



Between

120TACD2023

[Redacted]

[Redacted]

**Appellants**

and

**The Revenue Commissioners**

**Respondent**

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**Determination**

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## 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”) brought on behalf of [REDACTED] [REDACTED] (“the Appellants”) against Notices of Assessment to income tax for the year ending 31st December 2007 issued by the Revenue Commissioners (“the Respondent”) as follows:
  - a. [REDACTED] €64,749 (Notice of Amended Assessment dated 5 December 2012);
  - b. [REDACTED] €499,993 (Notice of Assessment dated 5 December 2012);
  - c. [REDACTED]: €499,993 (Notice of Assessment dated 5 December 2012);
  - d. [REDACTED] €499,993 (Notice of Assessment dated 5 December 2012).
2. This is a consolidated appeal against notices of assessment to income tax issued by the Respondent on 5 December 2012. The liabilities arose in circumstances where the Respondent contends that there was a transfer of assets, namely share rights, from a company [REDACTED] to its members, in accordance with the provisions of section 130(3)(a) TCA 1997. The Appellants maintain that no liability to income tax arises under the provisions of Section 130 TCA 1997.
3. The appeal proceeded by way of a hearing on 30 March 2023. The Appellants were represented by Senior Counsel and the Respondent was represented by Junior Counsel. One witness for the Appellant, [REDACTED] (“the Appellants’ witness) gave sworn oral testimony on behalf of the Appellant.

## Background

4. On 28 November 2007, [REDACTED] was incorporated. As set out at Companies Registration Office (“CRO”) Form B5 at pages 296 and 299 of the Booklet of Documents, on 6 December 2007, [REDACTED] allotted the following shares as part of its share capital:-

(a) “A” Ordinary shares at €1 nominal value to each of the following shareholders:

- 50 “A” ordinary shares to [REDACTED];

- 50 "A" ordinary shares to [REDACTED] [REDACTED];
- 50 "A" ordinary shares to [REDACTED] [REDACTED];
- 5 "A" ordinary shares to [REDACTED];
- 1 "A" ordinary share to [REDACTED].

(b) 100 €1 nominal Ordinary Shares to a company called [REDACTED] [REDACTED] at a share premium of €77,999 per share, being a total consideration of €7,800,000".

5. In December 2007, the issued share capital of [REDACTED] the parent company, was made up of ordinary shares, "A" ordinary shares, "B" ordinary Shares, "C" ordinary shares, "D" ordinary shares and "E" ordinary shares. The purported share register of [REDACTED] is at page 364 of the Booklet of Documents and a summary of the share register is at page 381 of the Booklet of Documents.
6. On 12 December 2007, [REDACTED] passed a special resolution ("the Special Resolution") which is contained at page 302 of the Booklet of Documents, altering the rights attaching to the ordinary shares and "A" ordinary shares in [REDACTED]. The Special Resolution conferred on the holders of the "A" ordinary shares the exclusive right to receive notice of and to attend, speak and vote at general meetings. The Special Resolution further provided that, in the event of a winding up, any remaining surplus of assets was to be distributed to the holders of "A" ordinary shares only.
7. On 21 December 2007, [REDACTED] passed a further special resolution, at page 304 of the Booklet of Documents, which had the effect of placing [REDACTED] in a members' voluntary liquidation. As a consequence of the said liquidation, capital distributions were made by [REDACTED] in the following sums, to the following payees, as so described in AIB bank account documentation at page 450 of the Booklet of Documents:- [REDACTED] - €2,449,968.58, [REDACTED] [REDACTED] €2,449,968.58, [REDACTED] [REDACTED] - €2,449,968.58 and [REDACTED] - €244,966.85.
8. On 3 March 2011, the Respondent issued correspondence indicating that an investigation had commenced into the Appellants' tax affairs and the consequences of transactions involving the transfer of share rights to the trusts by [REDACTED]. The Respondent indicated that the alteration of the share rights attached to the two classes of shares in [REDACTED] amounted to a transfer of share rights from [REDACTED] to its members and that same was chargeable to income tax under section 130 TCA 1997.

9. Furthermore, the correspondence outlines that information available to the Respondent suggests that *“the trust subscribed for “A” ordinary shares in [REDACTED] at par. Rights attaching to the shares held by company in [REDACTED] were transferred to the shares held by the trust in [REDACTED]”*. The letter asserted that: *“Under the Taxes Acts, the value of the rights transferred from the company to you is chargeable to income tax.”* The letter of investigation said that the Respondent was unable to ascertain that the transaction and amounts had been returned for tax purposes and invited a response within 21 days of the date of the correspondence.

10. By letter of response dated 17 May 2011, the Appellants stated that:

*“As part of a company reorganisation, the trading company [REDACTED] injected funds into a limited company, [REDACTED] for ordinary shares at a premium. The shareholders subscribed for A ordinary shares in the same company.*

.....

*The acquisition of A ordinary shares in the investment company is a capital gains tax transaction. The value shift is also a capital gains tax transaction and the deemed cost is as set out in section 543(1)(a) TCA 1997. This equals the amount earlier subscribed by the trading company.*

*In the subsequent liquidation of the investment company, the acquisition costs received are equal to original subscription costs and no gain arises.”*

11. In an exchange of correspondence that ensued, the Appellants and Respondent addressed the following; the concept of an “asset” for the purposes of section 130(3)(a) TCA 1997, the concept of a “transfer” for the purposes of section 130(3)(a) TCA 1997 and the applicability of section 543 TCA 1997, it being contended on behalf of the Appellants that section 543 TCA 1997 applied and governed the transaction to the exclusion of section 130(3)(a) TCA 1997.

12. The Appellants maintain that no liability to income tax arises as a consequence of section 130 TCA 1997. However, it is contended by the Respondent that at the time of the passing of the Special Resolution, there was a transfer of an asset from a company [REDACTED] to its members within the meaning of section 130(3)(a) TCA 1997 and which consequently, gave rise to a distribution by [REDACTED].

13. By notices of appeal dated 20 December 2012 and 2 January 2013, the Appellants appealed against the Notices of Assessment to income tax dated 5 December 2012.

14. In early 2017, a request was made by the Appellants for a direction under section 949E TCA 1997, staying the progression of the appeals, until such time as a decision in another appeal was completed, which was determined and awaiting rehearing by the Circuit Court pursuant to section 942 TCA 1997. The Commissioner issued a direction staying the within appeals, in circumstances where the appeal before the Courts was relevant to the within appeal. It is the case that the decision of the Circuit Court was then appealed to the High Court and appeals were stayed until such time that the High Court delivered its decision. Accordingly, following the decision of the High Court and the filing of submissions in the within appeals, it was not until 30 March 2023, that these appeals proceeded by way of a hearing before the Commissioner.

### **Legislation and Guidelines**

15. The legislation relevant to this appeal is as follows:-

16. Section 20 Schedule F TCA 1997, Schedule F, *inter alia* provides:-

(1) *The Schedule referred to as Schedule F is as follows:*

1. *In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 and sections 436, 436A, 437, 816(2)(b) and 817.*
2. *Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.*

17. Section 130 TCA 1997, Matters to be treated as distributions, *inter alia* provides:-

(1) *The following provisions of this Chapter, together with sections 436 and 437, and subsection (2)(b) of section 816, shall, subject to any express exceptions, apply with respect to the meaning in the Corporation Tax Acts of "distribution" and for determining the persons to whom certain distributions are to be treated as made; but references in the Corporation Tax Acts to distributions of a company shall not apply to distributions made in respect of share capital in a winding up.*

(2) *In relation to any company, "distribution" means -*

(a) *any dividend paid by the company, including a capital dividend;*

(b) any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except, subject to section 132, so much of the distribution, if any, as represents a repayment of capital on the shares or is, when it is made, equal in amount or value to any new consideration received by the company for the distribution;

.....

(3) (a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount").

.....

18. Section 135 TCA 1997, Distributions; Supplemental, *inter alia* provides:-

(1) (a) In this Chapter, "new consideration" means consideration not provided directly or indirectly out of the assets of the company, but does not include amounts retained by the company by means of capitalising a distribution

(2) Notwithstanding paragraph (a), where share capital has been issued at a premium representing new consideration, any part of that premium applied afterwards in paying up share capital shall also be treated as new consideration for that share capital, except in so far as the premium has been taken into account under section 132 (3) so as to enable a distribution to be treated as a repayment of share capital.

19. Section 543 TCA 1997, Transfers of value derived from assets, *inter alia* provides:-

(1) Without prejudice to the generality of the provisions of the Capital Gains Tax Acts as to the transactions which are disposals of assets, any transaction which under this section is to be treated as a disposal of an asset-

(a) shall be so treated (with a corresponding acquisition of an interest in the asset) notwithstanding that there is no consideration, and

(b) in so far as, on the assumption that the parties to the transaction were at arm's length, the party making the disposal could have obtained consideration or additional consideration for the disposal, shall be treated as not being at arm's

*length, and the consideration so obtainable, added to the consideration actually passing, shall be treated as the market value of what is acquired.*

.....

(2) (a) *Where a person having control of a company exercises that control so that value passes out of shares in the company owned by such person or a person with whom such person is connected, or out of rights over the company exercisable by such person or by a person with whom such person is connected, and passes into other shares in or rights over the company, that exercise of such person's control shall be a disposal of the shares or rights out of which the value passes by the person by whom they were owned or exercisable.*

## **Evidence and Submissions**

### **Appellants' Evidence**

20. [REDACTED] gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given:-

- (i) The witness made reference to his witness statement at page 361 of the Booklet of Documents. The witness confirmed that he signed the statement and prepared the appendices therein. The witness stated that he is a fellow of the Institute of Chartered Accountants in Ireland. The witness confirmed that at the time, his firm of Chartered Accountants and Registered Auditors was appointed as Auditors to the [REDACTED]. In addition, he stated that his firm of Chartered Accountants and Registered Auditors was responsible for performing accountancy and routine tax services for the [REDACTED]. The witness stated that [REDACTED] is the Secretary of [REDACTED] and a member of [REDACTED]
- (ii) The witness confirmed that he is familiar with the shareholding of [REDACTED] and he made reference to the register of shareholders of [REDACTED] at page 365 of the Booklet of Documents. The witness stated that there are different categories of shares issued by [REDACTED] and different members hold different categories of shares. The witness made reference to pages 365 which he said reflects the holder of the "D" ordinary shares in [REDACTED] and pages 373, 374 and 375 which he said reflects the holders of the "E" ordinary shares in [REDACTED]. Reference was made to page 381 of the Booklet of Documents entitled "Schedule 2" which the witness testified was prepared to illustrate what the shareholding in [REDACTED] was, in or around the end of 2007.



- (iii) The witness gave evidence in relation to the reorganisation of ██████ in ██████ and associated documentation in relation to the creation of the three Trusts on ██████ (██████████). Reference was made to correspondence received from the Respondent on 19 December 2011 and 6 December 2012 at pages 91 and 94 of the Booklet of Documents. The witness testified that no assessment has been raised in respect of withholding tax and the witness confirmed that he has never had sight of an assessment to Capital Acquisitions Tax (“CAT”) from the Respondent.
- (iv) During cross examination, the witness confirmed that he has been involved in these matters since the Respondent’s letter of investigation issued in March 2011. The witness testified that whilst he answered the correspondence from the Respondent, he was not a tax expert and as such, he had the assistance of ██████ (██████████) (“the Tax Advisor”) who provided him with text to insert into the correspondence, by way of response to the queries raised by the Respondent.
- (v) The witness confirmed that when requested by the Respondent, the witness furnished a full list of shareholders in ██████ to the Respondent. Counsel for the Respondent made reference to correspondence dated 17 May 2011, from the witness to the Respondent at page 196 of the Booklet of Documents. It was put to the witness that he has accepted that the shareholders in ██████ subscribed for the “A” ordinary shares in ██████. Further, it was put to him that the first mention that the “A” ordinary shareholders in ██████, were not also shareholders in ██████ was in written legal submissions in this appeal. The witness did not agree and said that in respect of the correspondence dated 17 May 2011, it does not specifically mention shareholders in ██████. The witness then conceded that it could be interpreted that the letter is referring to the ██████ shareholders, but that it is probably, what he termed, badly phrased.
- (vi) The witness reiterated that he had no knowledge of ██████ despite responding to the correspondence of the Respondent. The witness testified that the Tax Advisor would provide him with text to insert into the responses to the Respondent and that was all that he knew about ██████, as it was the Tax Advisor that held the knowledge as to the incorporation of ██████ and subsequent events. The witness was asked why he did not state that the shareholders in ██████ were the ██████. The witness testified that he did not understand the importance of it as he is not a tax expert. The witness gave evidence that he responded to the

correspondence from the Respondent as his client had requested that he do so, despite his lack of knowledge of [REDACTED]

- (vii) Counsel for the Respondent referred the witness to correspondence dated 18 July 2011, from the Respondent, at page 199 of the Booklet of Documents. The witness confirmed that he knew about the [REDACTED] at the time of the creation of the Trusts. It was put to the witness that the Respondent's correspondence is clear, such that the Respondent is stating that there has been a transfer of assets from a company ([REDACTED]) to its members and that the shareholders paid no consideration. The witness stated that he accepted that the company ([REDACTED]) referred to in correspondence is [REDACTED], as is the shareholders but stated that if that was the case it would only be referring to [REDACTED] and [REDACTED] [REDACTED] as they were both members of [REDACTED]
- (viii) The witness was asked whether the Tax Advisor had provided the text in letter dated 17 May 2011, in particular paragraph 3 which is in quotes. The witness confirmed that as correct. The witness accepted that this is what the Tax Advisor understood the situation to be, as he held the knowledge as to [REDACTED]. The witness testified that anything which the Tax Advisor has written, he cannot comment on. The witness accepted that that the paragraph referred to is to be construed as the words of the Tax Advisor, about a situation that the Tax Advisor created, advised on and put in place; that it is the understanding of the person closest to the events in [REDACTED].
- (ix) Reference was made to correspondence dated 7 September 2011 at page 201 of the Booklet of Documents. The witness confirmed that the first paragraph in open quotes are the words of the Tax Advisor wherein it states that "*at no point is there a transfer of that asset (shares) to the shareholder.*" The witness agreed that there was no response given to factual matters raised or documentation requested. Reference was made to correspondence dated 13 September 2011 at page 202 of the Booklet of Documents and the term "asset".
- (x) Counsel for the Respondent made reference to page 203 of the Booklet of Documents and it was agreed that there could be no ambiguity in correspondence dated 13 September 2011 from the Respondent, wherein it states that "*in the instant case, there was a transfer of share rights, (the assets in this case) by the parent Company to individuals who are members of the parent Company*". It was put to the witness that this is a factual matter not a technical tax matter. The



Trustee of the [REDACTED]. The witness testified that it should have been obvious to the Respondent that the [REDACTED] are different Trusts and were not the Trusts that subscribed for the [REDACTED] ordinary shares in [REDACTED], in [REDACTED]. It was put to the witness that his evidence was that he is not familiar with [REDACTED] and therefore cannot comment on it. Further, it was put to the witness that the person who was familiar with the scheme did not contradict the Respondent in its correspondence that there was a transfer to the members of [REDACTED]

- (xv) Reference was made to page 365 of the Booklet of Documents namely the share register of [REDACTED] exhibited with the witness's statement. Evidence was given in relation to [REDACTED] of the [REDACTED] and the [REDACTED]. Reference was made to page 296 of the Booklet of Documents and to CRO Form B5 which sets out the allotment of shares that took place in [REDACTED] on 6 December 2007. The witness was asked why there was no reference to the [REDACTED] on the document. The witness stated that he did not prepare the document and therefore, could not comment on it.
- (xvi) Counsel for the Respondent directed the witness to page 453 of the Booklet of Documents and correspondence dated 11 March 2008, after the conclusion of the winding up of [REDACTED]. It was put to the witness that these amounts and the amounts at page 452 of the Booklet of Documents are not the amounts at issue in this appeal, but that there exists no correspondence instructing AIB to make payments in the sums that are at issue in this appeal and to whom those payments were made.
- (xvii) The witness said that the [REDACTED] was set up with the sole purpose of estate planning for tax. He confirmed that neither the [REDACTED] nor the [REDACTED] were registered for tax purposes, until the Respondent's investigation commenced.
- (xviii) In re-examination by Counsel for the Appellants, the witness testified that the [REDACTED] [REDACTED] were never shareholders in [REDACTED].

### **Appellants' submissions**

21. Senior Counsel made submissions on behalf of the Appellant. The Commissioner sets out hereunder a summary of the submissions made:-

- (i) The Appellant adopts its outline of arguments in relation to these appeals.
- (ii) There are 3 issues to be addressed in this appeal which are: firstly, the Respondent has raised assessments on three Trusts that were members not of

██████████ but of ██████████. ██████████ was a common shareholder between both of them and there will be separate submissions in relation to ██████████;

- (iii) Secondly, assuming that the right members have been identified, which the Appellants' fundamentally say have not been, to what extent has the Respondent correctly applied section 130(3)(a) TCA 1997 and the reference to new consideration. There is no evidence at all that the Respondent considered what was being given up, whether one calls that a cost that has to be taken into account in respect of the benefit or whether one calls it new consideration. The share premium and the acquisition of the shares by ██████████ in ██████████ involved a combined consideration of €7.8 million moving out of ██████████ and into ██████████ and the special resolution meant that ██████████ lost €7.8 million. If that happened, the members of ██████████ themselves, their shares, were devalued or reduced in value by the proportion that €7.8 million bore to the value of the assets of ██████████, that would in turn have been reflected in the value of their shares.
- (iv) Thirdly, Allen J. when he delivered his decision in *Raymond Hughes v The Revenue Commissioners* [2019] IEHC 907 ("*Hughes*"), did not have the benefit of the Supreme Court decision in *Bookfinders v The Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*") and the recalibration in relation to taxing statutes. It is clear from *Bookfinders* that the purposive approach that O'Donnell J. suggested would be taken in respect of taxing statutes, was deemed by O'Donnell J. in *Bookfinders* to have gone too far and to be wrong. The relevant extracts from that judgment are at paragraph 3.7 in the Appellants' submissions. It is questionable as to whether Allen J. would have engaged in the analysis he engaged in, had he been aware of the decision in *Bookfinders*.
- (v) The ██████████ are members of ██████████ not members of ██████████. The requirement for the operation of section 130(3)(a) TCA 1997 is that there must be a transfer of an asset or liability to a member of that company. The evidence of the witness for the Appellants is clear, such that the ██████████ never received a distribution and never entered into a transaction, hence why it did not have a tax number. The position and the only evidence adduced is that the ██████████ were members of ██████████ and never received a distribution. The Trusts that did receive a distribution from ██████████ were the ██████████. It is a simple exercise to cross-check the number of shares with what is said on the Share Register.
- (vi) Reference was made to the decision of *Bookfinders* at page 313 of the decision wherein O'Donnell J. stated

*“it is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against double penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed 'strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language”.*

- (vii) Reference was also made to the decision in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 (“*Dunnes Stores*”) and *Heather Hill Management Company CLG and Gabriel McCormack v An Bord Pleanala, Burkeway Homes Limited and The Attorney General* [2022] IESC 43 (“*Heather Hill*”). Murray J. in *Heather Hill* strongly suggests that contextual material can be consulted in construing taxation statutes.
- (viii) The second aspect of section 130(3)(a) TCA 1997, that is the issue of benefit and the issue of new consideration, was not considered at all in the *Hughes* decision. The Respondent’s position is that the ██████████ were members of ██████████ but that is disputed. The sum of €7.8 million passed out from ██████████ and passed to the shareholders. If €7.8 million had passed out of the value of the shares because of the change in the rights in ██████████, that €7.8 million was the €7.8 million that affected the value of the shares of all shareholders, depending upon their class in ██████████ itself. The Respondent has no regard at all to that in their approach to making the assessment.
- (ix) Reference was made to section 135 TCA 1997 and the definition of new consideration. The shareholders, on the Respondent’s theory, lost as well as gained and no account is given for that by the Respondent. Reference was made to section 135(2)(a) TCA 1997. Each of the shares was impacted, according to the Respondent, by the transaction that resulted in the transfer of the rights.
- (x) Reference was made to the decision in *Pickles & another v the Commissioners for her Majesty’s Revenue and Customs* [2020] UKFTT 195 (TC) (*Pickles* (“*FTT*”)), in particular reference was made to page 944 of the decision. The decision deals

with what the section mandates, such that when one calculates what was received as value and what was given as value that becomes the sum that is subject to tax. There is a serious dispute in relation to the requirement for consideration of what costs were incurred so that a benefit could be received. Reference was also made to the decision of the Upper Tribunal in *The Commissioners for her Majesty's Revenue and Customs v Pickles & another* [2020] (*Pickles* ("UT")) which by agreement, vacated the decision in *Pickles* (FTT).

- (xi) Reference was made to AIB bank account statements of the Liquidator of [REDACTED] and payment instructions from the Tax Advisor at pages 449, 450, 451,452 and 453 of the Booklet of Documents. There can be no credible suggestion that it is not the [REDACTED] that is receiving the funds. There is also the uncontroverted evidence of the Appellants' witness that the [REDACTED] did not receive any distributions.

#### **Respondent's submissions**

22. The Respondent did not adduce any witness evidence to the Commissioner.

23. Counsel made submissions on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:-

- (i) The Respondent adopts its outline of arguments in relation to these appeals.
- (ii) With reference to the bank account statements and payment instructions from the Tax Advisor at pages 449, 450, 451,452 and 453 of the Booklet of Documents, it is argued by Counsel for the Appellant that here can be no credible suggestion that this bank account is not the bank account of the [REDACTED]. However, [REDACTED], who is a Trustee of the [REDACTED] and of the [REDACTED] did not adduce evidence in relation to these matters nor is there any other Trustee of any Trust to verify any of this. The Appellants' witness was a Trustee of the [REDACTED], but that ended. There is every doubt that this is the bank account of the [REDACTED] not least because even though the [REDACTED] is prescriptive as to what it is to be called, [REDACTED], this bank account is not on its face called the [REDACTED]. For example, [REDACTED] is addressed as the [REDACTED], not the [REDACTED], care of [REDACTED]
- (iii) What is required is proof that the [REDACTED] is actually a shareholder in [REDACTED]. There is no CRO B1 return in respect of [REDACTED] with a list of members or a register of members. In addition, there is no memorandum of association in respect of [REDACTED].

- (iv) Reference was made to page 296 of the Booklet of Documents and the allotment of shares in [REDACTED]. There was an allotment of shares by [REDACTED] to a Trust that the Appellants contend is the [REDACTED], but there is no evidence of this, such as the register either in the CRO or the members register. The Trust is not the [REDACTED], it is just the [REDACTED] [REDACTED], the [REDACTED] [REDACTED] and the [REDACTED] [REDACTED]. Those Trusts are named [REDACTED] and you cannot tell that these Trusts are the [REDACTED] [REDACTED]. There is a huge significance to that issue.
- (v) What is required is that the Appellants discharge the burden of proof to satisfy the Commissioner of the membership of [REDACTED]. Assertions are not proof and the matter has not been proven. The burden of proof in a tax appeal is squarely on the Appellants. The Appellants witness knew nothing about [REDACTED], in fact he knew so little that he was not prepared to draft correspondence in response to Respondent. The Appellants' witness is the only person who has been prepared to give oral testimony on oath. The documents do not establish the shareholding asserted.
- (vi) There are both "*Hughes*" and "*non-Hughes*" arguments in this appeal. Reference was made to page 71 of the Booklet of Documents. The "*Hughes*" arguments relate to points 1 and 2 and the "*non-Hughes*" arguments are at points 3 and 4. In the *Hughes* decision, share rights were held to be assets.
- (vii) Reference was made to paragraph 4.8 of the Appellants' outline of arguments at page 73 of the Booklet of Documents. The Appellants state that the share rights are not legally separable from the shares and thus are not an asset. That was a *Hughes* argument and paragraphs 47 to 60 of the *Hughes* decision dealt with the matter of a transfer of an asset. At paragraph 4.9 of the Appellants' outline of arguments, the Appellants state that there was no transfer of an asset, but this is also dealt with in the *Hughes* decision at paragraphs 67 and 68. The point is made at paragraphs 4.13 to 4.18 that the resolutions to transfer the voting rights and the right to the share premium account were not resolutions of the members of [REDACTED] but resolutions of [REDACTED]. That is a *Hughes* argument
- (viii) The Commissioner cannot revisit the *Hughes* decision and decide that *Hughes* was wrong, such that actually share rights are not legally separable from shares, they are not an asset, the shares did not transfer and therefore there was no transfer of any asset. The law is, as Allen J has stated it, and the authority of *Hughes* is binding in that regard.



- (ix) The Appellants have urged a strict approach to statutory construction and the decision in *Heather Hill* is cited. The Appellants have framed the consideration point by urging consideration of the benefit or value of what was lost by the shareholders in ██████ versus what was gained by the shareholders in ██████. That really only applies to ██████ because they say the Appellants were not shareholders in both.
- (x) What section 130(3)(a) TCA 1997 is concerned with is a “*transfer of assets by a company to a member*”, the value of consideration given by the member can only refer to consideration given by the member to the company. The diminution in value of shareholding argument fails on that basis. It is unstatable as a matter of statutory construction and logic. Apart from that, there is absolutely no evidence to support it and that this is the appropriate way to look at the consideration point. There are no resolutions of ██████ in relation to this decision, they are wholly absent. The Respondent’s correspondence requested the resolutions of ██████ and the response from the Appellants witness was “*all I know is that there might be some on the CRO, and you have seen them*”. In addition, shareholders have no interest in a company’s assets, so merely by being a shareholder in ██████ you do not own ██████ assets, it is share rights. Any argument that a shareholder has an interest in the value of ██████, would require evidence being adduced.
- (xi) Reference was made to the both *Pickles* decisions (FTT and UT). In this case, the question arose as to the construction of section 1020 of the Corporation Tax Act in the UK, and how one construes the concept of consideration. It is important to note that not only was the FTT decision vacated, but it was vacated with the agreement of both sides in the appeal, that the lower tribunal were in error. The facts in the *Pickles* decision are not helpful to the construction of section 130(3)(a) TCA 1997 in this case, also in light of the High Court decision in *Hughes* on the construction of that section.
- (xii) Reference was made to the principles of statutory interpretation and to the decisions in *Revenue Commissioner v O’Flynn* [2011] IESC 47 (“*O’Flynn*”), *Bookfinders*, *Dunnes Stores* and *Heather Hill*.
- (xiii) When the Respondent corresponded with the Appellants’ witness and stated that there has been a transfer from ██████ to its members, the obvious response from the Tax Advisor, who, the evidence has established, was drafting the response, would have been “you are wrong, we are not caught because we are not members

of [REDACTED]". The Appellants' witness was not in a position to explain the absence of an explanation. The Appellant must prove, that the "A" ordinary shareholders in [REDACTED] were not the [REDACTED].

### Material Facts

24. Having read the documentation submitted, and having listened to the sworn testimony of the Appellants' witness and oral submissions at the hearing, the Commissioner makes the following findings of material fact:

- (i) On 28 November 2007, [REDACTED] was incorporated.
- (ii) In December 2007, the issued share capital of [REDACTED] the parent company, was made up of ordinary shares, [REDACTED] ordinary shares, [REDACTED] ordinary Shares, [REDACTED] ordinary shares, [REDACTED] ordinary shares and [REDACTED] ordinary shares.
- (iii) [REDACTED] is the holder of the [REDACTED] ordinary shares in [REDACTED]. The [REDACTED] ordinary shares in [REDACTED] are held by the [REDACTED] of [REDACTED] [REDACTED], the [REDACTED] of [REDACTED] [REDACTED] and the [REDACTED] of [REDACTED] [REDACTED].
- (iv) On 6 December 2007, ordinary shares in [REDACTED] were allotted as follows: "A" Ordinary shares at €1 nominal value to each of the following shareholders:
  - 50 "A" ordinary shares to [REDACTED] [REDACTED];
  - 50 "A" ordinary shares to [REDACTED] [REDACTED]
  - 50 "A" ordinary shares to [REDACTED] [REDACTED];
  - 5 "A" ordinary shares to [REDACTED]
  - 1 "A" ordinary share to [REDACTED]
  - 100 €1 nominal Ordinary Shares to a Company called [REDACTED] [REDACTED] at a share premium of €77,999 per share, being a total consideration of €7,800,000".
- (v) On 12 December 2007, [REDACTED] passed a Special Resolution. The Special Resolution conferred on the holders of the "A" ordinary shares the exclusive right to receive notice of and to attend, speak and vote at general meetings. The Special Resolution further provided that, in the event of a winding up, any remaining surplus of assets was to be distributed to the holders of "A" ordinary shares only.

- (vi) On 21 December 2007, a special resolution was passed by the shareholders of ██████████, placing the ██████████ in liquidation.
- (vii) On 8 February 2008, ██████████ made distributions in the following sums, to the following payees, as so described in AIB bank account documentation at page 450 of the Booklet of Documents:- ██████████ ██████████ - €2,449,968.58, ██████████ ██████████ - €2,449,968.58, ██████████ ██████████ - €2,449,968.58 and ██████████ ██████████ - €244,966.85.
- (viii) The bank account details submitted show that payments were made from the ██████████ Liquidators account.
- (ix) ██████████ is a member of ██████████ and of ██████████
- (x) The members of the ██████████ are members of ██████████.
- (xi) The CRO B5 Form does not show that the holders of the “A” ordinary shares in ██████████ were the ██████████, as nowhere in the document are the allottees of the “A” ordinary shares so described.
- (xii) In relation to the allottees of the “A” ordinary shares, CRO B5 Form dated 6 December 2007, at page 296 of the Booklet of Documents, states ██████████ ██████████. There is no reference under Allottees to the name ██████████
- (xiii) The Commissioner is satisfied that share rights are legally separable from the shares to which they attach and are thus an “asset”.
- (xiv) On 6 December 2007, on the passing of the Special Resolution, there was a transfer of an asset when the voting rights and distribution rights attached to the ordinary shares held by ██████████ in ██████████, were transferred to the “A” ordinary shareholders in ██████████.
- (xv) The Commissioner is satisfied that a transfer of an asset occurred herein.
- (xvi) The taxable event for the purposes of this appeal was the passing of the Special Resolution on 6 December 2007, transferring share rights from the holders of the ordinary shares in ██████████ to the holders of the “A” ordinary shares in ██████████
- (xvii) The Appellants’ witness used large swathes of correspondence, prepared by the Tax Advisor and inserted it into his correspondence in response to the Respondent.

- (xviii) The Tax Advisor and the person whom the evidence suggests was the most knowledgeable as to events in ██████, was not present at the hearing of the appeal to give sworn evidence as to the matters at issue in these appeals.
- (xix) No legal documentation such as a CRO share register of ██████ or its memorandum of association has been produced by the Appellants in this appeal.
- (xx) No evidence of ██████ share register, prepared in accordance with section 169 of the Companies Act, 2014, was submitted in this appeal to establish the members of ██████
- (xxi) The instructions issued by the Tax Advisors practice to the Manager of AIB submitted in these appeals, are not instructions to the AIB Manager in relation to the distribution amounts herein.

### **Analysis**

25. The appropriate starting point for the analysis of the issues is to confirm that in an 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 paragraph 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”.*

26. As per the Appellants’ notices of appeal, the Appellants’ appeal the notices of assessment to income tax on the basis that the distributions received by the taxpayers, do not constitute distributions in accordance with the provisions of section 130(3)(a) TCA 1997.

27. The issue for determination in this case is whether the movement in rights attaching to shares between two separate shareholdings, is a transaction chargeable to income tax as a distribution, pursuant to section 130(3)(a) of the Taxes Consolidation Act 1997. The Commissioner considers it prudent to consider the principles applicable to statutory interpretation prior to considering the substantive arguments in this appeal.

### **Statutory interpretation**

28. In relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point is generally accepted as being the judgment of

Kennedy CJ in *Revenue Commissioners v Doorley* [1933] I.R. 750 at page 765 wherein he held that:

*"The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is...as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament."*

29. Whilst the parties' representatives made comparable submissions in relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders*, as helpfully set out by McDonald J. 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*") at paragraph 74:

*"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. 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 self-evident, 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, 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 possible”.*

30. The Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning. In addition, context is critical. In that regard the Commissioner is mindful of the recent decision of Mr Justice Murray in *Heather Hill*, wherein he conducted a review of the jurisprudence and the well settled principles relating to statutory interpretation. At paragraph 108 of his decision, Murray J. states:

*“it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is not clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is*

*inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed”.*

31. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill*, the Commissioner finds that the words contained in section 130 (3)(a) TCA 1997 are plain and their meaning is self-evident, such that a literal interpretation is sufficient.

### **Substantive issue**

32. Section 130(3) TCA 1997 is, in part, an anti-avoidance provision against attempts to withdraw funds from a company otherwise than through its share capital or securities. It applies only to transactions between a company and a member or members of the company.
33. Section 130(3)(a) TCA 1997 treats a transfer of an asset from a company to its members to be a distribution for income tax purposes. The Appellants submit that in order for section 130(3)(a) TCA 1997 to apply, the transaction must satisfy a number of separate elements, namely:-
- i. There must be a transfer of an asset;
  - ii. The asset must be transferred by ██████████
  - iii. The transfer must be to a “member” of ██████████
  - iv. The value of the benefit (taken according to its market value) must be received by the member of ██████████ and the monetary value of any such benefit is reduced by any “new consideration” given by the member of ██████████. Where the consideration equals the value of the benefit then the benefit to be assessed is nil. That is to say that where the “difference” is nil then there is no liability.
34. Counsel for the Appellants submit that there are three issues to be dealt with; firstly, who are the members of ██████████. The members of ██████████ are not members of ██████████. Secondly, the construction of section 130 TCA 1997, in particular new consideration and thirdly, the *Hughes* decision. The Commissioner considers it appropriate to approach the analysis of each of the issues to be dealt with in reverse order, with the third point being dealt with first, as it features comprehensively in the

submissions of both parties. The Commissioner is satisfied that once the competing arguments in relation to the *Hughes* decision are analysed, the Commissioner should then proceed to deal with both the construction of section 130 TCA 1997 and the members of ██████ and ██████ together as the points are interrelated.

### **The Hughes decision**

35. The Respondent placed significant emphasis on the High Court decision in *Hughes* and Mr Justice Allen's consideration of the correct construction of section 130(3)(a) TCA 1997. The Respondent contends that the circumstances in this appeal are similar to the circumstances in the *Hughes* decision and give rise to the same legal questions. Therefore, the legal principles enunciated by Allen J. in the *Hughes* decision apply to the facts herein.
36. The Commissioner observes that the *Hughes* decision was a case stated, brought by the taxpayer, from the determination of Comerford J. on the taxpayer's appeal from the determination of the Appeal Commissioners, which held that the transfer of share rights was a distribution for the purposes of section 130(3)(a) TCA 1997. The issues in the case stated in *Hughes* included: first whether an enquiry needed to be held to see which provision better caught the share rights transfer; (section 130(3)(a) or section 543 TCA 1997), second whether the share rights transferred were "assets" within the meaning of section 130(3)(a) TCA 1997 (on the proper interpretation of that section and having regard to the nature of a share right), third whether the actions of Hughes Chemical in voting through the special resolution 31 January 2006 amounted to a "transfer" for the purposes of section 130(3)(a) TCA 1997 (whether the extinguishment and creation of share rights could amount to a transfer and whether the transfer had to be to the Appellant and his wife in their capacity as members of Hughes Chemical). The first issue in *Hughes* is not relevant for the purposes of these appeals, but the second and third issues, as aforementioned, are relevant.
37. The Respondent submits that the *Hughes* decision is binding authority for the proposition that the transfers which occurred in the appeals herein, as in *Hughes*, are each a distribution within the meaning of 130(3)(a) TCA 1997.
38. The Appellants seek to distinguish the *Hughes* decision on the basis that the Learned High Court Judge, when deciding *Hughes*, did not have the benefit of the decision of O'Donnell J. in *Bookfinders* as regards his obiter comments in *O'Flynn* (paragraph 41-42), wherein O'Donnell J stated:



*“It is clear that my observations on the issue of statutory interpretation in the O’Flynn case were obiter. On reflection, they were, I think, unnecessary, incautiously expressed, and made without the benefit of opposing arguments. In particular, I think it was wrong to use the loaded word “purposive” and to further suggest that the Interpretation Act mandated such an approach in respect of taxation legislation”.*

39. In *Bookfinders*, O’Donnell J confirmed that he was wrong to use the term “purposive” and was incorrect to suggest that the Interpretation Act mandated such an approach in respect of taxation legislation. Nevertheless, he confirmed at paragraph 47 of *Bookfinders* that his correction should not mean that the interpretation of tax statutes cannot have regard to the purpose of the provision, or that the manner in which the Court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on that basis conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. He stated:

*“Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.”*

40. It appears to the Commissioner, that the Appellants makes the point that the corollary of this is that Allen J. applied a purposive or a teleological approach in the *Hughes* decision and that Allen J. could not have arrived at his conclusions in that decision other than by that route, such that the decision in *Hughes* is somehow unsafe in that regard. The Appellants submit that this *“would affect the way in which Mr. Justice Allen approached the issues and in particular the statutory construction and the application of that statutory construction to the facts before him”*.
41. The Commissioner does not accept that argument and considers reliance on such an argument to be misplaced. It is not open to the Commissioner to revisit the decision in *Hughes* and decide that the decision in *Hughes* is wrong. Consequently, the Commissioner is satisfied that she can proceed to consider the decision in *Hughes* and the applicability or otherwise of the legal principles to the appeals herein.
42. The Commissioner considers that it is appropriate to approach this appeal methodically, dealing with the all of the separate elements that the transactions must satisfy in order for section 130(3)(a) TCA 1997 to apply. The Commissioner considers that paragraph 4.1 of the Appellant’s outline of argument, points 1-4 as referred to above at paragraph 32 is an appropriate way to proceed.

### **The construction of section 130(3)(a) TCA 1997**

43. In approaching the analysis of the construction of section 130(3)(a) TCA 1997 and the requirements to be satisfied, the Commissioner is conscious of McKechnie J's dictum in *Dunnes Stores* at paragraph 66 that "each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."
44. As set out above, there are a number of requirements to be satisfied in order that a transaction is caught by the provisions of section 130(3)(a) TCA 1997. Section 130(3)(a) TCA 1997 provides that "Where on a **transfer of assets** .....by a **company** to its **members** ..... the amount or value of the **benefit received** by a member.....**exceeds** the amount or value (so taken) of any **new consideration given** by the member, the company shall be treated as making a **distribution** to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount")". [Emphasis added]

#### **(i) An asset**

45. Therefore, it is evident to the Commissioner that firstly, the section requires that there be a transfer of an **asset**. Thus, the question arises was there a transfer of an asset by virtue of the passing of the Special Resolution on 12 December 2007. The Appellants make lengthy arguments in their submissions, why the share rights in this transaction are not an asset for the purposes of section 130(3)(a) TCA 1997 and hence, no transfer of an asset occurred on the passing of the Special Resolution. Rather, there was an alteration of rights that attached to ██████ shares in ██████. It is argued that the "A" ordinary shareholders in ██████ did not acquire a new asset. Instead, the rights of the "A" ordinary shareholders were altered on the passing of the Special Resolution.
46. The Commissioner is satisfied that the dicta of Allen J. in *Hughes* deals with the meaning of an asset for the purposes of section 130(3)(a) TCA 1997, and as aforementioned, it is authoritative in this regard and binding on the Commissioner. Allen J. gave detailed consideration to whether share rights were "assets" within the meaning of section 130(3)(a) TCA 1997. He concluded that they were assets on the basis that the transaction itself showed this to be so, (paragraph 52) but also, and separately, on the basis of an analysis of the authorities cited and discussed (paragraph 60). Allen J. stated that:

*"52. It seems to me that the proposition that share rights are not legally separable from the shares to which they attach is shown to be wrong by the transactions in this case. The Circuit Court judge said that he was tempted to say so. In my view there was no reason why he could not have said so. The resolution of 31st January, 2006 stripped*

*the participation and voting rights from the ordinary shares and vested them in the holders of the A ordinary shares. The fact that the rights had to be attached to one or other class of shares does not mean that they are not valuable or capable of being moved (to use an entirely neutral term) from one class to the other.*

.....

*60. I am satisfied that the rights attached to the shares in Greenane Developments to attend and vote at general meetings and to participate in a surplus on winding up were valuable rights which were divisible from the shares to which they were attached and were assets”.*

47. In light of the above principles enunciated by Allen J. in *Hughes* and applying it to the facts of the Appellants’ appeals, the Commissioner is satisfied that share rights are an asset for the purposes of section 130(3)(a) TCA 1997. Consequently, the Commissioner is further satisfied that the share rights attaching to the shares in ████████ held by the ordinary shareholders ████████ and the “A” ordinary shareholders are thus, an asset. With that in mind, the Commissioner will now consider whether a **transfer of an asset** occurred for the purposes of these appeals.

**(ii) Transfer of an asset**

48. The Appellants argue that *“if, which is denied, the share rights are an asset for the purposes of the section, it is submitted that there has been no transfer of those assets by ████████. The Appellants submits that “██████ did not transfer assets to the Appellants, rather what occurred was value was allowed to move over shares in ████████ from ████████ to the A ordinary shareholders”.*

49. It is contended for by the Appellants that the Special Resolution was not a transfer of assets, rather it allowed value to move from the shares held by ████████ to the “A” Ordinary shareholders, a matter specifically taxable under Section 543(2)(a) TCA 1997 not section 130(3)(a) TCA 1997. Again, the Respondent relies heavily on the dicta of Allen J. in *Hughes* and his consideration of whether a transfer of an asset has occurred. In this regard, Allen J. stated as follows:

*“65. The appellant accepts (as Keane J. said in Re Sugar Distributors Limited [1995] 2 I.R. 194, 207) that a share in a company is a bundle of proprietary rights which can be sold or exchanged for money or other valuable consideration. The appellant accepts that the rights may be sold or exchanged by way of a shareholders’ agreement and that “the said rights constitute assets for the purpose of the Capital Gains Tax Acts”. It seems to me that the acceptance that the rights attached to shares can be bought and*

*sold by a shareholders' agreement is an acknowledgment that the bundle of rights is divisible. It is not suggested that there is any special definition of assets for the purposes of the Capital Gains Tax Acts: so if the rights are assets for the purposes of the Capital Gains Tax Acts, they must equally be assets for the purpose of the Income Tax Acts.*

.....

*67. It seems to me that the fundamental flaw in this argument is that it fails to recognise the basic principle of company law spelled out in *Borland's Trustee* that the articles of association are a contract between the members and the company, and between the members inter se. The resolutions, which are passed by the members and not by the company, create a contract between the members and the company, and the members inter se, as to how the assets of the company are to be distributed in the event of a winding up. While it is perfectly correct to describe the resolutions as resolutions of the company, it does not follow that they are not also resolutions of the members.*

*68. It is accepted by the appellant that the resolution of 31st January, 2006 effected a "movement of share rights as between different classes of shares". The rights moved from the ordinary shares, held by Hughes Chemical, to the A ordinary shares, held by Mr. and Mrs. Hughes. That movement occurred because Hughes Chemical, as the only shareholder in Greenane Developments entitled to vote, voted for the extinguishment of the rights attaching to its shares and the creation of the same rights in the shares owned by Mr. and Mrs. Hughes. As a result of the action of Hughes Chemical, the rights in Greenane Developments theretofore held by it were thereafter held by Mr. and Mrs. Hughes.*

*69. The appellant, by reference to the definition of a transfer offered by Murdoch and Hunt, argues that the rights acquired by Mr. and Mrs. Hughes did not come "from" Hughes Chemical but were new rights created on the extinguishment of the rights of Hughes Chemical. That may be so, but as counsel for the Revenue point out, what s. 130(3)(a) captures is a transfer "by" rather than a transfer "from" a company.*

*70. On the same day and by the same resolution, by the vote of Hughes Chemical, the rights to vote and to participate in a surplus of assets in Greenane Developments ceased to belong to Hughes Chemical and came to belong to Mr. and Mrs. Hughes. The resolution and the amended articles of association amounted to an agreement between Hughes Chemical and Mr. and Mrs. Hughes that the rights in Greenane Developments formerly enjoyed by Hughes Chemical would thenceforth be enjoyed by Mr. and Mrs. Hughes. I cannot see how this was anything other than a transfer.*

*71. In my view the Circuit Court judge was correct in his determination that the extinguishment of a right and creation of a new right could be a mechanism to effect a transfer and that there was abundant justification for his conclusion that the resolution effected a transfer”.*

50. Following the incorporation of ██████ on 6 December 2007, the allotment of shares in ██████ took place. In that regard, the Commissioner has considered CRO Form B5 at page 296 of the Booklet of Documents. The Commissioner notes that the allottees details are set out with reference to the Appellants’ names and the words ██████ appear after the names. Notably, there is **no reference** made to the words “██████” or ██████” contained in this document. The Commissioner observes that the shares being allotted to the Appellants are the “A” ordinary shares in ██████. In addition, the Commissioner has also considered CRO Form B5 at page 299 of the Booklet of Documents, wherein it states that the allottees ██████ subscribed for 100 ordinary shares in ██████. Further, the Commissioner observes that under the heading “**Allotment for cash consideration**”, the amount paid or due and payable on each share was the sum of **€78,000**.
51. It is contended for by the Respondent that the Special Resolution was passed by the holder of the ordinary shares ██████, which made the original cash injection, and which held the valuable voting, share premium and distribution rights. Moreover, the Respondent contends that the holder of the ordinary shares ██████ has exercised control by way of voting to pass its share rights, and the value attached to those rights, to the “A” ordinary shareholders.
52. The Commissioner has considered the Special Resolution at page 302 of the Booklet of Documents which altered the voting rights and distribution rights attached to the ordinary shares held by ██████ and vested them in the holders of the “A” ordinary shares. The Commissioner is satisfied based on the factual situation herein, that on the passing of the Special Resolution, there was **a transfer of an asset** between the holder of the ordinary shares ██████ and the A ordinary shareholders. The Commissioner is satisfied that share rights are legally separable from the shares to which they attach and are thus, an asset. The Commissioner considers this to be **a material fact found**. The Commissioner will now consider whether the transfer of an asset by the Company ██████ was made to its **members**.

(iii) **The transfer of an asset by a company to its members**

53. In addition to the above requirements, Section 130(3)(a) TCA 1997 provides that the asset must be transferred by a company to its members and the question arises as to who are its **members**. The Respondent's argument is that the material facts in these appeals are identical to the material facts in the *Hughes* decision, such that the company is ██████ being the holder of the ordinary shares in ██████, which transferred its share rights to its members, the Appellants and the holders of the "A" ordinary shares in ██████. This is in circumstances where the CRO Form B5 does not show that the holders of the "A" ordinary shares are not members of ██████. Thus, the effect of the Special Resolution was that the "A" ordinary shareholders in ██████ and whom are members of ██████ (the Appellants) became entitled to both the right to vote and to participate in the surplus. The Respondent argues that "*the scheme is designed to extract monies from ██████ via shares held by that company in another company, namely ██████, of which the Appellants were also shareholders*". The Appellants with the exception of ██████ contend that they are not members of ██████. The Appellants' witness confirmed that the ██████ were never shareholders in ██████, but that it was the ██████ that were shareholders in ██████. Therefore, section 130(3)(a) TCA 1997 cannot apply to the transactions.
54. The Commissioner has considered the exchange of correspondence that took place between the parties on the commencement of an investigation by the Respondent. The Commissioner considers it important to set out certain pieces of correspondence to assist with the analysis of the members' requirements. The Commissioner notes initial correspondence from the Respondent dated 3 March 2011 which states: "*The investigation is concerned inter alia with the tax consequence of transactions involving the transfer of share rights to the trust by ██████ [sic] ("the Company"). Information available to me suggests that the trust subscribed for "A" ordinary shares in ██████ at par. Rights attaching to those shares held by the company in ██████ were transferred to the shares held by the trust in ██████. Under the Taxes Act, the value of the rights transferred from the company to the trust, is chargeable to income tax*".
55. Furthermore, the Commissioner has considered the document entitled "Exhibit 2 Summary of Shareholding in ██████ at page 381 of the Booklet of Document. This document is exhibited to the witness statement of the Appellants' witness. The document purports that ██████ is the holder of ██████ ordinary shares in ██████. In addition, it states the "██████ of ██████ ██████" are the holder of ██████ ordinary shares in ██████, the ██████ of ██████ ██████" are the holder of

■■■■ ordinary shares in ■■■■ and the “■■■■ of ■■■■ ■■■■” are the holder of ■■■■ ■■■■ ordinary shares in ■■■■

56. The Appellants’ witness confirmed that his firm of Chartered Accountants and Registered Auditors was responsible for company secretarial services to ■■■■ and that his firm of Chartered Accountants and Registered Auditors had prepared ■■■■ share register. It was put to the Appellants’ witness by Counsel for the Respondent that Company Law dictates that Trusts should not be entered on a company share register and reference was made to section 123 of the Companies Act 1963, in that regard. The Appellants’ witness conceded that it was a correct statement of the law regarding entries on the share register. The Commissioner notes the testimony of the Appellants’ witness that these Trusts became commonly known as the “■■■■” as opposed to the “■■■■” which the Appellants contend are not members of ■■■■. The evidence of the Appellants’ witness, in addition to his witness statement, confirm that both Trusts are commonly referred to under those names.
57. On 17 May 2011, the Appellants representative and witness in the appeal herein responded to the aforementioned correspondence. The correspondence states “*As part of a Company reorganisation, the trading company ■■■■ injected funds into a limited company ■■■■ for ordinary shares at a premium. The shareholders subscribed for A ordinary shares in the same company. The rights to each set of shares were subsequently exchanged*”. The Appellants’ witness testified that with reference to the above text, the paragraphs were provided to him the Tax Advisor for insertion into his replying correspondence to the Respondent, as the witness is not a tax expert. Further, he confirmed that he had no knowledge as to ■■■■, of which the Appellants’ Tax Advisor held all the knowledge.
58. The Commissioner considers this to be of notable importance in terms of the Appellants’ appeals. The Commissioner notes the evidence of the Appellants’ witness wherein he states that it is his opinion that it is not clear that the correspondence is referring to a transfer from ■■■■ to ■■■■ rather than ■■■■. The witness gave evidence that his view was it was referencing ■■■■ when it states that “*The shareholders subscribed for A ordinary shares in the same company*”. It was put to him by Counsel for the Respondent that “the company” can only mean ■■■■. Nevertheless, as stated above, he conceded that he had no knowledge of ■■■■
59. The Commissioner observes that by letter dated 18 July 2011, the Respondent wrote to the Appellants’ representative. The correspondence referenced section 130 (3)(a) TCA 1997 and stated that “*As the shareholders paid no consideration to the parent company*

*for the transfer of the rights concerned, the entire value of those rights is chargeable to income tax...".* The correspondence also requested certain information, *inter alia* minutes and company secretarial records of the parent and subsidiary company, namely [REDACTED] and [REDACTED]. Of note and as set out above, the firm of the Appellants' witness provided company secretarial services to [REDACTED]

60. By response dated 7 September 2011, the Appellants representative, with reference to section 130(3)(a) TCA 1997, stated that "*The asset in this case is shares. At no point is there a transfer of that asset to the shareholder. The company at all times owned and continued to own the shares in its subsidiary. Sect 130 applies to an actual transfer and no actual transfer has occurred here*". Again, the Commissioner notes the evidence of the Appellants' witness confirming that the forgoing paragraph was provided by the Appellants' tax advisor to him for insertion into his replying correspondence to the Respondent. The Commissioner considers it important that this correspondence from the Appellants' witness addresses only the matter of a transfer of an asset and does not in any way seek to address the Respondent's contention that there was a transfer by a company [REDACTED] to a member [REDACTED]. The Commissioner considers that this is important as it tends to suggest that the Appellants were focused on the meaning of an asset, rather than the members.
61. The Commissioner considers the evidence of the Appellant's witness, having admitted that large swathes of correspondence was actually prepared by the Tax Advisor for insertion into his correspondence, to be of little persuasive value to the matters at issue herein. The Tax Advisor and person whom the evidence suggests was the most knowledgeable as to events in [REDACTED], was not present at the hearing of the appeal to give sworn evidence as to the matters at issue in these appeals.
62. Having regard to the dicta of Allen J. in the *Hughes* decision and as set out above, the Commissioner is satisfied that a transfer of an asset occurred herein. The Commissioner finds this to be **a material fact**. Notably, no documentation sought in the Respondent's letter dated 18 July 2011 was provided with the response. The Commissioner observes that the request of the Respondent for minutes and company secretarial documentation is repeated in the Respondent's correspondence dated 24 January 2012, in addition to a request *inter alia* for bank statements associated with each Trust. The Commissioner notes that company secretarial documentation, such as the memorandum of association or share register of [REDACTED] has not been submitted in these appeals. The Commissioner has considered section 169 of the Companies Act 2014 in relation to a register of members. Section 169 provides that a company shall keep a register of its members and



enter in it certain particulars in relation to the members and the shares held. The Commissioner observes the use of the word “shall” in section 169, which implies that it is a mandatory requirement for companies.

63. The Commissioner has considered letter dated 22 February 2012, wherein the Appellants respond to the request by the Respondent for minutes and company secretarial documentation stating that “*As far as we are aware, the only minute etc. are those which are available on the CRO records of which you would already be aware*”. In addition, the correspondence furnished to the Respondent was *inter alia* the Trust documents dated [REDACTED], in relation to the following Trusts; the [REDACTED] the [REDACTED] and the [REDACTED]. The Commissioner has considered the Trust documentation relating to the [REDACTED] at pages 201-236 (repeated at pages 413 to 440 of the Booklet of Documents).
64. In addition, the Commissioner has also considered the Deeds of Trust documentation dated [REDACTED], at pages 307 to 328 of the Booklet of Documents (repeated at pages 383 to 404 of the Booklet of Documents) and the stock transfer forms at pages 407 to 412 of the Booklet of Documents. During the course of the hearing these Trusts were referred to as the “[REDACTED]”. The Appellants’ witness has testified that at the time, the [REDACTED] were members of [REDACTED]. The Appellant’s witness also testified that he was a Trustee of the [REDACTED], but is no longer a Trustee.
65. During cross examination of the Appellants’ witness, Counsel for the Respondent referred the Appellants’ witness to page 245 of the Booklet of Documents namely, correspondence dated 7 November 2012, from the Appellants representative in response to the Respondent’s correspondence dated 27 September 2012, requesting information in relation to withdrawals of sums from certain Trust accounts. The Commissioner notes at point 3 of the correspondence it states “[REDACTED] as owner of the shares was paid the proceeds”. The Appellants’ witness testified that this was what he termed “badly worded” and did not mean what it said. The witness said that it should have stated it was paid to the Trust. Again, of note is the correspondence dated 23 November 2012, at page 246 of the Booklet of Documents, from the Appellants’ witness furnishing a list of shareholders in [REDACTED] and confirming that “*As far as we are aware there have been no changes in the since 2007...*”. The Appellants’ witness stated that the [REDACTED] have never held shares in [REDACTED] and that the [REDACTED] did not receive a distribution from [REDACTED].
66. In addition to consideration of correspondence which ensued between the parties during the course of the Respondent’s investigation, the Commissioner has considered bank

account statements submitted at pages 449 to 451 of the Booklet of Documents. It was submitted that the statements relate to the Liquidator's account for [REDACTED]. The Commissioner observes the credit balance showing on the account on 21 December 2007, in the sum of €7,800,256.00 and the subsequent payments made on 8 February 2008 to the following entities described in the bank account statements as "[REDACTED] [REDACTED]", "[REDACTED] [REDACTED]" and "[REDACTED] [REDACTED]" in the sum of €2,449,968.58 and "[REDACTED]" in the sum of €244,996.85. The Respondent submits that there is no reference therein of payments being made to the [REDACTED] or the [REDACTED] and thus, it is entirely unclear as to whom the distributions were made following the special resolution dated 12 December 2017 to place [REDACTED] in liquidation.

67. The Commissioner notes the correspondence dated 7 February 2008 and 11 March 2008, at pages 452 and 453 of the Booklet of Documents which contains instructions from the firm of the Tax Advisor to the Manager of AIB requesting that certain payments are made. The Commissioner has considered in detail both the references on the accounts and the payment instructions to AIB from the Tax Advisor. The Commissioner considers that there is a stark difference in description between the different payments on each occasion and the instructions given.
68. The Commissioner considers that when compared, it is evident that the payment instructions that have been submitted in this appeal refer to the [REDACTED] being paid, yet the payment references in the AIB bank account that have been submitted at pages 450 and 451 use different language on each of the three occasions. Moreover, the instructions submitted in these appeals are not the instructions in relation to the distribution amounts. To take [REDACTED] for example, payment is made to the "[REDACTED] [REDACTED]" on 14 March 2008 and "[REDACTED]" on 7 February 2008. The instructions were to pay the "[REDACTED]" on both occasions, yet the references on the bank account submitted are different. Again, those references are different to the reference used in relation to the payment on 8 February 2008, that match the distribution amounts at issue in the within appeals, which describe the payment as going to the "[REDACTED] [REDACTED]". The only consistent language that is used is with reference to [REDACTED] and [REDACTED]. The Commissioner considers this lack of clarity on the Appellants' part as to payments made, to be unhelpful to its appeals.
69. As set out above the burden of proof in a tax appeal before the Commissioner is on the Appellants. There was no evidence adduced before the Commissioner to confirm that payment of the amount in accordance with the distribution was paid to the members of the [REDACTED], as opposed to the [REDACTED]. The Respondent points out that there is no

documentary evidence submitted by the Appellant in the form of an instruction to AIB for payment, in relation to the sums at issue herein. The instructions issued by the Tax Advisors practice and submitted in these appeals are not the instructions to the AIB Manager in relation to the distribution amounts.

70. The Commissioner considers that to be of notable importance in this appeal. It is a document which could have assisted the Commissioner with her consideration of the competing arguments as to whom are the members of [REDACTED] and [REDACTED] and thus provided clarity in relation to that issue. The absence of the document was not explained by the Appellants.
71. The Commissioner has considered the additional AIB bank account statements submitted by the Appellants at the hearing of the appeal. It was argued that the bank account statements submitted are the bank accounts of the [REDACTED]. However, no evidence was adduced in relation to this submission and the Commissioner observes that the bank account names do not reference the "[REDACTED]". In fact, the Commissioner observes that the whilst [REDACTED] and [REDACTED] accounts have the word "Trust" after their names, the [REDACTED] account simply states "The [REDACTED] Current Account". Further, the Commissioner notes that the AIB bank accounts that received the distributions state on the address line, as opposed to the account name, "C/O [REDACTED]".
72. The Commissioner is satisfied that when CRO Form B5 was filed showing an allotment of shares by [REDACTED] to a Trust, it did not state the [REDACTED]. In addition, the bank accounts submitted by the Appellant and contended to be the bank accounts of the [REDACTED] do not corroborate the submission that the [REDACTED] did not receive the distribution. As aforementioned above at paragraph 66, they do not state the words [REDACTED]. Moreover, no evidence has been adduced by any Trustee of any Trust to establish to whom the bank accounts belong to. The Appellants' witness stated that the [REDACTED] did not receive a distribution. However, the Appellants witness confirmed that he had no knowledge of [REDACTED] and the Commissioner has addressed the weight to be attached to his evidence in this regard. The Commissioner considers there to be a deficiency in records and documentation relating to the shareholding in these companies and the Appellants have not shown on balance that the holders of the ordinary shares in [REDACTED] did not transfer shares rights to its members, being the "A" ordinary shareholders in [REDACTED]

**(iv) New consideration**

73. Section 130(3)(a) TCA 1997 further stipulates that *“the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference”*.
74. Section 130(3)(a) TCA 1997 taxes as a distribution “the difference” between value received by a member and the consideration paid by a member, in respect of the transfer of assets by a company to the member. In other words, section 130(3)(a) TCA 1997 taxes a movement of assets between two taxable persons and provides that the amount of the difference between the value received and the consideration paid (referred to as ‘the relevant amount’) “shall be treated as ....a distribution”, and thus, chargeable to income tax in the hands of the recipient. The Commissioner has found that value passed between the ordinary shares held by ██████ in ██████ and the “A” ordinary shares held in ██████. There was no evidence adduced of consideration paid for the transfer of share rights.
75. The Appellants argue that the Respondent has not considered what was being given up, such that the share premium and the acquisition of shares by ██████ involved a combined consideration of €7.8 million moving out of ██████ and into ██████. The Appellants submit that the Special Resolution meant that ██████ lost €7.8 million. It is argued by the Appellants that the members of ██████ themselves and their shares were reduced in value by the proportion that €7.8 million bore to the value of the assets of ██████ that would in turn have been reflected in the value of their shares. The Commissioner observes that no evidence was adduced, nor was a Special Resolution of ██████ submitted in relation to this point. The Commissioner notes the Respondents argument that *“the shareholders in ██████ if they weren't the same as the shareholders in ██████ how did it come to be that they thought it was a good idea to do any of this?”*
76. The Commissioner observes that it is the Appellants’ argument that the effect of the Special Resolution on the value in the shareholding of ██████ must be considered. The Appellants contend that the Respondent’s approach does not have regard to the commensurate diminution in the value of the shareholding in ██████ on the passing of the Special Resolution. It is argued by the Appellants that as the Respondent states that ██████ was liable to DWT on the basis of a distribution made, on the passing of the Special Resolution, the value of this distribution is confirmed by the Respondent as being equivalent to the value of the rights which were altered in ██████

77. In contrast, the Respondent submits that it is a complete misreading of section 130(3)(a) TCA 1997 by the Appellants, done in any event in the absence of any evidence. The Respondent contends that the Appellants' argument is unstatable for a number of reasons. Firstly, no evidence was adduced as to what [REDACTED] or anyone else lost. [REDACTED] was not the only shareholder in [REDACTED] there were other members. [REDACTED] shareholding in [REDACTED] was informed not only by his share rights, but many other matters, of which no evidence has been adduced. Whilst there was a loss in the value of shares in [REDACTED], no evidence has been adduced as to the actual loss to the shareholders.
78. The Commissioner notes the submissions made in respect of section 135(2)(a) TCA 1997. The Respondent states that this specifically excludes exactly what the Appellants are trying to achieve in terms of the point that the consideration was the diminution in value of share capital, in circumstances where section 135(2)(a) TCA 1997 provides "*No consideration derived from the value of any share capital or security of a company or from voting or other rights in a company shall be regarded for the purposes of this chapter as new consideration received by the company...*"
79. Contrary to the Respondent's argument, the Appellants argue that the word "unless" appears in section 135(2)(a) TCA 1997 and means, in its natural and ordinary meaning, "*if any of the three integers that follow apply, then it does amount to new consideration*". The Appellants highlight the following paragraph:- "*(i) money or value received from the company as a distribution*". The Appellants state that there was a distribution. The Appellants contend the Respondent attributed nil to the balancing exercise they were required to do under the section, and it is simply a wrong assessment.
80. The Commissioner is satisfied that section 130(3)(a) TCA 1997 can only impose taxation on the difference between the amount of the benefit and the amount of any such consideration. In the outline of arguments, the Appellants contend that the increase in the value of the Appellants' shareholding in [REDACTED] is offset by the decrease in the value of their shares in [REDACTED] such that, there is no difference between the amount of the benefit and the amount of the consideration which the Appellants contend is a charge to income tax of nil.
81. The Appellant relied on the decision in *Pickles*. Counsel for the Appellants submit that in *Pickles* the Tribunal was looking at a cost benefit analysis to work out what the net benefit was. This is what the section mandates and it was submitted that this is "*the delta between what was received as value and what was given as value that becomes the sum that is subject to tax*". The Respondent submits that the facts in the *Pickles* decision are

not really terribly helpful to a construction of section 130(3)(a) TCA 1997 in this case. Moreover, there exists the benefit of a judgment of the High Court in Ireland on the construction of that section in *Hughes*. The Commissioner agrees with this statement and the Respondent's submission that "*what is perhaps useful in the Pickles case is that it sets up the dynamic which is contemplated by 130(3)(a) here, that is something passes from a company to its member and something passes back from a member to the company*".

82. The Commissioner is satisfied that the transfer of share rights from the ordinary shareholders ██████ to the "A" ordinary shareholders was achieved by Special Resolution and as such, the method achieved by the Special Resolution did not require an obligation to pay any consideration. It is therefore beyond doubt that there was a transfer of assets in the form of a movement of share rights by the holder of the ordinary shares ██████ to its members, the "A" ordinary shareholders, for a value that was in excess of any consideration paid. There has been no evidence adduced to suggest otherwise, either in the form of sworn oral testimony of a witness or resolutions of ██████ in respect of its shareholding in ██████
83. In taking an appeal to the Commission, the Applicants have undertaken the burden of establishing that the Respondent was incorrect to raise the assessments to income tax. The Commissioner considers there to be a deficiency in records and documentation relating to the shareholding in these companies, in circumstances where the Appellants bear the burden of proof in an appeal before the Commission.
84. There exists no clear, cogent and credible evidence, neither in the form of documentary evidence submitted or the testimony of the Appellants' witness that tends to show or on balance establishes the shareholding of ██████ and ██████ at that time. Counsel for the Appellants states that the evidence of the Appellants' witness was clear, such that the ██████ never received a distribution, never entered into a transaction, hence why it did not have a tax number and that the Trust that did receive a distribution from ██████ was the ██████. The Commissioner does not accept that such a contention is evidenced. Moreover, the Commissioner has set out above why the testimony of the Appellants witness carries little weight. Consequently, the Commissioner is satisfied that the Appellants have on balance failed to establish that the holders of the "A" ordinary shares in ██████, were not members of ██████ for the purposes of section 130(3)(a) TCA 1997.
85. In the circumstances, the Commissioner finds on the balance of probabilities that the Appellants have failed to adduce any evidence, whether oral or documentary, which tends

to establish their claim. As set out above there exists no evidence of the members of [REDACTED], such as the CRO share register or otherwise which tends to show that the members of [REDACTED] were not the holders of the "A" ordinary shares in [REDACTED]. The only evidence adduced is that the "A" ordinary shares were allotted to the Trust described as [REDACTED] and payments were made on 8 February 2008 to a [REDACTED]. The evidence adduced does not establish that these [REDACTED] were not members of [REDACTED].

86. Finally for the sake of completeness the Commissioner shall address three other points made; firstly, the Appellants make an argument, in their outline of arguments that as this is a liquidation case, the provisions of section 130 TCA 1997 do not apply. While it is true that [REDACTED] went into liquidation and the proceeds of the share account were distributed by the Liquidator, the taxable event was not the distribution made in the winding up, but rather the transfer of share rights from the holder of the ordinary shares ([REDACTED] to the "A" ordinary shareholders, which occurred on the passing of the Special Resolution.
87. Secondly, the Appellants' outline of arguments make reference to a [REDACTED] being an entity which is incapable of receiving a benefit. Nevertheless, the Commissioner heard no evidence or legal submissions in respect of this point and thus, no finding is made in this regard. Moreover, the Commissioner observes that whilst the Appellants make reference to this argument in their outline of arguments, it nowhere appears in the grounds of appeal contained in their notices of appeal.
88. Thirdly, despite reference being made to section 543(2)(a) TCA 1997 in the Appellants' outline of arguments, no submissions were made in respect of this matter at the hearing of the appeal and thus, the Commissioner makes no finding in this respect either.
89. For the reasons set out above, the Commissioner determines that the Appellant has not shown on balance that there was no transfer of assets from a company [REDACTED] to a member, such that the provisions of section 130(3)(a) TCA 1997 are not applicable. The Commissioner considers that no evidence has been adduced which can satisfactorily show that the holders of the "A" ordinary shares in [REDACTED] were not members of [REDACTED]. Consequently, the Respondent was correct to treat this as a transfer of an asset between a company [REDACTED] and a member and to treat the transaction as a distribution in accordance with section 130(3)(a) TCA 1997.

## Determination

90. As such and for the reasons set out above, the Commissioner determines that the Appellants have failed in their appeals. The Appellants have not succeeded in showing that the tax is not payable and that the Respondent was incorrect to raise the assessments.

91. Therefore, the Notices of Assessment and Notice of Amended Assessment to income tax, dated 5 December 2012, for the year ending 31 December 2007, in the following sums shall stand:

- i. [REDACTED] €64,749 (Notice of Amended Assessment dated 5 December 2012);
- ii. [REDACTED] €499,993 (Notice of Assessment dated 5 December 2012);
- iii. [REDACTED]: €499,993 (Notice of Assessment dated 5 December 2012);
- iv. [REDACTED] €499,993 (Notice of Assessment dated 5 December 2012).

92. The Commissioner appreciates this decision will be disappointing for the Appellants. However, the Commissioner is charged with ensuring that the Appellants pay the correct tax.

93. 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 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine  
Appeal Commissioner  
11 July 2023

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