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85TACD2023

Between

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against an amended notice of assessment to Capital Acquisitions Tax ("CAT") raised by the Revenue Commissioners ("the Respondent") on 22nd January 2018 for the period of assessment 1st September 2012 to 31st August 2013. The amount of tax at issue is €236,770. The Appellant makes his appeal in accordance with the provisions of section 67 of the Capital Acquisitions Tax Consolidation Act 2003 ("CATCA 2003").

2. The assessment relates to the denial of business property relief in respect of a portion of deemed cash assets received by the Appellant in the form of a gift on 18th April 2013.

Background

3. The Appellant is a shareholder of (formerly called and hereinafter referred to as "the Group"). Included within the Group are a number of subsidiary companies.

4. The Group is a supplier of [redacted] [redacted] and is the exclusive distributor for a range of products sold under the [redacted] brand.

5. On 18th April 2013, the Appellant was gifted 28.4% of the shares in the Group from his father ("the first gift"). Following that gift, the Group is owned and controlled by the Appellant and those connected to him. Separate and distinct to the first gift, the Appellant was gifted a share in a company unconnected with the Group ("the second gift") on the same date. The value of that second gift was €428,571.

6. The gifting of the shares from the Appellant's father resulted in the Appellant being deemed to receive gifts of the value of the shares from his father and a corresponding liability to CAT arose on the value of these gifts. For the purpose of comprehension, the value placed on the first gift was based upon a valuation formed using the Group's Balance Sheet as at 31st December 2013. As part of the underlying assets in the Group's Balance Sheet consisted of cash assets (bank accounts), the first gift was deemed by the Respondent to include a percentage of the cash balances. The Respondent would later claim, as it formed the opinion that 75% of this cash balance was "excess cash", that this excess cash was ineligible for a relief known as Business Property Relief ("BPR") which the Appellant had claimed on the entire value of the first and second gift. The restriction was only sought to be imposed by the Respondent on the first gift as the Respondent accepted that the second gift received by the Appellant comprised fully of assets eligible for the relief and hence qualified for BPR in full.

7. BPR is provided for under section 93 (1) CATCA 2003 and subject to certain conditions being fulfilled reduces the market value of a gift or inheritance by up to 90% of the value of the gift or inheritance where the underlying gift or inheritance consists of "relevant business property". Relevant business property in the Appellant's case equated to the market value of the shares acquired from his father on 18th April 2013.

8. A CAT return (Form IT 38) detailing the gifts was filed by the Appellant in a timely manner on 13th November 2013 for the period of assessment 1st September 2012 to 31st August 2013 and the related CAT liability was paid by the Appellant on time.

9. On 3rd March 2016, a notification of a Revenue Audit ("Audit") issued to the Appellant from the Respondent. That Audit covered CAT and Capital Gains Tax ("CGT") for the periods 2011, 2012, 2013 and 2014.

10. On 4th March 2016, the Appellant's father received a notice under section 46 (13) CATCA 2003 requiring him to provide details of all gifts made by him and his spouse. Section 46

(13) CATCA 2003 requires the disponer of a gift to provide the Respondent with a full and true return of all of the property comprised in relation to any gifts made, together with details of the market value of those gifts and any other particulars as may be relevant to the assessment to tax in respect of such gifts. The Appellant's father provided this information, which detailed the gifts made to the Appellant, by way of letter to the Respondent on 22nd April 2016.

11. The Appellant's Audit subsequently took place on 12th July 2016. In reply to queries raised by the Respondent during the course of the Audit, the Appellant's agents in their letter of 21st July 2016, explained to the Respondent that the Appellant and the Board of Directors of the Group were of the view that the cash balances in the Group at the date of the gift remained in use by the business.

12. On 8th December 2016, the Respondent raised further queries in relation to those cash balances. Before the Appellant's agent replied to this correspondence, the Respondent issued further communication to the Appellant which stated it did not accept that the full amount of cash balances within the Group were required by the business and that it intended to restrict the amount of cash balances qualifying for BPR.

13. Further correspondences ensued between the Appellant and the Respondent which cumulated in the Respondent issuing an amended notice of assessment to CAT in the sum of €236,770 on 22nd January 2018.

14. The Appellant who was not in agreement with the notice of assessment lodged a notice of appeal with the Commission on 19th February 2018. The appeal was heard in person on the 9th and 10th January 2023 and the Appellant and the Respondent were represented by Senior Counsel.

Legislation and Guidelines

15. The following legislation is relevant to this appeal.

Capital Acquisitions Tax Consolidation Act 2003

Section 27 – Market value of certain shares in private companies

(1) In this section -

"group of shares", in relation to a private company, means the aggregate of the shares in the company of -

(a) the donee or successor,

(b) the relatives, civil partner, children, or children of the children of the civil partner, of the donee or successor,

(c) the civil partners of persons who are by virtue of section 2(4) (b) or (c) relatives of the donee or successor,

(d) the civil partners of any children or any children of the children of the civil partner of the donee or successor,

(e) nominees of the donee or successor,

(f) nominees of -

(i) relatives of the donee or successor,

(ii) the civil partner of the donee or successor,

(iii) children or children of the children of the civil partner of the donee or successor,

(iv) the civil partners of persons who are by virtue of section 2(4) (b) or (c) relatives of the donee or successor, or

(v) the civil partners of any children or any children of the children of the civil partner of the donee or successor,

…

"private company" means a body corporate (wherever incorporated) which -

(a) is under the control of not more than 5 persons, and

(b) is not a company which would fall within section 431 of the Taxes Consolidation Act 1997 if the words "private company" were substituted for the words "close company" in subsection (3) of that section, and if the words "are beneficially held by a company which is not a private company" were substituted for the words of paragraph (a) of subsection (6) of that section;

"share", in relation to a private company and in addition to the interpretation of "share" in section 2(1), includes every debenture, or loan stock, issued otherwise than as part of a transaction which is wholly and exclusively a bona fide commercial transaction.

(2) (a) The market value of each share in a private company which (after the taking of the gift or of the inheritance) is, on the date of the gift or on the date of the inheritance, a company controlled by the donee or successor, shall be ascertained by the

Commissioners, for the purposes of tax, as if, on the date on which the market value is to be ascertained, it formed an apportioned part of the market value of a group of shares in that company, such apportionment, as between shares of a particular class, to be by reference to nominal amount, and, as between different classes of shares, to have due regard to the rights attaching to each of the different classes.

…

<u>*Section 46 – Delivery of returns*</u>

(1) In this section -

(a) notwithstanding anything contained in sections 6 and 11 a reference, other than in subsection (13) or (14), to a gift or a taxable gift includes a reference to an inheritance or a taxable inheritance, as the case may be, and

a reference to a donee includes a reference to a successor.

(b) Any person who is primarily accountable for the payment of tax by virtue of paragraph (c) of section 16, paragraph (c) of section 21, or who is accountable by virtue of section 45(1), -

deliver to the Commissioners a full and true return of -

(i) every gift in respect of which that person is so accountable,

(ii) all the property comprised in such gift on the valuation date,

(iii) an estimate of the market value of such property on the valuation date, and

(iv) such particulars as may be relevant to the assessment of tax in respect of such gift;

notwithstanding section 49, make on that return an assessment of such amount of tax as, to the best of that person's knowledge, information and belief, ought to be charged, levied and paid on that valuation date, and

(c) duly pay the amount of such tax

…

(4) Subsection (2) applies to a charge for tax arising by reason of section 15 or 20 and to any other gift where -

(a) the aggregate of the taxable values of all taxable gifts taken by the donee on or after 5 December 1991, which have the same group threshold (as defined in Schedule 2) as that other gift, exceeds an amount which is 80 per cent of the threshold amount (as defined in Schedule 2) which applies in the computation of tax on that aggregate,

(aa) the gift comprises or includes -

(i) agricultural property within the meaning of section 89(1), or

(ii) relevant business property within the meaning of section 93(1),

or

(b) the donee or, in a case to which section 32(2) applies, the transferee (within the meaning of, and to the extent provided for by, that section) is required by notice in writing by the Commissioners to deliver a return,

and for the purposes of this subsection, a reference to a gift includes a reference to a part of a gift or to a part of a taxable gift, as the case may be.

(5) For the purposes of this section, the relevant date shall be -

(a) the valuation date, or

(b) where the donee or, in a case to which section 32(2) applies, the transferee (within the meaning of, and to the extent provided for by, that section) is required by notice in writing by the Commissioners to deliver a return, the date of the notice.

(6) [deleted]

(7) (a) Any accountable person shall, if that person is so required by the Commissioners by notice in writing, deliver and verify to the Commissioners within such time, not being less than 30 days, as may be specified in the notice -

(i) a statement (where appropriate, on a form provided, or approved of, by them) of such particulars relating to any property, and

(ii) such evidence as they require,

as may, in their opinion, be relevant to the assessment of tax in respect of the gift.

(b)The Commissioners may authorise a person to inspect -

(i) any property comprised in a gift, or

(ii) any books, records, accounts or other documents, in whatever form they are stored, maintained or preserved, relating to any property as may in their opinion be relevant to the assessment of tax in respect of a gift,

and the person having the custody or possession of that property, or of those books, records, accounts or documents, shall permit the person so authorised to make that inspection at such reasonable times as the Commissioners consider necessary.

(7A) The making of enquiries by the Commissioners for the purposes of subsection (7)(a) or the authorising of inspections by the Commissioners under subsection (7)(b) in connection with or in relation to any relevant return (within the meaning given in section 49(6A)(b)) may not be initiated after the expiry of 4 years commencing on -

(a) subject to paragraphs (b) and (c), 31 December in the year in which the relevant return is received by the Commissioners,

(b) in the case of inheritances referred to in sections 15(1) and 20(1), the date on which the relevant return is received by the Commissioners, or

(c) if later than the date referred to in paragraph (a), where the matter of such conditions being satisfied is relevant to the assessment of the tax concerned, the latest date on which all of the conditions for a relief or exemption were required to be satisfied.

(7B) (a) The time limit referred to in subsection (7A) shall not apply where the Commissioners have reasonable grounds for believing that any form of fraud or neglect has been committed by or on behalf of any accountable person in connection with or in relation to any relevant return which is the subject of any enquiries or inspections.

(a) The time limit referred to in subsection (7A) shall not apply where the Commissioners have reasonable grounds for believing that any form of fraud or neglect has been committed by or on behalf of any accountable person in connection with or in relation to any relevant return which is the subject of any enquiries or inspections.

(b) In this subsection 'neglect' means a negligence or a failure to deliver a correct relevant return (within the meaning given in section 49(6A) (b).

(8) The Commissioners may by notice in writing require any accountable person to -

(a) deliver to them within such time, not being less than 30 days, as may be specified in the notice, an additional return, if it appears to the Commissioners that a return

made by that accountable person is defective in a material respect by reason of anything contained in or omitted from it,

(b)notwithstanding section 49, make on that additional return an assessment of such amended amount of tax as, to the best of that person's knowledge, information and belief, ought to be charged, levied and paid on the relevant gift, and

(c) duly pay the outstanding tax, if any, for which that person is accountable in respect of that gift,

and

(i) the requirements of subparagraphs (ii), (iii) and (iv) of subsection (2)(a) shall apply to such additional return required by virtue of paragraph (a), and

(ii) subsection (3) shall, with any necessary modifications, apply to any payment required by virtue of paragraph (c).

(9) Where any accountable person who has delivered a return or an additional return is aware or becomes aware at any time that the return or additional return is defective in a material respect by reason of anything contained in or omitted from it, that person shall, without application from the Commissioners and within 3 months of so becoming aware -

(a) deliver to them an additional return,

(b) notwithstanding section 49, make on that additional return an assessment of such amended amount of tax as, to the best of that person's knowledge, information and belief, ought to be charged, levied and paid on the relevant gift, and

(c) duly pay the outstanding tax, if any, for which that person is accountable in respect of that gift,

and

(i) the requirements of subparagraphs (ii), (iii) and (iv) of subsection (2)(a) shall apply to such additional return required by virtue of paragraph (a), and

(ii) subsection (3) shall, with any necessary modifications, apply to any payment required by virtue of paragraph (c).

(10) Any amount of tax payable by an accountable person in respect of an assessment of tax made by that accountable person on a return delivered by that accountable person (other than an amount of that tax payable by the transfer of securities to the Minister for Finance under section 56) shall accompany the return and be paid to the Collector.

(11) Any assessment or payment of tax made under this section shall include interest on tax payable in accordance with section 51.

(12) The Commissioners may by notice in writing require any person to deliver to them within such time, not being less than 30 days, as may be specified in the notice, a full and true return showing details of every taxable gift (including the property comprised in such gift) taken by that person during the period specified in the notice or, as the case may be, indicating that that person has taken no taxable gift during that period,

(13) As respects a taxable gift to which this subsection applies, the Commissioners may by notice in writing require a disponer to deliver to them within such time, not being less than 30 days, as may be specified in the notice, a full and true return -

(a) of all the property comprised in such gift on the valuation date,

(b) of an estimate of the market value of such property on the valuation date, and

(c) of such particulars as may be relevant to the assessment of tax in respect of the gift.

(14) Subsection (13) applies to a taxable gift, in the case where -

(a) the taxable value of the taxable gift exceeds an amount which is 80 per cent of the group threshold (as defined in Schedule 2) which applies in relation to that gift for the purposes of the computation of the tax on that gift,

(b) the taxable value of the taxable gift taken by the donee from the disponer increases the total taxable value of all taxable gifts and taxable inheritances taken on or after 5 December 1991 by the donee from the disponer from an amount less than or equal to the amount specified in paragraph (a) to an amount which exceeds the amount so specified,

(c) the total taxable value of all taxable gifts and taxable inheritances taken on or after 5 December 1991 by the donee from the disponer exceeds the amount specified in paragraph (a) and the donee takes a further taxable gift from the disponer, or

(d) the gift comprises or includes -

(i) agricultural property, within the meaning of section 89(1), or

(ii) relevant business property, within the meaning of section 93(1).

…

<u>*Section 49 – Assessment to Tax*</u>

(1) Subject to section 46, assessments of tax under this Act shall be made by the Commissioners.

(1A) The Commissioners may issue an assessment to a person referred to in section 45(1) where a return has not been delivered to them under section 46(2).

(2) If at any time it appears that for any reason an assessment was incorrect, the Commissioners may make a correcting assessment, which shall be substituted for the first-mentioned assessment.

(3) If at any time it appears that for any reason too little tax was assessed, the Commissioners may make an additional assessment.

(4) The Commissioners may serve notice in writing of the assessment of tax on any accountable person or, at the request of an accountable person, on that accountable person's agent, or on the personal representative of an accountable person if that person is dead.

(5) Where the place of residence of the accountable person or of that accountable person's personal representative is not known to the Commissioners they may publish in Iris Oifigiúil a notice of the making of the assessment with such particulars of that assessment as they shall think proper and on the publication of the notice in Iris Oifigiúil the accountable person or that accountable person's personal representative, as the case may be, is deemed to have been served with the notice of the assessment on the date of such publication.

(6) Any assessment, correcting assessment or additional assessment under this section may be made by the Commissioners from any return or additional return delivered under section 46 or from any other information in the possession of the Commissioners or from any one or more of these sources.

(6A) (a) For the purposes of subsection (6) an assessment, a correcting assessment or an additional assessment made in connection with, or in relation to, a relevant return may not be made after the expiry of 4 years from -

(i) 31 December in the year in which the relevant return is received by the Commissioners, or

(ii) in the case of inheritances referred to in sections 15(1) and 20(1), the date on which the relevant return is received by the Commissioners.

(b)In this subsection 'relevant return' means a return or an additional return within the meaning of section 46.

(6B) Notwithstanding subsection (6A), an assessment, a correcting assessment or an additional assessment may be made by the Commissioners at any time -

(a) where they have reasonable grounds for believing that any form of fraud or neglect (within the meaning given in section 46(7B)(b)) has been committed by, or on behalf of any accountable person in connection with, or in relation to, any relevant return (within the meaning given in subsection (6A)) which is the subject of assessment, or

(b) to take account of any fact or matter arising by reason of an event occurring after a relevant return is received by the Commissioners.

(7) The Commissioners, in making any assessment, correcting assessment or additional assessment, otherwise than from a return or an additional return which is satisfactory to them, shall make an assessment of such amount of tax as, to the best of their knowledge, information (including information received from a member of the Garda Síochána) and belief, ought to be charged, levied and paid.

(8) Nothing in section 46 shall preclude the Commissioners from making an assessment of tax, a correcting assessment of tax, or an additional assessment of tax, under the provisions of this section.

Section 67 – Appeals in other cases.

(1) [deleted]

(2) (a)Subject to the other provisions of this Act, a person aggrieved by an assessment made by the Commissioners on that person may appeal the assessment to the Appeal Commissioners, in accordance with section 949I of the Taxes Consolidation Act 1997, within the period of 30 days after the date of the notice of assessment.

(b)In default of an appeal, in accordance with paragraph (a) or section 66, as the case may be, being made by a person to whom a notice of assessment has been given, the assessment made on the person shall be final and conclusive.

(c) An assessment that is otherwise final and conclusive shall not, for any purpose of this Act, be regarded as not final and conclusive or as ceasing to be final and conclusive by

reason only of the fact that a Revenue officer has amended, or may amend, the assessment.

Chapter 2 Business Relief

Section 90 – Interpretation

(1)In this Chapter -

"agricultural property" has the meaning assigned to it by section 89;

"business" includes a business carried on in the exercise of a profession or vocation, but does not include a business carried on otherwise than for gain;

"excepted asset" shall be construed in accordance with section 100;

"full-time working officer or employee", in relation to one or more companies, means any officer or employee who devotes substantially the whole of such officer's or employee's time to the service of that company, or those companies taken together, in a managerial or technical capacity;

"holding company" has the meaning assigned to it by section 8(1) of the Companies Act 2014;

"quoted", in relation to any shares or securities, means quoted on a recognised stock exchange and "unquoted", in relation to any shares or securities, means not so quoted;

"relevant business property" shall be construed in accordance with section 93;

"subsidiary" has the meaning assigned to it by section 7 of the Companies Act 2014;

"undertaking of substantial interest" shall be construed in accordance with section 314(1)(b) of the Companies Act 2014.

(2) In this Chapter a reference to a gift shall be construed as a reference to a taxable gift and a reference to an inheritance shall be construed as a reference to a taxable inheritance.

(3) For the purposes of this Chapter a company and all its subsidiaries and any undertaking of substantial interest of that company or of any of those subsidiaries and any subsidiary of such an undertaking of substantial interest are members of a group.

…

Section 92 – Business Relief

Where the whole or part of the taxable value of any taxable gift or taxable inheritance is attributable to the value of any relevant business property, the whole or that part of the taxable value is, subject to the other provisions of this Chapter, treated as being reduced by 90 per cent.

Section 93 – Relevant Business Property.

(1) In this Chapter and subject to the following provisions of this section and to sections 94, 96 and 100(4) "relevant business property" means, in relation to a gift or inheritance, any one or more of the following, that is:

(a) property consisting of a business or interest in a business.

(b) unquoted shares in or securities of a company whether incorporated in the State or otherwise to which paragraph (c) does not relate, and which on the valuation date (either by themselves alone or together with other shares or securities in that company in the absolute beneficial ownership of the donee or successor on that date) give control of powers of voting on all questions affecting the company as a whole which if exercised would yield more than 25 per cent of the votes capable of being exercised on all such questions,

(c) unquoted shares in or securities of a company whether incorporated in the State or otherwise which is, on the valuation date (after the taking of the gift or inheritance), a company controlled by the donee or successor within the meaning of section 27,

(d) unquoted shares in or securities of a company whether incorporated in the State or otherwise which do not fall within paragraph (b) or (c) and which on the valuation date (either by themselves alone or together with other shares or securities in that company in the absolute beneficial ownership of the donee or successor on that date) have an aggregate nominal value which represents 10 per cent or more of the aggregate nominal value of the entire share capital and securities of the company on condition that the donee or successor has been a full-time working officer or employee of the company, or if that company is a member of a group, of one or more companies which are members of the group, throughout the period of 5 years ending on the date of the gift or inheritance,

(e) any land or building, machinery or plant which, immediately before the gift or inheritance, was used wholly or mainly for the purposes of a business carried on by a company of which the disponer then had control or by a partnership of which the disponer then was a partner and for the purposes of this paragraph a person is deemed to have

control of a company at any time if that person, or that person and his or her spouse or civil partner, then had control of powers of voting on all questions affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised on all such questions,

…

(2) Where a company has shares or securities of any class giving powers of voting limited to either or both -

(a) the question of winding-up the company, and

(b) any question primarily affecting shares or securities of that class,

the reference in subsection (1) to all questions affecting the company as a whole has effect as a reference to all such questions except any in relation to which those powers are capable of being exercised.

(3) A business or interest in a business, or shares in or securities of a company, is not relevant business property if the business or, as the case may be, the business carried on by the company consists wholly or mainly of one or more of the following, that is, dealing in currencies, securities, stocks or shares, land or buildings, or making or holding investments.

(4) Subsection (3) shall not apply to shares in or securities of a company if-

(a) the business of the company consists wholly or mainly in being a holding company of one or more companies whose business does not fall within that subsection, or

(b) the value of those shares or securities, without having regard to the provisions of section 99, is wholly or mainly attributable, directly or indirectly, to businesses that do not fall within that subsection.

(5) Any land, building, machinery or plant used wholly or mainly for the purposes of a business carried on as mentioned in subsection (1) (e) is not relevant business property in relation to a gift or inheritance, unless the disponer's interest in the business is, or shares in or securities of the company carrying on the business immediately before the gift or inheritance are, relevant business property in relation to the gift or inheritance or in relation to a simultaneous gift or inheritance taken by the same donee or successor.

(6) The references to a disponer in subsections (1) (e) and (5) include a reference to a person in whom the land, building, machinery or plant concerned is vested for a beneficial interest in possession immediately before the gift or inheritance.

…

Section 94 – Minimum Period of Ownership

In relation to a gift or an inheritance, property shall not be relevant business property unless it was comprised in the disposition continuously -

(a) in the case of an inheritance, which is taken on the date of death of the disponer, for a period of 2 years immediately prior to the date of the inheritance, or

(b) in any other case, for a period of 5 years immediately prior to the date of the gift or inheritance,

and any period immediately before the date of the disposition during which the property was continuously in the beneficial ownership of the disponer, or of the spouse or civil partner of the disponer, is deemed, for the purposes of this Chapter, to be a period or part of a period immediately before the date of the gift or inheritance during which it was continuously comprised in the disposition.

Section 99 – Value of certain shares and securities

(1) Where a company is a member of a group and the business of any other company which is a member of the group falls within section 93(3), then, unless that business consists wholly or mainly in the holding of land or buildings wholly or mainly occupied by members of the group whose business does not fall within section 93(3), the value of shares in or securities of the company is taken for the purposes of this Chapter to be what it would be if that other company were not a member of the group.

(2) (a) In this subsection "shares" include securities and "shares in a company" include other shares in the same company which are represented by those shares.

(b) Where unquoted shares in a company which is a member of a group are comprised in a gift or inheritance and shares in another company which is also a member of the group are quoted on the valuation date, the value of the first-mentioned shares is taken, for the purpose of this Chapter, to be what it would be if that other company were not a member of the group, unless those unquoted shares were in the beneficial ownership of the disponer immediately prior to the disposition and those quoted shares were unquoted -

(i) at some time prior to the gift or inheritance when they were in the beneficial ownership of the disponer or a member of that group, while being a member of such group, or

(ii) at 23 May 1994,

whichever is the later date.

<u>Section 100. Exclusion of value of excepted assets</u>.

(1) In determining for the purposes of this Chapter what part of the taxable value of a gift or inheritance is attributable to the value of relevant business property, so much of the last-mentioned value as is attributable to -

(a) any excepted assets within the meaning of subsection (2), or

(b) any excluded property within the meaning of subsection (8),

is disregarded.

(2) An asset is an excepted asset in relation to any relevant business property if it was not used wholly or mainly for the purposes of the business concerned throughout the whole or the last 2 years of the relevant period; but where the business concerned is carried on by a company which is a member of a group, the use of an asset for the purposes of a business carried on by another company which at the time of the use and immediately prior to the gift or inheritance was also a member of that group is treated as use for the purposes of the business concerned, unless that other company's membership of the group is to be disregarded under section 99.

(3) The use of an asset for the purposes of a business to which section 93(3) relates is not treated as use for the purposes of the business concerned.

(4) Subsection (2) shall not apply in relation to an asset which is relevant business property by virtue only of section 93(1)(e), and an asset is not relevant business property by virtue only of that provision unless either -

(a) it was used in the manner referred to in that provision -

(i) in the case where the disponer's interest in the business or the shares in or securities of the company carrying on the business are comprised in an inheritance taken on the date of death of the disponer, throughout the 2 years immediately preceding the date of the inheritance, or

(ii) in any other case, throughout the 5 years immediately preceding the date of the gift or inheritance,

or

(b) it replaced another asset so used and it and the other asset and any asset directly or indirectly replaced by that other asset were so used for periods which together comprised -

(i) in the case referred to at paragraph (a)(i), at least 2 years falling within the 3 years immediately preceding the date of the inheritance, or

(ii) in any other case, at least 5 years falling within the 6 years immediately preceding the date of the gift or inheritance,

but where section 97 applies paragraphs (a) and (b) are deemed to be complied with if the asset, or that asset and the asset or assets replaced by it, was or were so used throughout the period between the earlier and the subsequent benefit mentioned in that section, or throughout the part of that period during which it or they were in the beneficial ownership of the disponer or the disponer's spouse or civil partner.

(5) Where part but not the whole of any land or building is used exclusively for the purposes of any business and the land or building would, but for this subsection, be an excepted asset, or, as the case may be, prevented by subsection (4) from being relevant business property, the part so used and the remainder are for the purposes of this section treated as separate assets, and the value of the part so used shall (if it would otherwise be less) be taken to be such proportion of the value of the whole as may be just.

(6) For the purposes of this section the relevant period, in relation to any asset, is the period immediately preceding the gift or inheritance during which the asset or, if the relevant business property is an interest in a business, a corresponding interest in the asset, was comprised in the disposition (within the meaning of section 94) or, if the business concerned is that of a company, was beneficially owned by that company or any other company which immediately before the gift or inheritance was a member of the same group.

(7) For the purposes of this section an asset is deemed not to have been used wholly or mainly for the purposes of the business concerned at any time when it was used wholly or mainly for the personal benefit of the disponer or of a relative of the disponer.

(8) Where, in relation to a gift or an inheritance -

(a) relevant business property consisting of shares in or securities of a company are comprised in the gift or inheritance on the valuation date, and

(b) property consisting of a business, or interest in a business, not falling within section 93(3) (in this section referred to as "company business property") is on that date

beneficially owned by that company or, where that company is a holding company of one or more companies within the same group, by any company within that group,

that company business property shall, for the purposes of subsection (1), be excluded property in relation to those shares or securities unless it would have been relevant business property if -

(i) it had been the subject matter of that gift or inheritance, and

(ii) it had been comprised in the disposition for the periods during which it was in the beneficial ownership of that first-mentioned company or of any member of that group, while being such a member, or actually comprised in the disposition.

(9) In ascertaining whether or not company business property complies with paragraphs (i) and (ii) of subsection (8), section 95 shall, with any necessary modifications, apply to that company business property as to a case to which subsection (1) of section 95 relates.

Section 101 – Withdrawal if relief.

(1) In this section "relevant period", in relation to relevant business property comprised in a gift or inheritance, means the period of 6 years commencing on the date of the gift or inheritance.

(2) The reduction which would fall to be made under section 92 in respect of relevant business property comprised in a gift or inheritance shall cease to be applicable if and to the extent that the property, or any property which directly or indirectly replaces it -

(a)would not be relevant business property (apart from section 94 and the conditions attached to paragraphs (d) and (f) of subsection (1) of section 93 and other than by reason of bankruptcy or a bona fide winding-up on grounds of insolvency) in relation to a notional gift of such property taken by the same donee or successor from the same disponer at any time within the relevant period, unless it would be relevant business property (apart from section 94 and the conditions attached to paragraphs (d) and (f) of subsection (1) of section 93) in relation to another such notional gift taken within a year after the first-mentioned notional gift,

(b) is sold, redeemed or compulsorily acquired within the relevant period and is not replaced, within a year of the sale, redemption or compulsory acquisition, by other property (other than quoted shares or securities or unquoted shares or securities to which section 99 (2) (b) relates) which would be relevant business property (apart from section 94 and the condition attached to section 93 (1) (d)) in relation to a notional gift of that

other property taken by the same donee or successor from the same disponer on the date of the replacement,

and tax is chargeable in respect of the gift or inheritance as if the property were not relevant business property, but -

(i) *any land, building, machinery or plant which are comprised in the gift or inheritance and which qualify as relevant business property by virtue of section 93 (1) (e) shall, together with any similar property which has replaced such property, continue to be relevant business property for the purposes of this section for so long as they are used for the purposes of the business concerned,*

(ii) *this section shall not have effect where the donee or successor dies before the event which would otherwise cause the reduction to cease to be applicable.*

(3) Notwithstanding subsection (2), where relevant business property (in this section referred to as 'original property') comprised in a gift or inheritance has been replaced directly or indirectly by other property and the market value of the original property is greater than the market value of that other property, then the reduction which would fall to be made under section 92 in respect of the original property shall be reduced in the same proportion as the market value of the other property bears to the market value of the original property.

(4) (a)In this subsection -

'division' means a division undertaken in accordance with Chapter 4 of Part 9 of the Companies Act 2014;

'merger' means a merger undertaken in accordance with Chapter 3 of Part 9 of the Companies Act 2014;

'successor company' means a company to which assets have been transferred from a transferor company as a result of a merger or division;

'transferor company' means a company from which assets have been transferred to a successor company or successor companies as a result of a merger or division.

(b) For the purposes of subsection (2) (b), relevant business property shall not be regarded as having been sold where it was transferred from a transferor company to a successor company as a result of a merger or a division.

Section 949 AK Taxes Consolidation Act 1997 (“TCA 1997”)

(1) In relation to an appeal against an assessment, the Appeal Commissioners shall, if they consider that—

(a) an appellant has, by reason of the assessment, been overcharged, determine that the assessment be reduced accordingly,

(b) an appellant has, by reason of the assessment, been undercharged, determine that the assessment be increased accordingly, or

(c) neither paragraph (a) nor (b) applies, determine that the assessment stand.

…

Documentation Presented to the Commission

16. The Appellant provided the Commission with the following documentation.

16.1 A document entitled “summary and analysis of financial performance”. Included within the document was the following information in relation to the Group:

16.1.1 A summary of turnover for the years 2006 to 2015. This disclosed that the 2013 turnover was [redacted] which had increased by 55% when compared to the previous year’s turnover. This document also showed that turnover grew by a further 20% in 2014 and a further 4% in 2015.

16.1.2 A schedule of [redacted] for the periods 2009 to 2015 which were included as part of the Group’s fixed assets. The value of these assets was [redacted] in 2013, [redacted] in 2014 and [redacted] in 2015.

16.1.3 A schedule of stock values showing stock values of [redacted] in 2013 growing to [redacted] in 2014.

16.1.4 Cash at bank for the years 2009 to 2015. This showed cash balances of €4.5m in 2013, increasing to [redacted] in 2014 and [redacted] in 2015. From these amounts, the totals owed to trade creditors and the Respondent (in respect of PAYE/PRSI (“PREM”) and Value Added Taxation (“VAT”) liabilities) were deducted. The resulting cash cover after providing for payment of these liabilities was minus [redacted] in 2013, minus [redacted] in 2014 and positive [redacted] in 2015.

16.1.5 A document entitled “analysis of changes in net debt”. This document purported to show the movement of debt for the years 2009 and 2015.

16.2 Consolidated Accounts for the Group for the periods 2010 to 2015. Included within the financial statements for 2013 were fixed assets of €21m which included the [redacted].

Witness Evidence – The Appellant

17. The Appellant advised that he acted as Finance Director to the Group since [redacted] and was still engaged in that role. Prior to that position, the Appellant stated after obtaining his commerce degree, he subsequently qualified as a chartered accountant and spent a number of years working with a top tier firm of accountants in an audit related capacity.

18. The Appellant came across to the Commissioner as an honest and diligent witness. Within his evidence he stated that the business was established in [redacted] by his grandfather and its main business was originally [redacted]. The Appellant advised that his father joined the business in the 1960's and since then the business had diversified into four main categories. These four main categories being [redacted].

19. The Appellant stated that the [redacted] had changed significantly over the years and rather than [redacted], the majority of customers preferred service agreements. The Appellant explained that these service agreements were for fixed periods of time, typically 5 years and during that period the customer was charged a set amount [redacted] rather than the "traditional method" of [redacted]. The Appellant explained that when a customer availed of a service agreement, the Group was required to purchase [redacted] upfront and this required significant "upfront capital expenditure" by the Group and that it took a number of years to recover the full cost of this initial outlay.

20. The Appellant submitted that the [redacted] divisions of the business were mainly conducted for large entities such as [redacted] and [redacted] and were very capital intense meaning that they required a large outlay by the Group before the full amount of the particular project was recovered. The Appellant submitted that the virtual collapse of this sector during the Global financial crisis, which persisted during the period under appeal, resulted in the clients in this division of the business only dealing with reputable "asset-strong" entities, such as the Group since there was a fear of placing business with a provider who could suffer cash flow problems and subsequently go out of business during the project. Hence, the Appellant submitted that it was important to attract customers to this division of the Group's activities that the Group had significant cash reserves at its disposal.

21. The Appellant advised that the [redacted] arm of the Group primarily provided [redacted] and during 2013, the Group acquired its largest client, the [redacted]. The Appellant advised that client made a payment on account during 2013 of stg[redacted] but as the Group had not completed the level of work which equated to the amount of the retainer then some of the liquid funds held by the Group at the date the valuation of the company took place, then this resulted in some of the cash reserves being held "on account" for that client and hence should not be included in determining if there was excess in the Group as at the valuation date.

22. Turning to the Groups Consolidated Balance Sheet as at 31st December 2013, the Appellant stated that he was of the view that the fixed assets were not readily converted into cash. He explained that the fixed asset investments of [redacted] consisted of a building which was in use by the Group valued at [redacted] and investments in subsidiary companies of some [redacted]. The Appellant advised he disputed that either of these investments were readily convertible into cash as the subsidiaries were ancillary to the business of the Group and the premises had a mortgage on it which resulted in their being little or no equity available on a sale of that asset, in particular if a "fire sale" was to occur. In noting that the other fixed assets of the Group were also in use by it and as the debtors and creditors essentially cancelled one another out, the Appellant submitted that this only left an available cash balance of €4.5m to fund the entire activities of the Group. Allowing for the payment on account received from its [redacted] and the amount committed to capital expenditure projects, the Appellant submitted that all of the cash was required by the Group to fund its activities in particular having regard to its turnover of some [redacted].

23. The Appellant concluded his examination in chief by stating that all the assets held by the Group were used in the business and it did not hold any assets for private use such as yachts or villas and any cash retained within the Group was used to fund and grow its activities. The Appellant submitted that this was evident from the Group's cash balances being held in short term deposit accounts or current accounts rather than in longer term "investment type products".

24. Under cross examination, the Appellant advised the Respondent's Counsel that the agreement it had with its main supplier did not mandate that it held large cash reserves in order for the agreement to remain operational.

25. The Appellant further advised the Respondent's Counsel that it had not provided the Commission with a copy of the valuation report as at the date of the gift but instead provided the Group's financial statements for calendar year ends. When pressed by the

Respondent's Counsel as to why the valuation report was not submitted within the appeal documentation, the Appellant was unable to provide a cogent reason for this omission.

26. The Respondent's Counsel further submitted to the Appellant that the extracts it had provided to the Commission regarding its cash reserves was misleading since it took its cash balances and deducted the amount it owed to creditors without any reflection on the amount owed to the Group by its debtors. While the Appellant provided explanations to these calculations, the Commissioner was not convinced by the Appellant's responses.

27. The Respondent's Counsel concluded his examination by asking the Appellant if he could provide the Commission with an explanation as to why the Group's cash balances grew over the periods subsequent to the gift or whether he could identify specific projects which cash had been set aside for. While the Appellant provided responses such as the funds held on account in respect of the payment on account from [redacted] and the potential large outlay on the [redacted] being undertaken by the Group at that time, he was unable to provide a "complete reconciliation" of what the then cash reserves were required to be maintained in the Group for.

Submissions

Appellant

28. The Appellant's Counsel submitted that the provisions of section 100(2) CATCA 2003 which define "excepted assets" were clear and unambiguous and as they did not contain qualifications such as "excess", "necessary" or "required" then BPR ought to be extended to the Appellant without any restrictions imposed on that relief. "Excepted assets" are defined under that section as assets which are "*not used wholly or mainly for the purposes of the business concerned throughout the whole or the last 2 years of the relevant period*".

29. The Appellant's Counsel opened a previous Determination of the Commission[1] which the Appellant's Counsel submitted examined similar matters as the Appellant's appeal. Based upon this Determination, the Appellant's Counsel submitted that all that was required for the Appellant to avail of the relief in full was to establish that the assets of the Group did not contain any personal assets such as a yacht or a holiday home. The

[1] 132TACD2021 – Available for viewing at https://www.taxappeals.ie/en/determinations/132tacd2021-cat

Appellant's Counsel submitted that as the Group did not hold such assets then the full amount of BPR ought to be applied to the Appellant's gift of the shares in the Group.

30. Without prejudice to the foregoing submission, the Appellant's Counsel submitted that the Group did not have any excess cash. In support of this submission, the Appellant's Counsel submitted that all of the alleged excess cash was generated by the business of the Group, was in use in that business and was never diverted for use outside the Group's core businesses. As such, Counsel for the Appellant submitted that the Respondent's submissions (the excess cash was not used in the Group) was both "unproven and unsubstantiated".

31. In further support of that submission, the Appellant's Counsel advised that the Appellant's father's shareholding was purchased by the Group for some ████ after he gifted the shares to the Appellant. The Appellant's Counsel submitted that as the Group could not afford that transaction, the Appellant's father subsequently lent ███ of the proceeds he received back to the Group as it was required for liquidity purposes. The Appellant's Counsel further submitted that as the buyback of the shares was for the benefit of the trade (in assisting the withdrawal of a retiring director), then this transaction was evidence that the Group did not have excess cash at the time the Appellant received his shareholding.

32. In support of the submission that the cash was used within the Group, the Appellant's Counsel submitted it was necessary for the Group to have a strong Balance Sheet so that it could win tenders and pay for products in advance. The Appellant's Counsel submitted that this requirement was particularly relevant as its main supplier was unable to obtain credit insurance during the financial crisis that pertained in those years for products supplied to the Group which resulted in the Group having to pay up front for all supplies in the years 2010 and 2011. The Appellant's Counsel further submitted since those years, its main supplier required the Group to keep substantial cash on its Balance Sheet as part of its agreement to for the Group to maintain its ████████ in Ireland. Hence, the Appellant's Counsel submitted that holding cash in the Group was a "key tool to retain its exclusive relationship with" its main supplier.

33. The Appellant's Counsel further submitted that the Board of Directors rather than the Respondent were best placed to decide on the amount of cash that the Group required on its Balance Sheet. The Appellant's Counsel submitted as a result of the prudent forecasting of cash reserves, this enabled the Group to see off the Global crisis that pertained in the periods under appeal and further enabled the Group's business to grow in stature to date. In addition, the Appellant's Counsel submitted that the Group adopted

a policy of growing its business from cash held rather than bank debt and as new projects often required significant cash to be expended up front, that the Group required cash for such purposes. Counsel for the Appellant said that this requirement was evident from the fact the Group kept its cash in current accounts or short-term deposit accounts rather than longer term illiquid investments.

34. In addition to the foregoing cash requirements, the Appellant's Counsel submitted that some stg[redacted] was held by the Group in order to hedge against foreign exchange risk and that was necessary as one of its large suppliers based in the United Kingdom ("UK") offered a [redacted] early discount for any orders it received. The Appellant's Counsel stated in order to qualify for the early discount that particular supplier required payment within [redacted] days of delivery of their products to the Group and often the Group had to pay for these items (in sterling) before it had received payment from its customer. In addition, the Appellant's Counsel submitted that the Group required funds to advance long term projects it was involved in such as the [redacted] which the Group had [redacted] in 2014 for its business activity of [redacted].

35. The Appellant's Counsel also referenced the stg[redacted] held in the Group's bank account, which the Appellant director explained in his evidence represented a payment on account for the [redacted] it had secured. The Appellant's Counsel submitted that combining this payment on account with the funds required to meet the Group's capital expenditure budget and the amount required to service its business efficiently resulted in their being no excess cash and hence the Respondent's arguments to the contrary should be rejected by the Commission.

36. The Appellant's Counsel further submitted that the provisions of section 49 (6) (a) CATCA 2003 applied as the assessment was raised later than 4 years from the date that the Appellant's CAT return was received by the Respondent. The Appellant's Counsel stated that as the Appellant lodged the return on 13th November 2013 and as the Respondent raised its assessment on 22nd January 2018 and as there was no "fraud or neglect" on the Appellant's behalf in filing the return, then the Commission should find that the Respondent's assessment was void.

37. In conclusion, the Appellant's agent submitted that the provisions of the CATCA 2003 did not contain any legislative basis to support the Respondent's submissions that BPR did not apply to the deemed portion of the share valuation referable to "excess cash". Further or in the alternative, the Appellant's Counsel submitted that the Group did not have any excess cash as all of the cash held by the Group was utilised by it. In those

circumstances, the Appellant's Counsel submitted that the Commission ought to allow the Appellant's appeal and vacate the Respondent's notice of assessment.

Respondent

38. Counsel for the Respondent advised the Commission that there was an error in respect of the value of the first gift received by the Appellant. Counsel explained that this gift was originally valued at €6,798,774, but after the Appellant lodged his CAT return his agent noted an error in the computation and that the correct valuation should have been €6,817,520. The Respondent's Counsel advised that the Appellant's agent informed the Respondent of this error and as such the parties were in agreement that the assessment originally issued by the Respondent should be corrected by the Commission to take account of this error, albeit marginal, to reflect the correct position. This proposed correction was not contested by the Appellant.

39. As such the Respondent's Counsel stated in taking the corrected value of the first gift, €6,817,520 and the agreed value of the second gift, €428,571 this resulted in the Appellant receiving total gifts from his father of €7,246,091 and this was the correct valuation to use in respect of those gifts before considering BPR.

40. The Respondent's Counsel advised the Commission that it with uncontested that the Appellant qualified for BPR and fulfilled all of the requirements to avail of that relief in respect of the first gift with the stipulation that the Respondent was of the view that 75% of the cash reserves within the Group ought to be disallowed when calculating the amount eligible for BPR. The Respondent's Counsel further advised that the Respondent was in agreement that the Appellant was entitled to full BPR in respect of the second gift.

41. The Respondent's Counsel advised that the Respondent agreed with the Appellant's agent's (revised) valuation of the first gift which it noted had been prepared using the Group's Balance Sheet as at 31st December 2013. The Respondent's Counsel stated that a review of this Balance Sheet revealed that the debtors (amount owed to the business) and creditors (amounts owed by the business) effectively cancelled one another out meaning that the amount owed to the business could pay the amount owed by the business without any call on the Group's cash reserves. The Respondent's Counsel further advised that the Group's Balance Sheet disclosed Fixed Assets (buildings, equipment and similar assets) of ██ and included within those Fixed Assets was investment type assets of €4.3m. The Respondent's Counsel submitted that in addition to the Groups Fixed Assets, the Group held cash in the bank of some €4.5m.

42. The Respondent's Counsel submitted as the Group's investment type assets could be readily converted to cash at relatively short notice then when combining the figure for those investments with the Groups cash held of €4.5m, the Group had liquid assets of some €8.8m. The Respondent's Counsel submitted as this sum of money was in excess of that required to operate the Group's business then an amount of cash assets ought to be excluded when calculating the amount of BPR applicable to the first gift.

43. In determining that amount, the Respondent's Counsel advised that the Respondent calculated the excess cash by ignoring the investment type assets of €4.3m and instead focused on the cash held by the Group in its bank accounts. The Respondent allowed 25% of the sum held in cash as being eligible for BPR (deeming It necessary that the Group have a cash balance of that amount to keep it operational and to enable it to deal with any contingencies that might require cash flow) but sought to disallow 75% of the pro-rata amount of cash held by the Group relative to the Appellant's shareholding percentile. As the Appellant was entitled to a [redacted] share of [redacted] of the Group in respect of the first gift, this resulted in the amount of €808,093 [redacted] being treated as an "excepted" asset and thus ineligible for BPR.

44. The Respondent's Counsel advised as a result of disallowing a pro-rata share of 75% of the cash balance referable to the first gift, that this gave rise to an overall CAT liability (in respect of both the first and second gift) as follows:

	Respondent's Caluclation of CAT Due		
Gift 1	Market Value of Appellant's Shareholding	6,817,520	
	Excepted Asset - Deemed Cash Balance	-808,093	
	Stamp Duty Paid	-67,987	
	Gross Assessable Amount	5,941,440	
	Business Property Relief @ 90%	5,347,296	
	Deemed Value of "BPR" Assets	594,144	
	Add: Excepted Asset	808,093	
	Assessable Value Gift One		1,402,237
Gift 2	Market Value of Appellant's Shareholding	428,571	
	Business Property Relief @ 90%	385,714	
	Assessable Value Gift two		42,857
			1,445,094
	Computation		
	Assessable Value of Both Gifts		1,445,094
Less:	Small Gift Exemption		3,000
	Taxable Value of both gifts		1,442,094
	CAT @ 33%		475,891

45. The Respondent's Counsel advised that two additional errors were noted in the filing of the Appellant's tax returns associated with the gifts received by him. The first error arose in respect of stamp duty paid on the first gift which was based on the original erroneous valuation rather than the corrected value of that gift. As schedule 1 to the Stamp Duties Consolidation Act 1999 ("SDCA 1999"), required stamp duty to be paid at a rate of 1% on the market value of shares transferred, the Respondent's Counsel submitted that the noted computational error gave rise to an underpayment of stamp duty. The Respondent's Counsel advised in applying the rate of stamp duty applicable to the revised valuation of the first gift, this resulted in an underpayment of stamp duty in the sum of €188 (€68,175 - €67,987). As such the Respondent's Counsel submitted that the Respondent was seeking the additional sum of €188 in respect of under returned stamp duty to correctly reflect the Appellant's liability.

46. The Respondent's Counsel advised that the second error arose on the filing of the Appellant's CAT return on 13th November 2013. Within that return, the Appellant stated that he had received no previous gifts or inheritances. Subsequently, the Appellant agreed that he had made an error in that regard owing to "mistake or lack of knowledge" and he had in fact received prior gifts which should have been included on that return. Subsequently the Appellant and the Respondent reached a settlement agreement in relation to that omission. The effect of that settlement to this appeal means the Appellant does not have any "exempt class threshold" to offset against the assessable value of the first and second gift. Therefore, the Appellant is liable to CAT at the appropriate rate, 33% on the entire assessable value of the first and second gift received by him. An "exempt class threshold" is the amount of gifts or inheritances that an individual can receive before they are liable to tax and the amount of the threshold is determined by reference to the relationship between the person making the gift or inheritance and the person receiving that gift or inheritance.

47. Turning to the Appellant's submissions that the assessment issued out of time and was therefore void. Counsel for the Appellant submitted that the provisions of section 47 (6B) CATCA 2003 permitted the Respondent to make an assessment at any time where fraud or neglect occurred in the filing of the Appellant's return. While noting no fraud had occurred, the Respondent's Counsel submitted that it was evident from the multiple errors noted in the filing of the Appellant's CAT return that this amounted to neglect and therefore the Respondent was not precluded from making the assessment.

48. Counsel for the Respondent submitted that it was well established that the burden of proof rested with the Appellant in his appeal and hence it was for him to prove that the

amount of cash deemed an excepted asset was not such. The Respondent's Counsel advised in deriving the amount of cash deemed to be an excepted asset in respect of the first gift, the Respondent had regard to the Group's provided Balance Sheet as at 31st December 2013. The Respondent's Counsel stated that it was an unusual aspect of this appeal that the Appellant had not provided the Commission with a copy of his valuation report as at the date of the gift, 18th April 2013, but choose instead to provide its financial statements for various years. However, given this position the Respondent's Counsel stated that the Respondent had chosen to focus on the Group's Balance Sheet as at 31st December 2013 in computing the amount of cash it deemed an excepted asset.

49. The Respondent's Counsel advised that the Respondent's examination of the Group's Balance Sheet as at 31st December 2013 established that the Group was well enough resourced and without the cash balance in question was well able to respond to any change in the demands of its business as it had significant Fixed Assets which it could convert into cash readily if required. In taking these assets with the amount of cash allowed by the Respondent (25% of the overall balances held), the Respondent's Counsel submitted that it was reasonable to conclude that the Group held excess cash and hence it should be deemed an excluded asset for the purpose of determining the amount eligible for BPR in respect of the first gift.

50. The Respondent's Counsel submitted that it was for the Appellant not only to demonstrate that the cash was necessary for use in the business at the date of the gift but as section 100 (2) CATCA 2003 required the cash balance to have been used "wholly or mainly for the purpose of the business concerned throughout the whole or the last 2 years of the relevant period", also for the two years preceding the date of the gift.

51. The Respondent's Counsel submitted that rather than demonstrate the use of this cash, the Appellant wrongly focused on the Commission's previous Determination on the availability of BPR for excepted assets (see paragraph 29 above) and concluded that as the Group did not hold any personal assets, such as a yacht or a villa, then the funds within the business were used wholly or mainly for the business and as such were entitled to qualify for BPR.

52. Counsel for the Respondent submitted that the Appellant erred in coming to this conclusion as the previous Commissioner's Determination clearly illustrated the purpose for which the full cash balance was required, whereas the Appellant in his appeal had failed to so do. Thus, Counsel for the Respondent submitted as the Appellant had not demonstrated to the Commission why the amount of excess cash was required for use in the Group, then his appeal ought to be refused.

53. The Respondent's Counsel opened the UK case of *Barclays Bank Trust Limited v Inland Revenue Commissioners* {1998) Sp C 158 ("*Barclays*") which considered cash balances in an analogous situation where the following was held (in relation to the future use of cash):

> ""*I do not accept that future' means at any time in the future nor that 'was required' includes the possibility that the money might be required should an opportunity arise to make use of the money in two, three or seven years' time for the purposes of the business. In my opinion and I so hold that 'required' implies some imperative that the money will fall to be used upon a given project or for some palpable business purpose….*"

54. The Respondent's Counsel submitted that as *Barclays* was considering the UK equivalent of section 100(2) CATCA 2003, then having regard to that jurisprudence, it was not sufficient for the Appellant to successfully submit that as it "might" need the cash at some stage in the future, then this permitted the full value of the first gift to qualify in full for BPR. Thus, the Respondent's Counsel submitted that as the Appellant had not demonstrated the "full" use of the cash balances held by the Group in the two years preceding the date of the gift to the Appellant, then it was not possible for the excess cash to be deemed eligible for BPR.

55. In conclusion, the Respondent's Counsel submitted the Respondent's notice of assessment was valid and as the Appellant had not proven that the amount of excess cash was used in the business of the Group for the two years preceding the date of the gift, then the Appellant's appeal should be refused and the assessment upheld.

Material Facts

56. The Commissioner finds the following material facts:-

56.1. On ███ ████████, the Appellant received two gifts from his father consisting of shareholdings in two separate companies.

56.2. The value of the first gift included a deemed cash value of €1,077,457 of which the Respondent sought to disallow 75% of that balance or €808,093 as it considered this cash was an excepted asset and as such ineligible for BPR.

56.3. The Appellant fulfilled all of the criteria to avail of BPR in respect of the first gift, with the exception of the deemed excepted asset and all of the criteria without limitation in respect of the second gift.

56.4. The value of the second gift was €428,571. This valuation was uncontested between the Appellant and the Respondent.

56.5. The Appellant filed his original CAT return and paid the associated liability in a timely manner.

56.6. Subsequent to the lodging of that return, the Appellant's agent informed the Respondent that it had made an error in the original return and in a connected stamp duty return. The effect of this error for CAT purposes was that gross value of the first gift received by the Appellant should have been recorded as €6,817,520 rather than €6,798,774 and this caused a corresponding underpayment of CAT. Furthermore, as stamp duty is paid at 1% of the market value of the shares transferred this resulted in an underpayment of stamp duty in the sum of €188.

56.7. In addition to that error, when completing the Appellant's original CAT return, the Appellant wrongly advised the Respondent that he did not receive any prior gifts or inheritances since 5th December 1991. Subsequently the Appellant made a settlement with the Respondent in respect of this error and as a result of this settlement, the Appellant is not entitled to any amount of exempt class threshold in respect of the first or second gift received on 18th April 2013.

56.8. When the Appellant submitted his first CAT return, he paid the sum of €238,980 which represented the then liability at the time.

Analysis

57. Before, turning to the substantive issue, the Appellant's Counsel submitted that the Respondent issued its assessment outside the four-year time permitted under section 49 (6) (a) CATCA 2003 and as such was void. The provisions of section 49 (6B) CATCA provide:

> "*Notwithstanding subsection (6A), an assessment, a correcting assessment or an additional assessment may be made by the Commissioners at any time -*
>
> > *where they have reasonable grounds for believing that any form of fraud or neglect (within the meaning given in section 46(7B)(b)) has been committed by, or on behalf of any accountable person in connection with, or in relation to, any relevant return (within the meaning given in subsection (6A)) which is the subject of assessment, …"*

58. As noted in paragraphs 38 and 45 above, the Appellant made a series of errors in submitting his CAT and stamp duty returns. As section 49 (6B) CATCA 2003 and similar

legislative provisions in respect of stamp duty (section 159C SDCA 1999) permit the Respondent to raise an assessment "at any time" where neglect occurred, it follows that the Respondent is permitted to issue its assessment at any time, which by definition includes outside the four-year timeframe, where neglect has occurred in the filing of the Appellant's tax returns. Given that neglect did occur in the filing of the Appellant's tax returns, by virtue of the incorrect valuation being used and an amount of Class Threshold being wrongly claimed, it is evident to the Commissioner that the Respondent's assessment to CAT is not void. Furthermore, the Commissioner determines that the Respondent is permitted to raise an assessment for the additional stamp duty due in the sum of €188.

59. Turning to the substantive issue, at the outset of this appeal the parties agreed that the question to be determined in this appeal is whether certain assets of the Group ("the cash balances") are excepted assets within the meaning of section 100 CATCA 2003 for the purpose of calculating the Appellant's entitlement to BPR under section 92 CATCA 2003.

60. While both parties placed emphasis on the findings contained in a previous Determination of the Commission (132TACD2021), the Commissioner having the benefit of reading that Determination draws a distinction in the facts of that Determination to the Appellant's appeal. In the previous Determination, the Commissioner undertook a detailed analysis of the assets of the company and in concluding that the majority of these assets were used for the purpose of funding the business in the preceding two years held that no excepted assets existed and hence the Appellant was entitled to full BPR. For reasons that will become evident, the Commissioner does not consider such an analytical approach is necessary to determine whether BPR ought to be extended in full to the Appellant.

61. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners and ors.* 2020 IEHC 552 ("*Perrigo*") where he 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".

62. In valuing the shares received by the Appellant in respect of the first gift, the provisions of section 27 CATCA 2003 require that those shares are valued at open market value after taking account of the respective shareholdings of persons connected to the Appellant. Aside from that qualification, which is in place to ensure that minority shareholder discounts are not applied to the valuation, no further stipulations are applied to valuing the Appellant's shareholding for the purpose of ascertaining his liability to CAT.

63. As the Respondent conceded in its submissions, that the value of the first gift received by the Appellant was €6,817,520 (before any allowance for BPR), it follows that the market value of the Appellant's first gift is this amount.

64. Section 93 CATCA 2003 defines "Relevant Business Property" in the Appellant's case as "unquoted shares in a company incorporated in the State or otherwise". Subsection 93 (3) CATCA 2003 imposes a restriction on that definition in holding that companies which carry on the business wholly or mainly of dealing in currencies, securities, stocks or shares, land or buildings, or making or holding investments are precluded from this definition.

65. The Commissioner notes from the Appellant's evidence that the Fixed Asset Investments held in the Group's Balance Sheet as at 31st December 2013 consisted of a (mortgaged) property which was in use by the Group and unlisted investments in subsidiary undertakings. Given the nature of these investments, it is evident that these assets were not readily convertible into liquid form and this appears to have been accepted by the Respondent in choosing to ignore these assets, instead focusing solely on the cash in bank figure of €4.5m in calculating the amount it deemed an excepted asset. As the Group held that cash figure in current or short term deposit accounts, the Commissioner concludes that those balances do not constitute the "making or holding of investments" are therefore not deemed an excepted asset under the provisions of section 93 (3) CATCA 2003. In addition, as none of the other assets held in the Group's Balance Sheet as at 31st December 2013 fall within the restrictions imposed under that section, the Commissioner finds that the Group did not hold any excepted assets within the meaning of section 93 (3) CATCA 2003.

66. A further stipulation to the availability of BPR is contained within section 100 (2) CATCA 2003 which requires the assets of the business to have been used by the business "wholly or mainly for the purposes of the business concerned throughout the whole or the last two years of" the date preceding the first gift.

67. In adapting the principles promulgated in *Perrigo* in considering the use of the word "used", the Commissioner notes that this equates, in the current context, as being "employed for a purpose or utilised"[2]. As cash is a fungible commodity, it is difficult to ascertain the meaning of section 100 (2) CATCA 2003 as the expression "employed for a purpose" is vague and the use of word "utilised" implies that it was spent and hence is no longer available which is a contradiction in the circumstances of the Appellant's appeal. As the latter position would equate to there being no business (since it would have no cash to operate), the Commissioner, in place considers the use of the words "employed for a purpose" in ascertaining the meaning of section 100 (2) CATCA 2003.

68. In considering the Appellant's evidence and the submissions of his Counsel that the funds were utilised within the Group for a variety of purposes including the prudent decision to hedge against foreign exchange risk, to bankroll some of the large projects it was involved in and that some of the funds held in the Group's bank account represented an advance payment for works to be completed on behalf of its ████████, the Commissioner considers to a degree of certainty that a portion of the €4.5m held by the Group in its bank account's was employed for a purpose by the business. A review of the Group's provided Balance Sheets for the period prior to the gift confirms that position for the preceding two years also.

69. As the Commissioner finds nothing in the legislation to support the Respondent's submission that the Appellant was required to pinpoint the exact use of 75% of the funds held in its bank account in order for his appeal to succeed, it is difficult to support this submission. Furthermore, such a submission requires the use of subjective analysis which could easily be displaced by the Appellant stating that he required the funds for a rainy day or to grow the business or such like. Indeed, within the Appellant's submissions and evidence, several reasons were provided for the use of the funds held in the Group's bank accounts which included growing the business absent substantial bank borrowings and the prudent decision to hold foreign exchange amounts on deposit to hedge against such risk. In considering those submissions, the Commissioner finds that the funds held in the Group were employed for a purpose within the business and hence the

[2] Source - https://www.collinsdictionary.com/dictionary/english/used

Respondent's submissions that 75% of the Group's cash should be considered an excepted asset cannot succeed.

70. In advance of reaching that finding the Commissioner considered the Respondent's submissions on the UK *Barclay* case. However, as that case is not binding in this jurisdiction and as the UK legislation specifically refers to "*…an asset required at the time of the transfer for future use for those purposes",* unlike the "equivalent" Irish legislation, the Commissioner is unable to attach any weight to those submissions.

71. The Commissioner is reassured that his findings in this regard are correct having regard to two material matters. The first of these matters is the appeal itself which had it not proceeded would have allowed the Appellant to take out a large sum of cash, €808,093 at the rate of 33% rather than the higher rate which will apply if he chooses to take additional funds from the Group in the form of salary or dividend (this rate would likely be 53% representing PAYE/PRSI and USC in noting the Appellant's current salary). Given the Appellant's "sacrifice" of leaving these funds in the Group rather than withdraw them in a tax effective manner is, in part, testament to the Group not having excess funds as alleged by the Appellant.

72. Furthermore, if the Appellant diverted any of the assets, which by definition includes the disputed cash amount into excluded assets, such as the much mentioned "yacht or villa" within a period of six years, it was open to the Respondent to withdraw the relief under the provisions of section 101 CATCA 2003. In allowing for the passage of time since the date of the Appellant's gift and the hearing of the appeal and in noting that no evidence was presented to the Commission that any of the funds were so diverted, then it is evident to the Commissioner that the funds gifted to the Appellant in respect of the first gift were continuously utilised by the Group for the purpose of supporting and growing its activities, the latter of which is confirmed by a cursory review of the Group's financial statements which show significant growth for the periods subsequent to the gift.

73. As the Appellant has been successful in his appeal, the Commissioner in noting the computational error in the original return submitted by him is required to re-calculate the Appellant's liability to CAT on the first and second gift received from his father. That computation is as follows and provides for a reduction of 90% on the full value of those gifts:

Gift 1, €6,817,520 - €68,175 (corrected stamp duty)

= €6,749,345 @ 10% = €674,935

Gift 2, €428,571 (agreed valuation after stamp

duty deduction)	€42,857
Assessable Value of both gifts	€717,792
Less: Small Gift Exemption	3,000
Taxable Value	€714,792
CAT @ 33%	€235,881
Less: CAT paid by Appellant	€238,980
Refundable	€3,099

74. As noted in sub-paragraph 56.6 above, the Appellant underpaid stamp duty on the erroneous valuation of the first gift in the sum of €188. Accordingly, the Respondent is permitted to offset this payable amount (together with interest and penalty if applicable) against the CAT refund due (inclusive of the interest due on that overpayment) to the Appellant. This offset will result in the Appellant's refund being reduced from €3,099 (plus interest) by the amount of €188, in respect of the underpayment of stamp duty (and further by the amount of interest and penalty if applicable).

75. In appeals before the Commission, the burden of proof rests with the Appellant who must prove on a balance of probabilities that the assessments or tax deductions are incorrect. In the case of *Menolly Homes v Appeal Commissioner and another* (2010) IEHC 49 ("*Menolly*"), at paragraph 22 Charleton J. stated:

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

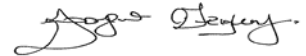
76. The Appellant has discharged that burden of proof in his appeal and the Commissioner determines that the Respondent's Notice of Assessment be reduced from €236,770 to a refundable amount of €3,099 (plus interest) as computed at paragraph 73 of this Determination. Arising from the underpayment of stamp duty, the Respondent is authorised to offset the amount of this underpayment, together with interest and penalty (if any) against the CAT refund due to the Appellant.

Determination

77. The Commissioner determines that the Appellant has been successful in his appeal. As such, the Appellant has been overcharged to CAT in the sum of €3,099 (plus interest) as computed at paragraph 73 of this determination. For the provided reasons, the

Commissioner further determines that the Appellant has underpaid stamp duty in the sum of €188 and the Respondent is authorised to deduct this sum, together with interest and penalty, if applicable, from the amount refundable to the Appellant.

78. The appeal is determined in accordance with section 949AK TCA 1997. 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 TCA 1997.



Andrew Feighery
Appeal Commissioner
20th April 2023