AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

27TACD2023

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against a Notice of Amended Assessment (hereinafter the "Amended Assessment") to Capital Acquisitions Tax (hereinafter "CAT") raised on 8 November 2019 by the Revenue Commissioners (hereinafter the "Respondent").

2. The total amount of tax under appeal is €238,394.00.

Background

3. Ms [redacted] (hereinafter the "Appellant") is a taxpayer. The Appellant's parents, [redacted], held a life insurance / investment policy number [redacted] (hereinafter the "Policy") with [redacted].

4. On 20 April 2015, the Appellant's parents entered into an agreement (hereinafter the "Agreement") with their [redacted] children, the Appellant and her [redacted], concerning the Policy as follows:

> "***THIS AGREEMENT FOR THE SALE OF A LIFE INSURANCE POLICY*** *is made on 20th day of April 2015*
>
> ***BETWEEN:***
>
> *(1)* [redacted] *and* [redacted] *both of* [redacted] *(the "**Grantors**" which expression shall where the context so admits or requires include their successors and assigns); and*
>
> *(2)* [redacted] *of* [redacted], [redacted] *of … and* [redacted] *of … (the "**Grantees**" which expression shall where the context so admits or requires include his / her successors and assigns).*
>
> ***RECITALS:***
>
> *(A) The Grantors are the legal and beneficial owners of the life assurance policy the details of which are more particularly set out in the Schedule hereto (the "**Policy**").*
>
> *(B) The Grantors have agreed with the Grantees for the sale to them of the Policy for the price or sum of €3,400,000 (three million, four hundred thousand euro) and in the manner appearing below.*
>
> ***NOW IT IS AGREED AS FOLLOWS:***

1 ***Sale of Beneficial Interest in the Policy***

*1.1 The Grantors, as legal and beneficial owners, sell Policy to the Grantees with effect from date first written above (the "**Gift**").*

*1.2 The consideration for the Gift shall be the sum of €3,400,000 (three million, four hundred thousand euro)(the "**Financial Consideration**") and the natural love and affection which the Grantors bear for the Grantees.*

1.3 The Grantees shall beneficially own the Policy in equal shares as tenants in common and shall contribute the Consideration in equal shares.

2 ***Completion***

2.1 It is intended that the Grantors shall remain as legal owners of the Policy and shall surrender and encash the Policy within a period of two months from the date of this Agreement. The Grantees agree (i) that they have no right to be consulted about or to approve the management or surrender of the Policy and (ii) that the Grantors shall not be liable for any loss to the value of the Policy however arising except as a result of the fraud, dishonesty or gross negligence of the Grantors.

2.2 Following such surrender and encashment, Completion shall take place on such date as may be agreed by the Grantors and Grantees.

2.3 On Completion, the Grantors shall pay to the Grantees in equal shares, the net proceeds of the Policy after deducting the Financial Consideration (which sum the Grantors shall retain unless such Financial Consideration shall have been paid in advance of Completion by the Grantees to the Grantors).

3 ***Assignment***

3.1 This Agreement shall not be assignable in whole or in part by the grantors or the Grantees.

4 ***Invalidity***

4.1 If at any time any one or more of the provisions hereof or any part thereof is or becomes invalid, illegal or unenforceable in any respect under any law, the validity,

legality and enforceability of the remaining provisions hereof shall not in any way be affected or impaired.

5 ***Entire Agreement***

5.1 This Agreement (together with any documents referred to in this Agreement) constitutes the whole agreement and supersedes any previous agreements in relation to its subject matter made between any of the parties to this Agreement.

6 ***Counterparts***

6.1 This Agreement may be executed in any number of counterparts, each of which is an original and all of which when taken together shall constitute one and the same agreement.

7 ***Governing Law and Jurisdiction***

7.1 This Agreement shall be governed by and construed in accordance with the laws of Ireland and each of the parties hereby submits to the jurisdiction of the courts of Ireland.

SCHEDULE

Life Insurance Policy Number [redacted] ***held with*** [redacted] ***"***

5. At the date of the Agreement, the Policy had a value of €5,576,112. The Agreement noted that consideration of €3,400,000 was to be paid equally by the Appellant and her [redacted].

6. Stamp duty in the amount of €5,576 was returned in respect of the Agreement and on 14 May 2015 a Stamp Certificate was issued by the Respondent to reflect same.

7. The following dates are noted in relation to this appeal:

   - On Monday 20 April 2015 the Agreement was entered into by the Appellant, her siblings and their parents;
   - On Monday 18 May 2015 the amount of GBP£1,981,617.00 was lodged into the Appellant's father's [redacted] Sterling account;

- On Thursday 21 May 2015 the amount of €2,820,730.28 was lodged into the Appellant's father's [redacted] Euro account.
- On Friday 22 May 2015 the amount of €713,582.00 was lodged into the Appellant's [redacted] Bank account by way of transfer from the Appellant's father; and
- On 21 June 2015 the amount of €542.00 was lodged into the Appellant's [redacted] Bank account by way of transfer from the Appellant's father making a total transfer from the Appellant's parents to the Appellant of €714,124.00.

8. The Appellant's parents made a gain on disposal of the Policy of €1,812,057 which was charged to income tax at 41% in the amount of €742,943 pursuant to section 730K(1) of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997"). The said income tax of €742,943 was returned by the Appellant's father in the 2015 Form 11 filed on his behalf and on behalf of the Appellant's mother and the said income tax was duly paid.

9. On 9 November 2015 the Appellant filed two CAT returns for the period 1 September 2014 – 31 August 2015 each of which set out the Appellant's parents as disponers of separate gifts of €361,202 to her totalling €722,404 as follows:

	Absolute Interest €
Market Value of Property	929,352
Total Reliefs / Exemption	0
Value after Reliefs & Exemptions	929,352
Liabilities, Costs & Expenses	1,483
Incumbrance Free Value	927,869
Consideration, if any	566,667
Taxable Value	361,202
Taxable Value of Benefit	361,202

10. Each of the CAT returns filed by the Appellant claimed relief in the form of Capital Gains Tax (hereinafter "CGT") Credit Deductible in the amount of €119,197 (being a total relief claim of €238,394) which represented one-third of the income tax paid by the Appellant's parents on foot of the gain on disposal of the Policy. The CGT Credit Deductible relief

was claimed under the provisions of section 104 of the CATCA2003 entitled "*Allowance for capital gains on the same event*".

11. The two CAT returns filed by the Appellant each calculated the CAT liability on the benefit received as follows:

	€
Group Threshold	225,000
Taxable Value of Prior Benefits	1,256,567
Unused Portion of Threshold	0
Taxable Value Current Benefits	361,202
Taxable Excess	361,202
Additional Benefits	
Total Taxable Excess	361,202
Tax at 33%	119,197
Credits Deductible	
Capital Gains Tax	119,197
Prior CAT on same event	0
Total Credits Deductible	119,197
Net Tax Payable	0

12. On 25 January 2019 the Respondent issued a Notification of Revenue Audit (hereinafter the "Audit") to the Appellant in respect of the CAT period 1 September 2014 to 31 August 2015 and the said Audit took place on 20 February 2019.

13. Following the Audit the Respondent raised various queries seeking documentation and information from the Appellant. On 22 July 2019 the Respondent's caseworker wrote to the Appellant stating that he had written to the Revenue Technical Service in relation to a query he had in relation to the CGT credit issue and that he was awaiting an opinion in relation to same.

14. On 8 November 2019 the Respondent wrote to the Appellant stating:

"*Having reviewed documentation in relation to the gift received from your parents* [redacted] *and* [redacted] *I am of the opinion that the credit for CGT paid is not allowable under Section 104 CATCA 2003 against the Capital Acquisitions Tax liability.*"

15. The letter of 8 November 2019 included a Notice of Amended Assessment to CAT which included the following relevant information:

• Date of Gift / Inheritance	22.05.2015
• Valuation Date	22.05.2015
• Period of Assessment	01.09.2014 to 31.08.2015
• Disponer	[redacted]
• Taxable Value of all Benefits	€722,404.00
• Benefits Taxable @ 33%	€238,394.00
• CAT due	€238,394.00
• CAT Paid	€ 0.00
• Total Amount Now Payable	€238,394.00

16. By way of Notice of Appeal dated 22 November 2019 the Appellant appealed the CAT Notice of Amended Assessment issued by the Respondent on 8 November 2019.

17. On 25 November 2019 and on 20 May 2020, subsequent to lodging the Notice of Appeal herein, the Appellant wrote to the Respondent's caseworker seeking further information in relation to the basis upon which the Respondent had formed the opinion that the credit for CGT paid is not allowable under Section 104 CATCA 2003 against the Capital Acquisitions Tax liability.

18. On 21 May 2020 the Respondent's caseworker wrote to the Appellant stating as follows:

"*I apologise for the delay in replying to your letter of 25 November 2019 for the reason that I had sought an opinion from Revenue RTS and RLS technical and legislative divisions on the matter prior to raising the assessment on 8 November 2019 and only received a reply as of last week 12 May 2020. Having examined all correspondence received in relation to the gift I was not fully satisfied that the credit for CGT under Section 104 CATCA 2003 was due under the terms of the agreement.*

I had concerns over the event that gave rise to CAT. Was it the date of the agreement 20.04.2015 or the date the gift was made on 22.05.2015?

It is the opinion of Revenue that at the date of the agreement on 20.04.2015 the Appellant only acquired an interest in expectancy in the proceeds of the Life Assurance Policy as opposed to become entitled in possession to the proceeds of the policy.

The Appellant only became beneficially entitled in possession to a cash gift on 22.05.2015 on the surrender / encashment of the Life Assurance Policy by her parents [redacted] *and* [redacted].

A charge to CAT does not arise on an interest in expectancy, until the event happens whereby it ceases to be an interest in expectancy and falls into possession.

As the agreement transferring the beneficial interest in the foreign life policy is not the same event in which CAT arises the credit for CGT under Section 104 CATCA 2003 is not allowable.

The above will form part of Statement of case on behalf of the Respondent due for submission to the Tax Appeals Commission on 29 May 2020."

19. The Commissioner has considered the legislation, case law, the submissions received both written and oral, the documentary evidence and the witness evidence at the oral hearing in making this determination.

Legislation and Guidelines

20. The legislation relevant to this appeal is appended to this determination at **Annex 1** below.

Submissions and Witness Evidence

21. The Commissioner notes that at the outset of the oral hearing of this appeal Senior Counsel for the Appellant indicated that the arguments which were now being made had changed from those set out in the Outline of Arguments submitted to the Commission. The reason for this, the Appellant submitted, was that subsequent to the submission of the Respondent's Outline of Arguments, the arguments on which the Respondent intended to rely had changed. The Commissioner notes that no additional Outline of Arguments was submitted by either Party to the appeal from those submitted by them in April 2021. Whilst some elements of the arguments made by both Parties were contained in the written Outline of Arguments submitted, the Parties have largely relied on arguments which were not submitted in writing to the Commissioner. The Commissioner consented to both Parties proceeding on this basis.

Appellant's Submissions

Preliminary Issue

22. A preliminary issue was raised by the Appellant wherein it was submitted that the Amended Assessment the subject of this appeal was raised on 8 November 2019 and that it appears that in raising the Amended Assessment, the Respondent did not know the basis for so doing.

23. It was submitted that by way of correspondence dated 25 November 2019 and 20 May 2020, the Appellant's solicitor sought the reasons why the Appellant's claim for credit for CGT paid was incorrect. By reply dated 21 May 2020 (six months after the raising of the assessment), the caseworker on behalf of the Respondent replied stating that he had sought "*…an opinion from Revenue RTS and RLS technical and legislation divisions on the matter prior to raising the assessment on 8 November 2009 and only received a reply as of last week 12 May 2020. Having examined all correspondence received in relation to the gift I was not fully satisfied that the credit for CGT under Section 104 CATCA 2003 was due under the terms of the agreement.*"

24. The Appellant submitted that at the time of issuing the Amended Assessment the Respondent, despite requests, did not specify the reason for doing so. The Appellant further submitted that at least up until the time of the submission of the Appellant's Outline of Arguments to the Commission in April 2021 the basis upon which the Amended Assessment was issued was unclear.

Substantive Issue

25. The Appellant submitted that the matter at issue in this appeal is whether the credit for income tax paid by the Appellant's parents and which is treated as CGT pursuant to section 730K(5) of the TCA1997 is available against the Appellant's CAT liability as provided for in section 104 of the CATCA2003.

26. The Appellant submitted that at the date of the Agreement her parents disposed of, and she received, an interest in the rights under the Policy. As a result of the Agreement, it was submitted, she obtained a beneficial interest in the Policy on 20 April 2015. Therefore she became entitled in possession to the Policy, along with her siblings, for the purposes of section 5 of the CATCA2003 on 20 April 2015 and the gift was deemed to be taken on that date.

27. The Appellant submitted that on 23 April 2015 Mr [redacted], as nominee / bare trustee acting on behalf of the Appellant and her siblings, gave the instruction to encash the Policy and to withdraw the monies from the Policy on behalf of the beneficial owners of the Policy, that is to say on behalf of the Appellant and her siblings. Those monies came out of the Policy at some point between the date of the instruction to encash and the lodgement of the monies into Mr [redacted]'s bank accounts.

28. It was submitted that Mr [redacted] was chargeable to tax and that as a result he returned the amount of €742,943 in income tax in relation to the transaction the subject matter of the Agreement to the Respondent in his 2015 Form 11. It was submitted that the income tax paid by Mr [redacted] should be treated as being CGT for the purposes of section 104 of the CATCA2003 as provided for in section 730K(5) of the TCA1997.

29. It is the Appellant's position that at the date of the Agreement her parents disposed of, and she received an interest in, the rights under the Policy and that she therefore became entitled in possession to the Policy for the purposes of section 5 of the CATCA2003 on that date. It is the Appellant's position that it is plain from the Agreement that she became entitled to the beneficial interest in the Policy or to the rights under the Policy and that the only entitlement which Mr and Mrs [redacted] retained was the entitlement to communicate with [redacted] to instruct the encashment of the Policy.

30. It was submitted that the date of 22 May 2015, being the valuation date and the date of the gift identified on the Amended Assessment raised by the Respondent, is the charge to tax on which the Respondent relies. The Appellant submitted that the date of 22 May 2015 could not be the correct date as the instruction to encash the Policy was given by Mr [redacted] on 23 April 2015 and the funds arrived in Mr [redacted]'s bank accounts on 18 May 2015 and on 21 May 2015. The Appellant submitted that the Policy did not exist on 22 May 2015 and the date of 22 May 2015 on the Amended Assessment issued by the Respondent is incorrect.

31. The Appellant submitted that the Respondent cannot now rely on the two year rule as set out in section 104(3) of the CATCA2003 as this is something which is not reflected by the Assessment the subject matter of this appeal. The Appellant submitted that the Commissioner's focus is on the Assessment and the charge to tax and highlighted that the Court of Appeal in *Stanley v The Revenue Commissioners* [2017] IECA 279 held that:

> "*From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge.*"

32. The Appellant submitted that it is not open to the Respondent to rely on a different gift than that to which the Amended Assessment refers and that the date of the gift and the valuation date contained in the Amended Assessment is incorrect. Therefore, the Appellant submits, the Amended Assessment is incorrect and therefore the liability contained therein should not stand.

33. In relation to the two year rule contained in section 104(3) of the CATCA2003 the Appellant submitted that the CATCA2003 does not contain a definition of a "disposal". The Appellant submitted that the ordinary meaning of disposal is that a person disposes of something to somebody else. The Appellant also submitted that the encashment of the Policy could not have been a disposal in that the Appellant and her siblings did not dispose of the Policy to somebody else and that [redacted] did not acquire anything by virtue of the encashment of the Policy.

34. The Appellant submitted that section 535 of the TCA1997 which is entitled "*Disposals where capital sums derived from assets*" is a deeming provision and relates to CGT and not CAT. The Appellant submitted that there is no matching provision in the CATCA2003 and therefore the encashment of the Policy cannot be and is not a disposal for the purposes of CAT.

Witness 1 – Mr [redacted]

35. The Commissioner heard evidence from Mr [redacted], the Appellant's father and one of the holders of the Policy. Mr [redacted] stated that he is now retired and outlined his previous education and business experience as being:

- [redacted]
- Worked with [redacted] from the mid-1960's to the early 1980's mainly on their [redacted] programme;
- In the early 1980's he joined [redacted] which ultimately became the [redacted] where he was [redacted] and [redacted] until the late 1990's;
- In the late 1990's took up [redacted] in a number of financial services companies including being [redacted] of [redacted] Ireland continuing in those [redacted] until in or around 2014 or 2015;
- [redacted]

36. Mr [redacted] stated that in 2001 he and his wife invested in the Policy having considered various investment options available at the time. He stated that they considered the option of a life policy containing long term investments to be "*good*" as the gains on the investments were not taxed as they arose but instead were taxed when a policy was liquidated, in other words on exiting such a policy. In 2001 the gains on such policies were taxed at a preferential rate of 23%. He stated that they were attracted to this type of policy because of the legislation which was in place which provided that the exit tax, although technically income tax, would be regarded as CAT or CGT for the purposes of offsetting a CAT liability. Mr [redacted] stated that as a result of the above they opted for a foreign life policy with a company called [redacted] based in [redacted]. This company was subsequently taken over by [redacted].

37. At the time of opening the Policy an initial investment of in or around €1 million was made by Mr [redacted] and his wife and over the years a total of in or around €3.7 million had been invested in the Policy. Mr [redacted] stated that he took periodic advice from a financial adviser in London in relation to the type of funds the Policy should be invested in and on foot of that advice he made decisions in relation to the Policy. This financial advisor also acted as Mr and Mrs [redacted]'s main contact with [redacted].

38. Mr [redacted] stated that he was attracted by legislation which provided that the tax to be paid on exiting the Policy, although technically income tax, would be regarded as CGT for the purpose of offsetting a CAT liability. He stated that it seemed to him to be an ideal vehicle for long term investment of funds which were surplus to his immediate needs.

39. Mr [redacted] stated that subsequent to opening the Policy a number of developments occurred post the economic collapse and recession whereby the exit tax rate, which was previously 23%, increased to 41%. In addition, he stated, a new provision was introduced whereby the gains from such policies would be taxed every 8 years even if they were not realised. He stated that on the basis of the change in the tax provisions for such funds and on the basis that in or around 2013 [redacted] became increasingly difficult to deal with, he and his wife decided that the Policy was no longer the optimal vehicle for investing their surplus funds. As a result they decided to exit the Policy.

40. At the same time as deciding to exit the Policy, Mr [redacted] stated that he and his wife developed a view that they should, during their lifetime, share some of their surplus assets with their children. As a result they decided to enter into the Agreement with their children to take advantage of the tax provisions which provided that the exit tax which they would

pay on the Policy could be offset against the CAT which their children would incur on receipt of the gift.

41. Mr [redacted] stated that he and his wife considered assigning the Policy to their children but decided against this course partly on the basis that [redacted] had announced that they were no longer accepting additional investments from people resident in Ireland. In addition, as [redacted] had become increasingly difficult to deal with they decided that anything which would have required [redacted]'s cooperation would be too much trouble. On those bases, he stated, he and his wife decided that a much simpler solution would be to sell the beneficial interest in the Policy to their children at a discount.

42. Mr [redacted] stated that on 16 February 2015 he and his wife had issued an instruction that all of the investments in the Policy be converted into cash and that this instruction had been completed prior to 20 April 2015, the date of the agreement. As a result on the date of the agreement the Policy was entirely comprised of a cash investment. He stated that on 23 April 2015 he and his wife instructed their London financial advisor to initiate the encashment of the Policy with [redacted]

43. When asked by his Senior Counsel why the Appellant had not held on to the Policy for two years from the date of the Agreement on 20 April 2015, Mr [redacted] responded that they had been aware of the two year rule but their understanding was that this rule did not apply to life policies and therefore it was not relevant to their consideration.

Witness 2 – Ms [redacted]

44. The Commissioner also heard evidence from the Appellant. The Appellant is a [redacted] having qualified in [redacted] and being [redacted] there for four years. Thereafter she stated that she moved to an in-house role in London and since [redacted] she has been employed by [redacted] in Dublin where she is responsible for [redacted].

45. She stated that her understanding of the purpose of the Agreement was for her to acquire a beneficial interest in the Policy. She stated that her understanding of clause 2.1 of the agreement was that, whilst she acquired a beneficial interest in the Policy, her parents would continue to be the parties responsible for dealing with [redacted] and for issuing instructions to them. She stated that this was important because [redacted] were very difficult to deal with and it was important that her parents would continue to be able to issue instructions in respect of the Policy.

46. The Appellant stated that it was her understanding that there was a credit available to her in relation to her CAT liability against the income tax / CGT which had been paid by her parents.

47. The Appellant also relied on the documentary evidence submitted which is listed at paragraph 61 below.

Respondent's Submissions

48. The Respondent did not adduce any witness evidence at the oral hearing and relied solely on the documentary evidence which is listed at paragraph 61 below.

49. The Respondent submitted that the first question which needs to be addressed is whether the Appellant was entitled in possession to the rights in the Policy on 20 April 2015, that is to say whether the Appellant had a present right to the enjoyment of the Policy as opposed to having a future right in the Policy.

50. The Respondent submitted that Clause 2.1 of the Agreement makes it clear that the Appellant's parents would retain the legal interest in the Policy and that what they were selling was the beneficial interest in the Policy. The Respondent submitted that the words of Clause 2.1 of the Agreement fettered or restricted the Appellant's equitable interest in the Policy in a manner which was not consistent with her present enjoyment of the Policy. Those words in Clause 2.1 of the Agreement are:

> "*…but the Grantees agree that they have no right to be consulted about or to approve the management or surrender of the policy.*"

51. The Respondent submitted that the effect of the words of Clause 2.1 of the Agreement was that the Appellant's parents did not merely retain legal ownership of the Policy but that they retained an element of control over the Policy which was not consistent with the Appellant having a present right of enjoyment over the Policy. The Respondent submitted that the terms of the Agreement meant that if the Appellant had decided that she did not want the Policy to be encashed, she did not have a right to be able require to her parents to maintain the Policy until a future date. The Respondent submitted that as a result a very significant level of control over what happened to the Policy remained with the Appellant's parents. Therefore, the Respondent submitted that Clause 2.1 of the Agreement when read objectively suggests that a level of control was retained by the Appellant's parents which was not consistent with the Appellant having acquired the present right of enjoyment in the Policy.

52. It was on this basis that the Respondent came to the view that the present right of enjoyment in the Policy only accrued to the Appellant on or about 22 May 2015 which was the date upon which the proceeds of her share of the Policy proceeds came into her account. It is the Respondent's position that 22 May 2015 is the date upon which the Appellant acquired an interest in the Policy for the purpose of a liability to CAT.

53. As a result, the Respondent submitted, the Appellant's parents CGT liability and the Appellant's CAT liability no longer derive from the same event. The CGT liability, the Respondent submitted, arose on the date of the Agreement 20 April 2015 when the Appellant parents disposed of their rights in the Policy. On the other hand, the Respondent submitted, the Appellant's CAT liability did not arise at the same time but instead at a later date when the Appellant received her share of the net proceeds of encashment of the Policy. Therefore, the Respondent submitted, the provisions of section 104 of the CATCA2003 do not apply on the basis that in order for the allowance for CGT under section 104 of the CATCA2003 the CGT and CAT liabilities must arise out of the same event.

54. The Respondent identified a second feature of the Agreement which it submitted tended to support its position that the Appellant did not acquire a present right to the enjoyment of the Policy on 20 April 2015: the manner in which the consideration was paid. The Respondent submitted that the consideration paid was effectively a sum retained out of the encashment proceeds which the Appellant's parents received on or about 21 May 2015. The Respondent submitted that if the payment of the consideration was the event or act which triggered the acquisition of an interest in the Policy by the Appellant this was deferred until the Policy was encashed on 21 or 22 May 2015.

55. It was the Respondent's position that both of these features of the Agreement raise a question as to whether the Appellant acquired the beneficial interest on the Policy on 20 April 2015. The Respondent's position is that whatever interest the Appellant acquired in the Policy was acquired subsequent to 20 April 2015 and not by virtue of the same event. As a result, the provisions of section 104 of the CATCA2003 do not apply on the basis that in order for the allowance for CGT under section 104 of the CATCA2003 to apply requires that the CGT and CAT liabilities arise out of the same event.

56. The Respondent submitted that even if they are wrong and the Appellant did acquire a present right of enjoyment in the Policy on 20 April 2015, there was a subsequent disposal of the Policy by virtue of the encashment of the Policy which occurred within 2 years of the date of the gift. Therefore, the Respondent submitted, section 104(3) of the

CATCA2003 deprives the Appellant of the relief available pursuant to section 104(1) of the CATCA2003 as it states:

> *"The deduction by virtue of subsection (1) of capital gains tax chargeable on the disposal of an asset against gift tax or inheritance tax shall cease to apply to the extent that the asset is disposed of within 2 years commencing on the date of the gift or, as the case may be, the date of the inheritance."*

57. In its submissions to the Commissioner at the oral hearing, Senior Counsel for the Respondent submitted that, on the evidence, it had been established that Mr [redacted] triggered the encashment nearly straight away through his London broker within a day or two of the agreement and that because of general inefficiency of [redacted] the encashment did not materialise for a number of weeks thereafter.

58. However, the Respondent also submitted that, if the Appellant's parents disposed of their interest in the Policy and the Appellant acquired the right of present enjoyment in the Policy on 20 April 2015, because the encashment occurred after the date of the Agreement then there was a subsequent disposal of that right within 2 years of the date of the gift.

59. The Respondent disagreed with the Appellant's argument that that the encashment of the Policy was not a disposal within the meaning of section 104(3) of the CATCA2003. The Respondent submitted that the common sense understanding of disposal does not require another party and what the word concentrates on is what is done with the asset. The Respondent gave the example of the disposal of litter which can be disposed of without worrying about who is actually getting it. A disposal, the Respondent submitted, concentrates on the person with the asset and whether they are relinquishing control of it and it is not relevant whether there is somebody on the other side to take possession of it.

60. The Respondent submitted that section 535 of the TCA1997 which is entitled "*Disposals where capital sums derived from assets*" contains a definition of a disposal where a capital sum is derived from an asset notwithstanding that no assets is acquired by a person on the other side of the transaction. In addition, the Respondent submitted, that section 2 of the CATCA20023 contains a definition of a "*disposition*" which is sufficiently wide to accommodate the surrender and encashment of a Life Assurance Policy as being a disposal, as it includes:

"*(a) any act or omission by a person as a result of which the value of that person's estate immediately after the act or omission is less than it would be but for the act or omission,*

…

(f)the grant or the creation of any benefit,

…

(h) the release, forfeiture, surrender or abandonment of any debt or benefit, or the failure to exercise a right, and, for the purpose of this paragraph, a debt or benefit is deemed to have been released when it has become unenforceable by action through lapse of time (except to the extent that it is recovered subsequent to its becoming so unenforceable),

…"

Documentary Evidence

61. The following were the agreed documents submitted and relied on by the Parties in this appeal:

	Document Date	Document Description
1	10 July 2001	Application form completed by [redacted] and [redacted] in relation to the investment in a private client portfolio with [redacted] [redacted] [redacted] (subsequently acquired by [redacted].).
2	Undated	Policy conditions attaching to the private client investment portfolio.
3	20 April 2015	Agreement for sale of Life Assurance Policy made between [redacted] and [redacted] of the one part and [redacted], [redacted] and [redacted] of the other part.
4	14 May 2015	Stamp duty certificate.

5	10 November 2015	Copy two CAT returns filed on behalf of Appellant on 10 November 2015 in respect of benefits taken from [redacted] and [redacted] under the Agreement.
6	29 June 2016	Form 11 return submitted by [redacted] to Respondent for 2015.
7	29 June 2016	Acknowledgement of Income Tax Return and Self-Assessment for 2015 issued by Respondent to [redacted].
8	29 November 2017	Notice of Amended Assessment for 2015 issued by Respondent to [redacted].
9	29 November 2017	Statement Balance issued by Respondent to [redacted]
10	25 January 2019	Notification to Appellant of Audit by Respondent
11	1 March 2019	Email from Respondent to Appellant's solicitor
12	5 April 2019	Letter from Appellant's solicitor to Respondent with enclosures: - Copy application form completed by [redacted] and [redacted] in respect of the Policy; - Copy letter dated 12 July 2011 from [redacted] confirming that the Private Client Portfolio No [redacted] was held in the joint names of [redacted] and [redacted]; - Copy notice received confirming that [redacted]. had acquired [redacted]; - Copy of the Policy terms and conditions; - Copy Agreement; - Copy computation of taxable gain on the disposal of the Policy and the resulting tax liability; - Copy extract bank statement of the Appellant.

13	20 May 2019	Letter from Respondent to Appellant's solicitor.
14	11 June 2019	Letter from Appellant's solicitor to Respondent with enclosures: - Copy valuation statement of Policy as at 23 April 2015; - Copy bank statements of [redacted] showing lodgements dated 18 May 2015 and 21 May 2015.
15	22 July 2019	Email from Respondent to Appellant's solicitor.
16	22 July 2019	Email from Appellant's solicitor to Respondent.
17	2 August 2019	Email from Respondent to Appellant's solicitor.
18	29 August 2019	Email from Appellant's solicitor to Respondent.
19	8 November 2019	Letter from Respondent to Appellant's solicitor containing letter to Appellant and Amended Notice of Assessment to CAT
20	22 November 2019	Letter and Notice of Appeal from Appellant's solicitor to Commission.
21	25 November 2019	Letter from Appellant's solicitor to Respondent.
22	20 May 2019	Letter from Appellant's solicitor to Respondent.
23	21 May 2019	Letter from Respondent to Appellant's solicitor.
24	30 June 2020	Appellant's Statement of Case.
25	30 June 2020	Respondent's Statement of Case.
26	30 April 2021	Appellant's Outline of Arguments.
27	30 April 2021	Respondent's Outline of Arguments.
28	14 June 2022	Statement of Agreed Facts.

Material Facts

62. The following material facts are not at issue between the Parties and the Commissioner accepts same as material facts:

- The Appellant's parents held a life policy No [redacted] with [redacted];
- On 20 April 2015 the Appellant, along with her [redacted], entered into the Agreement with their parents concerning the Policy;
- At the date of the Agreement the Policy was worth €5,576,112. The consideration of €3,400,000 noted in the Agreement was paid equally by the Appellant and her [redacted];
- The effect of the Agreement was that the Appellant received a gift from her parents;
- The Appellant's parents made a gain on disposal of the Policy in the amount of €1,812,057 which was charged to income tax at 41% in the amount of €742,943 under section 730K(1) of the TCA1997 which was returned by the Appellant's father in his tax return for 2015 and the income tax was duly paid;
- On 9 November 2015 the Appellant filed two CAT returns for the period 1 September 2014 to 31 August 2015;
- Stamp duty in the amount of €5,576 was also returned in respect of the Agreement.

63. The following material facts are at issue between the Parties:

- The Appellant was entitled in possession to the gift the subject matter of the Agreement on 20 April 2015;
- The Policy was encashed within 2 years of the Appellant acquiring an interest in same;
- The encashment of the Policy was a disposal within the meaning of the CATCA2003.

The Appellant was entitled in possession to the gift the subject matter of the Agreement on 20 April 2015:

64. Section 2 of the CATCA2003 defines "*entitled in possession*" as meaning:

> *"…having a present right to the enjoyment of property as opposed to having a future such right, and without prejudice to the generality of the foregoing a person is also, for the purposes of this Act, deemed to be entitled in possession to an interest or share in a partnership, joint tenancy or estate of a deceased person, in which that person is a*

partner, joint tenant or beneficiary, as the case may be, but that person is not deemed to be entitled in possession to an interest in expectancy until an event happens whereby this interest ceases to be an interest in expectancy;"

65. On the one hand, the Appellant asserts that the effect of the Agreement was that she became entitled in possession to the gift the subject matter of the Agreement on 20 April 2015, that being the date of the Agreement. On the other hand, the Respondent asserts that the Appellant was not entitled in possession to the gift the subject matter of the Agreement on 20 April 2015 but rather she became entitled in expectancy to the gift on 20 April 2015 and that she became entitled in possession to the gift sometime after her father received the funds into his bank account on 18 May 2015 and 21 May 2015.

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

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

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

"…

- *The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would have reasonably*

been available to the parties in this situation in which they were in at the time of the contract.

- *The Court has to start somewhere and the starting point is the wording used by the parties in the Contract.*
- *It is not for the Court to rewrite the party's bargain. If the language is unambiguous, the Court must apply it.*
- *Where a term of a contract is open to more than one interpretation, it is generally appropriate for the Court to adopt the interpretation which is most consistent with the business common sense. A Court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.*
- *The contract is to be read as a whole and an 'iterative process' is called for: '… involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'."*

68. In interpreting the Agreement the Commissioner must start by looking at the wording of the document.

69. The title of any document is an indication of its contents and is a distinguishing description given to the document at hand. The Agreement entered into between the Appellant and her parents contains the following words as the title:

> *"**THIS AGREEMENT FOR THE SALE OF A LIFE INSURANCE POLICY** is made on 20th day of April 2015*"

70. Clause 1 of the Agreement then states:

> ***1. Sale of Beneficial Interest in the Policy***
>
> *1.1 The Grantors, as legal and beneficial owners, sell Policy to the Grantees with effect from date first written above (the "Gift").*
>
> *1.2 The consideration for the Gift shall be the sum of €3,400,000 (three million, four hundred thousand euro)(the "**Financial Consideration**") and the natural love and affection which the Grantors bear for the Grantees.*
>
> *1.3 The Grantees shall beneficially own the Policy in equal shares as tenants in common and shall contribute the Consideration in equal shares.*

71. Clause 2 of the Agreement then goes on to state:

*"**2 Completion***

2.1 It is intended that the Grantors shall remain as legal owners of the Policy and shall surrender and encash the Policy within a period of two months from the date of this Agreement. The Grantees agree (i) that they have no right to be consulted about or to approve the management or surrender of the Policy and (ii) that the Grantors shall not be liable for any loss to the value of the Policy however arising except as a result of the fraud, dishonesty or gross negligence of the Grantors.

2.2 Following such surrender and encashment, Completion shall take place on such date as may be agreed by the Grantors and Grantees.

2.3 On Completion, the Grantors shall pay to the Grantees in equal shares, the net proceeds of the Policy after deducting the Financial Consideration (which sum the Grantors shall retain unless such Financial Consideration shall have been paid in advance of Completion by the Grantees to the Grantors)."

72. Taking the Title of the Agreement together with Clause 1, the language sets out that the Grantors, that is to say the Appellant's parents, were selling the beneficial interest in the Policy to the Grantees, that is to say to the Appellant and her siblings, for the sum of €3,400,000 and that the Grantees were purchasing the beneficial interest in the Policy from the Grantors. Clause 2 of the Agreement then goes on to deal with the completion of the transaction the subject matter of the Agreement and provides that completion of the transaction would occur following the surrender and encashment of the Policy by the Appellant's parents by way of the distribution of the net proceeds of the Policy to the Appellant and her siblings.

73. Having considered the wording of the document the Commissioner must ascertain the intention of the Parties as confirmed by Laffoy J in *Kymmene*. In doing so the Commissioner heard the uncontested evidence of the Appellant and her father. The Appellant stated that her understanding of the purpose of the Agreement was for her to acquire a beneficial interest in the Policy. She stated that her understanding of Clause 2 of the agreement was that, whilst she acquired a beneficial interest in the Policy, her parents would continue to be the parties responsible for dealing with [redacted] and for issuing instructions to them. She stated that this was important

because [redacted] were very difficult to deal with and it was important that her parents would continue to be able to issue instructions in respect of the Policy.

74. The Commissioner notes that the Appellant's uncontested evidence at the oral hearing was very short and concise. The Commissioner notes that the Appellant was articulate and very clear in her understanding that the purpose of the Agreement was for her to acquire a beneficial interest in the Policy. This may have been because of [redacted] and [redacted].

75. The Commissioner also heard the uncontested evidence of the Appellant's father, Mr [redacted], in which he stated that, at the same time as deciding to exit the Policy, sometime prior to February 2015, he and his wife developed a view that they should, during their lifetime, share some of their surplus assets with their children. As a result they decided to enter into the Agreement with their children to take advantage of the tax provisions which provided that the exit tax which they would pay on the Policy could be offset against the CAT which their children would incur on receipt of the gift.

76. Mr [redacted] stated that he and his wife considered assigning the Policy to their children but decided against this course partly on the basis that [redacted] had announced that they were no longer accepting additional investments from people resident in Ireland. In addition, as [redacted] had become increasingly difficult to deal with, they decided that anything which would have required [redacted]'s cooperation would be too much trouble. On those bases, he stated, he and his wife decided that a much simpler solution would be to sell the beneficial interest in the Policy to their children at a discount.

77. The Commissioner has considered the wording of the Agreement and finds that it is clear that the intention of the parties to the Agreement was that the beneficial interest in the Policy was transferred to the Appellant and her siblings and that the Appellant's parents remained as the legal owners of the Policy merely as nominees to facilitate the giving of an instruction to encash the Policy. As affirmed by Kelly J in *Dunnes* at paragraph 51 it is not for the Court to rewrite the bargain, if the language is unambiguous, the Court must apply it. In addition the Commissioner has considered what a reasonable person would have understood the parties to the Agreement to have meant. Having considered the wording of the Agreement and having considered the uncontested evidence of the Appellant and her father, the Commissioner finds that a reasonable person would have understood that the parties' intention was to transfer the beneficial interest in the Policy to the Appellant and her siblings.

78. The Commissioner has further considered the Respondent's argument that the provisions of Clause 2.1 fettered or restricted the Appellant's equitable interest in the Policy in a manner which was not consistent with her present enjoyment of the Policy in that the Appellant's parents retained an element of control over the Policy which was not consistent with the Appellant having a present right of enjoyment over the Policy. The clear intentions of the parties to the Agreement have been established and part of those intentions was that the Appellant's parents would encash the Policy on behalf of the Appellant and her siblings, there is no dispute about this and nothing was put to the Commissioner which tended to suggest otherwise. The Commissioner finds that the effect of the Agreement was that the Appellant's parents would issue an instruction to [redacted] for the Policy to be encashed on behalf of the Appellant and her siblings. The Commissioner finds that there was no fetter or restriction to the Appellant's rights in the Policy as a result of Clause 2.1 of the Agreement and that the effect of the Agreement was that Appellant had a present right to the enjoyment of the Policy.

79. Therefore**,** the Commissioner finds as a material fact that the Appellant was entitled in possession to the gift the subject matter of the Agreement, that is to say the Policy, on 20 April 2015.

80. The Commissioner has considered the Respondent's submission that if the payment of the consideration was the event or act which triggered the acquisition of an interest in the Policy by the Appellant this was deferred until the Policy was encashed on 21 or 22 May 2015. The Commissioner has already found as a material fact that on the basis of the wording of the Agreement and the intentions of the parties thereto the Appellant was entitled in possession to the gift the subject matter of the Agreement on 20 April 2015. Therefore, the Commissioner finds as a material fact that the payment of the consideration was not the event or act which triggered the acquisition of an interest in the Policy by the Appellant.

The Policy was encashed within 2 years of the Appellant acquiring an interest in same:

81. On the one hand the Respondent submits that the Policy was encashed within 2 years of the Appellant acquiring an interest in it. On the other hand the Appellant submits that the Policy was not encashed within 2 years of her acquiring an interest in it.

82. Mr [redacted] also gave evidence that on 23 April 2015 an instruction was given to the London financial advisor to initiate the surrender and encashment of the Policy to [redacted]. No documentary evidence was submitted during the course of this

appeal which evidences an instruction being issued by Mr and Mrs [redacted] to either the London financial advisor or to [redacted] to encash the Policy and in particular no documentary evidence which established the date of encashment of the Policy has been submitted by the Appellant. The only documentary evidence which was submitted in relation to the Policy as it was in 2015 was a document entitled "[redacted] – *Personal Client Valuation (Interim) – Verified Balances*" which is dated 23 April 2015 and indicates an overall value for the Policy at the close of business on 22 April 2015 as being €5,605,312.93 all of which was held in cash in the form of GBP£2,822,145.49 and €1,984,626.71 with a charge of €164.08 being applied to the account. This document does not refer to anything other than the value of the Policy at the close of business on 22 April 2015 and does not establish a date of encashment of the Policy.

83. The Commissioner notes that, in support of this appeal, the Appellant has submitted *inter alia* a copy of the original application form which her parents completed and signed on 10 July 2001 when opening the Policy. In addition the Appellant has submitted a copy of the undated Policy Conditions issued by [redacted]. These documents, along with the document dated 23 April 2015 containing the verified balances of the Policy are the only documents which the Appellant has submitted in relation to the Policy itself.

84. The Appellant has also submitted a copy of her father's [redacted] Sterling account which shows a lodgement of GBP£1,981,617 on 18 May 2015. In addition the Appellant has submitted a copy of her father's [redacted] Euro Account which shows a lodgement of €2,820,730.28 on 21 May 2015. The Commissioner notes that these transactions / lodgements were received some 28 and 31 days after the date of the Agreement. These documents do not refer to the origin of the funds and do not establish the date of encashment of the Policy although it is not in dispute that the origin of these funds was the encashment of the Policy.

85. In appeals before an Appeal Commissioner the burden of proof rests on the Appellant who must prove on the balance of probabilities that the contested tax is not payable. This is confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49 by Charleton J at paragraph 22:-

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

86. The Commissioner does not accept that the Appellant has discharged the burden of proof in relation to her claim that the Policy was not encashed within 2 years of her acquiring an interest in it.

87. In his evidence at the hearing of this appeal, Mr [redacted] gave clear evidence that a large part of the reason that he and his wife invested in the Policy was the preferential exit tax rate which applied to such policies at that time. Mr [redacted] also gave clear evidence at the oral hearing of this appeal that he and his wife entered into the Agreement because they had decided they wished to share some of their surplus assets with their children during their lifetime. As a result, he stated, they decided to enter into the Agreement with their children to take advantage of the tax provisions which provided that the exit tax / CGT which they would pay on the Policy could be offset against the CAT which their children would incur on receipt of the gift.

88. The Commissioner notes that the Appellant is an experienced business woman and has worked in [redacted] for all of her professional life. As such, the Commissioner considers that the Appellant is aware of the importance of supporting documentation. In addition, the Commissioner notes that the Appellant's father also worked in [redacted] for all of his considerable and highly successful business life and the Commissioner considers that he is also aware of the importance of supporting documentation.

89. No documentation in relation to the instruction to encash the Policy has been submitted by the Appellant. The Commissioner finds it reasonable to expect that the Appellant would have submitted some documentation to support her claim that the Policy was not encashed within 2 years of her acquiring an interest in it and which would tend to establish the precise date on which the Policy was encashed. The Commissioner does not find it credible or plausible that the encashment of a Policy with a value of €5,605,312.93 did not generate some paperwork or documentation such as, but not limited to:

    - the instruction to encash which was issued by Mr and Mrs [redacted];
    - confirmation from the London financial advisor that he had received and acted on the instruction to encash the Policy;
    - confirmation of encashment and the date thereof from [redacted].;
    - confirmation of the date of closure of the Policy from [redacted].;
    - confirmation of the transfer of funds from [redacted] to the Appellant's father.

90. As a result, the Commissioner finds as a material fact that, on the balance of probabilities, the Policy was encashed on a date between 23 April 2015, being the date of the document entitled ""[redacted] – *Personal Client Valuation (Interim) – Verified Balances*", and 18 May 2015 being the date the first lodgement of funds was received by Mr [redacted] into his [redacted] Sterling account.

91. The Commissioner has already found as a material fact that the Appellant was entitled in possession to the Policy on 20 April 2015. As a result of the Commissioner's finding that the Policy was encashed on a date between 23 April 2015 and 18 May 2015, it therefore follows that the Policy was encashed within 2 years of the Appellant acquiring an interest in it. Therefore the Commissioner finds as a material fact that the Policy was encashed within 2 years of the Appellant acquiring an interest in it. This material fact is accepted.

The encashment of the Policy was a disposal:

92. The Respondent has submitted that the encashment of the Policy was a disposal for the purposes of section 104(3) of the CATCA2003 and has submitted that the common sense understanding of disposal does not require another party and what the word concentrates on is which is done with the asset. A disposal, the Respondent submitted, concentrates on the person with the asset and whether they are relinquishing control of it and it is not relevant whether there is somebody on the other side to take possession of it.

93. The Appellant has submitted that the encashment of the Policy was not a disposal within the meaning of section 104(3) of the CATCA2003. The Appellant submitted that the ordinary meaning of disposal is that a person disposes of something to somebody else. The Appellant also submitted that the encashment of the Policy could not have been a disposal in that the Appellant and her siblings did not dispose of the Policy to somebody else and that [redacted] did not acquire anything by virtue of the encashment of the Policy.

94. Section 104(3) of the CATCA2003 provides:

> *"Allowance for capital gains tax on the same event.*
>
> *(3)The deduction by virtue of subsection (1) of capital gains tax chargeable on the disposal of an asset against gift tax or inheritance tax shall cease to apply to the extent that the asset is disposed of within 2 years commencing on the date of the gift or, as the case may be, the date of the inheritance."*

95. As the Appellant has correctly submitted, the CATCA2003 does not contain a definition of "*disposal*". Section 2 of the CATCA2003 is entitled "*General Interpretation*" and subsection (1) thereof contains, *inter alia*, a definition of "*disposition*" as including:

> *"(b)any trust, covenant, agreement or arrangement, whether made by a single operation or by associated operations,*
>
> *…*
>
> *(f)the grant or the creation of any benefit,*"

96. In addition section 2(1) of the CATCA2003 contains a definition of the "*date of disposition*" as meaning:

> *(e)in any other case, the date on which the act (or where more than one act is involved, the last act) of the disponer was done by which that disponer provided or bound that disponer to provide the property comprised in the disposition;*

97. Section 2(1) of the CATCA2003 also contains a definition of *"disponer":*

> *"…in relation to a disposition, means the person who, for the purpose of the disposition, directly or indirectly provided the property comprised in the disposition, and in any case where more than one person provided the property each is deemed to be the disponer to the extent that that disponer so provided the property;*"

98. 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".

99. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner has considered the ordinary meaning of the word disposal. The Collins dictionary defines disposal as being "*the act of getting rid of something that is no longer wanted or needed*". The Cambridge dictionary defines disposal as being "*the act of getting rid of something, especially by throwing it away*".

100. There can be no doubt that the encashment of the Policy was a disposal. The Policy was encashed, in other words it was surrendered or it was gotten rid of. In return for surrendering the Policy to [redacted] a payment out of cash was received into Mr [redacted]'s two [redacted] accounts. The Commissioner does not accept the argument made by the Appellant that the ordinary meaning of disposal is that a person disposes of something to somebody else or that the encashment of the Policy could not have been a disposal in that the Appellant and her siblings did not dispose of the Policy to somebody else and that [redacted] did not acquire anything by virtue of the encashment of the Policy.

101. As a result of the above the Commissioner is satisfied that encashment of the policy was a disposal and means that the Policy was disposed of within the mearing of section 104(3) of the CATCA2003.

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

- The Appellant's parents held a life policy No [redacted] with [redacted];
- On 20 April 2015 the Appellant, along with her [redacted], entered into an agreement with their parents concerning the Policy;
- At the date of the Agreement the Policy was worth €5,576,112. The consideration of €3,400,000 noted in the Agreement was paid equally by the Appellant and her [redacted];
- The Policy valuation document has a valuation date of the close of business on Wednesday 22 April 2015;
- The effect of the Agreement was that the Appellant received a gift from her parents;

- The Appellant's parents made a gain on disposal of the Policy in the amount of €1,812,057 which was charged to income tax at 41% in the amount of €742,943 under section 730K(1) of the TCA1997 which was returned by the Appellant's father in his tax return for 2015 and the income tax was paid;
- On 9 November 2015 the Appellant filed two CAT returns for the period 1 September 2014 to 31 August 2015;
- Stamp duty in the amount of €5,576 was also returned in respect of the Agreement;
- The Appellant was entitled in possession to the gift the subject matter of the Agreement on 20 April 2015;
- The payment of the consideration was not the event or act which triggered the acquisition of an interest in the Policy by the Appellant;
- The Appellant was entitled in possession to the gift the subject matter of the Agreement on 20 April 2015;
- The Policy was encashed on a date between 23 April 2015 and 18 May 2015;
- The Policy was encashed within 2 years of the Appellant acquiring an interest in it;
- The encashment of the Policy was a disposal within the meaning of the CATCA2003.

Analysis

Preliminary Issue

103. The Preliminary issue raised by the Appellant was not pursued with any vigour at the oral hearing, however the Commissioner notes that the jurisdiction of an Appeal Commissioner has been set out in a number of cases decided by the Courts, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (hereinafter "*Lee*")*, Stanley v The Revenue Commissioners* [2017] IECA 279*, The State (Whelan) v Smidic* [1938] 1 I.R. 626*, Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 *and the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577.

104. Most recently Murray J. in *Lee* held as follows:

"*From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The 'incidental questions' which the case*

law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment."[1]

105. Murray J further found that:

"*The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment.*"

106. The Commissioner therefore has no jurisdiction to enquire into the legal validity of the within CAT Notice of Amended Assessment and makes no comment on same.

Substantive Issue

107. It is not in dispute between the Parties that the Appellant was in receipt of a gift to the value of €722,404 from her parents pursuant to section 5 of the CATCA2003.

108. On foot of the provisions of section 4 of the CATCA2003 a charge to CAT arises pursuant to section 4 of the CATCA2003 on the taxable value of a gift as follows:

"A capital acquisitions tax, to be called gift tax and to be computed in accordance with this Act, shall, subject to this Act and any regulations made under the Act, be charged, levied and paid on the taxable value of every taxable gift taken by a donee."

109. It is also not in dispute between the Parties that the Appellant's parents made a gain on disposal of the Policy in the amount of €1,812,057 which was charged to income tax at 41% in the amount of €742,943 and that they paid same pursuant to section 730K(1) of the TCA1997 which is entitled "*Disposal of foreign life policy*".

110. Section 730K(5) of the TCA1997 provides that:

"*Where an individual is chargeable to tax in accordance with subsection (1) in respect of an amount of income the tax thereby payable, in so far as it is paid, shall be treated as an amount of capital gains tax paid for the purposes of section 104 of the Capital Acquisitions Tax Consolidation Act 2003*."

[1] At paragraph 64

111. It therefore follows that the income tax of €742,943 returned by Mr [redacted] on the gain of the disposal of the Policy is to be treated as CGT for the purposes of section 104(1) of the CATCA2003.

112. Section 104(1) of the CATCA2003 provides:

(1) Where gift tax or inheritance tax is charged in respect of property on an event happening on or after the date of the passing of this Act, and the same event constitutes for capital gains tax purposes a disposal of an asset (being the same property or any part of the same property), the capital gains tax, if any, chargeable on the disposal is not deducted in ascertaining the taxable value for the purposes of the gift tax or inheritance tax but, in so far as it has been paid, is deducted from the net gift tax or inheritance tax as a credit against the same; but, in relation to each asset, or to a part of each asset, so disposed of, the amount deducted is the lesser of –

(a) an amount equal to the amount of the capital gains tax attributable to such asset, or to the part of such asset, or

(b) an amount equal to the amount of the gift tax or inheritance tax attributable to the property which is that asset, or that part of that asset."

113. Section 104(3) of the CATCA2003 provides that:

(3) The deduction by virtue of subsection (1) of capital gains tax chargeable on the disposal of an asset against gift tax or inheritance tax shall cease to apply to the extent that the asset is disposed of within 2 years commencing on the date of the gift or, as the case may be, the date of the inheritance."

114. The Commissioner finds that the provisions of section 104(3) of the CATCA2003 apply to the Appellant for the purposes of this appeal for the following reasons:

- It is not in dispute between the Parties that the effect of the Agreement was that the Appellant received a gift from her parents;
- The Commissioner has found as a material fact that the Appellant was entitled in possession to the Policy on the date of the Agreement 20 April 2015 and that is the date of the gift for the purposes of section 104(3) of the CATCA2003.
- The Commissioner has also found as a material fact that the encashment of the Policy was a disposal for the purpose of the CATCA2003.
- In addition, the Commissioner has found that the Policy was encashed within 2 years of the date of the gift of the Policy to the Appellant.

- As a result of the encashment of the Policy on some date between 23 April 2015 and 18 May 2015 it therefore follows that the provisions of section 104(3) of the CATCA2003 apply to the encashment of the Policy and the CGT returned and paid by Mr and Mrs [redacted] on the disposal of the Policy by operation of the Agreement on 20 April 2015 cannot be offset against the CAT liability which arose to the Appellant on foot of the encashment of the Policy on some date between 23 April 2015 and 18 May 2015.

Determination

115. 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, 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."*

116. The Commissioner determines that the Appellant has not discharged the burden of proof in this appeal and that she has not succeeded in showing that the relevant tax was not payable.

117. The Commissioner therefore determines that Notice of Amended Assessment to Capital Acquisitions Tax raised on 8 November 2019 by the Respondent in relation to the Appellant shall stand.

118. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular section 949 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 42 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
12 December 2022

Annex 1

Section 2 of the CATCA2003:

"…

*"**benefit**" includes any estate, interest, income or right;*

…

*"**date of the disposition**" means—*

…

(e)in any other case, the date on which the act (or where more than one act is involved, the last act) of the disponer was done by which that disponer provided or bound that disponer to provide the property comprised in the disposition;

…

*"**disponer**", in relation to a disposition, means the person who, for the purpose of the disposition, directly or indirectly provided the property comprised in the disposition, and in any case where more than one person provided the property each is deemed to be the disponer to the extent that that disponer so provided the property;*

…

*"**disposition**" includes—*

…

(b)any trust, covenant, agreement or arrangement, whether made by a single operation or by associated operations,

…

(f)the grant or the creation of any benefit,

…

*"**date of the disposition**" means—*

(a)in the case of a will, the date of the testator's death,

(b)in the case of an intestacy or a partial intestacy, the date of death of the intestate,

(c)in the case of a benefit under Part IX or section 56 of the Succession Act 1965, the date of death of the relevant testator or other deceased person, and correspondingly in the case of an analogous benefit under the law of another territory,

(d)in the case of a disposition which consists of the failure to exercise a right or a power, the date of the latest time when the disponer could have exercised the right or the power if that disponer were sui juris and not under any physical disability, and

(e)in any other case, the date on which the act (or where more than one act is involved, the last act) of the disponer was done by which that disponer provided or bound that disponer to provide the property comprised in the disposition;

…

*"**entitled in possession**" means having a present right to the enjoyment of property as opposed to having a future such right, and without prejudice to the generality of the foregoing a person is also, for the purposes of this Act, deemed to be entitled in possession to an interest or share in a partnership, joint tenancy or estate of a deceased person, in which that person is a partner, joint tenant or beneficiary, as the case may be, but that person is not deemed to be entitled in possession to an interest in expectancy until an event happens whereby this interest ceases to be an interest in expectancy;*

*"**interest in expectancy**" includes an estate in remainder or reversion and every other future interest, whether vested or contingent, but does not include a reversion expectant on the determination of a lease;*" [emphasis added]

Section 4 of the CATCA2003:

"A capital acquisitions tax, to be called gift tax and to be computed in accordance with this Act, shall, subject to this Act and any regulations made under the Act, be charged, levied and paid on the taxable value of every taxable gift taken by a donee."

Section 5 of the CATCA2003:

"*Gift deemed to be taken.*

(1)For the purposes of this Act, a person is deemed to take a gift, where, under or in consequence of any disposition, a person becomes beneficially entitled in possession, otherwise than on a death, to any benefit (whether or not the person becoming so

entitled already has any interest in the property in which such person takes such benefit), otherwise than for full consideration in money or money's worth paid by such person.

…"

Section 104 of the CATCA2003:

"Allowance for capital gains tax on the same event.

(1)Where gift tax or inheritance tax is charged in respect of property on an event happening on or after the date of the passing of this Act, and the same event constitutes for capital gains tax purposes a disposal of an asset (being the same property or any part of the same property), the capital gains tax, if any, chargeable on the disposal is not deducted in ascertaining the taxable value for the purposes of the gift tax or inheritance tax but, in so far as it has been paid, is deducted from the net gift tax or inheritance tax as a credit against the same; but, in relation to each asset, or to a part of each asset, so disposed of, the amount deducted is the lesser of—

(a)an amount equal to the amount of the capital gains tax attributable to such asset, or to the part of such asset, or

(b)an amount equal to the amount of the gift tax or inheritance tax attributable to the property which is that asset, or that part of that asset.

(2)For the purposes of any computation of the amount of capital gains tax to be deducted under this section, any necessary apportionments are made of any reliefs or expenditure and the method of apportionment adopted is such method as appears to the Commissioners, or on appeal to the Appeal Commissioners, to be just and reasonable.

(3)The deduction by virtue of subsection (1) of capital gains tax chargeable on the disposal of an asset against gift tax or inheritance tax shall cease to apply to the extent that the asset is disposed of within 2 years commencing on the date of the gift or, as the case may be, the date of the inheritance.

(3A)Where an amount of tax is treated as an amount of capital gains tax for the purposes of this section under section 730GB of the Taxes Consolidation Act 1997, subsection (3) shall not apply in relation to that amount of tax.

(4)(a)In this subsection "division", "merger", "successor company" and "transferor company" have the meanings assigned to them by section 101(4)(a).

(b)For the purposes of subsection (3), a transfer of an asset from a transferor company to a successor company as a result of a merger or a division shall not be regarded as a disposal."

Section 535 of the TCA1997:

"*Disposals where capital sums derived from assets.*

(1)In this section, "capital sum" means any money or money's worth not excluded from the consideration taken into account in the computation of the gain under Chapter 2 of this Part.

(2)(a)Subject to sections 536 and 537(1) and to any other exceptions in the Capital Gains Tax Acts, there shall be for the purposes of those Acts a disposal of an asset by its owner where any capital sum is derived from the asset notwithstanding that no asset is acquired by the person paying the capital sum, and this paragraph shall apply in particular to—

(i)capital sums received by means of compensation for any kind of damage or injury to an asset or for the loss, destruction or dissipation of an asset or for any depreciation or risk of depreciation of an asset,

(ii)capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, an asset,

(iii)capital sums received in return for forfeiture or surrender of a right or for refraining from exercising a right, and

(iv)capital sums received as consideration for use or exploitation of an asset.

(b)Without prejudice to paragraph (a)(ii) but subject to paragraph (c), neither the rights of the insurer nor the rights of the insured under any policy of insurance, whether the risks insured relate to property or not, shall constitute an asset on the disposal of which

a gain may accrue, and in this paragraph "policy of insurance" does not include a policy of assurance on human life.

(c)Paragraph (b) shall not apply where the right to any capital sum within paragraph (a)(ii) is assigned after the event giving rise to the damage or injury to, or the loss or depreciation of, an asset has occurred, and for the purposes of the Capital Gains Tax Acts such an assignment shall be deemed to be a disposal of an interest in the asset concerned."

Section 730K(1) of the TCA1997:

"730KDisposal of foreign life policy.

(1)Where on or after 1 January 2001 a person disposes, in whole or in part, of a foreign life policy, and the disposal gives rise to a gain computed in accordance with subsection (2),

then, notwithstanding section 594, the amount of the gain shall be treated as an amount of income chargeable to tax under Case IV of Schedule D, and where the person is not a company the rate of income tax to be charged on that income shall, notwithstanding section 15, be—

(a)(i)subject to paragraph (b), in the case of a foreign life policy which is a personal portfolio life policy, at the rate of 60 per cent, and

(ii)in any other case, at the rate of 41 per cent,

…"