AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

23TACD2023

Between:

[redacted]

Appellant

And

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against a Notice of Assessment to Capital Gains Tax (hereinafter "CGT") for the tax year 2005 raised on 27 July 2016 by the Revenue Commissioners (hereinafter the "Respondent").

2. The total amount of tax under appeal is €137,914. .

Background

3. The Appellant and his wife were the joint owners of lands and a house contained in Folio [redacted] which they purchased in [redacted] 1991 for IR£195,000 (€247,650) and which comprised of 20 acres of land and a house. The Appellant and his wife sold 16.5 acres of the land on [redacted] 2005 for €950,000. No CGT Return was filed in relation to the sale of the land.

4. On 7 April 2015 the Appellant's Tax Agents submitted correspondence and an accompanying cheque for €6,112 in respected of an unprompted disclosure in relation to Income Tax returns for the Appellant for the tax years 2006 to 2014 inclusive.

5. On 2 September 2015, on foot of the unprompted disclosure, the Respondent issued a Notification of Revenue Audit to the Appellant in relation to Income Tax and CGT for the tax years 2005 to 2014 inclusive which said audit took place on 5 October 2015 at which the Appellant submitted a Form CG1 CGT Return for 2005 as follows:

1. Details of Disposal of Assets		
(c) Agricultural Land / Buildings		Aggregate Consideration: €950,000
5. Claim to Reliefs - Self		
(c) Retirement Relief – Outside the Family	Consideration on disposal of qualifying assets	€475,000
6. Claim to Reliefs - Spouse		
(c) Retirement Relief – Outside the Family	Consideration on disposal of qualifying assets	€475,000
7. Chargeable Gains	Self: €357,500	Spouse: € 357,500
11. Personal Exemption	Self: €1,270	Spouse: €1,270
12 Net Chargeable Gain	Self: €356,230	Spouse: €356,230

6. In addition the Appellant submitted a handwritten CGT computation in relation to the disposal of the lands in 2005 which claimed relief available pursuant to section 598 of the Taxes Consolidation Act 1997(hereinafter the "TCA1997") on the basis that the Appellant and his wife had owned and farmed the land the subject of the 2005 disposal for a period of 10 years prior to the disposal.

7. On 8 October 2015 the Respondent wrote to the Appellant's Tax Agent in relation to a CGT computation for 2005 which had been submitted by the Appellant at the audit. The Respondent indicated that due to the Appellant deregistering for Income Tax with effect from November 1998, it was considered that the lands had not been used in relation to farming and did not fall within the definition of a chargeable business asset as defined in section 598 of the TCA1997 at the time of its disposal.

8. On 14 January 2016 the Appellant's Tax Agent responded indicating, *inter alia*, that:

    i. the Appellant and his wife had been farming the land the subject of the disposal for 10 years ending on the disposal;

    ii. the Appellant and his wife held a joint bank account to which they both had cheque signing authority and that both were involved in the operations and management of the enterprise;

    iii. up until 2002 the Appellant and his wife stocked deer on the land and that the deer farming enterprise proved to be unsuccessful under which serious losses arose;

    iv. throughout the period that the land was stocked with deer, it became very fertile. This allowed the Appellant and his wife to sell grass and hay from the land from 2002 to the date of the disposal of the land in 2005 without incurring significant input costs;

    v. as the proceeds from the disposal of the land did not exceed €1,000,000 retirement relief was available to the Appellant and his wife and therefore the disposal did not give rise to CGT.

9. On 25 February 2016 the Respondent wrote to the Appellant's Tax Agent noting that in order to qualify for Retirement Relief pursuant to section 598 of the TCA1997 chargeable business assets must have been owned and used by each individual throughout the 10 years period ending with the disposal. The correspondence also noted that the Appellant had ceased for Income Tax with effect from 11 November 1998 and sought evidence of the business undertaken by the Appellant and his wife from 12 November 1998 to the date of disposal on 22 June 2005.

10. On 14 March 2016 the Appellant's Tax Agent wrote to the Respondent and set out the following:

    i. The fact that the Appellant ceased for Income Tax on 11 November 1998 and did not make income tax returns on a loss making venture does not preclude him from claiming Retirement Relief;

ii. The fact of the land being held in the joint names of the Appellant and his wife means that relief can be available to both individuals provided both of them meet the necessary conditions. Therefore, the chargeable person who disposed of the land is the Appellant and his wife.

11. On 23 March 2016 the Respondent wrote to the Appellant's Tax Agent requiring documentary evidence that a commercial partnership existed between the Appellant and his wife in respect of a claimed deer farming enterprise. The letter further indicated that, in the Respondent's opinion, the fact that the Appellant and his wife held a joint bank account does not in itself indicate that they were both involved in the operations and management of the enterprise. No response to the Respondent's letter of 23 March 2016 was submitted by the Appellant.

12. On 27 July 2016 the Respondent wrote to the Appellant's Tax Agent informing him that, in the absence of the reply to the correspondence of 23 March 2016 requesting documentary evidence that a commercial partnership existed between the Appellant and his wife, Retirement Relief pursuant to section 298 of the TCA1997 was not being granted. The letter also stated that a Notice of Assessment to CGT for 2005 had been raised and that the "draft liability" was €137,915 plus interest and penalty.

13. The Appellant submitted a Notice of Appeal to the Commission dated 24 August 2016 appealing the Respondent's decision.

Legislation and Guidelines

14. The legislation relevant to the appeal is as follows:

Section 18(2) of the TCA1997:

"Tax under Schedule D shall be charged under the following Cases:

Case I — Tax in respect of—

(a)any trade;

(b)profits or gains arising out of lands, tenements and hereditaments in the case of any of the following concerns—

(i)quarries of stone, slate, limestone or chalk, or quarries or pits of sand, gravel or clay,

(ii)mines of coal, tin, lead, copper, pyrites, iron and other mines, and

(iii)ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways,

bridges, ferries and other concerns of the like nature having profits from or arising out of any lands, tenements or hereditaments;

Case II — Tax in respect of any profession not contained in any other Schedule;

Case III — Tax in respect of—

(a)any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable in or outside the State, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation out of it, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods, but not including any payment chargeable under Case V of Schedule D;

(b)all discounts;

(c)profits on securities bearing interest payable out of the public revenue other than those charged under Schedule C;

(d)interest on any securities issued, or deemed within the meaning of section 36 to be issued, under the authority of the Minister for Finance, in cases where such interest is paid without deduction of tax;

(e)income arising from securities outside the State except such income as is charged under Schedule C;

(f)income arising from possessions outside the State except, in the case of income from an office or employment (including any amount which would be chargeable to tax in respect of any sum received or benefit derived from the office or employment if the profits or gains from the office or employment were chargeable to tax under Schedule E), so much of that income as is attributable to the performance in the State of the duties of that office or employment;

Case IV — Tax in respect of any annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule;

Case V — Tax in respect of any rent in respect of any premises or any receipts in respect of any easement;

and subject to and in accordance with the provisions of the Income Tax Acts applicable to those Cases respectively."

Section 598 of the TCA1997 – *Disposals of business or farm on "retirement"*

"(1)(a) In this section and in section 599 –

…

"chargeable business asset" means an asset (including goodwill but not including shares or securities or other assets held as investments) which is, or is an interest in, an asset used for the purposes of farming, or a trade, profession, office or employment, carried on by—

(i)the individual,

…

"qualifying assets", in relation to a disposal, includes—

(iii)land used for the purposes of farming carried on by the individual which he or she has owned and used for that purpose for a period of not less than 10 years ending with the transfer of an interest in that land for the purposes of complying with the terms of the Scheme,"

(2)(a)Subject to this section, where an individual who has attained the age of 55 years but has not attained the age of 66 years disposes of the whole or part of his or her qualifying assets, then—

(i)if the amount or value of the consideration for the disposal does not exceed €500,000, relief shall be given in respect of the full amount of capital gains tax chargeable on any gain accruing on the disposal;

(ii)if the amount or value of the consideration for the disposal exceeds €500,000, the amount of capital gains tax chargeable on the gain accruing on the disposal shall not exceed 50 per cent of the difference between the amount of that consideration and €500,000."

Section 654 of the TCA1997 – *Interpretation*

"*In this Part other than in section 664—*

"farming" means farming farm land, that is, land in the State wholly or mainly occupied for the purposes of husbandry, other than market garden land;

"market garden land" means land in the State occupied as a nursery or garden for the sale of the produce (other than land used for the growth of hops), and "market gardening" shall be construed accordingly;

…"

Preliminary Issue

15. The hearing of this appeal was scheduled on 17 August 2022. In advance of the hearing the Commissioner wrote to the Parties requesting a copy of the Notice of Assessment to CGT on which this appeal is grounded. The Appellant's Tax Agent responded stating that neither he nor the Appellant had access to the Notice of Assessment to CGT. The Respondent replied enclosing a copy of a Demand Notice which had issued to the Appellant on 8 September 2016 seeking payment of €137,914 of CGT for the year 2005. The Commissioner notes that this Demand Notice was issued after the Notice of Appeal had been submitted by the Appellant to the Commission. In addition, the Respondent enclosed an extract from its records detailing the issuing of the Demand Notice to the Appellant on 8 September 2016.

16. At the hearing of the appeal on 17 August 2022 the Appellant raised an issue submitting that the Notice of Assessment had never been served on the Appellant and that the Notice of Appeal had been lodged with the Commission on 24 August 2016 on foot of the decision communicated in the Respondent's letter of 27 July 2016. The Respondent was unable to produce a copy of the Notice of Assessment at the oral hearing on 17 August 2022 and time was given to the Respondent to investigate whether the Notice of Assessment had been issued to the Appellant. The hearing of the appeal was adjourned to 7 October 2022.

17. Prior to the resumed hearing the Respondent submitted the following correspondence to the Commission on 14 September 2022:

> "*On 17th August 2022 the hearing was adjourned when Commissioner O Driscoll requested the Revenue Commissioners to provide evidence of the issue of the Notice of Assessment under appeal, to Mr* [redacted] *and/or his agents. This request arose from concerns the Commissioner expressed relating to her jurisdiction to determine the matter under appeal.*
>
> *Following an initial recess granted during the original appeal hearing on 17th August 2022, the Commissioner adjourned the hearing to the 7th October 2022 and Revenue was granted time to review and examine our records to establish if a notice of assessment had issued to Mr* [redacted] *on 16th August 2016 as Revenue had outlined at the hearing.*
>
> *I can state that Revenue, following Commissioner O Driscoll's direction, contacted its Information and Communications Technology Division, and has established the*

following data from our records which indicates that Notices of Assessment issued in this case to the taxpayer Mr [redacted] *and his registered agent* [redacted] *on 16th August 2016.*

As can be seen from the attached screenshots from the relevant Revenue Integrated Tax System (ITS) records, the Notices of Assessment are shown to have issued to Mr [redacted] *at his address listed on Revenue records and also shown on the assessment –* [redacted]*. A copy of this assessment was also sent to the agent for Mr* [redacted] *listed on our records –* [redacted]*. Our records indicate that these assessments were issued by post in paper form. Copies of the assessments are provided (attached).*"

18. In response to the Respondent's correspondence the Appellant's tax agent submitted the following to the Commission:

"*The purported Amended Notice of Assessment provided by the respondent on the 14th September 2022 includes the following paragraph 'If you wish to appeal against the assessment to which this notice refers, you must do so within the period of 30 days after the date of this notice by completing and submitting a Notice of Appeal form to the Tax Appeals Commission (TAC)'.*

The letter dated the 27th July 2016 states 'Therefore, I have raised a Notice of Assessment for Capital Gains Tax 2005. Normal appeal provisions apply to this assessment'.

I note that as per the respondent's written submission this assessment did not issue electronically. This would appear to be contrary to standard revenue practice. Where an assessment is issued generally it would issue by both post and also electronically. It is odd that this did not occur in this case.

I note that as per the respondent's submission of documents, and in particular the respondent's Statement of Case prepared by [redacted]*], a reference to the Capital Gains Tax Assessment for 2005 raised by Revenue is referenced along with confirmation that the assessment is attached. The referenced assessment is the 4 screenshots of Revenue's system showing that they adjusted the system to disallow retirement relief. These screenshots are the screenshots showing this assessment did not issue.*

I note that when called on to provide the Notice of Assessments by the Commissioner prior to the appeal hearing, neither the appellant or respondent were able to produce same.

I note that it would appear to have taken the respondent 29 days to procure the purported Notice of Amended Assessment from Revenue's system.

While it is not possible for the appellant or I to prove that the Notice of Amended Assessment did not issue via post, I can state categorically that neither [redacted] *nor the Appellant have any records of receiving these assessments. The above sequence of events are highly concerning, contradictory and do not point to the assessment having ever actually been issued.*

Is it reasonable to consider that during an appeal which first commenced on the 24th August 2016 not once would an agent of the Respondent look to attach the Notice of Amended Assessment? Is it reasonable to consider that it would require an agent of the Respondent 29 days to procure this Notice of Amended Assessment? Is it reasonable to consider that an agent of the respondent would refer he 4 screenshots the Notice of ended Assessment on a Statement of Case to TAC if an actual Notice of Amended Assessment had issued?"

19. At the rescheduled oral hearing on 7 October 2022 the Commissioner heard further oral submissions from the Parties in relation to the service of the Notice of Amended Assessment. The Parties' oral submissions largely reflected the written submissions received. In addition, the Respondent's representative submitted that he had spoken to a person in the Respondent's technical department who told him that in or around July / August 2016 enhancements to the Respondent's IT system were such that it was possible that an electronic issue of the Notice of Assessment might not have been issued electronically on a particular day. Whilst this was not a normal process there were circumstances on which only paper versions of a Notice of Assessment may have issued.

20. The Commissioner has considered the issues raised by the Appellant in relation to the Notice of Assessment being issued to the Appellant. The Commissioner notes that the Appellant states that the Notice of Appeal was lodged on foot of the Respondent's letter of 27 July 2016 which stated that it had issued a Notice of Assessment to CGT for 2005 in the amount of €137,914 and that neither he nor his Tax Agent had received the Notice of Assessment. The Commissioner notes the submissions from both Parties and the explanation received from the Respondent. Having considered same the Commissioner

considers that on the balance of probabilities, the Notice of Assessment did issue on 16 August 2016 to the Appellant by post. The Commissioner makes this finding on the basis of the documentation received from the Respondent and in particular on the basis of the screenshot of the Respondent's IT system which sets out that a Notice of Assessment number [redacted] issued to the Appellant and his Tax Agent on 16 August 2016.

21. The Commissioner also notes that the Appellant lodged the Notice of Appeal on the basis of the Respondent's letter of 27 July 2016 and not on the basis of the receipt of a Notice of Assessment. That letter contained a decision that the Respondent was unable to allow Retirement Relief to the Appellant pursuant to section 598 of the TCA1997. Section 949(1) of the TCA1997 provides as follows:

> "*Any person aggrieved by any determination by the Revenue Commissioners, or such officer of the Revenue Commissioners (including an inspector) as they may have authorised in that behalf, on any claim, matter or question referred to in section 864 may, subject to Chapter 6 of Part 41A and on giving notice in writing to the Revenue Commissioners or the officer within 30 days after notification to the person aggrieved of the determination, appeal to the Appeal Commissioners.*"

22. The Commissioner is satisfied that the matter before her is an appeal of the determination of the Respondent on 27 July 2016 that the Appellant could not avail of Retirement Relief pursuant to section 568 of the TCA1997. On that basis the Commissioner is satisfied that she has jurisdiction to determine the within appeal pursuant to section 949AK of the TCA1997 which provides:

> "*In relation to an appeal against an appealable matter, other than—*
>
> *(a)an assessment, or*
>
> *(b)a matter referred to in section 949AK(3),*
>
> *the Appeal Commissioners shall, if they consider that the decision, determination or other matter, as the case may be, ought to be varied, determine that the decision, determination or other matter be varied, even if such variation is not to the advantage of the appellant; otherwise they shall determine that the decision, determination or other matter stand.*"

Submissions

Appellant's Submissions

23. The Appellant submits that he and his wife were entitled to Retirement Relief pursuant to section 598 of the TCA1997 for the following reasons:

i. Both he and his wife jointly owned the lands;

ii. They were over 55 when the lands were sold;

iii. They actively farmed the lands between the periods 1993 and 2005 when the disposal of the lands took place;

iv. They both actively reared deer on the farm in the period from 1993 to 2001;

v. In the period between 2001 and the date of disposal of the land in 2005 the lands were used for the purposes of the production of hay and silage which was harvested and sold on to a neighbouring farmer.

24. The Commissioner heard sworn evidence from both the Appellant and his wife.

Witness 1 – Mrs [redacted]

25. The Commissioner heard evidence from the Appellant's wife Mrs [redacted] who stated that the Parties married in 1969. She stated that she and the Appellant farmed together from the beginning of their marriage and that she would rear the calves, do the yard work, feed the animals and assist with fencing as well as doing the banking for the farm. She stated she was behind the Appellant in anything he could not do.

26. The Appellant and his wife had two children and his health deteriorated significantly when the Appellant was in his 20s which ultimately became a catastrophe for the family. The Appellant required treatment in the UK which left him debilitated and unable to farm and this resulted in the family becoming very poor and having to sell their first farm. Times were extremely tough for the family and Mrs [redacted] stated that she did everything she could, as well as she could, to keep matters going for the family and the farm which she was in charge of running.

27. She stated that in 1993 they purchased the land the subject matter of this appeal and that she and the Appellant got into deer farming. She stated that she would get the deer into pens and was involved in injecting them and moving them from pen to pen. She stated that they are placid animals and that once they learned the pen system that they were easy to manage. Mrs [redacted] stated that she and the Appellant learned the techniques for caring for and rearing deer together.

28. Under cross examination Mrs [redacted] stated that she and her husband carried out the farm work together every day. They would get up together and go about their work together. She stated that she always wrote cheques on the joint account she had with the Appellant and that she mainly did the banking business for the farm.

29. She stated that the deer were not a profit making enterprise and that, even though they enjoyed looking after the deer, the bottom line was that they needed to make money out of the deer or else they could not keep them. Therefore, the deer were sold and left the land in 2002.

Witness 2 – the Appellant

30. The Appellant stated that he and his wife bought the land the subject of this appeal in 1991 and that from 1992 they started to prepare the land for the arrival of deer as this was an enterprise which the government and farming authorities were strongly encouraging at the time. The deer arrived on the land in 1993.

31. He stated that he and his wife both worked the farm and looked after the deer but that the enterprise was loss making. In that regard the Appellant submitted accounts for the years 1996 and 1997. The accounts for 1996 recorded gross farm income of €336 and a loss of €9,262. The accounts for 1997 recorded gross farm income of €2,969 and a loss of €1,403. He stated that deer required additional supplements as well as the grass which they ate and that over the years it became apparent that they were subsidising the deer and that this was a situation which could not continue. He stated that he and his wife decided to sell the deer sometime around 2001, although the deer remained on the land until 2002 when the buyer took them away. He stated that after the deer had left it took him some time to get his head around the situation, he missed the deer and he decided not to lease the lands at that time. He stated that a neighbouring farmer approached him in relation to the grass from the lands and purchasing same. They struck a deal that the neighbouring farmer would buy the grass from the lands but that the neighbour did not have access to the lands other than to harvest the grass at specific times each year.

32. The Appellant stated that he and his wife decided to sell the land in or around 2004 because the situation for them at that time was all downhill. He stated that they both had jobs outside of the farm and that they could no longer subsidise the land, but the real reason was that they were not making money from the land. He also stated that they wanted to look after their children and decided to capitalise the land and help the children out.

33. Under cross examination, the Appellant stated that in the early days of the deer farming enterprise there were expenses in relation to a shed, sawdust, straw, bedding, fencing and maintenance of the deer. Fencing, he stated, was crucial for the deer. In general he stated that maintenance in relation to the deer was low but that they required supplements to ward off disease otherwise they would die.

34. He stated that he decided to de-register as a chargeable person in 1998 as the deer enterprise was going downhill and there was not much money at all in them. He stated that after the deer went in 2022 he and his wife held on to the land for another while. Both he and his wife were working outside the farm and paying “normal” taxes. He stated that no money was coming in on foot of the deer enterprise but that they were still farming the lands and caring for the deer up until they left the land in 2002. He stated that he had continued to farm after 1998 but there was nothing to report in terms of income.

35. In relation to the situation after the deer left the farm, the Appellant stated that the neighbouring farmer cut and harvested the grass and that was the arrangement which they came to. The neighbouring farmer did not have access to the land other than to cut the grass. The Appellant stated that he was paid by cheque but that he had not issued any receipts for the payments. The cheque payments were lodged to their joint bank account. In support of this element of his claim the Appellant submitted a letter from the neighbouring farmer dated 4 August 2022 which confirmed that he purchased hay, silage and grass from the Appellant and his wife from 2002 to 2005 along with bank statements for 2002, 2003 and 2004.

36. Under cross examination, he stated that prior to the sale of the land in 2005 he had been advised by his accountant that he and his wife had done their 10 years farming and that they would be eligible for Retirement Relief. He stated that the reason he had not filed a CGT return in relation to the disposal of the land was because he was eligible for Retirement Relief and was not liable to CGT. Therefore there was no reason to file a CGT return.

37. The Tax Agent for the Appellant submitted that the Appellant and his wife were eligible for Retirement Relief and that no liability to CGT arose on the disposal of the land.

38. The Tax Agent submitted that section 654 of the TCA 1997 defines farming as follows:

> "*Farming" means occupying farm land, that is, land in the state wholly or mainly occupied for the purposes of husbandry, other than market garden land*"

39. It was submitted that as "husbandry" is not defined in the TCA1997 it must therefore be given its normal English meaning and that husbandry (and therefore farming) may best be described as the working of land with the object of extracting its produce. This includes the growing of crops and breeding / rearing of animals.

40. It was submitted that the Appellant and his wife’s farming enterprise was small scale particularly after the land was destocked. However, it was submitted that notwithstanding

the scale of the enterprise, their activities fall under the definition of farming under section 654 of the TCA1997.

41. It was submitted that section 598 of the TCA1997 is the relevant section in relation to Retirement relief and that the Appellant and his wife qualify for Retirement Relied pursuant to section 598 of the TCA1997 as they both owned and farmed the land for the required minimum of 10 years prior to the disposal.

Respondent's Submissions

42. The Respondent submitted that the Appellant and his wife failed to advise of the sale undertaken on 22 June 2005 until 5 October 2015 over ten years after the Return filing date.

43. The Respondent submitted that there is a 7 year gap in the Appellant's trading record from 1998 when he de-registered for Income Tax to 2005, the year in which the land was disposed.

44. The Respondent stated that the main issue is whether the land was used for the purposes of farming in the 10 years up to the disposal of the land pursuant to section 598 of the TCA1997. The Respondent placed emphasis on the requirement that the land must be used for farming purposes and not just owned for the purposes of farming.

45. The Respondent submitted that the land was not used for the purpose of farming after 1998 on the following grounds:

    i. The Appellant had ceased for Income Tax with effect from 11 November 1998;

    ii. There is an absence of farming accounts / records between 1998 and 2005;

    iii. The bank statements submitted by the Appellant are not evidence of farming activity;

    iv. The deer were sold in 2001 and there is not record of them remaining on the land as claimed;

    v. The sale of grass from the land is not sufficient to establish on the balance of probabilities that farming occurred;

    vi. There is no evidence that a partnership existed between the Appellant and his wife in relation to the farm.

46. The Respondent submitted that the totality of the evidence points to the conclusion that farming activity was not carried out on the land for the period of 10 years up to the disposal of the land.

Material Facts

47. The following facts are not in dispute between the Parties and the Commissioner accepts and finds them as material facts:

    i. The Appellant and his wife were the joint owners of the lands contained in Folio [redacted] which they purchased in June 1991 for IR£195,000 (€247,650) and which comprised of land of 20 acres;

    ii. The Appellant and his wife sold the land of 16.5 acres on [redacted] 2005 for €950,000;

    iii. The Appellant and his wife were each aged over 55 years, but had not reached the age of 66, on 22 June 2005;

    iv. No CGT Return was filed in relation to the sale of the land;

48. The following material facts are in dispute between the Parties:

    i. The land was wholly or mainly occupied for the purposes of farming for the period between 1993 and 2005;

    ii. The Appellant and his wife both farmed the land from 1993 to 2005.

49. The Commissioner has considered the material facts in dispute.

The land was used for the purposes of farming for the period between 1993 and 2005;

50. On the one hand the Appellant claims that the land which was disposed of on [redacted] 2005 was used for the purposes of farming by the Appellant and his wife for the period between 1993 and 2005 up until its disposal. On the other hand the Respondent claims that there is no evidence of farming by the Appellant and his wife between 2001 and 2005.

51. Part 23 of the TCA1997 is entitled "*Farming and Market Gardening*" and section 654 of the TCA1997 defines farming as meaning:

> "*farming farm land, that is, land in the State wholly or mainly occupied for the purposes of husbandry, other than market garden land.*"

52. Section 654 of the TCA1997 defines market garden land as meaning:

> "*land in the State occupied as a nursery or garden for the sale of the produce (other than land used for the sale growth of hops) and "market gardening" shall be construed accordingly.*"

53. The land the subject matter of this dispute is not market garden land and there is no dispute between the Parties in relation to that matter. The question which arises for the Commissioner is whether the land the subject matter of this appeal was mainly occupied for the purposes of "husbandry". As husbandry is not defined in the TCA1997, the Commissioner must first turn to the meaning of husbandry.

54. The Appellant and his wife gave evidence to the Commissioner that the land was stocked with deer until at least 2001 when the deer were sold. The Commissioner accepts this evidence and there is no controversy between the Parties in this regard. In relation to the period after 2001, the evidence brought forward to the Commissioner stated that the land was used for the purpose of growing grass which was then harvested and sold to a neighbouring farmer up until the land was sold in June 2005. It was submitted by the Appellant that the stocking of deer on the land from 1993 had rendered the land very fertile and this assisted in the growing of grass in the years after the land was destocked of deer. In support of this claim the Appellant has submitted a letter from the neighbouring farmer dated 4 August 2022 which confirmed that he purchased hay, silage and grass from the Appellant and his wife from 2002 to 2005.

55. The Appellant was cross examined in relation to the payments which he claims he received for the grass and the Appellant stated that the payments were received by way of cheques from the neighbouring farmer which were lodged into the joint account which he held with his wife. It was put to the Appellant by the Respondent that the lands were let to the neighbouring farmer and the Appellant denied this re-stating that the neighbouring farmer did not have access to the land save and except for the purpose of the harvesting of the grass.

56. Whilst the neighbouring farmer did not attend at the oral hearing, the Commissioner has no reason to consider that the letter from him was not genuine. In addition the Respondent did not challenge the validity of the letter. The Appellant also submitted bank statements in support of his claim that the neighbouring farmer paid for the hay, silage and grass. The bank statements submitted contained lodgements which the Appellant identified as cheques coming from the neighbouring farmer and as being payment for the

sale of the hay, silage and grass. The Commissioner accepts the Appellant's evidence in relation to the reason for the lodgements to the bank account and accepts that the lodgements were cheques from the neighbouring farmer as payment for the hay, silage and grass. The Commissioner notes that the following lodgements were identified by the Appellant as coming from the neighbouring farmer and as being payment for the sale of the hay, silage and grass:

i. 23 December 2002 €2,350

ii. 19 September 2003 €1,500

iii. 17 October 2003 €1,500

iv. 24 December 2004 €1,500

57. Based on the evidence adduced, both oral and documentary, the Commissioner accepts on the balance of probabilities that the Appellant and his wife used the land the subject matter of this appeal for the production of grass for the period from 2001 to 2005 which was sold to the neighbouring farmer up to the disposal of the land in June 2005.

58. In the judgment of 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 (hereinafter "*Perrigo*"), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in* Dunnes Stores v. The Revenue Commissioners *[2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in* Bookfinders Ltd v. The Revenue Commissioner *[2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is 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".*

59. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner has considered whether the growing of grass can be considered as husbandry for the purposes of the definition of farming pursuant to section 654 of the TCA1997 and has considered the context of the production of grass for hay and silage within the activity of farming. The Commissioner notes that the availability of fodder for the over-wintering of animals is one of the most important aspects to which dairy and beef farmers turn their attention throughout the year. The Central Statistics Office has produced preliminary results in respect of the use of agricultural land as part of the Census of Agriculture 2020.[1] Table 5.1 of the preliminary results of the Census of Agriculture 2020 states that 82.1% of the agricultural area utilised in the State is used as grassland. Table 5.3 of the preliminary results sets out statistics in relation to the use of grassland in the State and states that 942,062 hectares of grassland in the State is utilised for the permanent production of silage or hay.

60. The Merriam-Webster dictionary defines husbandry as it relates to agriculture as being "(a) *the cultivation or production of plants or animals*". In *Keir v Gillespie*, 1920SC 67 at 69, Lord Skerrington stated that "*…the primal and natural meaning of the term "husbandry" as applied to land includes all those acts of it which are commonly described as "farming"*".

61. As a result of the above the Commissioner is satisfied that the use of land for the production of grass for the purposes of silage and hay is one of the key activities which farmers undertake. Therefore, the Commissioner finds that the production of grass for the purposes of silage and hay is husbandry for the purposes of the definition of farming pursuant to section 654 of the TCA1997.

62. The Commissioner has accepted on the balance of probabilities that the Appellant and his wife used the land the subject matter of this appeal for the production of grass for the period from 2001 to 2005 which was sold to the neighbouring farmer up to the disposal of the land in June 2005. It therefore follows that the Appellant and his wife were engaged in husbandry on the lands from 1993 to 2005 up to the date of the disposal of the land. Therefore, the Commissioner accepts as a material fact that the land the subject matter of this appeal was wholly or mainly occupied for the purposes of farming for the period between 1993 and 2005.

[1] Available at https://www.cso.ie/en/releasesandpublications/ep/p-coa/censusofagriculture2020-preliminaryresults/landutilisation/

The Appellant and his wife both farmed the land from 1993 to 2005:

63. The Respondent disputes that the Appellant and his wife were in a partnership wherein they both farmed the land from 1993 to 2005. The Commissioner has already accepted as a material fact that the land the subject matter of this appeal was wholly or mainly occupied for the purposes of farming for the period between 1993 and 2005. The question which arises for consideration is whether the Appellant's wife, who was a joint owner of the land, farmed the land in addition to the Appellant.

64. The Commissioner heard uncontested evidence from Mrs [redacted] that she came from a farming background and that, having married the Appellant in [redacted], she was involved in every aspect of farming life with the Appellant. The Commissioner heard uncontested evidence of an extremely difficult health situation which the Appellant suffered in the 1980s and that Mrs [redacted] was the person who was left to look after the farm for extended period of time whilst the Appellant recovered from his illness. The Commissioner accepts this evidence. Evidence was also heard that those farming lands had to be sold in the late 1980s due to the Appellant's ill-health and that the land the subject matter of this appeal was purchased in 1991. Mrs [redacted] gave uncontested evidence of the deer farming enterprise being a new activity for both her and the Appellant and that they learned how to look after, and looked after, the deer together. The Commissioner accepts this evidence. Mrs [redacted] gave uncontested evidence that she assisted with the fencing and management of the land together with her husband as well as caring for the deer. The Commissioner accepts this evidence.

65. The Respondent submitted that the only documentary evidence of Mrs [redacted] active involvement in the farm was that of the joint bank account which she and the Appellant held. The Respondent submitted that the lack of any other documentary evidence of Mrs [redacted] being involved in the farming enterprise, such as invoices from suppliers or joint grant applications, should lead the Commissioner to find that she did not carry out farming activities on the land. The Commissioner asked the Respondent to address her in relation to the cultural barriers which would have existed to Mrs [redacted] being named on invoices from suppliers however the Respondent did not have any substantive submissions to make in this regard. The Appellant stated to the Commissioner that it was not normal practice for farmer's wives to be named on invoices from suppliers and that it would have been highly unusual for any farming family to have sought such a position to persist.

66. Having considered the evidence, both oral and documentary, and having accepted Mrs [redacted] evidence, the Commissioner accepts on the balance of probabilities that the Appellant and his wife both farmed the land from 1993 to 2005. The Commissioner accepts Mrs [redacted] evidence that she carried out substantial work on the farm during that period which was commensurate with the work that the Appellant carried out.

67. The Commissioner notes that the Appellant and his wife have a long history of farming which is not contested by the Respondent. The Commissioner further notes that the accounts for the farm for 1996 recorded gross farm income of €336 and a loss of €9,262. The accounts for the farm for 1997 recorded gross farm income of €2,969 and a loss of €1,403. The Respondent has not contested these accounts. The Commissioner notes that the payment amounts for the hay, silage and grass from the neighbouring farmer, albeit not significant, amounted to a total of €6,850 for the years 2002, 2003 and 2004 that being an average of €2,283 per annum. In the context of the Appellant's particular farm enterprise the Commissioner finds that this tends to indicate a continuation of farming activity Therefore, the Commissioner finds as a material fact that the Appellant and his wife both farmed the land from 1993 to 2005.

68. Therefore and for the avoidance of doubt, the Commissioner finds the following as material facts:

    i. The Appellant and his wife were the joint owners of the lands contained in Folio [redacted] which they purchased in [redacted] 1991 for IR£195,000 (€247,650) and which comprised of land of 20 acres;

    ii. The Appellant and his wife sold the land of 16.5 acres on [redacted] 2005 for €950,000;

    iii. The Appellant and his wife were each aged over 55 years, but had not reached the age of 66, on 22 June 2005;

    iv. No CGT Return was filed in relation to the sale of the land;

    v. The land was wholly or mainly occupied for the purposes of farming for the period between 1993 and 2005;

    vi. The Appellant and his wife both farmed the land from 1993 to 2005.

69. The Commissioner has considered the background, the submissions of the Parties, the evidence adduced, both oral and documentary, and the legislation relevant to this appeal.

Analysis

70. Section 598 of the TCA1997 entitled "*Disposals of business or farm on "retirement"*, as it was enacted in 2005, provides that:

> *"(1)(a) In this section and in section 599 –*
>
> *"qualifying assets", in relation to a disposal, includes—*
>
> *(iii)land used for the purposes of farming carried on by the individual which he or she has owned and used for that purpose for a period of not less than 10 years ending with the transfer of an interest in that land for the purposes of complying with the terms of the Scheme,"*
>
> *(2)(a)Subject to this section, where an individual who has attained the age of 55 years but has not attained the age of 66 years disposes of the whole or part of his or her qualifying assets, then—*
>
> *(i)if the amount or value of the consideration for the disposal does not exceed €500,000, relief shall be given in respect of the full amount of capital gains tax chargeable on any gain accruing on the disposal;*
>
> *...*"

71. The Commissioner has already accepted as material facts that the land was wholly or mainly occupied for the purposes of farming for the period between 1993 and 2005 and that the Appellant and his wife both farmed the land the subject matter of this appeal. The land was jointly owned by the Appellant and his wife.

72. Section 598 of the TCA1997 defines a qualifying asset for the purposes of Retirement Relief as being "*…(iii)land used for the purposes of farming carried on by the individual which he or she has owned and used for that purpose for a period of not less than 10 years ending with the transfer of an interest in that land for the purposes of complying with the terms of the Scheme*,"

73. Therefore, the land the subject matter of this appeal was a qualifying asset as defined under section 598 of the TCA1997.

74. It is not in dispute between the Parties, and the Commissioner has accepted as a material fact, that Appellant and his wife were each aged over 55 years, but had not reached the age of 66, on 22 June 2005 that being the date of disposal of the land.

75. Section 598(2)(a) of the TCA1997 as it was enacted in 2005 provides that where a qualifying asset is disposed of by an individual between the ages of 55 and 66, relief shall be given in respect of the full amount of CGT chargeable on any gain accruing on the disposal where the amount of value of the consideration does not exceed €500,000.

76. As the land was jointly owned by the Appellant and his wife it follows that the consideration received by the Appellant and his wife on the disposal of the land was in the amount of €475,000 each. As this amount did not exceed €500,000 the Commissioner finds that the Appellant and his wife were each entitled to the relief provided for pursuant to section 598(2)(a) of the TCA1997 in respect of the disposal of the land on 22 June 2005.

Determination

77. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, is on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the relevant tax is not payable.*"

78. The Commissioner determines that the Appellant has discharged the burden of proof in the above appeals and that he has succeeded in showing that the relevant tax was not payable.

79. The Commissioner therefore determines that the Notice of Assessment to Capital Gains Tax raised by the Respondent in relation to the Appellant for the tax year 2005 in relation to the Appellant shall be reduced to nil.

80. The Commissioner wishes to commend both Parties on the manner in which this appeal was conducted.

81. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular section 949AK thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll

Appeal Commissioner
30 November 2022