AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

198TACD2024

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant"), against an amended assessment to capital gains tax ("CGT") raised by the Revenue Commissioners ("the Respondent") for the year ended [redacted]. The amount of tax at issue is €2,220,625.00.

2. The amended assessment arose on foot of the disposal by the Appellant of [redacted] shareholding in [redacted] to [redacted]. The issue for determination in this appeal is whether a minority discount was applicable to the disposal of the Appellant's shareholding.

Background

3. The Appellant was the owner of [redacted] ordinary shares in [redacted] which constituted the entire share capital of [redacted]

4. On [redacted] the Appellant executed [redacted] separate deeds of gift, each of which transferred a [redacted] of [redacted] shareholding in [redacted] to each of [redacted]. Therefore, each recipient received [redacted] ordinary shares.

5. In the calculation of [redacted] CGT liability on the disposal of [redacted] shares, the Appellant proceeded on the basis that [redacted] had made [redacted] separate disposals, and that therefore a 30% minority discount was applicable. [redacted] paid CGT in the amount of €1,947,728.

6. On 13 December 2023, the Respondent issued a notice of amended assessment to CGT for [redacted] The notice of amended assessment stated that the CGT owing on the disposal of the Appellant's shareholding in [redacted] was €4,168,353. As the Appellant had paid €1,947,728, the balance due was €2,220,625. The Respondent raised the amended assessment on the basis that the Appellant had disposed of 100% of [redacted] shares in [redacted] and therefore no minority discount was applicable.

7. On 10 January 2024, the Appellant appealed against the amended assessment to the Commission. [redacted] The appeal proceeded by way of a hearing in private on 18 September 2024. The Appellant was represented by Frank Mitchell SC. The Respondent was represented by Aoife Goodman SC and Gráinne Duggan BL.

Legislation

8. Section 28(1) of the Taxes Consolidation Act 1997 as amended ("TCA 1997") states that

"*Capital gains tax shall be charged in accordance with the Capital Gains Tax Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets.*"

9. Section 532 of the TCA 1997 states *inter alia* that

"*All forms of property shall be assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not, including –*

(a) options, debts and incorporeal property generally…"

10. Section 547 of the TCA 1997 states *inter alia* that

"(1) Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where –

(a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift)…

(4)(a) Subject to the Capital Gains Tax Acts, a person's disposal of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where –

(i) the person disposes of the asset otherwise than by means of a bargain made at arm's length (including in particular where the person disposes of it by means of a gift)…"

11. Section 548 of the TCA 1997 states *inter alia* that

"(1) Subject to this section, in the Capital Gains Tax Acts, "market value", in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market…

(4) Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length…"

12. Section 549 of the TCA 1997 states *inter alia* that

"(1) This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.

(2)Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length…"

Evidence

13. An agreed statement of facts was submitted, and no oral evidence was proffered by or on behalf of the Appellant. The Respondent put forward [redacted] as an expert witness. [redacted] is a chartered account and managing director of [redacted], and had prepared a valuation report in respect of [redacted] as at [redacted] for the Respondent. In advance of the hearing, the Appellant objected to [redacted] being permitted to give evidence, on the basis *inter alia* that he had not provided an expert report setting out the evidence that he intended to give, and that it appeared the evidence he intended to give would contradict the agreed statement of facts.

14. Having considered written submissions received from the parties, the Commissioner notified them that he would not prevent [redacted] from giving evidence. He asked the Respondent to clarify if it was resiling from point 8 of the agreed statement of facts, which stated that "*The sole issue in dispute is whether, as a matter of law, a minority discount is applicable to the disposal or disposals made by the Appellant*." The Respondent stated that it was not resiling from this point, but that [redacted] would be called to address what a willing vendor would do in a hypothetical sale of the Appellant's shares in [redacted] on the open market.

15. [redacted] gave evidence after the conclusion of the Appellant's oral submissions. He set out his qualifications and experience to the Commissioner. He stated that he was independent and had taken an independent view of the matter. He was heavily involved in the preparation of the valuation report for the Respondent, which was prepared in August 2023.

16. He stated that he valued [redacted] at [redacted], and divided the total valuation by [redacted] to get a valuation of [redacted] for each [redacted] shareholding. He stated that the Appellant's valuation valued [redacted] at €[redacted] and then applied a 30% discount to reduce it to €[redacted] He disagreed with the Appellant's valuation insofar as it included €[redacted] for goodwill. Regarding the application of a minority discount by the Appellant's expert, he stated that it was done at the level of the company as a whole, rather than in respect of each [redacted]

shareholding. While he believed in principle this was incorrect, he accepted that mathematically it had the same result.

17. He did not agree that a discount on a [redacted] shareholding should be 30%, but considered that 62/63% would be more appropriate. However, he believed that the statutory hypothesis meant that he had to consider what a willing vendor on the open market would do, and he believed that such a willing vendor would seek to sell 100% of the company, rather than [redacted] shareholdings of [redacted] Therefore a minority discount was not appropriate. The Appellant's 100% shareholding was disposed on one day: "*It wasn't disposed over a week, it wasn't disposed over months; it was disposed in one day.*" A willing seller on the open market would not sell it in [redacted] tranches at a discount. He stated that "*This was a singular transaction.*" He stated that he was not using "*disposal*" in a legal sense, but was talking "*in a valuation sense.*"

18. Before commencing cross examination, Mr Mitchell SC asked for confirmation that the Respondent was not resiling from the agreed statement of facts, and Ms Goodman SC confirmed that the statement of facts previously submitted remained agreed. On cross examination, [redacted] was asked whether he notified the Respondent that he considered that an appropriate minority discount would be 62% before or after it was agreed that the minority discount (if applicable) was 30%. [redacted] checked his notes and stated that he communicated it to the Respondent on 31 July 2024, which was after the statement of facts was agreed on 18 July 2024.

Submissions

Appellant

19. In written submissions, the Appellant stated that it was widely understood and accepted that a shareholding o[redacted] of the shares in a company did not equate to[redacted] of the overall value of the company, because the holder of a minority interest could not exercise control over the company. The Appellant's expert valued that a discount of 30% should apply to the value of the minority shareholdings in [redacted]

20. The Appellant submitted that each shareholding of [redacted] which [redacted] disposed to each of [redacted] had to be valued separately, and that a willing buyer of [redacted] of the share capital of [redacted] would insist on a minority discount of at least 30%.

21. It was undoubtedly the case that the legal authorities required one to assume the vendor would have obtained the best price possible, but that enquiry was as to the best price possible for the asset that was disposed of. The task was not to consider what was the

greatest sum of money which the Appellant could reasonably have hoped to obtain if [redacted] had sold 100% of [redacted] shares in one lot – because that is not what occurred – but rather what [redacted] could reasonably have hoped to obtain for the sale of a [redacted] interest in the share capital of the company.

22. There was no suggestion of any tax avoidance scheme being applied. The Appellant simply divided [redacted] shareholding in [redacted] between [redacted]. Nor was there any deeming provision which could apply to treat the [redacted] disposals as one. If the Appellant had given [redacted] separate gifts of a [redacted] shareholding in the company, section 550 of the TCA 1997 would have applied to value those [redacted] shareholdings by reference to "*the aggregate market value of those assets when taken together*". That deeming provision confirmed that, as a matter of principle, the CGT Acts require one to value separately any asset disposed of. There was no similar deeming provision, however, which applied to the current case to treat the [redacted] separate shareholdings as one. The Respondent's attitude in this appeal begged the following rhetorical question of statutory construction: what was the point of section 550 if transactions not falling within its terms could be aggregated in any event?

23. There was a provision in UK law that deemed that separate disposals such as occurred in this appeal should be treated as one; section 71 of the Finance Act 1985 and subsequently section 19 of the Taxation of Chargeable Gains Act 1992. Despite the changes made to the UK legislation, no change has been made to section 550 of the TCA 1997 (which had been replicated in UK legislation in 1979). The Respondent could not ask the Commissioner to do by way of interpretation that which would require express legislation.

24. The Respondent had sought to rely on 12TACD2017, notwithstanding that the determination largely contradicted its position in this appeal. In that case, the taxpayers had argued that no minority discount should apply, whereas the Respondent contended that a minority discount was applicable. Commissioner Gallagher agreed with the Respondent and found that a discount of 35% was appropriate where a minority interest of 25% was acquired.

25. In oral submissions, counsel stated that the arguments put forward by the Appellant were simple, straightforward and anchored in the clear wording of the legislation. The same was not true for the submissions of the Respondent. The case centred on a fundamental proposition applicable to taxation – that, subject to the application of anti-avoidance or deeming provisions, tax applies to the transactions that actually happened, not transactions that might have happened if a different course was taken. In this appeal, the

Appellant chose not to sell [redacted] shareholding to the highest bidder. [redacted] chose to give a gift of [redacted] of [redacted] shares to each of [redacted] and that was the transaction to which the Act applied.

26. In *McGrath v McDermott* [1988] IR 258, the Supreme Court held that it did not have jurisdiction to apply tax to transactions that had not occurred. The position adopted by the Respondent in this appeal required one to ignore both the legislation and settled case law in pursuit of an objective that was unjustified and irrational. The Respondent was seeking to drive a wedge between the amount of money that the Appellant was deemed to have received, and the amount of money that [redacted] were deemed to have paid. A proper reading of the legislation made it clear that whatever the disponer was deemed to have received was precisely the same as what the recipient was deemed to have paid.

27. It was submitted that there were five issues that fell to be determined: (1) What was a disposal, and did the Appellant make one disposal or [redacted] disposals? (2) What was an asset? Did the Appellant own one asset, as the Respondent argued, or [redacted] separate assets? (3) Was there a statutory deeming provision requiring the amalgamation of the separate disposals? (4) What was the consideration which [redacted] were deemed to have paid and the Appellant was deemed to have received for the assets of which [redacted] disposed? (5) What was the pooling provision on which the Respondent placed so much weight, and was it applicable herein?

28. Regarding the first issue, in *Kirby (Inspector of Taxes) v Thorn EMI* (1988) 1 WLR 445, the English Court of Appeal held that a disposal was a transfer of an asset by one person to another. In this case, the Appellant made [redacted] disposals. If this was accepted, it was fatal to the Respondent's case, because section 28 of the TCA 1997 provided that CGT was charged on the disposal of assets. There was no disposal of the Appellant's 100% shareholding in [redacted] there were [redacted] disposals, and it was those transactions that were charged to tax.

29. Regarding the second issue, the Respondent had contended that the Appellant had disposed of [redacted] entire shareholding in one day. It was inviting the Commissioner to find that the Appellant owned the company, and that the company was the asset [redacted] held. However, the Appellant did not own the company – [redacted] owned the shares which the company issued. Section 532 of the TCA 1997 provided that the shares, which were incorporeal property, were assets, and the Appellant therefore owned [redacted] separate assets. In Tom Maguire's book on Irish Capital Gains Tax, it was stated at paragraph 10.03 that each share in a company was an asset in its own right. However, without any

basis in law, the Respondent was inviting the Commissioner to find that the Appellant held one asset, which [redacted] subsequently disposed of.

30. Case law demonstrated that each disposal had to be treated separately for CGT purposes: *Aberdeen Construction Group Ltd v IRC* [1978] AC 885; *Whittles v Uniholdings Ltd (No 3)* [1996] STC 914; *Fullarton v IRC* [2004] STC (SCD) 207. These were basic principles that had been settled for 50 years. The Respondent knew this, because it had stated in correspondence to the Appellant, regarding the disposal of antiques, that "*the sale of each antique is a separate disposal for CGT purposes*."

31. Regarding the third issue, it was necessary to see if there was a deeming provision that allowed or required the Commissioner to treat the separate disposals as one. However, it was agreed that there was no such deeming provision existing in legislation in this jurisdiction. The other deeming provisions that did exist, e.g. section 550, proved that, as a matter of first principles, all separate disposals are separately taxed, because deeming provisions are required in order to tax separate disposals as one.

32. The Respondent was seeking to rely on a non-statutory deeming provision, but how such a provision would be applied was wholly unclear. In written submissions, the Respondent had stated that section 550 applied to the value of what was acquired, but the wording of the section clearly concerned the value of what was disposed of. The Appellant's agent queried this further with the Respondent, and stated that it appeared to conflict with the Respondent's own guidance note. The Respondent did not retract its submission, which appeared to be in direct conflict with the wording of the legislation.

33. There was an applicable deeming provision in respect of capital acquisitions tax (section 27 of the Capital Acquisitions Tax Consolidation Act 2003), and the [redacted] had paid capital acquisitions tax as if they had each received [redacted] of 100% of the company with no discount. There was also the provision in UK law (section 71 of the Finance Act 1985) which did not have an equivalent in Irish legislation but which the Respondent was asking the Commissioner to apply on a non-statutory basis. To do so would be to go beyond the intention of the legislature and would also go beyond the Commissioner's powers, which were simply to apply the legislation as enacted.

34. Counsel submitted that if the Commissioner agreed with the Appellant on the first three questions, that would be determinative of the appeal. Regarding the fourth issue, the assessment against the Appellant hinged on the transaction falling within 549 of the TCA 1997, because otherwise there would be zero consideration and zero gain. Section 549(1) only applied when somebody acquired an asset, and nobody had acquired 100% of the shares in [redacted] Section 549(2) made it clear that both the person who acquired the

asset and the person disposing of the asset were treated as parties to a transaction at arm's length.

35. Subsections (1) and (4) of section 547 were identical, except that one referred to the acquirer and the other to the person making the disposal. It was not possible to read sections 547 and 549 as imposing or allowing a different consideration to be received than the one that was paid, having regard to the Supreme Court judgment in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43. The market value was just the way of valuing the consideration which was deemed to have been paid and received.

36. Regarding the fifth issue, the Respondent was relying on a principle of "prudent lotting" which was found in UK cases, but those cases said did not apply in the circumstances that arose here. In *Stephen Anthony Solomon Marks v HMRC* [2011] UKFTT 221 (TC), the First Tier Tribunal held that, while death duties were computed on the value of the estate as a whole, CGT was computed on the disposal of each asset separately. The UK Valuation Office Agency Manual stated something similar. The Respondent had also sought to rely on Mr Maguire's book on CGT, but at paragraph 8.115 of that book, it was stated that "*In Capital Gains Tax cases it is generally not appropriate to lot the asset, or assets, included in a disposal together with other assets that, although part of the vendor's estate, were not included in the disposal*."

37. In each of the disposals, a valuation of the aggregate value of all of the shares within those disposals was given, not the aggregate value of each share multiplied by [redacted]. Therefore, the Appellant had applied the "pooling principle" in respect of each disposal. But that principle did not require the Appellant to treat [redacted] separate disposals as one.

38. In reply to the Respondent, counsel stated that the Respondent had not previously accepted that the Appellant had made [redacted] separate disposals, or that each share constituted an asset. The Appellant's agents were frustrated that these concessions had not been made previously. Regarding the [redacted] stamp duty returns, there was a specific aggregation provision that applied to stamp duty under the Stamp Duties Consolidation Act 1999. There was no such provision applicable to CGT.

Respondent

39. In written submissions, the Respondent stated that the issue in dispute was whether the deemed consideration received by the Appellant on the disposal by [redacted] of [redacted] should be discounted by 30%.

40. The Appellant owned the entire shareholding of [redacted] which [redacted] disposed of on [redacted] It was agreed that, as of the date of disposal, the value of the company was €[redacted] The Appellant submitted that [redacted] had disposed of [redacted] separate shareholdings in [redacted] in one day. However, it was the Respondent's position that no hypothetical vendor would have disposed of the shareholding in that way, so as to achieve a consideration than would have been less than would have been achieved if the shareholding was sold in one lot.

41. It was immaterial for the purposes of ascertaining the gain made by the Appellant, for the charge to CGT, that [redacted] chose to divide [redacted] shareholding into lots and to gift them to [redacted]. In accordance with section 548(4) of the TCA 1997, when determining the market value of the Appellant's shareholding, it was necessary to assume the value that the Appellant's shareholding would fetch in a hypothetical sale on the open market (the statutory hypothesis).

42. The importance of the hypothetical vendor could not be dismissed, albeit that was what the Appellant contended for. [redacted] case was premised upon a disposal on the same day of [redacted] separate [redacted] shareholdings in the company being worth less than the sum of their parts. Selling the company in that way was not what "*reasonable people buying and selling such property would be likely to have done in real-life*"; *IRC v Gray* [1994] STC 360.

43. This principle of valuation was also referred to as "prudent lotting", as set out at paragraph 8.115 of Maguire's book on Irish Capital Gains Tax. Section 19 of the Taxation of Chargeable Gains Tax Act 1992 in the UK appeared to place this valuation principle of prudent lotting on a statutory footing in that jurisdiction. It was immaterial that the Oireachtas had not enacted a similar provision, as the valuation principle of prudent lotting already existed.

44. In oral submissions, counsel stated that the Respondent accepted that Mr Mitchell's analysis of section 550 was correct, and that she had understood that this had been clarified before the hearing. She apologised on behalf of the Respondent for the failure to do so.

45. It was submitted that, in deciding what to value, one has to answer a practical question and apply common sense; *Duke of Buccleuch v IRC* [1967] 1 AC 506. It was necessary to assume that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life; *IRC v Gray* [1994] STC 360.

46. It was not disputed that there were [redacted] separate disposals in this case, but they were identical and simultaneous disposals. The expert retained by the Respondent, [redacted], had given evidence that this affected his valuation, as it was necessary to take the commercial context and the reality of what happened into consideration.

47. It was also not disputed that a single share could be an asset, and that the asset that was the subject of each of the [redacted] disposals was a [redacted] interest in the company. What remained in dispute was where a minority discount was appropriate in circumstances where there were [redacted] simultaneous and identical disposals on the one day to [redacted].

48. The stamp duty returns filed by the [redacted] had stated each of the transfers formed part of a larger transaction. Correspondence from the Appellant's agent referred to "*the transfer of* [redacted] *entire shareholding in* [redacted] *to* [redacted] *in equal shares*", and the valuation provided by the Appellant had telescoped the [redacted] transactions into one.

49. It was necessary to look at what would have happened on a hypothetical sale on the open market. The Appellant contended that each of [redacted] should be valued in isolation, but this was to ignore what actually happened. It made more sense to assume that the hypothetical vendor, having decided to dispose of [redacted] entire shareholding, would have put it on the market on terms which would have enabled [redacted] to achieve the highest possible price for it.

50. It was not disputed that if the Appellant had disposed of [redacted] of [redacted] shareholding, and had retained the remainder, then a minority discount would be appropriate. But this was not what happened. There were [redacted] identical gifts made on the same day. It was accepted that the deeds of gift were not legally interdependent, but they were subdivisions of what was commercially a single transaction.

51. It was not strictly necessary for the Respondent to rely on section 549 of the TCA 1997, even though the persons to the transactions were connected, because the transactions were gifts and therefore captured by section 547. The Appellant did not dispose of the gifts by means of a bargain at arm's length, and therefore market value was deemed to apply.

52. In 12TACD2017, what was at issue was the base cost of the appellants on their subsequent disposal of shares that the trustees had transferred to them. Therefore, the issue in that appeal was the opposite at issue in this. Commissioner Gallagher held there was nothing to prevent the market value in subsection (1) of section 547 being different from that under subsection (4). It was not necessary in this appeal to determine whether

it would be incorrect to have one market value for the purposes of the Appellant's disposal, and a different market value for the purposes of [redacted] future base cost.

53. It was submitted that the principle of prudent lotting was applicable. It was accepted that it was mainly a provision applicable to the valuation of estates, and that it had limited application for CGT purposes, but it was not the case that it was never applicable. It would be consistent with prudent lotting to value on the basis that the Appellant actually placed all of [redacted] shares on the market at the same time.

Material Facts

54. As already stated herein, the parties submitted a statement of agreed facts prior to the hearing. While the expert called on behalf of the Respondent, [redacted], criticised aspects of the valuation carried out on behalf of the Appellant, counsel for the Respondent confirmed that the statement of facts remained agreed. Based on the statement of facts, as well as the submissions of the parties, the Commissioner makes the following findings of material fact:

    54.1. The Appellant was the owner of [redacted] ordinary shares in [redacted] being the entire share capital of [redacted]

    54.2. On [redacted] the agreed value of [redacted] was [redacted].

    54.3. On [redacted] the Appellant transferred [redacted] of [redacted] shareholding in [redacted] (i.e. [redacted] ordinary shares) to each of [redacted]. [redacted] entered into [redacted] separate deeds of gift with each of [redacted].

    54.4. The Appellant calculated [redacted] CGT liability on the basis of having made [redacted] separate disposals of [redacted] separate assets.

    54.5. In the calculation of the Appellant's CGT liability, a minority discount of 30% was applied to the valuation of each minority shareholding disposed of by [redacted] Notwithstanding that the Respondent believed a minority discount should not have been applied, it was agreed that, if the relevant provisions of the TCA 1997 required the valuation of shares amounting to a [redacted] interest in [redacted] it was appropriate that the value of the shares be calculated as [redacted] of the open market value of [redacted] discounted by 30%.

    54.6. The Appellant paid CGT on foot of the disposals by [redacted] in the amount of €1,947,728.

54.7. On 13 December 2023, the Respondent issued a notice of amended assessment to CGT for [redacted] The notice of amended assessment stated that the total CGT owing on the disposal of the Appellant's shareholding in [redacted] was €4,168,353, with an outstanding balance €2,220,625. The Respondent raised the amended assessment on the basis that the Appellant had disposed of 100% of [redacted] shares in [redacted] and therefore no minority discount was applicable. On 10 January 2024, the Appellant appealed against the amended assessment to the Commission.

Analysis

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

56. In addition to the above, in the recent judgment in *Hanrahan v The Revenue Commissioners* [2024] IECA 113, the Court of Appeal clarified the approach to the burden of proof where an appeal relates to the interpretation of law only. The court stated *inter alia* that

> *"97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake……..*
>
> *98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation……."*

57. Section 28 of the TCA 1997 charges gains accruing on the disposal of assets to CGT. Section 547(4) provides that where a person disposes of an asset by way, *inter alia*, of a gift, the disposal is deemed to have been for a consideration equal to the market value of the asset. Section 548(1) defines "market value" as the price that an asset might reasonably be expected to fetch on a sale in the open market. Section 549 applies to

transactions between connected persons, and provides that such persons will be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.

58. On [redacted], the Appellant executed [redacted] deeds of gift, which transferred [redacted] entire shareholding in [redacted] ([redacted] ordinary shares) to each of [redacted] in [redacted] equal interests ([redacted] ordinary shares). The Appellant treated each of the transfers as a separate disposal and applied a 30% minority discount to the valuation of each of the [redacted] interests in [redacted]. The Respondent contended that [redacted] should have treated the disposals as if [redacted] transferred [redacted] entire shareholding in one lot, and that consequently no minority discount should have been applied.

59. Each of the deeds of gift was in identical terms (save for the name and address of the recipient), and stated that the Appellant agreed to transfer [redacted] shares to the recipient "*by way of absolute, unconditional gift*" and that the parties acknowledged "*that no rights or conditions attach to the Gift.*" It was contended by the Appellant, and accepted by the Respondent at the hearing, that the each of the transfers constituted a separate disposal. The Commissioner considers that this is clearly correct, having regard to the *dictum* of Nicholls LJ in *Kirby (Inspector of Taxes) v Thorn EMI* (1988) 1 WLR 445 at page 450 that

> *"Thus the basic structure of the tax [i.e. CGT] is of a charge on gains accruing to a person on disposal of an asset by him. There is no statutory definition of disposal but, having regard to the context, what is envisaged by that expression is a transfer of an asset (i.e. ownership of an asset) as widely defined, by one person to another."*

60. In this case, the Appellant transferred [redacted] ownership of [redacted] of [redacted] shareholding in [redacted] to each of [redacted] children, and therefore [redacted] made [redacted] disposals. It was also not disputed by the Respondent that each of the Appellant's shares in [redacted] constituted an asset. Consequently, the Commissioner does not understand that the argument of the Respondent was that the Appellant held in effect one asset, which [redacted] disposed of in one transaction.

61. However, it was the argument of the Respondent that, as the Appellant disposed of [redacted] entire shareholding on one day to [redacted], it would be in accordance with the principle of "prudent lotting" to treat the disposals as, in effect, one transaction, and that therefore no minority discount was applicable. The Commissioner understands this argument to be that the market value of the [redacted] nterests disposed of by the Appellant should be deemed to be the aggregate market value of those [redacted] nterests when taken together.

62. It was not in dispute that there was no statutory provision in this jurisdiction that has the effect as argued for by the Respondent. The Appellant pointed out that there was such a

statutory provision in the UK (section 71 of the Finance Act 1985, and subsequently section 19 of the Taxation of the Chargeable Gains Act 1992), and argued that it was not open to the Commissioner to seek to apply a similar approach on a non-statutory basis. The Respondent stated that it was immaterial that the Oireachtas had not enacted a similar provision in this jurisdiction, as the principle of "prudent lotting" already existed to deal with cases such as the Appellant's.

63. In support of its position, the Respondent sought to rely upon the judgments in *Duke of Buccleuch v IRC* [1967] 1 AC 506 and *IRC v Gray* [1994] STC 360. *Duke of Buccleuch v IRC* concerned the valuation of an estate for the purposes of estate duty. The House of Lords held that a large estate should be subdivided into its natural units for valuation purposes. In the course of his judgment, Lord Reid stated at page 526 that "*The question of what units to value is a practical question to be solved by common sense.*" In this case, the Respondent stated that it was likewise necessary to apply common sense.

64. *IRC v Gray* concerned capital transfer tax (subsequently known as inheritance tax) in the UK. Hoffman LJ stated at page 372 that

> *"In all other respects, the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life…*
>
> *In Duke of Buccleuch v IRC [1967] 1 AC 506 the House of Lords applied what I might call the reality principle to the question at issue in this case, namely, whether it should be assumed that items of property in an estate were sold separately or together."*

Similarly, in this case, the Respondent asked the Commissioner to apply a "common sense" and a "reality" approach to what happened.

65. However, the difficulty for the Respondent is that the above cases concerned estate duty (*Duke of Buccleuch v IRC*) and capital transfer tax (*IRC v Gray*) and neither concerned CGT. No authority was put forward to demonstrate that the same approach to valuation should be taken in CGT cases. Rather, the authorities put before the Commissioner suggested the opposite.

66. In *Stephen Anthony Solomon Marks v HMRC* [2011] UKFTT 221 (TC), the First Tier Tribunal stated at paragraph 10 that

> *"The cases on death duties under which related assets can be grouped together in order to obtain a better price for both (such as the combination of the deceased's management shares and voting preference shares so as to give voting control in*

Attorney-General of Ceylon v Mackie [1952] 2 All ER 775), which was relied on by Mr Morgan, in our view have no application to capital gains tax. While death duties are computed on the value of the estate as a whole, for which one has to split the assets into saleable parcels, capital gains tax is computed on the disposal of each asset separately." (emphasis added)

67. The Appellant also drew the Commissioner's attention to Tom Maguire's book on Irish Capital Gains Tax, wherein, at paragraph 8.115, the author quoted from HMRC's manual on the definition of market value. Part of the quotation included the following statement:

"The principle that emerges from [IRC v Gray] is that two or more different assets comprised in an estate can be treated as a single unit of property if disposal as one unit was the course that a prudent hypothetical vendor would have adopted in order to obtain the most favourable price without undue expenditure of time and effort. However, the important point to note is that in [inheritance tax] cases it is necessary to value the deceased's entire estate but in Capital Gains Tax cases (subject to the exception mentioned in CG16380...), it is only necessary to value the asset or assets that are included in the disposal. In Capital Gains Tax cases it is generally not appropriate to lot the asset, or assets, included in a disposal together with other assets that, although part of the vendor's estate, were not included in the disposal.

The principle that emerges from [IRC v Gray] may be applicable to Capital Gains Tax valuations in cases where more than one asset is actually included in a single disposal and in cases where the statutory hypothesis on which the valuation is based deems two or more assets to be disposed of together."

68. Importantly, the exception referred to in the above excerpt (i.e. that "*mentioned in CG16380"*) is that contained in section 19 of the Taxation of Chargeable Gains Act 1992, which, as already stated, does not have an equivalent in legislation in this jurisdiction. Consequently, the Commissioner does not agree with the Respondent that the principle of "prudent lotting", as considered in *Duke of Buccleuch v IRC* in respect of estate duty, and in *IRC v Gray* in the context of capital transfer tax / inheritance tax, is applicable in the same way in respect of CGT.

69. The Commissioner considers that better guidance can be gleaned from the authorities relied upon by the Appellant that specifically concerned CGT. In *Aberdeen Construction Group Ltd v IRC* [1978] STC 127, Lord Wilberforce stated at page 131 that

"The business reality of the present case is that the taxpayer company made an investment in Rock Fall… Those managing the affairs of the taxpayer company would

undoubtedly consider any proposition to 'get out' of Rock Fall in the light of this total investment; when they had done so, and obtained £250,000 from Westminster, they so recorded the result in their balance sheet. It is clear however that the capital gains tax legislation prevents the matter being looked at in so simple a manner as this because it imposes the tax on disposals of 'assets' (Finance Act 1965, s 19). So it is necessary to consider separately each asset disposed of, in the light of rules which apply to that asset." (emphasis added)

It is noted that section 28 of the TCA 1997 in this jurisdiction also imposes the tax on the "*disposal of assets*".

70. Additionally, in the English Court of Appeal case of *Whittles (Inspector of Taxes) v Uniholdings Ltd (No 3)* [1996] STC 914, Nourse LJ at page 924 quoted the above section of the judgment in *Aberdeen Construction Group Ltd v IRC* and stated that "*There Lord Wilberforce might have added that it is also necessary to consider separately each gain achieved and loss incurred, in the light of rules which apply to them respectively*."

71. Therefore, the Commissioner concludes that there is no legislative basis or judicial authority to support the approach of the Respondent that the separate disposals made by the Appellant should be aggregated for the purposes of ascertaining their market value. The Commissioner considers that the case law is clear that, in the absence of a statutory deeming provision to the contrary, each disposal must be considered separately for the purposes of calculating CGT.

72. The Respondent sought to rely on the evidence of its expert, [redacted], who believed that the statutory hypothesis meant that he had to consider what a willing vendor on the open market would do, and he believed that such a willing vendor would seek to sell 100% of the company, rather than [redacted] shareholdings of [redacted]. Therefore a minority discount was not appropriate.

73. However, the Commissioner considers that this approach was mistaken. Section 548(1) provides *that "market value", in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market."* (emphasis added). As the case law requires that each disposal must be considered separately, it is the market value of those assets transferred in each disposal that falls to be calculated. The Commissioner is satisfied that there is no basis in law for [redacted] suggested approach of aggregating the value of the disposals, on the basis that a willing vendor would choose to sell 100% of the shareholding in order to maximise value. In the absence of a statutory deeming provision, it is necessary to ascertain the market value of the disposal that actually took place, not a different disposal that another taxpayer might have

chosen to make. In this appeal, the Appellant chose not to dispose of [redacted] 100% shareholding in one lot, and the Commissioner is satisfied that there is no basis on which [redacted] could be deemed to have done so. The fact that the [redacted] disposals took place on the same day, or that they were in equal shares, does not alter or disapply this principle.

74. It was not in dispute that it was appropriate to apply a discount to the market value of a minority shareholding. Indeed, the evidence of [redacted] was that he considered that a discount of approximately 62% would be appropriate in respect of a [redacted] shareholding in a company. This was obviously considerably greater than the discount of 30% applied by the Appellant, and if applied by [redacted] would have resulted in a reduced liability to CGT. However, as the discount figure of 30% was agreed (albeit the Respondent did not believe that any discount should be applied), the Commissioner is satisfied that nothing further arises for consideration herein.

75. In Menolly Homes, Charleton J stated that *"Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute."* For the reasons set out herein, the Commissioner is satisfied that there is no statutory provision that would charge the Appellant to CGT on the aggregate value of [redacted] disposals taken together, and is further satisfied that to do so would contravene judicial authority on the correct approach to charging CGT on the disposal of assets. Consequently, the Commissioner determines that the appeal is successful.

76. Finally, for the avoidance of doubt, the Commissioner does not consider it necessary to address the question of whether subsections (1) and (4) of section 547 require that the market value of an asset on acquisition must necessarily be the same as the market value of the same asset on disposal, and no findings in respect of same are made.

Determination

77. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the amended assessment to CGT raised against the Appellant should be reduced by €2,220,625 to €1,947,728.

78. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

79. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

80. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Simon Noone
Appeal Commissioner
14 October 2024