AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

127TACD2023

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") pursuant to section 933 of the Taxes Consolidation Act 1997 as amended ("TCA 1997"), against a notice of amended assessment to corporation tax raised by the Revenue Commissioners ("the Respondent") for the period [redacted] in the amount of €483,997.75.

2. The appeal proceeded by way of an oral hearing on 24 July 2023.

Background

3. The Appellant acquired the [redacted] ("the property") in [redacted] for €15,080,129. On [redacted], it sold the property for €22,500,000. The Appellant calculated a chargeable gain of €7,424,155 and paid tax thereon at 33%, giving rise to a payment in the amount of €2,449,971.

4. On [redacted], the Respondent raised a Notice of Amended Assessment ("NOAA") in the amount of €483,997.75 against the Appellant. The NOAA was raised on the basis that the Appellant should have apportioned the net proceeds of sale of the

property between land and buildings, on the one part, and plant and machinery, on the other, resulting in two separate capital gains tax ("CGT") computations. The Respondent calculated that there had been a chargeable gain of €8,890,816 on the disposal of the property, which gave rise to the additional amount of tax being assessed.

5. On [redacted], the Appellant appealed against the NOAA to the Commission. The appeal proceeded by way of an oral hearing on 24 July 2023.

Legislation and Guidelines

6. Section 31 of the TCA 1997 states that

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

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

   (b) in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75)."

7. Section 532 of the TCA states that, "*All forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not…*"

8. Section 544(5) of the TCA 1997 states that

   "*For the purposes of any computation under this Chapter of a gain accruing on a disposal, any necessary apportionment shall be made of any consideration or of any expenditure, and the method of apportionment adopted shall, subject to this Chapter, be such method as appears to the inspector or on appeal the Appeal Commissioners to be such method as appears to the inspector or on appeal to the Appeal Commissioners to be just and reasonable.*"

9. Section 545(2) of the TCA states that, "*The amount of the gain accruing on the disposal of an asset shall be computed in accordance with this Chapter, and subject to the other provisions of the Capital Gains Tax Acts*".

10. Section 552(1) of the TCA 1997 states that

   "*(1) Subject to the Capital Gains Tax Acts, the sums allowable as a deduction from the consideration in the computation under this Chapter of the gain accruing to a person on the disposal of an asset shall be restricted to—*

(a) the amount or value of the consideration in money or money's worth given by the person or on the person's behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to the person of the acquisition or, if the asset was not acquired by the person, any expenditure wholly and exclusively incurred by the person in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by the person or on the person's behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by the person in establishing, preserving or defending the person's title to, or to a right over, the asset, and,

(c) the incidental costs to the person of making the disposal."

11. Section 554(1) of the TCA 1997 states that

    "*There shall be excluded from the sums allowable under section 552 as a deduction any expenditure allowable as a deduction in computing the profits or gains or losses of a trade or profession for the purposes of income tax or allowable as a deduction in computing any other income or profits or gains or losses for the purposes of the Income Tax Acts and any expenditure which, although not so allowable as a deduction in computing any losses, would be so allowable but for an insufficiency of income or profits or gains, and this subsection shall apply irrespective of whether effect is or would be given to the deduction in computing the amount of tax chargeable or by discharge or repayment of tax or in any other way*."

12. Section 555(1) of the TCA 1997 states that

    "*Section 554 shall not require the exclusion from the sums allowable as a deduction under section 552 of any expenditure as being expenditure in respect of which a capital allowance or renewals allowance is made but, in the computation of the amount of a loss accruing to the person making the disposal, there shall be excluded from the sums allowable as a deduction any expenditure to the extent to which any capital allowance or renewals allowance has been or may be made in respect of that expenditure*."

13. Section 560 of the TCA 1997 states *inter alia* that

    "*(1) In this Chapter…*

    "wasting asset" means an asset with a predictable life not exceeding 50 years, but so that…(c) plant (other than plant that is a work of art) and machinery shall in every case

be regarded as having a predictable life of less than 50 years, and in estimating that life it shall be assumed that its life will end when it is finally put out of use as being unfit for further use and that it will be used in the normal manner and to the normal extent and will be so used throughout its life as so estimated…

(3) In the computation under this Chapter of the gain accruing on the disposal of a wasting asset, it shall be assumed –

(a) that any expenditure attributable to the asset under section 552(1)(a), after deducting the residual or scrap value, if any, of the asset, is written off at a uniform rate from its full amount at the time when the asset is acquired or provided to nil at the end of its life, and

(b) that any expenditure attributable to the asset under section 552(1)(b) is written off at a uniform rate from the full amount of that expenditure at the time when that expenditure is first reflected in the state or nature of the asset to nil at the end of its life.

(4) Where any expenditure attributable to the asset under section 552(1)(b) creates or increases a residual or scrap value of the asset, the residual or scrap value to be deducted under subsection (3)(a) shall be the residual or scrap value so created or increased.

(5) Any expenditure written off under this section shall not be allowable as a deduction under section 552."

14. Section 561 of the TCA states that

"*(1) Subsections (3) to (5) of section 560 shall not apply in relation to a disposal of an asset –*

(a) which, from the beginning of the period of ownership of the person making the disposal to the time when the disposal is made, is used solely for the purposes of a trade or profession and in respect of which that person has claimed or could have claimed any capital allowance in respect of any expenditure attributable to the asset under paragraph (a) or (b) of section 552(1), or

(b) on which the person making the disposal has incurred any expenditure which has otherwise qualified in full for any capital allowance.

(2) In the case of the disposal of an asset which in the period of ownership of the person making the disposal has been used partly for the purposes of a trade or

profession and partly for other purposes, or has been used for the purposes of a trade or profession for part of that period, or which has otherwise qualified in part only for capital allowances –

(a) the consideration for the disposal and any expenditure attributable to the asset under paragraph (a) or (b) of section 552(1) shall be apportioned by reference to the extent to which that expenditure qualified for capital allowances,

(b) the computation under this Chapter of the gain on the disposal shall be made separately in relation to the apportioned parts of the expenditure and consideration,

(c) subsections (3) to (5) of section 560 shall not apply for the purposes of the computation in relation to the part of the consideration apportioned to use for the purposes of the trade or profession or to the expenditure qualifying for capital allowances,

(d) if an apportionment of the consideration for the disposal has been made for the purposes of making any capital allowance to the person making the disposal or for the purpose of making any balancing charge on that person, that apportionment shall be employed for the purposes of this section, and

(e) subject to paragraph (d), the consideration for the disposal shall be apportioned for the purposes of this section in the same proportions as the expenditure attributable to the asset is apportioned under paragraph (a).”

15. Section 959AA(1) of the TCA 1997 states that

“*Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period –*

(a) an assessment for that period, or

(b) an amendment of an assessment for that period,

shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return."

Submissions

Appellant

16. In written submissions, the Appellant confirmed that, while the tax at issue was corporation tax, because the amount of chargeable gains accruing to a company was computed in accordance with CGT principles, it was more convenient to refer only to CGT.

17. In line with the judgment of Stack J in *Hanrahan v Revenue Commissioners* [2022] IEHC 43, as the NOAA issued on [redacted], the assessment was presumptively invalid as it could not become final and conclusive within the four year period provided for in section 959AA, which expired on [redacted]. This meant that the Respondent was precluded from making the amended assessment. The time limits in the TCA 1997 were designed to provide a balanced scheme whereby the Respondent had a finite period in which to interrogate the return of a chargeable person and make an assessment, and the chargeable person was provided with certainty in relation to their tax affairs after the expiration of that period.

18. Without prejudice to the submission that the NOAA was out of time, the Respondent's calculation of the additional CGT liability was erroneous. The basic structure of CGT was of a charge on gains accruing to a person on disposal of an asset by him; *Kirby (Inspector of Taxes) v Thorn EMI Plc* [1988] 2 All ER 947. The purpose of CGT was to tax capital gains and to make allowance for capital losses, each of which ought to be arrived at on normal business principles; *Aberdeen Construction Group Limited v Inland Revenue Commissioners* [1978] 1 All ER 962.

19. In this appeal, the asset for CGT purposes was the property which was owned by the Appellant and disposed of under a contract for sale dated [redacted]. This appeal came within the "*straightforward situations*" referred to by the House of Lords in *Aberdeen Construction Group Limited.* The Respondent had produced a computation that apportioned the premises into two separate CGT computations, and in so doing had converted a capital gain of €7,344,026 to a capital gain on "land and buildings", and a capital loss on "plant and machinery", which thereby imposed an additional amount of tax of €483,997.75 on the Appellant. In producing this computation, the Respondent disregarded the terms of the contract for sale dated [redacted].

20. If, which was denied, the consideration and costs on the disposal of the property could be apportioned, the apportionment performed by the Respondent was not just and reasonable. Its computation attributed consideration of €6,355,523 for "plant and machinery" which appeared to be based on capital allowances claimed. This computation was not just and reasonable because it included expenditure on items which were part and parcel of the property. These items were integral to the property and would pass under the sale as an inherent part of the premises; *Melluish (Inspector of Taxes) v BMI (No 3) Limited* [1995] 4 All ER 453.

21. In oral submissions, the Appellant's solicitor stated this was a straightforward situation involving the acquisition of an asset and its disposal, giving rise to a gain, the tax on which had been paid to the Respondent. There were two issues for adjudication: (1) whether the Respondent was precluded from issuing the NOAA as it could not become final and conclusive within the four year period provided for in section 959AA of the TCA 1997, and (2) whether the Respondent's computation of additional CGT was incorrect.

22. In its CT1 form for ██████, the Appellant showed capital allowances for plant and machinery in the amount of €216,211, with total losses before capital allowances of €735,780. For ██████, there were capital allowances for plant and machinery of €958,702, and total losses before capital allowances of €2,245,816. For ██████, there were capital allowances for plant and machinery of €987,790, and total losses before capital allowances of €886,884. For ██████, there were capital allowances of €1,018,765, and total losses before capital allowances of €1,143,611. For ██████, there were no capital allowances for plant and machinery, and total losses before capital allowances of €1,104,024. The ██████ trade ceased on ██████ ██████.

23. In the Appellant's financial statements for the year ended ██████, the property was listed as having a total cost of €15,080,129, being made up of 'land and buildings leasehold' of €11,187,538, and 'fixtures, fittings and equipment' of €3,892,591. There was no similar breakdown in the contract of sale of ██████, which simply provided for a purchase price of €22,500,000.

24. In its CT1 form for ██████ the Appellant delivered a full and true disclosure of all material facts. Therefore, pursuant to the judgment in *Hanrahan*, the NOAA could not become final and conclusive within the 30 day period, and therefore the Respondent was precluded from raising the assessment. The judgment of Stack J in *Hanrahan* was given context by the Supreme Court's judgment in *Revenue Commissioners v Droog* [2016] IESC 55. It

was necessary for the Respondent to prove that one of the exceptions set out in section 959AA(2) applied in order for the NOAA to be valid.

25. The Appellant's solicitor brought the Commissioner to certain judgments regarding statutory interpretation, including *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, *Bookfinders Limited v Revenue Commissioners* [2020] IESC 60 and *Perrigo Pharma International Activity Company v McNamara* [2020] IEHC 552. When interpreting a statute, it was necessary to look at the ordinary basic meaning of the words. CGT involved the disposal of an asset, giving rise to a gain, and tax being paid on that gain. That was what had happened in this case. The Respondent was not entitled to seek to rewrite the bargain between the Appellant and the purchaser of the property; the Appellant had disposed of the asset and had paid tax on the chargeable gain arising.

26. The Respondent had engaged in legislative gymnastics to turn a capital gain into a loss, by artificially treating the consideration on disposal of the property as separate consideration for the land and buildings, on the one hand, and the plant and machinery, on the other hand. The Respondent had failed to identify the asset giving rise to the gain, which was the property. The Respondent had sought to rely on section 561 of the TCA 1997, which concerned wasting assets, but the property was not a wasting asset.

27. The assets of the property were used for the trade of ███ ████ until it was sold, and therefore section 561(1) applied; consequently that was the end of the matter. Alternatively, even if the Respondent was entitled to apportion the proceeds of sale, its manner of doing so was not just and reasonable. Parts of the property, such as fire safety systems, heating, ventilation systems and lifts, were integral to the building, and should not have been included in the Respondent's computation in respect of capital allowances. In this respect, *Melluish (Inspector of Taxes) v BMI (No 3) Limited* [1995] 4 All ER 453 and *RGRE Grafton Ltd v Bewleys Café Grafton St Ltd* [2023] IEHC 25 were relevant.

Respondent

28. In written submissions, the Respondent stated that the property was an asset which was used by the Appellant for the purpose of operating ███ ████ trade during part of the period in which it was owned by the Appellant. It was accepted that it was not used to operate █ ████ trade during the last ██████████ of its ownership by the Appellant. It was an asset which qualified in part for capital allowances. It was not disputed that the Appellant claimed capital allowances in respect of plant and machinery of ███ ████ between ████ ████████ in the total sum €3,181,468.

29. That being so, the effect of section 561(2)(a) of the TCA 1997 was that for the purpose of calculating tax payable in relation to the disposal of the property, the consideration paid to the Appellant on the disposal of the property in [redacted] had to be apportioned between that part of the property that qualified for capital allowances (the plant and machinery) and that part that did not (the land and buildings). The section was framed in mandatory terms and therefore it was not open to the Appellant to decide not to apportion the consideration for convenience or simply because it might be impractical to do so. Subsection (b) provided that the computation of the gain realised on the disposal must be made separately on the different parts of the consideration and the expenditure that had been apportioned.

30. While the taxpayer was obliged by section 561(2) to apportion the consideration and the expenditure where the asset being disposed of came within the scope of that section, the manner in which the apportionment was to be carried out was prescribed by section 544(5) of the TCA 1997, which requires the method of apportionment to be "just and reasonable".

31. Furthermore, the effect of section 551(1) of the TCA 1997 was that expenditure that had previously qualified for capital allowances may nevertheless be taken into account in calculating a chargeable gain upon a disposal of the asset in question. However, the situation was different in the case of a chargeable loss. Where a capital loss arose on the disposal of an asset that had previously qualified for capital allowances, then the full amount of the loss was not allowed. Instead, the amount of the allowable capital loss was limited or restricted by reference to the net capital allowances that were previously claimed by the taxpayer

32. In this case, the net capital allowances claimed by the Appellant were in a total sum of €3,181,468, and therefore, the capital loss allowed in respect of the disposal by the Appellant of the plant and machinery of [redacted] [redacted] was restricted by this amount.

33. In oral submissions, counsel for the Respondent stated that the Appellant's CT1 form for [redacted] was delivered on [redacted]. Therefore, the relevant chargeable period, for the purposes of section 959AA, ended on [redacted], and four years after that was [redacted]. Therefore, the NOAA was raised within time. There was no proviso or qualification in the legislation along the lines argued for by the Appellant. The *Droog* and *Hanrahan* cases were concerned with notices of opinion under section 811 of the TCA 1997, and thus were not analogous with the position of an assessment issued pursuant to section 959AA.

34. The Appellant was correct that the starting point for CGT was that there was a disposal of an asset, giving rise to a chargeable gain. However, once you got past the simplicity of the disposal and the gain, there were some relatively complicated rules about what could and could not be set off against that gain, or what deductions or losses could be applied, in order to work out the final amount that should be taxed.

35. In a letter from the liquidator to the Respondent dated 11 November 2020, it was confirmed that the purchase price of the property included all fixtures and fittings and that "*there was no apportionment of the sales proceeds between ███ ████ building, apartments, fixtures and fittings and equipment, it was just one contract covering all of the items.*"

36. The computation rules for CGT were set out in Chapter 2 of Part 19 of the TCA 1997. Section 561 concerned "wasting assets qualifying for capital allowances." Subsection (2) concerned a number of potential scenarios: (1) where the asset had been used partly for the purposes of a trade and profession and partly for other purposes, or (2) had been used for the purposes of a trade or profession for part of that period, or (3) which had otherwise qualified in part only for capital allowances. It was the Respondent's submission that the asset in question, the property, met all three of those conditions. The property was acquired on ██████████ and was disposed of on █████████████, but on █████████ it passed from being an asset that was used for a trade or profession, into an asset that was simply being used as an investment, because on that date the Appellant sublet the entirety of its concern to another entity. Furthermore, capital allowances were claimed on the asset, in part, for the years ██████████ inclusive.

37. Therefore, it was necessary to apportion the consideration for the disposal as between the land and buildings, upon which capital allowances were not claimed, and the plant and machinery, upon which they were claimed. The reason for this was that one could not retain the benefit of the capital allowances and use them to calculate the gain in a simple fashion.

38. It was necessary, under section 544(5), that the apportionment be done on a basis that was just and reasonable. In apportioning the consideration, the Respondent had considered a letter of the liquidator dated 10 May 2021, which included a table of capital allowances claimed. The Respondent considered that the table was inaccurate in some respects, and agreed with the outline given by the Appellant's solicitor in her submissions regarding the amount of capital allowances claimed by the Appellant. The Respondent understood that €216,211 was claimed in ████ €958,702 was claimed in ████ €987,790 was claimed in ████ and €1,018,765 was claimed in ████ Therefore, the total amount

of capital allowances claimed was €3,181,468, and this was the figure used by the Respondent to try and render a just and reasonable apportionment of the consideration.

39. The liquidator had provided an initial figure for plant and machinery in ████ of €6,576,367. The Respondent had added the value of the various additions to give a total cost of €9,536,991, and had then deducted the capital allowances of €3,181,468, to give a tax written down value of the sales proceeds of €6,355,523, with the balance being attributable to the land and buildings.

40. There had been no evidence from the Appellant to displace the figures provided by the Respondent, nor had there been any alternative computation provided. Therefore, if the Respondent was correct that there should be an apportionment of the consideration, the computation provided by the Respondent was just and reasonable, given the figures were all derived from the liquidator's records. The gain that was computed on the land and buildings could not be offset by any loss recognised on the plant and machinery, because of the operation of section 555. Therefore, the Respondent calculated a chargeable gain of €8,890,816, which was greater than the gain returned by the Appellant of €7,424,155. Consequently, there was an additional gain of €1,466,661, with additional tax payable of €483,998. The difficulty for the Appellant was that the value it had calculated was attributable to the assets upon which capital allowances were claimed.

41. In response to a question from the Commissioner, counsel stated that an argument contained in the Respondent's Outline of Arguments regarding balancing adjustments was a subsidiary argument, but did not change the amount that was assessed. There had been a nil balancing adjustment made by the Appellant, which suggested that it was satisfied that the capital allowances were correctly reflective of the value of the assets upon which they were claimed.

Material Facts

42. There was no oral evidence proffered at the hearing. Having read the documentation submitted, including the agreed statement of facts, and having listened to the submissions at the hearing, the Commissioner makes the following findings of material fact:

    42.1. The Appellant acquired the property for €15,080,129 in ████ In the Appellant's financial statements for ████ the cost was shown as split between €11,187,538 for 'Land and buildings leasehold', and €3,892,591 for 'Fixtures, fittings and equipment'.

42.2. The Appellant owned and operated the property as [redacted] from acquisition up and until [redacted], when [redacted] trade ceased. During the period when it operated the property as [redacted] the Appellant claimed capital allowances in respect of plant and machinery in the total amount of €3,181,468.

42.3. From [redacted] until [redacted], the property was leased to [redacted] [redacted]. The property was reclassified by the Appellant in its accounts as an investment asset.

42.4. On [redacted], the Appellant sold the property to [redacted] for €22,500,000. On disposal, the Appellant calculated that a chargeable gain of €7,424,155 arose, and therefore it paid tax of €2,449,971.

42.5. On [redacted], the Respondent raised a NOAA in the amount of €483,997.75 against the Appellant. The NOAA was raised on the basis that the Appellant should have apportioned the net proceeds of sale of the property between land and buildings, on the one part, and plant and machinery, on the other, resulting in two separate CGT computations.

42.6. The computation provided by the Respondent was based on figures provided to the Respondent by the Appellant/its liquidator. There was no contradictory computation, or other evidence, put forward by the Appellant to show that the Respondent's computation was not just and reasonable.

Analysis

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

44. In this appeal, the Appellant contends that the Respondent's NOAA was issued out of time and was "*presumptively invalid*", based on the Supreme Court judgment in *Revenue Commissioners v Droog* [2016] IESC 55 and the High Court judgment in *Hanrahan v Revenue Commissioners* [2022] IEHC 43. The Commissioner considers it appropriate to address this argument first before, if necessary, considering the basis for the raising of the NOAA itself.

45. The NOAA concerned the Appellant's [redacted] tax year and issued on [redacted]. Section 959AA(1) of the TCA 1997 provides that, *inter alia*, a notice of amended

assessment "*shall not be made by a Revenue officer on the chargeable person after the end of the 4 years commencing at the end of the chargeable period in which the return is delivered.*" The Appellant's corporation tax return for ████ was delivered in ████ therefore, the Commissioner understands section 959AA(1) to mean that the NOAA had to issue by ████████████. Given the NOAA in fact issued on ████████████, it would appear, on the wording of the statute, that it was issued within time.

46. However, the Appellant argued that the implication of both *Droog* and *Hanrahan* is that the NOAA could not become "*final and conclusive*" within the four-year time period, as the 30 day period for the making of an appeal had not elapsed, and therefore the NOAA was "*presumptively invalid*".

47. The Commissioner does not agree with the Appellant that this is the correct interpretation of section 959AA. He considers it significant that both *Droog* and *Hanrahan* were concerned with notices of opinion issued by the Respondent under the tax avoidance provisions of section 811 of the TCA 1997, rather than with a notice of assessment or amended assessment. Section 811(5)(e) provides that a notice of opinion becomes "*final and conclusive*" after the expiration of the appeal period (or alternatively, after the appeal process has concluded). However, there is no equivalent provision in respect of notices of assessment or amended assessment set out in section 959AA.

48. The Commissioner considers that it would be contrary to the wording of the statute to require a further 30 day period to elapse before a notice of assessment could become operative, so that, in effect, the Respondent would be required to raise a notice of assessment or amended assessment within 3 years and 11 months commencing at the end of the chargeable period in which the return is delivered. He is satisfied that this would be an erroneous interpretation of the provision. Consequently, as the NOAA was issued within four years of the end of the relevant chargeable period, being ████ the Commissioner determines that the Respondent raised the notice of amended assessment within the time period prescribed by section 959AA(1) of the TCA 1997.

49. Turning now to the substantive basis for the raising of the NOAA by the Respondent, the Commissioner notes that it is not disputed that the Appellant claimed capital allowances of €3,181,468 in total in respect of plant and machinery from acquisition of the property in ████ until it ceased operating it for the purposes of ██ ███ trade on ████████. It was also not disputed that, from ████████ until it disposed of the property on ████████ ████ the Appellant leased the property and it was reclassified in its accounts as an investment asset.

50. Consequently, the Commissioner agrees with the Respondent that each of the three potential circumstances envisaged by section 561(2) of the TCA 1997 applies, as the asset (i.e. the property) (1) had been used partly for the purposes of a trade and profession (i.e. [redacted] trade) and partly for other purposes (i.e. investment); (2) had been used for the purposes of a trade or profession for part of that period, and (3) had qualified in part only for capital allowances. Therefore, the Commissioner agrees with the submission of the Respondent that section 561(2) applies to the disposal of the property, and he further agrees that the requirements of section 561(2) are mandatory where at least one of the three circumstances applies (and in this instance, all three of them were applicable). The Appellant contended that section 561(2) did not apply because the property continued to be used as [redacted] during its ownership by the Appellant. However, the Commissioner considers that the use of the property changed on [redacted] from the point of view of the chargeable person (i.e. the Appellant), and therefore he is satisfied that section 561(2) does apply.

51. Having found that section 561(2) does apply, and that therefore the Respondent was correct to apportion the consideration for the disposal of the property, the question remains whether the apportionment was just and reasonable, as required by section 544(5). Counsel for the Respondent outlined the basis for the computation carried out by the Respondent, which is summarised at paragraphs 38 – 40 above. The Commissioner is satisfied that the computation was based on figures provided by the Appellant's liquidator, or otherwise taken from the Appellant's own financial statements. Given this, he considers that the computation was *prima facie* just and reasonable, and that it was therefore incumbent on the Appellant to demonstrate that it was not.

52. The Appellant contended that parts of the plant and machinery were integral to the building and therefore should not have been included in the Respondent's computation. However, the difficulty the Appellant faces in this regard is that no direct evidence was proffered by it regarding what elements should have been considered as integral to the building, nor was any alternative computation put forward by the Appellant. The Appellant's solicitor referred to corporation tax computations of the Appellant which particularised the capital allowances in respect of various elements of plant and machinery (e.g. carpets, sanitary fittings, fire alarms, telecommunications installations etc.), and, as the Commissioner understands it, invited him to conclude that some of these elements should be considered integral and excluded from the computation. However, the Commissioner considers that, in the absence of any evidentiary basis for such conclusions, this would require him to, in effect, guess at what elements should be excluded or not. He is satisfied that to do so would be impermissible, given that the burden

of proof rests on the Appellant to demonstrate that the Respondent's assessment was incorrect, and furthermore given that he is satisfied that the Respondent's computation was *prima facie* just and reasonable.

53. Consequently, as he finds that the Respondent was correct in applying the provisions of section 561(2) to the consideration for the disposal of the property, and that the apportionment of the consideration was just and reasonable, and further that the Appellant has not demonstrated any other error on the part of the Respondent, the Commissioner is satisfied that the Respondent was entitled to raise the NOAA against the Appellant. Therefore, the appeal is unsuccessful.

Determination

54. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent's notice of amended assessment to corporation tax, for the period [redacted] in the amount of €483,997.75, is correct, and the notice of amended assessment stands.

55. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
01st August, 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