



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH  
TAX APPEALS COMMISSION

Between

49TACD2026

[REDACTED]

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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## Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) against an amended assessment to income tax raised by the Respondent against the Appellant for the tax year 2005 in the amount of €185,508.
2. The Respondent raised the amended assessment on the basis that there had been a transfer of assets from a company to its members, including the Appellant, such as gave rise to a liability to income tax under section 130 of the Taxes Consolidation Act 1997 as amended (“TCA 1997”).
3. This appeal has been nominated as a lead appeal of a group of appeals, all of which relate to the same, or similar, subject matter. There have been a number of determinations of the Commission on appeals raising similar issues. Furthermore, the High Court (Allen J) in *Hughes v Revenue Commissioners* [2019] IEHC 807 (“*Hughes*”) upheld an assessment to income tax in similar circumstances as pertain herein.

## Background

4. The Appellant was a director and minority shareholder in the company [REDACTED]. The Appellant held [REDACTED] ordinary shares out of a total of [REDACTED] ordinary shares on issue in [REDACTED].
5. On 1 December 2005, the company [REDACTED] was incorporated and had authorised share capital of 1,000,000 ordinary shares of €1.00 each. The Appellant was also a minority shareholder in [REDACTED] holding [REDACTED] A ordinary shares out of a total of [REDACTED] A ordinary shares on issue in [REDACTED].
6. In December 2005, [REDACTED] subscribed for [REDACTED] ordinary shares of €1.00 in [REDACTED] at a premium of [REDACTED] per share and became the controlling shareholder in [REDACTED].
7. On 20 December 2005, the shareholders of [REDACTED] which included the Appellant and [REDACTED] passed a special resolution amending the Memorandum and Articles of Association of [REDACTED] as follows:
  - The authorised share capital of [REDACTED] of 1,000,000 Ordinary shares of €1.00 each was increased to 2,000,000 by the creation of an additional 1,000,000 A Ordinary shares of €1.00 each;
  - [REDACTED] allotted [REDACTED] ordinary shares of €1.00 each to [REDACTED] at a premium of [REDACTED] per share, totalling €1,500,000;
  - [REDACTED] allotted [REDACTED] A Ordinary Shares of €1.00 par as follows:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

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

8. On 21 December 2005, a special resolution was passed by [REDACTED] resolving that the company be wound up. On foot of the liquidation of [REDACTED] the Appellant received a distribution from the share premium account of [REDACTED]

9. On 6 December 2011, the Respondent issued a notice of amended assessment to income tax against the Appellant. The amended assessment was raised on the basis of the proportion of the share premium account to which the Appellant was entitled, i.e. €394,697.

10. The Appellant appealed against the amended assessment to the predecessor of the Commission, and the appeal was subsequently transferred to the Commission following its establishment in 2016. The appeal was stayed pending the judgment of the High Court in *Hughes*. Following the completion of that litigation, the stay on this appeal was lifted.

11. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

13. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
14. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

15. The appeal was heard before the current Commissioner on 24 February 2026. Both parties were represented by Senior Counsel.

### Legislation

16. The legislation relevant to this appeal, as of 2005, is as follows:

17. Section 20 of the TCA 1997 stated that:

*“(1) The Schedule referred to as Schedule F is as follows:*

#### *Schedule F*

- 1. In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 and sections 436 and 437, and subsection (2)(b) of section 816.*
- 2. Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.*

*(2) No distribution chargeable under Schedule F shall be chargeable under any other provision of the Income Tax Acts.”*

18. Section 130 of the TCA 1997 stated *inter alia* that:

*“(2) In relation to any company, "distribution" means –*

- (a) any dividend paid by the company, including a capital dividend;*
- (b) any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except, subject to section 132, so much of the distribution, if any, as represents a repayment of capital on the shares or is, when it is made, equal in amount or value to any new consideration received by the company for the distribution...*

*(3) (a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount")."*

19. Section 135(1)(a) of the TCA 1997 stated that:

*"In this Chapter, "new consideration" means consideration not provided directly or indirectly out of the assets of the company, but does not include amounts retained by the company by means of capitalising a distribution."*

20. Section 544(7) of the TCA 1997 stated that:

*"Any assessment to income tax or any decision on a claim under the Income Tax Acts, and any decision on an appeal under the Income Tax Acts against such an assessment or decision, shall be conclusive in so far as under any provision of the Capital Gains Tax Acts liability to tax depends on the provisions of the Income Tax Acts."*

21. Section 551(2) of the TCA 1997 stated that:

*"There shall be excluded from the consideration for a disposal of an asset taken into account in the computation under this Chapter of the gain accruing on that disposal any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income, profits, gains or losses for the purposes of the Income Tax Acts of, the person making the disposal..."*

## **Evidence**

22. Following discussions between the parties after the commencement of the hearing, a statement of facts was agreed. However, a small number of matters remained unagreed, and therefore brief sworn oral evidence was heard from the Appellant.

23. The Appellant stated that he received €378,900.55 on the distribution arising from the liquidation of ██████. This was because the costs of the liquidation were deducted from the receipts. He also stated that the accounts of ██████ for 2006 showed an investment by ██████ in ██████ of €1.5 million which was subsequently written off at the end of 2005.

24. On cross examination, the Appellant stated that ██████ subscribed for shares in ██████ in order to get a shareholding, with the intention that ██████ would be liquidated and monies released. He stated that he regarded this as an investment by ██████. He assumed that

████ could have subscribed for shares in █████ at par. He stated that the purpose of paying a premium was “*To get 1.5 million into █████ and to liquidate it subsequently.*” He did not accept that this constituted a divestment of █████s built-up reserves in order to release it to its shareholders.

25. It was put to the Appellant that he gave no consideration to █████ for its special resolution divesting itself of any entitlement on the winding up of █████ He disagreed, “*Because my shares in the top company reduced in value quite proportionately by 1.5 million.*” He was asked how █████ gained by the special resolution, and he stated that “*I did not say that █████ gained...I didn’t say that █████ received consideration.*” When asked if he accepted that █████ did not receive consideration, he stated “*No, I am saying I gave up consideration.*” He said that he did not know if █████ received consideration. He was subsequently asked whether he gave consideration to █████ and he stated “*I don’t believe █████ got anything, no.*”

## Submissions

### *Appellant*

26. In written submissions, the Appellant contended that in order for section 130(3)(a) of the TCA 1997 to apply, the transaction had to satisfy four criteria:
- There must be a transfer of an “asset”.
  - The asset must be transferred by the company, █████
  - The transfer must be to a “member” of █████
  - The value of the benefit (taken according to its market value) must be received by the member of █████ and the monetary value of any such benefit is reduced by any “new consideration” given by the member of █████ Where the consideration equals the value of the benefit received then the benefit to be assessed is nil. That is to say that where the “difference” is nil then there is no liability.
27. Issues similar to those in this appeal were considered by the High Court in *Hughes*. However, the Appellant contended that the judgment of Allen J ought not to be applied herein. It was submitted that there was no transfer of assets by █████ but an alteration of the rights that attached to █████s shares in █████ The share rights were not legally separable from the shares to which they were attached. Consequently, the A ordinary shareholders in █████ did not acquire a new asset. Rather the rights of the A ordinary shareholders were altered on the passing of the special resolution.

28. It was submitted that there had been no transfer of assets by ██████ to the Appellants. Rather, what occurred was value was allowed to move over shares in ██████ from ██████ to the A ordinary shareholders. What occurred was that certain rights held by ██████ in ██████ were extinguished and other rights created on the passing of the special resolution.
29. A related point was that the transfer must be made by ██████ to its members in their capacity as members of ██████. The Appellant did not receive the share rights in his capacity as a shareholder in ██████ but in his capacity as a shareholder in ██████. The difference between this case and the facts in *Hughes* was that the appellant in that case was a member of both Hughes Chemical and Greenane.
30. Even if section 130(3)(a) applied, which was denied, a further issue was that any value was reduced by new consideration given by the Appellants and others. Section 135(2)(a) provided that any value received from a company was regarded as “new consideration”. Section 130(3)(a) could only impose taxation on the difference between the amount of the benefit and the amount of any such consideration. The increase in the value of the Appellant’s shareholding in ██████ was offset by the decrease in the value of his shares in ██████.
31. The Appellant further submitted that the transaction was captured by capital gains tax (“CGT”) pursuant to section 543 of the TCA 1997. The function of the Commission on appeal was not to merely consider whether section 130(3)(a) applied but whether under the relevant legislation the transaction was more appropriately captured by some other provision such as section 543.
32. These arguments were reiterated and expounded upon in oral submissions by Senior Counsel for the Appellant. It was submitted that the finding in *Hughes*, that it was not appropriate to consider whether the transaction would have been better captured by section 543 rather than section 130, was incorrect in law. The proper function of the Commission was to have regard to the entirety of the statutory provisions. The judgment of the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18 (“*Lee*”) postdated that in *Hughes* and did not mean that the Commission was limited to dealing with the matter purely on the basis of the provision under which the Appellant had been assessed.
33. Section 551(2) of the TCA 1997 prevented double taxation, but did not prevent the Commission from considering and interpreting the legislation as a whole. The High Court in *Menolly Homes v Revenue Commissioners* [2010] IEHC 49 (“*Menolly Homes*”) had confirmed that one should have regard to the entirety of the applicable statutory

provisions. The proper approach to statutory interpretation was to consider the legislation in context, which was derived from the entire scheme of the legislation. In spite of the judgment in *Hughes*, the Appellant was repeating this argument and sought to rely on the judgment in *Menolly Homes*.

34. Regarding section 130, it was submitted that the share rights were not separable from the shares themselves. Furthermore, it was submitted that the shares did not give their holders any rights in the assets of the company. The share premium account in [REDACTED] was not the property of the shareholders, which was confirmed by the High Court judgment in *Re Permanent TSB Group Holdings plc* [2015] IEHC 500 ("*Permanent TSB*"). While Allen J in *Hughes* appeared to consider that the share premium account constituted income taxable in the hands of the appellant, this was incorrect in law. It did not appear that *Permanent TSB* had been opened to the court in *Hughes*.
35. It was further submitted that the reference in section 130 to a transfer by a company to "*its members*" had to refer to [REDACTED] in this instance, not [REDACTED]. The logical effect of paragraph 67 of the judgment in *Hughes* seemed to be that the veil of corporate personality could be lifted. But the submission of the Appellant was that there was no transfer for the purposes of section 130.
36. Another issue that did not appear to have been pursued in *Hughes* was the question of the value of the benefit. The evidence of the Appellant was that the investment by [REDACTED] in [REDACTED] was matched by a diminution in the value of [REDACTED] which wrote off the loss in its investment.
37. When asked by the Commissioner if there were distinguishing factual features in this appeal compared to *Hughes*, Senior Counsel stated that he was making arguments that did not appear to have been raised in *Hughes*. He also handed in the transcript of a decision from 2013 by the predecessor of the Commission (Commissioner O'Callaghan) which considered a related appeal and which found for the taxpayer.
38. On re-examination, Senior Counsel stated that it did not appear that the judgment in *Permanent TSB* had been opened to Allen J in *Hughes*. *Shearer v Bercairn Ltd* [1980] 3 All ER 295 also supported the Appellant's position. The Appellant was not seeking to challenge the validity of the amended assessment, but was asking the Commissioner to make an assessment based on the provisions of the TCA 1997. There was nothing in the Respondent's own guidance to suggest that the TCA 1997 established a hierarchy of taxes.

*Respondent*

39. In written submissions, the Respondent stated that the grounds relied upon by the Appellant had been determined in the binding judgment in *Hughes*, and that therefore this appeal fell to be determined on the basis of Allen J's judgment in *Hughes*.
40. It was not accepted that the Commission had jurisdiction to consider whether the CGT provisions constituted a "better fit" for the transaction. This argument had been rejected in *Hughes*. Furthermore, the jurisdiction of the Commission was clarified and confirmed in *Lee*.
41. Prior to the special resolution of 21 December 2005, the Appellant did not enjoy a right to receive a distribution from the share premium account of [REDACTED]. After 21 December 2005, he did. This was only because that right, previously enjoyed by [REDACTED] was transferred to the Appellant (who was a member of [REDACTED] to be enjoyed by him as the owner of shares in [REDACTED]. The Appellant could not otherwise receive €394,696 as a distribution on the winding up of [REDACTED].
42. In *Hughes*, the transfer of share rights was in all material respects the same as occurred in this appeal – Hughes Chemical Ltd and Raymond Hughes were both shareholders in Greenane Developments Ltd. Hughes Chemical passed valuable share rights in Greenane to Mr Hughes via special resolution. Allen J concluded that this was a transfer for the purposes of section 130.
43. Furthermore, in *Hughes*, Allen J analysed the relevant authorities and concluded that share rights were assets. The share rights herein carried significant real value, which indisputably passed from [REDACTED] to the Appellant, who turned those rights to account, to his considerable benefit.
44. There were no limiting words either before or after "transfer" in section 130(3)(a). The requirement was simply that an asset was transferred "by a company to its members." Nor, on the plain meaning of the words used, did the transfer have to be to a member in their capacity as member. The Appellant was a member of [REDACTED] and received a valuable asset – share rights from [REDACTED].
45. In oral submissions, Senior Counsel stated that what was of consequence was the value of the share premium account as at the time the special resolution was passed. This gave the A ordinary shareholders, including the Appellant, the entitlement to have sole benefit of the monies in the share premium account of [REDACTED] if they wished to call for a winding up. What the Appellant ultimately received on the distribution was not relevant to the

assessment. That the shareholders decided to pay €60,500 to the liquidator was a matter for them.

46. There was nothing novel arising from the facts of this appeal. The Appellant had not differentiated the appeal from *Hughes*. The Commissioner was bound by the judgment in *Hughes*, and furthermore there were other determinations of the Commission that were of assistance, including 10TACD2016, 24TACD2018 and 120TACD2023.
47. The Appellant's evidence was that he lost value in [REDACTED] by reason of the special resolution. That did not constitute him giving consideration to [REDACTED] and it was clear from the evidence that no consideration was given. It was open to the Commissioner to find as a material fact that no new consideration was given by the Appellant to [REDACTED]. Section 135(1)(a) of the TCA 1997 defined "new consideration" as consideration not provided directly or indirectly out of the assets of the company. But the consideration provided herein was clearly provided out of the assets of [REDACTED] and could therefore not be considered to be new consideration for the purposes of section 130.
48. The Appellant had sought to argue that section 135(2)(a) provided that any value received from a company was regarded as "new consideration". But this was not what that section stated; rather it sought to restrict what could be regarded as new consideration. In 24TACD2018, the Commission found that the transfer of rights by special resolution did not require an obligation to pay any consideration. Exactly the same circumstances existed herein. There was no reference within the special resolution to any form of consideration being provided in exchange for the benefit being received. A similar determination was reached in 120TACD2023.
49. The Appellant had failed to demonstrate how this appeal differed in substance from *Hughes*. The limits on the Commission's jurisdiction as outlined in *Hughes* also applied herein. Those limits were confirmed by Murray J in *Lee*. The Appellant seemed to be arguing that the amended assessment was invalid, but this was a matter that could only be addressed in a judicial review.
50. The TCA 1997 provided for a hierarchy of taxes, with income tax at the top. It was only if income tax did not apply that CGT would be considered. This position was confirmed by sections 544(7) and 551(2) of the TCA 1997. Just because whomever devised the scheme envisaged that it would be captured by CGT did not mean that income tax was not applicable.
51. Regarding the Appellant's argument in respect of the share premium account, all of the assets of a company were indirectly owned by its shareholders. The special resolution

granted control over the share premium account to the shareholders including the Appellant, and this was the taxable event. *Permanent TSB* simply confirmed that the rights of members of a company were determined by the articles of association, and were to the net assets of the company.

### **Material Facts**

52. As stated above, a statement of facts was agreed between the parties at the hearing. Based on that statement, the Commissioner makes the following findings of material fact that he understands to be agreed or uncontroverted:

52.1. [REDACTED] is a limited liability company registered under the Companies Acts, which was incorporated on [REDACTED]. The Appellant was a shareholder in and a director of [REDACTED] from in or around the early 1990s.

52.2. [REDACTED] was incorporated on [REDACTED]. It had an authorised share capital of 1,000,000 ordinary shares of €1.00 each.

52.3. On 20 December 2005, [REDACTED] as controlling member of [REDACTED] passed a special resolution amending the Memorandum of Association and Articles of Association of [REDACTED] as follows:

i. The authorised share capital of [REDACTED] of 1,000,000 ordinary shares of €1.00 each was increased to 2,000,000 by the creation of an additional 1,000,000 A ordinary shares of €1.00 each.

ii. [REDACTED] allotted [REDACTED] ordinary shares of €1.00 each to [REDACTED] at a premium of [REDACTED] per share, totalling €1,500,000.

iii. [REDACTED] allotted [REDACTED] A ordinary shares of €1.00 par as follows:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

52.4. On 21 December 2005, [REDACTED] as controlling member of [REDACTED] passed a special resolution amending the Memorandum of Association and Articles of Association of [REDACTED] as follows: certain rights attaching to the A ordinary shares of [REDACTED]

(held by the Appellant, [REDACTED])  
became those formerly attached to the ordinary shares of [REDACTED] (held by [REDACTED]).

52.5. On 21 December 2005, a special resolution of [REDACTED] was passed as set out below:

*“Resolved as special resolutions*

*(i) Alteration in share class rights*

*“That the rights attaching to the 1,000,000 Ordinary Shares, both issued and unissued in the share capital of the Company and the 1,000,000 “A” Ordinary Shares, both issued and unissued in the share capital of the Company be altered as follows:*

*(A) Voting Rights*

*The “A” Ordinary Shares shall alone confer on the holders thereof the right to receive notice of and attend, speak and vote at general meetings of the Company with each Share entitling the holder thereof (both on a show of hands and on a poll) to one vote per share. The holders of the Ordinary Shares shall not have any right to receive notice of or to attend, speak or vote at any general meetings of the Company.*

*(B) Rights to dividends*

*The Company may at any time and from time to time declare a dividend in respect of the Ordinary Shares or the A Ordinary Shares without any dividend being declared on the other class of share and dividends of differing percentages or amount may at any time and from time to time be declared upon either class of share. Regulation 120 of Table A Part 1 shall be modified accordingly.*

*(C) Winding up*

*On a winding up the assets available for distribution among the members shall be applied as follows and in the following order of priority:-*

*(a) First the holders of the Ordinary Shares shall be entitled to the return of the nominal capital paid up or credited as paid up there on in priority to the repayment of capital on any other class of shares;*

*(b) Next, the holders of the A Ordinary Shares shall be entitled to the return of the nominal capital paid up or credited as paid up thereon;*

(c) Then the share premium account if any shall be distributed to and amongst the holders of the A Ordinary Shares;

(d) Finally, any surplus remaining shall be distributed to and amongst the holders of the A Ordinary Shares in the Company in proportion to the amount of the capital paid up or credited as paid up upon their respective A Ordinary Shares.”

- 52.6. The foregoing facilitated the exercise of the rights attaching to the A ordinary shares held by the Appellant, [REDACTED] [REDACTED] to receive a distribution from the share premium account.
- 52.7. Later on 21 December 2005, it was resolved by the A ordinary shareholders that [REDACTED] be wound up. [REDACTED] was dissolved on [REDACTED].
- 52.8. The details of the transaction and the details of the amount involved were not treated by the Appellant as a distribution and these details were not included for income tax purposes in the 2005 tax return of the Appellant.
- 52.9. On 6 December 2011, the Respondent issued a notice of amended assessment to income tax against the Appellant. The amended assessment was raised on the basis of the proportion of the share premium account to which the Appellant was entitled on a *pro rata* basis, i.e. €394,697. The amount assessed to income tax on the Appellant was €185,508.
- 52.10. The Appellant appealed against the amended assessment to the predecessor of the Commission, and the appeal was subsequently transferred to the Commission.
53. Additionally, having considered all of the documentary and oral evidence submitted and the submissions provided, the Commissioner makes the following findings of material fact on matters that were not agreed:
- 53.1. The declared costs of the liquidation of [REDACTED] were €60,500. Therefore, the amount that the Appellant actually received following the deduction of his portion of the liquidator’s costs was €378,900.55.
- 53.2. No new consideration was given by the Appellant to [REDACTED] in exchange for the special resolution divesting itself of any entitlement on the winding up of [REDACTED]
- 53.3. There were no substantive factual differences between the appeal herein and the facts as found by the High Court in *Hughes*.

## Analysis

54. In *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.*”
55. Furthermore, in *Hanrahan v The Revenue Commissioners* [2024] IECA 113 (“*Hanrahan*”), 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.....”*

### *The Hughes judgment*

56. The Respondent has contended that this appeal concerns “*an identical series of steps*” as considered by Allen J in *Hughes*, and that therefore the Commission is bound to apply that judgment and uphold the amended assessment. The Appellant has contended that this appeal is distinguishable from *Hughes*, but has also argued that *Hughes* was wrongly decided and that the court did not consider relevant arguments.
57. It is a basic and fundamental element of the common law system that lower courts and tribunals are bound to apply the law as interpreted by the superior courts. Indeed, this was re-emphasised by the Court of Appeal in the last sentence of the portion of the judgment in *Hanrahan* quoted above. The Commissioner does not accept that he has any jurisdiction to find that the High Court erred in law, nor that it failed to properly consider relevant arguments. Any such finding could only be made by the superior courts themselves.
58. Consequently, it is necessary to consider the factual circumstances in *Hughes* to ascertain if they are substantively different to those herein, so this appeal can be

distinguished from *Hughes*. If not, the Commissioner is satisfied that he is obliged to apply the findings in *Hughes*, *mutatis mutandis*, to this appeal.

59. At paragraph 4 of *Hughes*, Allen J noted that “*In January, 2006 a scheme was devised to liberate €2 million from Hughes Chemical and to put the money into the hands of the shareholders, the appellant and his wife.*” He then went on to note the following findings of fact in respect of that scheme:

“9 *Greenane Developments was incorporated in September 2004. Its sole shareholder immediately prior to 30th January, 2006 was Hughes Chemical, which held 100 ordinary shares. Those shares carried the right to receive notice of, to attend, and to vote at general meetings of the company and to participate in profits and any surplus of capital.*

10 *On 30th January, 2006 the memorandum and articles of association of Greenane Developments were amended to increase the nominal share capital from €1 million to €3 million by the creation of 2 million A ordinary shares of €1 each. There were no voting rights attached to the A ordinary shares. The articles provided that on a winding up the holders of the A ordinary shares were entitled in priority to the return of capital paid up on those shares but not to participate in any share premium account or surplus of capital.*

11 *On the same day, Hughes Chemical subscribed for 100 ordinary shares at €20,000 each and Mr. & Mrs. Hughes respectively subscribed for 94 and 6 A ordinary shares, at par.*

12 *On 31st January, 2006 the articles of association of Greenane Developments were again amended by special resolution so that the voting rights and the right to participate in surplus capital were vested in the holders of the A ordinary shares, to the exclusion of the holders of the ordinary shares.*

13 *On 1st February, 2006 a special resolution was passed for a members' voluntary winding up of Greenane Developments. The winding up produced a surplus of €1,981,470, which was paid to Mr. and Mrs. Hughes as the holders of the A ordinary shares.”*

60. The Commissioner considers that it is readily apparent that the fundamental facts of the scheme in *Hughes* are essentially identical to those in this appeal. While the dates, *dramatis personae* and amounts at issue are different, the steps taken by the taxpayer in *Hughes* to liberate money from Hughes Chemical are effectively the same steps taken by



to any other judgment of the superior courts that casts doubt on the reasoning applied in *Hughes*.

64. Consequently, as he has found that the facts in this appeal are substantively the same as those considered by the High Court in *Hughes*, the Commissioner is satisfied that he is bound to apply the reasoning in *Hughes* to the appeal in this determination. The Commissioner will now proceed to consider the arguments raised by the Appellant in turn.

*Whether the transaction should be subject to CGT rather than income tax*

65. In oral submissions, Senior Counsel for the Appellant argued that the proper function of the Commission was to have regard to the entirety of the statutory provisions, and that the transaction that was the subject of the appeal was better captured by CGT rather than income tax. He argued that *Hughes* was wrongly decided on this point, and sought to rely on comments by Charleton J in *Menolly Homes*.

66. A similar argument was made in *Hughes*, and Allen J stated that:

*“38 In my opinion the appellant's reliance on Menolly Homes Ltd. is misplaced. That was an application by way of judicial review for an order quashing a decision of the Appeal Commissioner refusing to allow the taxpayer to cross-examine the Inspector of Taxes who had raised an assessment to value added tax. The object of the proposed cross-examination was to examine the inspector as to his state of mind when he made the assessment, specifically to try to show that the demand had been unlawful because he had not had “reason to believe” that the tax was due and payable. Charleton J. found that any issue as to the validity of the assessment was outside the scope of the appeal: which was limited to determining the amount, if any, of the tax due. The Appeal Commissioner's jurisdiction was confined to deciding whether the amount of the liability should be abated in its entirety, reduced, left stand, or increased.*

*39 The issue in ex parte Elmhirst was whether a taxpayer who had appealed an assessment to income tax to the Special Commissioners of Income Tax could withdraw his appeal without the consent of the Special Commissioners. The divisional court of King's Bench and the Court of Appeal in England held that he could not, because when the notice of appeal was given it became the duty of the Special Commissioners to arrive at a true assessment.*

*40 Both cases are authority for the proposition that the jurisdiction and duty of the Appeal Commissioners is to determine the amount, if any, of the tax assessed properly due and owing on the assessment. In Menolly Homes Ltd. it was value added tax; in ex parte Elmhirst it was income tax. Neither is authority for the proposition underlying*

*the appellant's submission which effectively is that the Tax Appeals Commission or the Circuit Court judge should have substituted a liability to capital gains tax (albeit a nil liability) for the assessment to income tax.*

*41 The legislation expressly contemplates that the disposal of assets may attract income tax. Sections 544(7) and 551(2) of the Taxes Consolidation Act, 1997 provide that if a receipt is chargeable to income tax, then it will not also be chargeable to capital gains tax.*

*42 The object of statutory interpretation is to discern the intention of the Oireachtas. That intention is to be ascertained by construing the words used. If the legislative intention is discernible from the words used, I can see no basis in law or in logic upon which the court might embark on an enquiry as to whether the intention might have been better expressed by the use of other words.*

*43 Moreover, the premise of the proposition that s. 543 is a better fit, or a happier formulation, or better or more clearly catches the transactions of 31st December, 2006 is that s. 130(3)(a) is a fit – albeit not as good a fit – or catches the transactions – albeit perhaps not as clearly as section 543 – while the appellant's real argument is that they are not caught by s. 130(3)(a) at all.*

*44 I fully agree with the Circuit Court judge that the approach urged on behalf of the appellant is not helpful and that the correct approach is to consider whether s. 130(3)(a) applied, even if another provision might apply, and that it is not necessary or appropriate to decide whether another provision did in fact apply.”*

67. Consequently, the Commissioner is satisfied that his role is limited to considering whether section 130(3)(a) of the TCA 1997 applies to the transaction herein, and he is not at liberty to consider whether CGT would have been a “*better fit*”. The Commissioner considers that this approach is confirmed by the Court of Appeal judgment in *Lee*, wherein Murray J considered the jurisdiction of the predecessor of the Commission and stated that:

*“20. The issue is, first and foremost, one of statutory construction. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation.*

[...]

31...Read together the provisions strongly suggest what is envisaged by s. 933 and the supporting legislative scheme is an appeal against an assessment alone directed solely to whether the Inspector has properly reflected the statutory charge to tax in the assessment itself, with the Appeal Commissioners abating, reducing, letting stand or indeed increasing the assessment as appropriate in the light of the facts and law found relevant to that inquiry...

[...]

64. I have explained earlier why I do not believe that the provisions of the TCA accommodate this construction. From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The 'incidental questions' which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment..."

68. While this judgment concerned the predecessor to the Commission, the Commissioner is satisfied that the comments above apply equally to the current Commission. The Appellant did not point to any countervailing precedent that demonstrated a power to apply a different tax head than that stated on the assessment on the basis that the Commissioner might consider it to be a "better fit" to the relevant transaction. Consequently, the Commissioner is satisfied that his role is limited to considering whether the Appellant has been correctly assessed to tax under section 130(3)(a).

#### *Whether the share rights were separate assets*

69. The Appellant contended that there had been an alteration of the rights that attached to ██████s shares in ██████ as a result of the special resolution, and that these rights were not legally separable from the shares to which they were attached.
70. A similar argument was raised in *Hughes*, and Allen J considered various authorities on what constituted an asset. At paragraph 52 he stated that:

*"It seems to me that the proposition that share rights are not legally separable from the shares to which they attach is shown to be wrong by the transactions in this case. The Circuit Court judge said that he was tempted to say so. In my view there was no reason*

*why he could not have said so. The resolution of 31st January, 2006 stripped the participation and voting rights from the ordinary shares and vested them in the holders of the A ordinary shares. The fact that the rights had to be attached to one or other class of shares does not mean that they are not valuable or capable of being moved (to use an entirely neutral term) from one class to the other."*

71. He then concluded as follows:

*"58 Arthur D. Little, then, is clear authority for the proposition that the right of disposal of shares is severable from the rights to vote and to receive and retain dividends and distributions. It seems to me that there is no reason in principle why the charge might not have extended to the right to receive and retain dividends and distributions, while leaving in the hands of chargor the right to vote.*

*59 In this case the effect of the special resolution was that Mr. and Mrs. Hughes became entitled to both the right to vote and the right to participate in the surplus, but it is useful to contemplate that the rights might have been split. Theoretically, if the right to trigger a winding up was divorced from the distribution right, Mr. and Mrs. Hughes' prospects of obtaining the money might have depended on Hughes Chemical voting for a members' voluntary winding up.*

*60 I am satisfied that the rights attached to the shares in Greenane Developments to attend and vote at general meetings and to participate in a surplus on winding up were valuable rights which were divisible from the shares to which they were attached and were assets."*

72. Consequently, as there does not appear to be any substantive difference between the share rights considered in *Hughes* and those herein, the Commissioner is satisfied that the share rights held by ██████ in ██████ were assets and were separable from the shares themselves.

*Whether the assets were transferred*

73. The Appellant contended that the A ordinary shareholders in ██████ did not acquire a new asset on the passing of the special resolution, and that there had been no transfer of assets by ██████ to its members. A similar argument was made in *Hughes*, wherein Allen J stated that:

*"67 It seems to me that the fundamental flaw in this argument is that it fails to recognise the basic principle of company law spelled out in Borland's Trustee that the articles of association are a contract between the members and the company, and between the members inter se. The resolutions, which are passed by the members and not by the*

*company, create a contract between the members and the company, and the members inter se, as to how the assets of the company are to be distributed in the event of a winding up. While it is perfectly correct to describe the resolutions as resolutions of the company, it does not follow that they are not also resolutions of the members.*

*68 It is accepted by the appellant that the resolution of 31st January, 2006 effected a “movement of share rights as between different classes of shares”. The rights moved from the ordinary shares, held by Hughes Chemical, to the A ordinary shares, held by Mr. and Mrs. Hughes. That movement occurred because Hughes Chemical, as the only shareholder in Greenane Developments entitled to vote, voted for the extinguishment of the rights attaching to its shares and the creation of the same rights in the shares owned by Mr. and Mrs. Hughes. As a result of the action of Hughes Chemical, the rights in Greenane Developments theretofore held by it were thereafter held by Mr. and Mrs. Hughes.*

*69 The appellant, by reference to the definition of a transfer offered by Murdoch and Hunt, argues that the rights acquired by Mr. and Mrs. Hughes did not come “from” Hughes Chemical but were new rights created on the extinguishment of the rights of Hughes Chemical. That may be so, but as counsel for the Revenue point out, what s. 130(3)(a) captures is a transfer “by” rather than a transfer “from” a company.*

*70 On the same day and by the same resolution, by the vote of Hughes Chemical, the rights to vote and to participate in a surplus of assets in Greenane Developments ceased to belong to Hughes Chemical and came to belong to Mr. and Mrs. Hughes. The resolution and the amended articles of association amounted to an agreement between Hughes Chemical and Mr. and Mrs. Hughes that the rights in Greenane Developments formerly enjoyed by Hughes Chemical would thenceforth be enjoyed by Mr. and Mrs. Hughes. I cannot see how this was anything other than a transfer.*

*71 In my view the Circuit Court judge was correct in his determination that the extinguishment of a right and creation of a new right could be a mechanism to effect a transfer and that there was abundant justification for his conclusion that the resolution effected a transfer.”*

74. Consequently, as there has been no distinction drawn between the relevant facts in *Hughes* and those applying to this appeal, the Commissioner finds that the special resolution of 21 December 2005 transferred the share rights in [REDACTED] from [REDACTED] to its shareholders, including the Appellant.

*Whether there was a transfer by the company to its members*

75. The Appellant argued that the transfer of the assets had to have been made by ██████ to its members in their capacity as members of ██████ rather than as members of ██████
76. Again, a similar argument was raised in *Hughes*, which was dealt with by Allen J as follows:

*“72 The appellant's third argument is that any transfer (if there was one) of any assets (if any) was not made to them in their capacity as members.*

*73 It is submitted on behalf of the Revenue that this contention would add to s. 130(3)(a) a requirement which is simply not in the wording. The paragraph, it is said, simply identifies the recipient of the assets, and no more. I agree.*

*74 The appellant acknowledges that the finding of the Circuit Court judge that s. 130(3)(a) does not require the transfer of assets to the member to be in his capacity as a member “may be correct as an abstract construction but ... it does not elucidate the matter in the instant case”. The argument then goes back to the proposition that there was no transfer.*

*75 I take the acknowledgement that the finding of the Circuit Court judge may have been correct, absent any argument as to why it was not or might not have been correct, as an acknowledgement that the finding was correct: which it was.”*

77. In oral submissions, senior counsel for the Appellant argued that paragraph 67 of *Hughes* (at paragraph 73 above) seemed to imply that the veil of corporate personality could be lifted, and questioned “*where do you begin and end?*” The Commissioner understood this to constitute an argument that Allen J had gone too far in his comments that “*While it is perfectly correct to describe the resolutions as resolutions of the company, it does not follow that they are not also resolutions of the members.*”
78. However, as already stated, the Commissioner is bound to follow the judgment of the High Court in *Hughes*, and therefore finds that there was a transfer of the share rights by ██████ to its members, including the Appellant.

*Whether the share premium account was income taxable in the hands of the Appellant*

79. Senior Counsel for the Appellant placed considerable emphasis in oral submissions on the argument that the ██████ share premium account belonged to ██████ and not its members, and that therefore the Respondent had wrongly assessed the Appellant to tax on the basis of the monies in the share premium account.

80. While it does not appear that an argument in precisely the same terms was raised in *Hughes*, it is clear that Allen J was satisfied that the share premium account of Greenane Developments was income taxable in the hands of the taxpayers:

*“77 In the course of his determination, the Circuit Court judge suggested that the only legal relevance of the €1,981,470 – which was the amount paid out by the liquidator – was that it was a reliable measure of what the value of the benefit was on 31st January, 2006. While it is a very small point, I think that the Circuit Court judge was not strictly correct. The assessment to income tax was not for the amount of the distribution following the liquidation but for the amount of the share premium account of Greenane Developments, which was €1,999,900: the difference between the €2 million subscribed by Hughes Chemical and the right to the return of the nominal value of the shares, which it retained.*

*[...]*

*80 On the transfer to Hughes Chemical of the original shares in Greenane Developments, Hughes Chemical became entitled to the return of capital on those shares. On their subscription on 30th January, 2006 for the new ordinary and A ordinary shares, each of Hughes Chemical and Mr. and Mrs. Hughes became entitled to the return of capital on those shares, with the A ordinary shares entitled to priority over the ordinary shares. As of 30th January, 2006 the total amount that had been subscribed was €2,000,200: €100 for the first 100 ordinary shares at par; €2 million for the second 100 ordinary shares at a premium of €19,999; and €100 for the A ordinary shares at par. The share premium account was €1,999,900. Ignoring the inevitable costs of winding up, the surplus on the morning of 1st February, 2006 was €1,999,900.*

*81 After the passing of the special resolution on 1st February, 2006 Hughes Chemical was entitled to the return of the nominal value of its shares - €200 - and Mr. and Mrs. Hughes to the return of the nominal value of their shares - €100. The right to take the surplus had been transferred to Mr. and Mrs. Hughes: but the amount of the surplus – again ignoring the costs of winding up – was the same. The rights to priority, to vote, and to participate in the surplus had been switched. The ordinary shares no longer carried the right to vote and participate but they now carried the right to priority. Since Greenane Developments had €2 million or so in the bank, the order of priority for distribution was of no practical significance, but legally there was no identity of rights. It seems to me that the fact that the rights were not the same goes to show that the rights attaching to each class of share were divisible and transferrable.”*

81. Counsel for the Appellant contended that this was wrong in law, and sought to rely on paragraph 100 of *Permanent TSB*, wherein Barrett J stated that:

*“It appears to the court that the contentions of the Notice Parties fundamentally misunderstand the nature of company capital, including share premium, and/or of shareholder funds. Capital and reserves represent a balancing item as between assets on the one hand and liabilities to creditors and other accruals on the other hand. Capital in that sense arises from double-entry book-keeping, insofar as for every asset of the company there are contra-entries represented by debts due to creditors and/or capital (which represents the interest of the members in the net assets). Capital is not, however, an asset. Neither, to use a colloquialism, is it a “pot of money”. It is a false belief that paid-in capital is a thing to which particular members, at a particular time, have any specific rights. As noted above, the rights of members are measured by the number of shares held, and are determined by the articles of association. The rights of members of the Company are to the net assets of the Company: if the assets of the Company are worthless, the shares are likewise worthless.”*

82. At the risk of repetition, the Commissioner cannot find that the High Court erred in law in *Hughes*. It is clear from the quotations above that Allen J was satisfied that the share premium account of Greenane Developments was income taxable in the hands of the taxpayers in that appeal. Accordingly, the Commissioner is satisfied that the share premium account of ██████ was income taxable in the hands of, *inter alia*, the Appellant.
83. In any event, *Permanent TSB* preceded the judgment in *Hughes*, and therefore the Commissioner must assume that Allen J was well aware of the judgment, or at the very least the relevant legal principles, when reaching his own conclusions, notwithstanding that it may not have been opened to him in submissions. Furthermore, the Commissioner agrees with the Respondent that *Permanent TSB* does not contradict *Hughes*, as it confirms that the rights of members of a company were determined by the articles of association, and that the rights of the members were to the net assets of the company. The effect of the special resolution herein was to grant control over the share premium account to the members, including the Appellant.
84. Finally, the Appellant also sought to rely on the judgment in *Shearer v Bercaim Ltd* [1980] 3 All ER 295. However, as this also preceded the judgment in *Hughes*, the Commissioner must again assume that it was within the knowledge and contemplation of the court when reaching its conclusions. Additionally, that case concerned the taxation of a company so involved different considerations to those herein.

*Whether there was new consideration given by the Appellant*

85. The Appellant contended that section 130(3)(a) could only impose taxation on the difference between the amount of the benefit and the amount of any new consideration given by him. As the increase in the value of his shareholding in ██████ was offset by the decrease in the value of his shares in ██████ there was no income tax arising.
86. A similar argument did not appear to have been raised in *Hughes*, and therefore to that extent it could perhaps be stated that this was a distinguishing element of this appeal. However, it does not appear to the Commissioner that there was any form of new consideration given by the Appellant to ██████ over and above that which was given by the taxpayer in *Hughes* to Hughes Chemical. Therefore, it seems to the Commissioner that the overall judgment in *Hughes* binds him on this point as well, as there does not appear to be any substantive factual distinction between the two cases.
87. In any event, evidence was heard from the Appellant regarding what new consideration, if any, was given by him to ██████. He stated that he “gave up consideration” because the value of his shares in ██████ decreased. However, he could not point to any consideration given by him to ██████ for its special resolution divesting itself of its entitlement to the winding up of ██████ and subsequently stated that “I don’t believe ██████ got anything, no.”
88. Section 130(3)(a) states that:
- “Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as “the relevant amount”). (emphasis added)*
89. Therefore, any new consideration has to have been given by “the member”, i.e. the Appellant. The Commissioner is satisfied based on the evidence that the Appellant gave no new consideration to ██████ for the special resolution. Furthermore, the special resolution of ██████ did not state that any new consideration was required from its members. Consequently, the Commissioner is satisfied that there was a transfer of assets in the form of the movement of share rights from ██████ to its members for a value in excess of any consideration paid.
90. The Commissioner does not agree that any diminution in the value of the Appellant’s shareholding in ██████ could constitute new consideration given by him to ██████. Even if

any such diminution could constitute new consideration in principle, he considers that it would be excluded by section 135(1)(a) of the TCA 1997, which provided that “*new consideration’ means consideration not provided directly or indirectly out of the assets of the company...*”

91. Therefore, the Commissioner determines that no new consideration was given by the Appellant to [REDACTED]

#### *Additional matters*

92. Before concluding, there are some additional matters that the Commissioner will briefly address. The Appellant was assessed on the amount in the share premium account that was attributable to him on a *pro rata* basis, i.e. €394,697. However, his evidence was that he received less than this on the distribution, as the costs of the liquidation were first deducted. His evidence was that he received €378,900.55.
93. The Commissioner accepts the evidence of the Appellant regarding how much was ultimately received by him. However, he is satisfied that the taxable event was the special resolution of 21 December 2005 and not the distribution on liquidation of [REDACTED] and therefore agrees with the Respondent that the Appellant fell to be assessed on the amount in the share premium account to which he was entitled. This is confirmed by the judgment in *Hughes*, wherein Allen J upheld the assessment raised on the basis of the amount in the share premium account, not the amount produced on the winding up.
94. Finally, Senior Counsel for the Appellant asked the Commissioner to take into consideration the decision of Commissioner O’Callaghan dated 26 April 2013, on a related appeal. The Commissioner agreed to accept the transcript of the decision, while pointing out that it obviously could not “trump” the judgment of the High Court in *Hughes*. The Commissioner has considered the decision and notes that it found in favour of the taxpayer on the basis that the share rights could not be classed as an asset. However, the High Court subsequently found differently, and the Commissioner has applied that judgment to the facts herein.
95. In conclusion, the Commissioner is satisfied that the Appellant was correctly assessed to income tax pursuant to section 130(3)(a) of the TCA 1997, and the appeal is unsuccessful.

#### **Determination**

96. 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 finds

that the amended assessment to income tax for the year 2005 in the amount of €185,508 should stand.

97. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular section 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**

98. 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**

99. 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  
26 March 2026

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