Current Partners have agreed to admit the Incoming Partner to the Partnership (as defined below) on the terms and conditions hereinafter appearing" (emphasis added).

39. The Respondent submitted that Clause 2.1 of the Amendment Deed also contains words of limitation on the admission of the Appellant to the Partnership where it states:

"As and with effect from the Commencement Date and subject to the terms of this Agreement and the terms of the Partnership Agreements, the Incoming Partner shall be admitted as a fixed share partner in the Partnership with all rights and obligations of an Existing Partner thereunder and so that her entitlement to share in the profits of the Partnership and her obligation to bear the proportionate share in the profits of the Partnership and her obligation to bear the proportionate share of any deficiency shall take effect from the Commencement Date but subject always to the following conditions" (emphasis added).

40. The Respondent submitted that the words "*but subject always to the following conditions*" contained in Clause 2.1 along with the provisions of the subsequent sections of the Amendment Deed strip away the provisions of Clause 2.1 almost in their entirety. The Respondent submitted that the provisions of the subsequent sections of the Amendment Deed create a position whereby the Appellant was held out as a Partner in the medical practice but where in reality she was an employee who was paid a salary up until the vesting date of 1 July 2019.

41. The Respondent submitted that Section 3 of the Amendment Deed is entitled "*Transitional Arrangements*" and that Clause 3.1 creates a position whereby the Appellant remained on the same salary, which would continue to be paid through the PAYE system, as before.
42. The Respondent submitted that Clause 3.3 of the Amendment Deed creates a position whereby with effect from the Commencement Date of 1 July 2015 until the Vesting Date of 1 July 2019 the Appellant was indemnified by the existing partners in relation to any losses or liability of the Partnership which may arise prior to the Vesting Date of 1 July 2019. In addition, it was submitted that, Clause 3.3 of the Amendment Deed creates a position where the Appellant's fixed profit of the Partnership was underwritten by the Partnership.
43. Clause 3.3, the Respondent submitted, is a reaction to the fact that the Amendment Deed created a position whereby the Appellant was not a full Partner in the Partnership but rather was a salaried Partner. As a result, the Respondent submitted, the Partnership indemnified the Appellant from all losses or liabilities which may arise prior to the Vesting Date which is the date on which the Respondent submitted the Appellant became a full Partner in the Partnership.
44. The Respondent submitted that Clause 3.4 of the Amendment Deed provided that as and from the Vesting Date of 1 July 2019 the Appellant's share of the Partnership's profits became 0.75% and also that her obligations in respect of the Partnership became joint and several. The Respondent submitted that it was when the Appellant's obligations to the Partnership became joint and several that she became a true Partner with an ownership interest in the Partnership.
45. The Respondent submitted that the Appellant continued to be paid a salary through the PAYE system until the Vesting Date of 1 July 2019.
46. It was submitted by the Respondent that, on foot of the disposal of the Partnership in 2020, the Appellant received a sum equal to in or around 15% of the amount received for the disposal and not 0.75% of the profit share amount to which she became entitled pursuant to Clause 3.4 of the Amendment Deed.
47. The Respondent submitted that the Appellant does not appear in the Form 1 tax returns made by the Partnership to the Respondent for the years 2015, 2016, 2017 and 2018. The first time that the Appellant appears in the Partnership Form 1 returns to the Respondent is in 2019. The 2019 Form 1 tax return by the Partnership recorded the Appellant receiving an 8.11% profit share and the 2020 Form 1 tax return by the Partnership recorded the Appellant receiving a 14.14% profit share.

Material Facts

48. The following material facts are not at issue in the within appeal and the Commissioner accepts same as material facts:

- (i) The Appellant is a medical doctor practicing as a GP;
- (ii) The Amendment Deed was executed some time in 2016;
- (iii) The Amendment Deed admitted the Appellant as a Partner into the [REDACTED];
- (iv) The Partnership was sold in 2020.
- (v) The Appellant submitted her Form 11 tax return for 2020 to the Respondent on 4 November 2021 and in that return submitted that the amount chargeable to CGT for 2020 was €186,601.
- (vi) The Appellant calculated her liability to CGT as being €18,660.
- (vii) The Appellant's Form 11 for 2020 contained an Expression of Doubt which stated that the Expression of Doubt related to "Our client has claimed entrepreneur relief on the 2020 CGT disposal";
- (viii) The Appellant further specified the Expression of Doubt on the Form 11 tax return as being:

"We understand to claim this relief an individual must have owned the "Chargeable Business Assets" for a continuous period of three years. Our client obtained all rights and obligations of being a partner as and from July 2015 which would meet this requirement. Our client became registered as self-employed in July 2019. We understand that July 2015 would be the relevant date for claiming entrepreneur relief as all partnership interests were acquired in 2015".

49. The following material fact is at issue between the Parties:

- (i) The date on which the Appellant was admitted as a full partner to the Partnership and on which she assumed an ownership interest in the Partnership;

The date on which the Appellant was admitted as a full Partner of the Partnership and on which she assumed an ownership interest in the Partnership:

50. In appeals before an Appeal Commissioner the burden of proof rests on the Appellant who must prove on the balance of probabilities that the contested tax is not payable. This is confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49 by Charleton J at paragraph 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 Commissioner as to whether the taxpayer has shown that the relevant tax is not payable.”

51. On the one hand, the Appellant submits that she became a full Partner and assumed an ownership interest in the Partnership on 1 July 2015 which is the Commencement Date contained in the Amendment Deed. On the other hand, the Respondent submits that the Appellant did not become a full Partner and did not assume an ownership interest in the Partnership until 1 July 2019 which is the Vesting Date contained in the Amendment Deed.

52. The Appellant gave evidence to the Commissioner that it was her understanding that she that she was admitted to the Partnership in July 2015 and that that she took on the full rights and obligations of being a Partner in the Partnership at that time. No other evidence was adduced to the Commissioner apart from that of the Appellant and in particular the Commissioner notes that no evidence from any of the Existing Partners who were party to the Amendment Deed was adduced at the oral hearing.

53. The correct approach to interpreting the construction of a contract has been set out by the Supreme Court in the judgment of *Analog Devices B.V. v Zurich Insurance Company* [2005] 1 IR 274 and was expressed by Laffoy J in *UPM Kymmene Corporation v BWG* unreported, High Court, Laffoy J, 11 June 1999 as follows:

“[T]he basic rules of construction which the Court must apply in interpreting the documents which contain the parties agreement are not in dispute. The Court’s task is to ascertain the intention of the parties and that intention must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties, the Court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties.”

54. The principles of interpretation applicable to contracts or agreements generally are well known having been recorded by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 which was confirmed in the UK Supreme Court decision in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and subsequently confirmed by Kelly J in *Dunnes Stores v Holtglan Limited* [2012] IEHC 93 and summarised by Gross LJ in *Al Sanea Saad Investments Co Limited* [2012] EWCA Civ 313 where he stated as follows:

“ ...

- *The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would have reasonably been available to the parties in this situation in which they were in at the time of the contract.*
- *The Court has to start somewhere and the starting point is the wording used by the parties in the Contract.*
- *It is not for the Court to rewrite the party's bargain. If the language is unambiguous, the Court must apply it.*
- *Where a term of a contract is open to more than one interpretation, it is generally appropriate for the Court to adopt the interpretation which is most consistent with the business common sense. A Court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.*
- *The contract is to be read as a whole and an 'iterative process' is called for: '... involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'.*

55. The Appellant entered into the Amendment Deed some time in 2016 and with a Commencement Date of 1 July 2015. The Commencement Date of the Amendment Deed is 1 July 2015 and the Vesting Date of the Amendment Deed is 1 July 2019.

56. In interpreting the Amendment Deed the Commissioner must start by looking at the wording of the document.

57. The Commissioner, in considering when the date on which the Appellant was admitted as a full partner to the Partnership and therefore the date on which she assumed an ownership interest in the Partnership, the relevant wording of the Amendment Deed which falls for consideration is that contained in Sections 2 and 3 of the Amendment Deed as follows:

“2 ADMISSION OF THE INCOMING PARTNER

2.1 *As and with effect from the Commencement Date and subject to the terms of this Agreement and the terms of the Partnership Agreements, the Incoming Partner shall be admitted as a fixed share partner in the Partnership with all rights and obligations of an Existing Partner thereunder and so that her entitlement to share in the profits of the Partnership and her obligation to bear the proportionate share in the profits of the Partnership and her obligation to bear the proportionate share of any deficiency shall take effect from the Commencement Date but subject always to the following conditions.*

3 TRANSITIONAL ARRANGEMENTS

3.1 *As and with effect from the Commencement Date and until the Vesting Date, the Incoming Partner’s share of the profits of the Partnership shall be fixed at a rate equal to her current rate of remuneration share continuing on a PAYE basis for taxation purposes.*

3.2 *In addition to her fixed profit share, the Incoming Partner shall receive until further reviewed on or before the Vesting Date, a net annual payment of €1,000 towards her motoring expenses and be entitled to eighteen (18) days annual leave and with effect from 1 January 2019, the Incoming Partner shall also be entitled to receive her proportionate share of the Practice’s GMS pension scheme entitlement. She shall attend to six (6) half-day clinical sessions per week and six (6) out-of-hours- sessions per annum.*

3.3 *As and from the Commencement Date until the Vesting Date, the Incoming Partner shall be indemnified by the Current Partners and held harmless against any losses or liabilities of the Partnership arising prior to the Vesting Date and her fixed profit share shall be underwritten by the Practice.*

3.4 *As and with effect from the Vesting Date the Incoming Partner’s share of the profits of the Partnership shall be 0.75% and her obligations in respect of the Partnership shall become joint and several thenceforward.”*

58. The Commissioner considers that the wording of sections 2 and 3 of the Amendment Deed is unambiguous and the Commissioner finds that the wording used means that:

- (i) the Appellant was admitted as a fixed share Partner in the Partnership with all the rights and obligations of an Existing Partner, with an entitlement to share in the profits of the Partnership and with an obligation to bear the proportionate share of any deficiency of the Partnership with effect from the Commencement Date of 1 July 2015. However, the language of Clause 2.1 sets out that the admittance of the Appellant as a fixed share Partner in the Partnership was qualified and limited by the conditions set out in Section 3 of the Amendment Deed which is entitled "*Transitional Arrangements*".
- (ii) The transitional arrangements set out in section 3 of the Amendment Deed qualify and limit the admission of the Appellant as a fixed share Partner in the Partnership as follows:
 - a. The Appellant's share of the Partnership's profits were fixed at a rate equal to her then current rate of remuneration and continued to be paid through the PAYE system for taxation purposes;
 - b. The Appellant would receive a net annual payment of €1,000 to her motoring expenses and with effect from 1 January 2019 was entitled to receive her proportionate share of the Practice's GMS pension scheme entitlement;
 - c. As and from the Commencement date of 1 July 2015 until the Vesting Date of 1 July 2019 the Appellant was indemnified by the then Current Partners against any losses or liabilities arising prior to the Vesting Date of 1 July 2019. In addition the Appellant's fixed profit share was underwritten and guaranteed by the then Current Partners;
 - d. As and from the Vesting date of 1 July 2019, the Appellant became entitled to a 0.75% share in the Partnership's profits and her obligations in respect of the Partnership became joint and several.

59. The Commissioner has considered the interaction of Section 2 and Section 3 of the Amendment Deed with sections 1 and 2 of the Partnership Act 1890.

60. Section 1(1) of the Partnership Act 1890 provides that:

"(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit"

61. Section 2(3) of the Partnership Act 1890 provides that:

(3)The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular -

...

(b)A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such

...”

62. In her judgment in *McAleenan v AIG* [2010] IEHC 128 (hereinafter “*McAleenan*”), Finlay Geoghegan J stated the following at paragraph 36:

“36. The law of partnership distinguishes between true partners and apparent partners in the following sense. By true partners is meant persons who are in fact and in law partners to each other in a partnership as defined by s. 1 of the Act of 1890. They have, as between themselves, all the rights and liabilities of partners, and similarly in relation to third parties. By an apparent partner, is meant a person who is not a true partner in the sense of being a partner in a partnership with others, but is held out, either by the true partners of the partnership, or by himself, to be a partner in the partnership. By so holding himself out, or being held out, he may become liable to third parties as a partner whilst not being a true partner, either by reason of s. 14(1) of the Act of 1890, or by application of the doctrine of estoppel by representation. Twomey, Partnership Law, (2000) (Dublin, Butterworths) at para. 7.01, explains:

“Like the expression ‘salaried partner’, the expression ‘partner by holding out’ is a contradiction in terms, since it is used to describe someone who is not in fact a partner. Rather, this expression denotes a person who, because of his action or inaction, is held to be liable to certain third parties as if he was a partner.”

37. I would respectfully agree with the above quotation insofar as it refers to a partner by holding out. The position in relation to the term salaried partner is more complex, insofar as a person so described may, in fact, sometimes be a true partner and sometimes not a true partner. The position in relation to salaried partners is, in my

view, correctly set out in *Lindley & Banks on Partnership*, (17th edition) (1995) (London, Sweet & Maxwell) at para. 5-65, by reference to what was stated by Megarry J. in *Stekel v. Ellice* [1973] 1 W.L.R. 191.

*“Perhaps the most common case of a deliberate holding out which will be encountered today, particularly in the professions, is that of the so called ‘salaried partner’. By this notoriously vague expression is usually meant a person who, though in reality an employee of the firm remunerated by a fixed or variable salary, is nevertheless held out to clients and the world as a partner. However, that is not to say that a salaried partner may not be a partner in the true sense, as was made clear by Megarry J. in *Stekel v. Ellice*:*

‘Certain aspects of a salaried partnership are not disputed. The term “salaried partner” is not a term of art, and to some extent it may be said to be a contradiction in terms. However, it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, with his name appearing as a partner on the notepaper of the firm and so on. At the same time, he receives a salary as remuneration, rather than a share of the profits, though he may, in addition to his salary, receive some bonus or other sum of money dependent upon the profits. Quoad the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner, and the partners will be liable for his acts accordingly. But within the partnership it may be important to know whether a salaried partner is truly to be classified as a mere employee, or as a partner.

‘ . . . It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship.’ Consistently with the views expressed in the above passage, few identifiable principles can be derived from the decided cases . . .”

38. Megarry J., in the above extract, is referring to the practice as developed prior to 1973. The use of the term “salaried partners” has continued, and I would agree with the current author of the 17th edition of Lindley & Banks that it is a “notoriously vague expression” and one which may include a person who is a true partner and also one who is not a true partner. In my view, the law of partnership in this jurisdiction is as stated by Megarry J., “salaried partner’ is not a term of art”. A person so described may or may not be a true partner, depending on the facts. As observed by Megarry J.,

“the question whether or not there is a partnership depends on what the true relationship is and not on any mere label attached to that relationship”.

This is particularly so where, as in this instance, there is no pre-existing partnership...”

63. As a result of the judgment in *McAleenan*, the Commissioner must consider whether the Partnership held the Appellant out to be a partner from the Commencement Date of 1 July 2015 and must also consider whether the Appellant was a salaried partner.

64. In relation to the question as to whether the Partnership held the Appellant out to be a Partner from the Commencement Date of 1 July 2015, no evidence was adduced to the Commissioner in this regard. The Commissioner has been given no insight or evidence as to what label, if any, was placed on the Appellant’s position within the Practice after the signing of the Amendment Deed. In addition, the Commissioner has been given no evidence as to whether the Appellant was in the position to, or did, bind the Partnership in any contractual matters between the Commencement Date of 1 July 2015 and the Vesting Date of 2019. The Commissioner has therefore not been assisted in coming to a decision as to whether the Appellant was held out as a Partner by the Partnership prior to the Vesting Date of 1 July 2019. The only information in relation to the Appellant’s position within the Partnership available to the Commissioner is that the Partnership did not include the Appellant as a Partner on its returns to the Respondent until 2019 which coincides with the Vesting Date of 1 July 2019 contained in the Amendment Deed.

65. The Commissioner must then consider whether the Appellant was a salaried Partner from the Commencement Date of 1 July 2015. In addressing this issue, the Commissioner has had regard to the Court of Appeal decision in *M Young Legal Associates Ltd v Zahid Solicitors (a firm)* [2006] 1 WLR 2562 at paragraph 33 where Wilson LJ stated:

“33. It is idle to deny that, indirectly, an employee has an interest in the profitability of the firm for the continuation of his job may well depend on it. Nevertheless the absence

of a direct link between the level of payments and the profits of the firm is in most cases a strongly negative pointer towards the crucial conclusion as to whether the recipient is among those who are carrying on its business. But the conclusion must be informed by reference to all the features of the agreement...”

66. Clause 3.1 of the Amendment Deed fixed the Appellant’s share of the profits of the Partnership at a rate equal to her then current rate of remuneration. In addition, Clause 3.3 provided that the Appellant’s fixed profit share was to be underwritten by the Practice.

67. Having considered all of the evidence adduced, the provisions of the Amendment Deed and the submissions made, the Commissioner finds that as the Appellant’s “profit share” was fixed at a rate equal to her then current rate of remuneration and as was not linked to the profitability of the Partnership, the Appellant was a salaried Partner. The Commissioner also bases this finding on the fact that the Appellant’s “profit share” was underwritten by the Practice and was not linked to the profitability or otherwise of the Partnership. This position persisted until the Vesting Date of 1 July 2019 when the Appellant’s profit share became a percentage of the profits of the Partnership and ceased to be underwritten by the Practice.

68. As a result of the above the Commissioner finds as a material fact that the Appellant was admitted as a full Partner of the Partnership on the Vesting Date of 1 July 2019.

69. In addition, on the basis that the 2019 Form 1 tax return by the Partnership was the first time that the Appellant is recorded as receiving an 8.11% profit share and also that the 2020 Form 1 tax return by the Partnership recorded the Appellant receiving a 14.14% profit share, the Commissioner finds as a material fact that the Vesting Date of 1 July 2019 was the date on which the Appellant assumed an ownership interest in the Partnership.

70. For the avoidance of doubt the Commissioner finds the following material facts in this appeal:

- (i) The Appellant is a medical doctor practicing as a GP;
- (ii) The Amendment Deed was executed some time in 2016;
- (iii) The Amendment Deed admitted the Appellant as a Partner into the [REDACTED];
- (iv) The Partnership was sold in 2020.

- (v) The Appellant submitted her Form 11 tax return for 2020 to the Respondent on 4 November 2021 and in that return submitted that the amount chargeable to CGT for 2020 was €186,601.
- (vi) The Appellant calculated her liability to CGT as being €18,660.
- (vii) The Appellant's Form 11 for 2020 contained an Expression of Doubt which stated that the Expression of Doubt related to "*Our client has claimed entrepreneur relief on the 2020 CGT disposal*";
- (viii) The Appellant further specified the Expression of Doubt on the Form 11 tax return as being:

"We understand to claim this relief and individual must have owned the "Chargeable Business Assets" for a continuous period of three years. Our client obtained all rights and obligations of being a partner as and from July 2015 which would meet this requirement. Our client became registered as self-employed in July 2019. We understand that July 2015 would be the relevant date for claiming entrepreneur relief as all partnership interests were acquired in 2015".
- (ix) The Appellant was admitted as a full Partner of the Partnership on the Vesting Date of 1 July 2019 which was also the date on which the Appellant assumed an ownership interest in the Partnership;
- (x) The Vesting Date of 1 July 2019 was the date on which the Appellant assumed an ownership interest in the Partnership.

Analysis

71. Section 597AA(1) of the TCA1997 as enacted for the tax year 2020 defines a "relevant individual" as meaning "*an individual who has been the beneficial owner of the chargeable business assets for a continuous period of not less than 3 years in the 5 years immediately prior to the disposal of those assets*".

72. Section 597AA(2) of the TCA1997 as enacted for the tax year 2020 defines a "chargeable business asset" as meaning "*an asset, including goodwill which is, or is an interest in, an asset used for the purposes of a qualifying business carried on by an individual...*"

73. Section 597AA(3) of the TCA1997 as enacted for the tax year 2020 provides that the rate of CGT chargeable on a chargeable gain accruing in respect of a disposal of the whole or

part of chargeable business assets made by a relevant individual shall be 10%. This is known as Revised Entrepreneur Relief.

74. The Commissioner has already found as material facts that the Appellant was admitted as a full Partner of the Partnership on the Vesting Date of 1 July 2019 and that the Vesting Date of 1 July 2019 was the date on which the Appellant assumed an ownership interest in the Partnership.
75. As a result, at the time of the sale of the Partnership in 2020, the Appellant had held an ownership interest in the Partnership for less than 2 years. It therefore follows that the Appellant could not have been a relevant individual for the purposes of section 597AA as she had not held an ownership interest in the Partnership for a period of not less than 3 years in the 5 years immediately prior to the disposal of the Partnership.
76. As the Appellant was not a relevant individual for the purposes of the disposal of the Partnership in 2020, she was not entitled to avail of the 10% CGT rate, known as Revised Entrepreneur Relief, in relation to the disposal of the Partnership.

Determination

77. For the reasons set out above, the Commissioner determines that the Appellant in this appeal has not succeeded in showing that the relevant tax was not payable.
78. It is understandable that the Appellant will be disappointed with the outcome of his appeal. The Appellant was correct to check to see whether her legal rights were correctly applied.
79. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949AK thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal to the High Court on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA1997.



Clare O'Driscoll
Appeal
Commissioner
28June 2023

THIS DEED is dated

2016

Parties

- (1) The persons named in Schedule 1 (the “Current Partners”); and
- (2) [REDACTED] of [REDACTED] (the “Incoming Partner”).

Background

- (A) The Current Partners carry on the Business under the terms of the Partnership Agreements (as defined below).
- (B) The Current Partners have agreed to admit the Incoming Partner to the Partnership (as defined below) on the terms and conditions hereinafter appearing.

Agreed Terms

1 INTERPRETATION

1.1 Words and expressions used in this deed shall, unless the context expressly requires otherwise, have the meaning given to them in and be interpreted in accordance with the Partnership Agreements. In addition, the following words and expressions shall have the following meanings:

1.1.1 **Commencement Date:** 1 July 2015

1.1.2 **Partners:** The Current Partner and the Incoming Partner

1.1.3 **Partnership:** [REDACTED] heretofore carried on in partnership by the Current Partners and to be continued with the Incoming Partner from its surgeries at [REDACTED] and [REDACTED] [REDACTED] under the Partnership Agreements.

1.1.4 **Partnership Agreements:** The successive partnership agreements dated respectively [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1.1.5 **Vesting Date:** 1 July 2019.

2 ADMISSION OF THE INCOMING PARTNER

2.1 As and with effect from the Commencement Date and subject to the terms of this Agreement and the terms of the Partnership Agreements, the Incoming Partner shall

be admitted as a fixed share partner in the Partnership with all rights and obligations of an Existing Partner thereunder and so that her entitlement to share in the profits of the Partnership and her obligation to bear the proportionate share in the profits of the Partnership and her obligation to bear the proportionate share of any deficiency shall take effect from the Commencement Date but subject always to the following conditions.

3 TRANSITIONAL ARRANGEMENTS

- 3.1 As and with effect from the Commencement Date and until the Vesting Date, the Incoming Partner's share of the profits of the Partnership shall be fixed at a rate equal to her current rate of remuneration share continuing on a PAYE basis for taxation purposes.
- 3.2 In addition to her fixed profit share, the Incoming Partner shall receive until further reviewed on or before the Vesting Date, a net annual payment of €1,000 towards her motoring expenses and be entitled to eighteen (18) days annual leave and with effect from 1 January 2019, the Incoming Partner shall also be entitled to receive her proportionate share of the Practice's GMS pension scheme entitlement. She shall attend to six (6) half-day clinical sessions per week and six (6) out-of-hours- sessions per annum.
- 3.3 As and from the Commencement Date until the Vesting Date, the Incoming Partner shall be indemnified by the Current Partners and held harmless against any losses or liabilities of the Partnership arising prior to the Vesting Date and her fixed profit share shall be underwritten by the Practice.
- 3.4 As and with effect from the Vesting Date the Incoming Partner's share of the profits of the Partnership shall be 0.75% and her obligations in respect of the Partnership shall become joint and several thenceforward.

4 SAVING PROVISIONS

- 4.1 The Partnership shall not be dissolved as among the Current Partners as a result of the admission of the Incoming Partner but shall continue as between the Current Partners and the Incoming Partner, on the terms of the Partnership Agreements as amended by this Agreement.
- 4.2 For the avoidance of doubt, the admission of the Incoming Partner to the Partnership shall not entitle her to participate in, derive any profit share from or be responsible for any obligations of the Current Partners with respect to their involvement with the
[REDACTED]
- 4.3 Save to the extent that they are amended by this Agreement, the Partnership Agreement shall continue in full force and effect.

5 GOVERNING LAW AND JURISDICTION

5.1 This Agreement shall be governed by and construed in accordance with Irish Law and save as otherwise provided for herein or in the Partnership Agreements each party irrevocably submits to the exclusive jurisdiction of the Irish courts to settle any dispute which may arise under or in connection with this deed (including but not limited to non-contractual disputes or claims).

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

SCHEDULE 1

THE CURRENT PARTNERS

Name

Address

████████████████████

[redacted]

████████████████

[redacted]

████████████████████

[redacted]

██████████████

[redacted]

████████████████

[redacted]