AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

74TACD2023

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination in relation to Preliminary Issue

Contents

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against a Notice of Amended Assessment to Income Tax (hereinafter the "Amended Assessment") raised by the Revenue Commissioners (hereinafter the "Respondent") on 6 December 2011 for the tax year 2005.

2. The total amount of tax under appeal is €185,508.

3. The Appellant has raised a preliminary issue in this appeal and contends that the Amended Assessment was raised outside of the four year time limit provided for the making or amendment of an assessment pursuant to section 955(2)(a) of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997").

4. The hearing of this preliminary issue took place on 13 February 2023. This then is a determination in relation to the preliminary issue raised by the Appellant.

Background

5. This appeal has been nominated as a lead appeal in a group of appeals all of which relate to the same, or similar, subject matter.

6. Mr [redacted] (hereinafter the "Appellant") was a director and minority shareholder in the company [redacted] (hereinafter "[redacted]"). The Appellant held 20 ordinary shares out of a total of 76 ordinary shares on issue in [redacted].

7. On 1 December 2005 the company [redacted] was incorporated and had authorised share capital of 1,000,000 ordinary shares of €1.00 each.

8. The Appellant was also a minority shareholder in [redacted] holding 80 A ordinary shares out of a total of 304 A ordinary shares on issue in [redacted].

9. In December 2005 [redacted] subscribed for 150 ordinary shares of €1.00 in [redacted] at a premium of €9,869 per share and became the controlling shareholder in [redacted].

10. On 21 December 2005 the shareholders of [redacted], which included the Appellant and [redacted], passed a special resolution amending the Memorandum and Articles of Association of [redacted] as follows:

    a. The authorised share capital of [redacted] of 1,000,000 Ordinary shares of €1.00 each was increased to 2,000,000 by the creation of an additional 1,000,000 A Ordinary shares of €1.00 each;

b. [redacted] allotted 152 ordinary shares of €1.00 each to [redacted] at a premium of €9,868 per share, totalling €1,500,000;

c. [redacted] allotted 304 A Ordinary Shares of €1.00 par as follows:

i. 80 A ordinary shares to the Appellant;

ii. 16 A ordinary shares to [redacted];

iii. 72 A ordinary shares to [redacted];

iv. 68 A ordinary shares to [redacted]; and

v. 68 A ordinary shares to [redacted].

d. Rights attaching to the ordinary shares of [redacted] moved or transferred to the A ordinary shares of [redacted], that is to say from the A ordinary shares held by [redacted] to the A ordinary shares held by the Appellant and other A ordinary shareholders.

11. On [redacted] 2005 a special resolution was passed by [redacted] resolving that the company be wound up. On foot of the liquidation of [redacted], the Appellant received €394,697 in respect of a capital distribution of his shares in [redacted].

12. The details of this transfer and distribution were not included in the Appellant's tax return for 2005 which was signed by the Appellant on 20 October 2006 and was submitted to the Respondent on 11 November 2006.

13. On 16 February 2011 the Respondent sent a letter of investigation to the Appellant as follows:

"*I am writing to advise you that this office has commenced an investigation into your tax affairs for the tax years 2005 et seq. The investigation is concerned, inter alia, with the tax consequences of transactions involving the transfer of share rights, to you by* [redacted] *("the company").*

Information available to me suggests that the company subscribed for ordinary shares in [redacted] *at a premium in 2005. The information also suggests that you subscribed for "A" ordinary shares in* [redacted] *at par. Rights attaching to the shares held by the company in* [redacted] *were transferred to the shares held by you in* [redacted]*. Under the Taxes Acts, the value of the rights transferred from the company to you, is chargeable to income tax.*

It is noted that, following the transfer of the rights, the assets of [redacted] *were distributed to you on its liquidation. Please detail how these funds, received by you, were utilised. In particular, please specify details of any settlements on, or transfers to, trusts or other instruments, and or investments in accounts / funds.*

I have reviewed your tax returns and I am unable to establish that the transaction and amounts have been returned for tax purposes. Please note that, if there has been a failure to make complete and accurate tax returns it must be rectified immediately. If there are any liabilities, which have not been met, please let me have details. In this context "tax" includes income tax, corporation tax, dividend withholding tax, capital gains tax, value added tax, inheritance tax, gift tax, residential property tax and stamp duty.

Liabilities which have not been discharged on their due date carry interest and if any such liabilities exist the matter of an immediate payment on account should be considered.

If information in respect of this matter has already been included in a return or supplied by you please advise me of the date of the correspondence and the address of the Revenue office to which it was sent.

I must point out that if additional tax liabilities arise as a result of this investigation, the option of making a qualifying disclosure is no longer available to you given that the investigation has commenced.

Please let me have your response within 21 days of the date of this letter. If you wish to have this matter referred to your tax agent to deal with please let me know and I will arrange accordingly."

14. On 9 March 2011 the Appellant responded to the Respondent as follows:

"*I refer to your letter dated the 16th February 2011.*

I note the content therein and would wish to advise you that I subscribed for shares in [redacted] *in 2005.*

This company made a capital distribution to me on liquidation, the detail of which I omitted to return in my income tax return for the tax year 2005.

I will now amend the relevant return and forward same within the next week or so when I have recovered the necessary file.

The funds in question were used for personal expenditure.

There were no settlements on, or transfers to, trusts or other instruments, and/ or investments in accounts/ funds.
Please note that no tax liability arises in respect of this disposal under the provisions of Section 547 TCA 1997.

You indicate that "Under the Taxes Acts, the value of the rights transferred from the company to you, is chargeable to income tax. You might confirm under what provisions you are relying upon with regard to this liability.

I await hearing from you in this regard."

15. The Respondent raised the Notice of Amended Assessment to Income Tax on 6 December 2011.

16. On 22 December 2011 the Appellant lodged an appeal with the Appeal Commissioners.

17. On 21 March 2016 the Commission was established on foot of the commencement of the Finance (Tax Appeals) Act 2015 (hereinafter the "2015 Act"). The transitional provisions contained Part 3 of the 2015 Act provide that an accepted appeal which existed prior to the establishment of the Commission should be progressed pursuant to Part 40A of the TCA1997. This applied to this appeal and this appeal has therefore been progressed pursuant to Part 40A of the TCA1997 since 21 March 2016.

18. From time to time this appeal has been stayed to allow the progression of a Case Stated to the High Court in the matter of *Raymond Hughes v The Revenue Commissioners* [2019] IEHC 807 in which the High Court delivered its judgment on 29 November 2019. The High Court decision was appealed to the Court of Appeal however this appeal was subsequently withdrawn. Following the withdrawal of the appeal to the Court of Appeal the stay in this appeal within the Commission was lifted.

19. The Appellant requested that the Commissioner determine the preliminary issue of whether the Amended Assessment was raised outside of the four year time limit provided for the making or amendment of an assessment pursuant to section 955(2)(a) of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997").

20. This then is a determination of a preliminary issue in this appeal made pursuant to Part 40A of the TCA1997.

21. 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 of the preliminary issue raised by the Appellant.

Legislation and Guidelines

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

Section 955 of the TCA1997 (as enacted in 2005)

"*(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.*

(2)(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of four years commencing at the end of the chargeable period in which the return is delivered and

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

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

by reason of any matter contained in the return.

(3) Nothing in this subsection shall prevent the amendment of an assessment –

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

….

"(4)(a)Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.

(b)This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question."

Section 956 of the TCA1997 (as enacted in 2005)

"(1)(a)For the purpose of making an assessment on a chargeable person for a chargeable period or for the purpose of amending such an assessment, the inspector –

(i)may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and

(ii)may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains, or allow any deduction, allowance or relief by reference to such statement or particular.

(b)The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a)(i) shall not preclude the inspector –

(i)from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and

(ii)subject to section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate.

(c)Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner."

Submissions and Witness Evidence

Appellant's Submissions

23. The Appellant submitted that the Amended Assessment is invalid unless the Respondent can establish that the four year time limit contained in section 955(2)(a) of the TCA1997 does not apply to the Appellant's 2005 tax return submitted by him on 11 November 2006. The Appellant submitted that no exception to the four year time limit provided for in section 955(2)(b)(i) of the TCA1997 arises in this appeal.

24. The Appellant submitted that section 877 of the TCA1997 imposes an obligation on every chargeable person to prepare and deliver to the Respondent a return in the form prescribed by the Respondent under the provisions of section 879 of the TCA1997. The prescribed form for the purposes of this case is "Form 11, Pay and File Income Tax Return for the year 2005" (hereinafter the "tax return").

25. Section 913(1) TCA provides that the provisions of the TCA1997 relating to the making or delivery of any return, apply in relation to Capital Gains Tax (hereinafter "CGT") in the same manner as they apply in relation to income tax.

26. The Appellant submitted that he has always filed his own annual tax returns and that he has done so in a manner which never gave rise to any compliance issues being raised by the Respondent for him in respect of any of his completed tax returns.

27. The Appellant submitted that he did not complete the CGT section of his tax return for 2005 because a liability to CGT or income tax did not arise on foot of the distribution and transaction of December 2005 in relation to [redacted] and [redacted]

28. The Appellant submitted that his tax return for 2005 contained a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period.

As a result, the Appellant submitted that the Amended Assessment which was raised by the Respondent on 6 December 2011 was raised outside of the four year time limit allowed by section 955 of the TCA1997 and that it is therefore out of time. The Appellant submitted that he is entitled to the protection for the four year time limit contained in section 955 of the TCA1997.

29. The Appellant submitted that at the time of completing and submitting of his 2005 tax return he did not have any doubt as to the tax treatment of the December 2005 transaction and distribution and as a result he did not need to include any expression of doubt within his 2005 tax return. He submitted that the Respondent had issued a clearance letter in relation to any tax issues arising from the December 2005 transaction and distribution and therefore he was sure that no tax liability arose which needed to be included in his tax return for 2005.

30. It was submitted that the Respondent could not have reasonable grounds to say that the Appellant's tax return for 2005 was completed negligently on the basis that the Appellant did not complete his tax return for 2005 on any different basis than he has completed all of his other tax returns. It was submitted that if the manner in which the Appellant completed his tax return for 2005 was wrong then it does not make sense that the Respondent has not come to the conclusion that all of the other tax returns completed by the Appellant are also wrong. It was submitted that, although negligence is not defined in sections 955 or 956 of the TCA1997, negligence must mean falling below some objective standard. It was further submitted that if the Respondent have an objective standard by which tax returns are to be completed this standard should have been applied to all of the Appellant's tax returns and it was not.

31. The Appellant submitted that section 49 of the Capital Acquisitions Tax Consolidation Act 2003 (hereinafter the "CATCA2003") contains a similar four year time limit for the raising of amended assessments by the Respondent as that contained in section 955 of the TCA1997 which is in respect of income tax. The Appellant relied on the judgment of the Supreme Court in *The Revenue Commissioners v Hans Droog* [2016] IESC 55 (hereinafter "*Droog*") and submitted that in that decision the Supreme Court held that an inspector of taxes is given wide power to inquire into the accuracy of any return but is not entitled to engage in a purely "fishing" exploration of old tax returns without having a reasonable basis for considering that the return is fraudulent or negligent before embarking on inquiries. The Appellant submitted that the Respondent has not in any way proven in this case that there was a basis for such a belief other than relying upon the

absence of an expression of doubt being indicated by the Appellant in his tax return for 2005.

32. The Appellant also relied on the judgment of the Court of Appeal in *Robert Stanley v The Revenue Commissioners* [2017] IECA 279 (hereinafter "*Stanley*") which also related to the four year time limit contained in section 49 of the CATCA2003. In particular the Appellant relied the Court's "*Conclusions in respect of the four year time limit"* contained in section 49 of the CATCA2003 which are set out at paragraphs 36 to 44 of that judgment.

33. The Appellant submitted that the details of the Appellant's involvement in the December 2005 transaction and distribution had been submitted to the CRO by way of the submission of a B5 Form dated 21 December 2005 which contained a copy of the resolution passed by [redacted] also dated 21 December 2005. The Appellant submitted that this document is the entirety of the documentation which he can point to which is the information which the Respondent had in relation to the December 2005 transaction and distribution.

34. The Appellant submitted that by writing to the Appellant on 16 February 2011, the Respondent was almost oblivious to the four year rule contained in section 955 of the TCA1997, otherwise they would have written to the Appellant in 2010 or earlier and not after the expiry of four years after the making of the tax return for 2005.

Witness – [redacted]

35. The Appellant gave direct evidence to the Commissioner at the oral hearing as follows:

36. The Appellant stated that he was in the habit of completing his own tax returns and submitting them to the Respondent.

37. The Appellant stated that he was consistent in the manner in which he completed his tax returns and in particular the CGT section of those returns in that he completed that section only when either a liability or a refund was due in a particular year.

38. He stated that he completed his tax return for 2005 in the manner in which he has always done and that, as he considered that he did not have any CGT liability in 2005 he did not complete any part of the CGT section on the tax return form relating to CGT.

39. He stated that he came to the conclusion that it was not necessary for him to complete the CGT section of his 2005 tax return because early in 2006 all of the details of the December 2005 transaction and distribution relating to [redacted] and [redacted] had

been sent to the Companies Registration Office and to the Respondent. He stated that his tax advisors had received confirmation from the Respondent that everything in relation to the transaction was in order. As a result he considered that the December 2005 transaction and distribution had been dealt with and, as he had no CGT to pay, he did not include any details of the transaction in the return.

40. He stated that he completed his tax return in other years in a similar fashion and pointed to the returns which he had submitted for 2009 and 2010 as examples where no CGT liability arose and where he had left that section of the tax return blank. He also stated that in other years when he did have a CGT liability he had completed the CGT section in the relevant tax return and he referenced the returns which he submitted to the Respondent for the years 2007 and 2008 as examples of that.

41. In relation to the expression of doubt box contained in the tax return, the Appellant stated that he had not ticked that box when completing the return for 2005 as there was no doubt in his mind in relation to whether he had a liability to CGT as a result of the December 2005 transaction and distribution. He stated that the Respondent had confirmed that there was no liability and he had absolutely no reason to have any doubt as to whether a CGT liability arose on foot of the transaction.

42. Commenting on this correspondence, the Appellant stated that the firm advice which he had received from his advisors was that there was no CGT due. He stated that when he said he had omitted to return the detail of the capital distribution to him on liquidation of [redacted] he meant that it was not put in his tax return. His view was that there was no reason to put the distribution into the return as it did not generate a liability to tax.

43. When asked by his own counsel whether he ever had any doubt that income tax might be involved in relation to the December 2005 transaction and distribution, the Appellant stated that it never crossed his mind.

Respondent's Submissions

44. The Respondent did not adduce any witness evidence at the oral hearing.

45. The Respondent submitted that the Appellant has not made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period in his tax return for 2005.

46. The basis on which the Respondent made this submission was that Appellant's 2005 tax return did not contain any reference to the December 2005 transaction and distribution,

whether in the CGT section of the tax return or in any other section, including sections relating to income, of the tax return.

47. The Respondent submitted that the details of the December 2005 transaction and distribution are material facts which were necessary for it to be in a position to make an assessment of the Appellant's tax position for 2005.

48. The Respondent submitted that the High Court decision of Stack J in *Hanrahan v The Revenue Commissioners* [2022] IEHC 43 (hereafter "*Hanrahan*") is supportive of the position that a chargeable person is not entitled to the protections contained in section 955 of the TCA1997 in circumstances where a full and true disclosure of all material fact necessary for the making of an assessment for the chargeable period has not been made.

Material Facts

49. 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*."

Agreed Material Facts

50. The following material facts have been agreed between the Parties and the Commissioner accepts same as material facts:

    i. The Appellant was a director and minority shareholder in [redacted].

    ii. The Appellant held 20 ordinary shares out of a total of 76 ordinary shares on issue in [redacted].

    iii. On 1 December 2005 [redacted] was incorporated and had authorised share capital of 1,000,000 ordinary shares of €1.00 each.

    iv. The Appellant was also a minority shareholder in [redacted] holding 80 A ordinary shares out of a total of 304 A ordinary shares on issue in [redacted].

    v. In December 2005 [redacted] subscribed for 150 ordinary shares of €1.00 in [redacted] at a premium of €9,869 per share and became the controlling shareholder in [redacted].

vi. On 21 December 2005 the shareholders of [redacted], which included the Appellant and [redacted], passed a special resolution amending the Memorandum and Articles of Association of [redacted] as follows:

a. The authorised share capital of [redacted] of 1,000,000 Ordinary shares of €1.00 each was increased to 2,000,000 by the creation of an additional 1,000,000 A Ordinary shares of €1.00 each;

b. [redacted] allotted 152 ordinary shares of €1.00 each to [redacted] at a premium of €9,868 per share, totalling €1,500,000;

c. [redacted] allotted 304 A Ordinary Shares of €1.00 par as follows:

i. 80 A ordinary shares to the Appellant;

ii. 16 A ordinary shares to [redacted];

iii. 72 A ordinary shares to [redacted];

iv. 68 A ordinary shares to [redacted]; and

v. 68 A ordinary shares to [redacted].

d. Rights attaching to the ordinary shares of [redacted] moved or transferred to the A ordinary shares of [redacted], that is to say from the A ordinary shares held by [redacted] to the A ordinary shares held by the Appellant and other A ordinary shareholders.

vii. On [redacted] 2005 a special resolution was passed by [redacted] resolving that the company be wound up. On foot of the liquidation of [redacted] the Appellant received €394,697 in respect of a capital distribution of his shares in [redacted].

viii. The details of the December 2005 transfer and distribution were not included in the Appellant's tax return for 2005 which was signed by the Appellant on 20 October 2006 and was submitted to the Respondent on 11 November 2006.

ix. The Appellant did not tick the "Expression of Doubt" box on the 2005 tax return.

x. The Amended Assessment was raised by the Respondent on 6 December 2011.

Material Facts at Issue

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

i. The B5 return of [redacted] to the CRO dated 21 December 2005 was also a submission to the Respondent;

ii. The Respondent's letter of 10 July 2006 was a tax clearance letter which related to the Appellant's tax involvement with the December 2005 transaction and distribution;

iii. The Appellant made a full and true disclosure of all material facts necessary for the making of an assessment for 2005.

The B5 return of [redacted] to the CRO dated 21 December 2005 was also a submission to the Respondent:

52. The Appellant has submitted that the B5 return dated 21 December 2005 which [redacted] submitted to the CRO was also a submission to the Respondent. The Appellant contends the Respondent would have been made aware of the contents of the B5 return and more specifically the Appellant's inclusion on the B5 return.

53. The Commissioner specifically addressed this issue with the Parties at the oral hearing and noted that whilst the B5 return contained the Appellant's name and address which was handwritten in to the return, it did not contain the Appellant's PPS number or any other information which would have linked the Appellant to the B5 return.

54. Counsel for the Appellant was unable to assist the Commissioner in this regard save and except to submit that the Respondent would have been notified of the directors of [redacted] and their PPS numbers prior to issuing the letter of 16 February 2016. The Commissioner notes that Counsel for the Appellant stated that no documentary evidence of the Appellant's PPS number being notified to the Respondent in relation to the B5 return is available. The Commissioner also notes that Counsel for the Respondent made a specific submission that the Respondent did not agree with the Appellant's contention in this regard.

55. The burden of proof rests with the Appellant in relation to this material fact. The Appellant has not adduced any evidence which would tend to suggest that the B5 submission to the CRO by [redacted] dated 21 December 2005 was also a submission to the Respondent. The Commissioner finds that it is reasonable to expect that the Appellant should be able to produce documentary evidence in relation to this claim but he has not done so.

56. The Commissioner finds that the Appellant has not discharged the burden of proof and has not established that the B5 return of [redacted] to the CRO dated 21 December 2005 was also a submission to the Respondent. Therefore this material fact is not accepted by the Commissioner.

The Respondent's letter of 10 July 2006 was a tax clearance letter which related to the Appellant's tax involvement with the December 2005 transaction and distribution:

57. The Appellant has submitted that the Respondent's letter of 10 July 2006 was a tax clearance letter which related to the Appellant's tax involvement with the December 2005 transaction and distribution. This letter states as follows:

    "*Date: 10/07/06*

    Our Ref: CRO NUMBER [redacted]

    Re: [redacted]

    Dear [redacted]*,*

    I refer to previous correspondence the above case.

    I wish to confirm that according to our records there are no outstanding returns / liabilities on file.

    On the basis of the information in the returns submitted it is not intended to carry out an audit. This position is subject to the provision that, if any information comes to light that would indicate that a return submitted was materially incorrect, any necessary assessment / amendment may be made in accordance with section 13(3) Finance Act 1988.

    It is in order to hold a Final Meeting and finalise the liquidation."

58. The Appellant agreed under cross examination that this letter related to the tax affairs of [redacted] and that it did not contain any specific reference to him or his tax affairs.

59. The Commissioner has considered the letter of 16 July 2006 from the Respondent and finds that the contents of this letter relate to [redacted]. The letter contains the CRO number of [redacted] and states that it is in reference to [redacted].

60. Further, the letter does not contain any reference to "tax clearance". The letter states that [redacted] had, on that date, no outstanding returns or liabilities. The letter does not refer to the December 2005 transaction and distribution. Similarly, the letter does not refer to the Appellant or to the Appellant's tax position in any shape or form.

61. The Commissioner finds the Appellant's contention that the Respondent letter of 10 July 2006 was a tax clearance letter which related to the Appellant's tax involvement with the December 2005 transaction and distribution to be unsustainable on any reading of the contents of the letter. Therefore this material fact is not accepted.

The Appellant made a full and true disclosure of all material facts necessary for the making of an assessment for 2005.

62. The Appellant submits that he made a full and true disclosure of all material facts necessary for the making of an assessment for 2005. In particular the Appellant submits that he was not required to make a disclosure of the details of the transaction and distribution of December 2005 in his tax return of 2005 because it did not give rise to a liability to tax and therefore it was not necessary to make a disclosure of the details of the transaction and distribution of December 2005 in the tax return.

63. Under cross examination the Appellant did not agree that it was necessary to populate the section of the Form 11 which is entitled "Capital Gains" when a disposal takes place. Instead it was the Appellant's position that it was only necessary to populate the section of the Form 11 which is entitled "Capital Gains" if a capital gain or loss occurs in a given year. The Appellant was clear in his opinion under cross examination that where no liability to tax arises on foot of a disposal then there is no requirement on a taxpayer to enter details of that disposal in the Form 11 return. As the Appellant stated under cross examination "*no capital gains, move on*".[1]

64. In support of this, the Appellant stated under cross examination that prior to submitting the 2005 tax return all of the details of the transaction and distribution of December 2005 had been sent to both the CRO and to the Respondent. In addition the Appellant submitted that prior to submitting the 2005 tax return his tax advisor had received "a clearance letter"[2] relating to the December 2005 transaction and distribution. As a result he stated that there was nothing to include in the 2005 tax return.

65. When asked about the clearance letter which the Appellant claimed had been received prior to the submission of his tax return for 2005, the Appellant stated that he had not seen this letter himself but that at the time of completing his tax return for 2005 he knew from his advisors that the matter had been cleared with the Respondent and the CRO.

66. When asked further about the details of the clearance letter received from the Respondent it was put to the Appellant that the letter which he had been told about by his tax advisors was the letter of 10 July 2006 from the Respondent to the Appellant's tax advisors.

67. The Appellant was asked under cross examination whether he could point to any document, other that the letter of 10 July 2006 from the Respondent, in which his

[1] Hearing transcript page 25 line 14
[2] Hearing transcript page 24 line 25

involvement in the [redacted] transaction and distribution had been brought to the Respondent's attention. In response the Appellant stated that his involvement would have been included in the return made by [redacted] to the CRO when details of the transaction, distribution and winding up of the company was notified to the CRO.

68. The Appellant has argued that because, in his view and understanding, the transaction and distribution of December 2005 did not give rise to tax of any description, it was not necessary for it to be included in the 2005 tax return.

69. This argument from the Appellant does not find favour with the Commissioner. The tax regime in the State is run on a self-assessment basis with chargeable persons being required to make full and true disclosures of all material facts to the Respondent in order to allow the Respondent assess the tax position of the chargeable person and make an assessment of the correct tax liability, if any, which may arise.

70. The High Court in *Hanrahan* dealt with the issue of full and true material disclosure as set out in section 955 of the TCA1997. At paragraphs 89 to 91 of that decision Stack J stated the following:

> *"89. The third argument made by the appellant on the time issue was to say that, insofar as there was a failure to make a full and true disclosure of all material facts on the tax return, this was not "necessary for the making of an assessment" because Revenue proceeded to make an assessment and they had never amended that assessment.*
>
> *90. I cannot accept that argument. It is tantamount to saying that because the notice of assessment issued on the basis of the material non-disclosure, Revenue is precluded from arguing that the non-disclosure is material. Although not expressed in these terms, this is what it seems to amount to and, in my view, such an interpretation of s. 955 (2) would be absurd.*
>
> *91. The word "assessment" in s. 955 (2) (a) does not refer, as the appellant appears to suggest, to the formal document which issues to a taxpayer who files a tax return under the self-assessment system, but to the process of assessing the tax payable or, in this case, the amount of allowable losses which may be deducted from chargeable gains."*

71. Having considered all of the submissions both oral, written and documentary in this preliminary appeal, the Commissioner finds that the Appellant has not discharged the burden of proof which establishes that he made a full and true disclosure of all material matters in his 2005 tax return. In order for the Respondent to have been in a position to

assess whether tax was payable on the December 2005 transaction and distribution as it related to the Appellant, the Respondent required full and true information about the December 2005 distribution and transaction. This was not included in any part of the Appellant's 2005 tax return.

72. The Commissioner has considered the Appellant's contention that the Respondent was aware of the Appellant's involvement in the December 2005 transaction and distribution prior to the expiration of the four year time limit contained in section 955 of the TCA1997. The Commissioner has already found that she does not accept the following as material facts in this preliminary appeal:

    i. The B5 return of [redacted] to the CRO dated 21 December 2005 was also a submission to the Respondent;

    ii. The Respondent's letter of 10 July 2006 was a tax clearance letter which related to the Appellant's tax involvement with the December 2005 transaction and distribution;

    iii. The Appellant made a full and true disclosure of all material facts necessary for the making of an assessment for 2005.

73. For the avoidance of doubt, the Commissioner finds the following material facts in this preliminary determination:

    i. The Appellant was a director and minority shareholder in [redacted].

    ii. The Appellant held 20 ordinary shares out of a total of 76 ordinary shares on issue in [redacted].

    iii. On 1 December 2005 [redacted] was incorporated and had authorised share capital of 1,000,000 ordinary shares of €1.00 each.

    iv. The Appellant was also a minority shareholder in [redacted] holding 80 A ordinary shares out of a total of 304 A ordinary shares on issue in [redacted].

    v. In December 2005 [redacted] subscribed for 150 ordinary shares of €1.00 in [redacted] at a premium of €9,869 per share and became the controlling shareholder in [redacted].

    vi. On 21 December 2005 the shareholders of [redacted], which included the Appellant and [redacted], passed a special resolution amending the Memorandum and Articles of Association of [redacted] as follows:

a. The authorised share capital of [redacted] of 1,000,000 Ordinary shares of €1.00 each was increased to 2,000,000 by the creation of an additional 1,000,000 A Ordinary shares of €1.00 each;

b. [redacted] allotted 152 ordinary shares of €1.00 each to [redacted] at a premium of €9,868 per share, totalling €1,500,000;

c. [redacted] allotted 304 A Ordinary Shares of €1.00 par as follows:

i. 80 A ordinary shares to the Appellant;

ii. 16 A ordinary shares to [redacted];

iii. 72 A ordinary shares to [redacted];

iv. 68 A ordinary shares to [redacted]; and

v. 68 A ordinary shares to [redacted].

d. Rights attaching to the ordinary shares of [redacted] moved or transferred to the A ordinary shares of [redacted], that is to say from the A ordinary shares held by [redacted] to the A ordinary shares held by the Appellant and other A ordinary shareholders.

vii. On [redacted] 2005 a special resolution was passed by [redacted] resolving that the company be wound up. On foot of the liquidation of [redacted] the Appellant received €394,697 in respect of a capital distribution of his shares in [redacted]

iv. The details of the December 2005 transfer and distribution were not included in the Appellant's tax return for 2005 which was signed by the Appellant on 20 October 2006 and was submitted to the Respondent on 11 November 2006.

v. The Appellant did not tick the "Expression of Doubt" box on the 2005 tax return.

vi. The Amended Assessment was raised by the Respondent on 6 December 2011.

Analysis

74. Section 955(2)(a) of the TCA1997 contains a protective section which provides that the Respondent is not entitled to raise or amend assessments outside of a four year time limit in circumstances where a chargeable person has made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period as follows:

"(2)(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of four years commencing at the end of the chargeable period in which the return is delivered and

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

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

by reason of any matter contained in the return.

75. The Commissioner has already found that the Appellant did not make a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period in his 2005 tax return.

76. It therefore follows that the Appellant is not entitled to rely on the protective provisions of section 955(2)(a) of the TCA1997 and it follows that the Respondent is not estopped from raising the Amended Assessment outside of the four year time limit.

77. The High Court in *Hanrahan* stated at paragraphs 92 and 93*:*

"92. It is quite clear from the terms of s. 955 (2)(a) that it only has application in the case of "a fully compliant tax return", as clearly stated by the Supreme Court in Droog. The appellant's argument would have the effect of avoiding this pre-condition entirely: once Revenue proceeded to an assessment, a taxpayer could say that because Revenue was able to issue a notice of assessment for some amount, it would follow in all cases where a formal notice of assessment issued that the material non-disclosure could not be said to be necessary to the assessment.

93. In my view, the appellant clearly did not make a full and true disclosure of all material facts necessary for the making of an assessment for the 2004 chargeable period. This means that the appellant is not a person who can avail of s. 955 (2) to prevent an assessment to capital gains tax for 2004. This follows from the Supreme Court judgment in Droog."

78. The Appellant has relied on the decisions in *Droog* and *Stanley*. The Commissioner notes that the relevant parts of these decisions for the purpose of this preliminary determination

related to section 49 of the CATCA2003 and also that in both of these cases it was accepted by the Court that the chargeable persons had made full and true disclosures of all material facts necessary for the making of an assessment.

79. In *Stanley* the Court of Appeal stated:

> "*Provided that the taxpayer has fully and correctly completed those parts, omitting no relevant detail that ought to be provided therein, he/she will have complied with the requirements of s. 46(2)(a). The next required step to be taken in accordance with s. 46(2)(b) is to self-assess the CAT which the taxpayer 'to the best of [his/her] knowledge, information and belief, ought to be charged'.*"

80. The Commissioner has further considered the matter of the Appellant not ticking the Expression of Doubt box in his 2005 tax return. The Appellant stated that at the time of the December 2005 transaction and distribution and at the time of completing his tax return for 2005 there was no question in his mind, nor had he been advised, of any potential issue in relation to income tax pertaining to this matter. That, he stated, was the "2005 reason that he did not include any details relating to the December 2005 transaction and distribution in the income section of his tax return for 2005. The Appellant was not in doubt at the time of completing his 205 tax return. Even at this remove some almost 18 years after completing his 2005 tax return, the Appellant has been very clear that he had no doubt.

81. The Commissioner has been asked to determine whether the Respondent was prevented from raising the Amended Assessment on the basis that the Appellant had made a full and true disclosure of all material facts necessary for the making of an assessment in his 2005 tax return. The Commissioner finds that the fact that the Appellant did not tick the Expression of Doubt box in his 2005 tax return does not impact on this preliminary determination.

Determination

82. The Commissioner determines that the Appellant has not discharged the burden of proof in this preliminary matter and that the Appellant has not succeeded in showing that the Respondent was prevented from raising the Amended Assessment.

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

Clare O'Driscoll
Appeal Commissioner
20 March 2023

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