Appeal No. REDACTED

Between/

NAME REDACTED

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondents

DETERMINATION

A. Introduction

1. This appeal involves a claim for retirement relief in relation to the sum of €749,000 received by the Appellant following the redemption and cancellation in 2009 of 12,500 shares in a company, **REDACTED**, of which the Appellant was Managing Director and majority shareholder.

2. On the 15th of August 2014, the Respondents issued an Amended Assessment in respect of the year ended 31 December 2009 in the amount of €357,464. By letter dated the 8th of September 2014, the Appellant, by his agents, appealed against the Amended Assessment on the grounds that:-

(a) no tax was in fact due, and

(b) the Respondents had misinterpreted the legislation in that the Appellant had fully complied with the conditions set out in sections 176 to 186 of the Taxes Consolidation Act 1997.

3. The appeal duly came on for hearing before me and I heard the sworn evidence of the Appellant and his son, **NAME OF SON 3 REDACTED**.

B. <u>Chronology of events giving rise to the appeal</u>

4. Having regard to the nature of the statutory tests which I shall be required to consider for the purposes of this determination, I think it is necessary to set out in some detail the history of events leading up to the events which took place on 21 December 2009 and gave rise to this appeal.

5. At the age of 12, the Appellant emigrated with his family from **REDACTED** to **REDACTED**. In 1970, having trained and worked in **REDACTED** and **REDACTED** for a number of years, and developed an expertise in the field of **REDACTED**, the Appellant returned to Ireland. In 1978, he established his own business and a company, **REDACTED** Limited (this is the name recorded in the Companies Registration Office records, although I note the spelling is different to the spelling of **REDACTED**, which latter spelling is used consistently in the company documentation discussed hereinafter), was incorporated for the purpose of carrying on that business. It is hereinafter referred to as **"the Company"**. The business of the Company centred on the design, supply, servicing and calibration of **REDACTED** and **REDACTED** systems.

6. The Appellant was Managing Director of the Company. He held 99% of the Company's 50,000 issued shares and his wife held the remaining 1%. At some point prior to 2009, the Appellant transferred the ownership of 5,500 shares to a company called **NAME OF RELATED COMPANY REDACTED** Limited, which I understand was owned by his son **NAME OF SON 3 REDACTED**, although it appears from the Company's 2009 Financial Statements that the Appellant continued to hold these shares in trust for **NAME OF RELATED COMPANY REDACTED** Limited until December 2009. Accordingly, as of the date of the transactions giving rise to this appeal, the ownership of the Company was as follows:-

(i)	Appellant	44,000 shares	88%
(ii)	Appellant (in trust for **REDACTED** Ltd)	5,500 shares	11%
(iii)	Appellant's wife	500 shares	1%

7. The Appellant and his wife were, until 2008, the Company's sole directors. It was clear from his evidence that for most of its existence, the Appellant was the driving force behind the Company; he was involved in a very hands-on manner in every aspect of the Company's operations, worked long hours to develop the business and was, as he put it himself, in charge of everything that was happening within the Company.

8. The Appellant's hard work bore fruit and over the following three decades he grew the Company and its business to the point where in 2008 it had 32 employees, a turnover in excess of €2,000,000 and net assets of just under €2,500,000.

9. Each of the Appellant's four children had or have an involvement in the Company. His eldest son, **NAME OF SON 1 REDACTED**, worked in the Company for a number of years until forced to retire for health reasons; **NAME OF SON 1 REDACTED**'s two sons, the Appellant's grandchildren, are now employed as **REDACTED** by the Company. His daughter, **NAME OF DAUGHTER REDACTED**, is the Company's **REDACTED**. The Appellant's son **NAME OF SON 2 REDACTED** worked with the Company on and off for a number of years before taking up employment elsewhere. Finally, the Appellant's son **NAME OF SON 3 REDACTED** has worked in the Company since his college days, initially on a part-time basis and then on a full-time basis from 1998 onwards.

10. **NAME OF SON 3 REDACTED** initially studied **REDACTED** before going on to obtain a degree in **REDACTED**. Both of these qualifications brought him skills which he was able to exercise to the benefit of the Company and his role and position within the Company developed over the years to the point where he effectively became the Appellant's right-hand man. In 2008, **NAME OF SON 3 REDACTED** was made a director of the Company.

11. After reaching a peak in 2008, the Company suffered a serious blow in the form of the loss of two key customers in 2008 and 2009 that together represented approximately 50% of the Company's turnover. It became apparent to the Appellant that the Company had grown over-reliant on a small number of large customers, whose loss could and did result in very serious detriment to the Company. This, coupled with a number of sad events in the Appellant's personal life, caused him to resolve that it was time to step back from the business he had grown and pass it on to the next generation.

12. The Appellant's son, **NAME OF SON 3 REDACTED**, had introduced a new firm of accountants as the Company's auditors in early 2009 and this firm was asked to advise the Company and the Appellant in relation to succession issues. The Appellant, having discussed the matter with his family, decided that he would retire from the day-to-day running of the Company but would remain on as Chairman, so that the Company could continue to benefit from his expertise and experience, and so that there would be a degree of continuity for certain long-standing customers of the Company. The Appellant's son **NAME OF SON 3 REDACTED** would take over as the Company's new Managing Director. The Appellant further decided that he would pass on part of his shareholding to his children to give them a stake in the business.

13. The Appellant gave evidence, which I accept as correct, that in addition to passing on shares to his children, he was advised that he could also *"take retirement relief from the company and the retirement relief was based on the company buying back shares I had in the company.*"

14. The Appellant was advised that it was open to him as an alternative to liquidate the Company and take for himself the significant sum represented by the Company's net assets. The Appellant rejected this possibility; it was, in his view, a family business which employed several members of his family and he and his family were anxious to see the Company and the business continue into the future.

15. Following a meeting in November 2009 with the Company's accounting and financial advisors, the Appellant decided that he would redeem 12,500 shares in the Company for a total consideration of €749,000 and would at the same time transfer part of his shareholding and his wife's shareholding so that, following the transactions, the shares in the Company would be held as follows:-

(i)	Appellant	10,875 shares	29%
(ii)	Appellant's wife	375 shares	1%
(iii)	**NAME OF SON 3 REDACTED**	9,500 shares	25.33%
(iv)	**REDACTED** Ltd	5,500 shares	14.67%
(v)	**NAME OF SON 2 REDACTED**	3,750 shares	10%

(vi)	**NAME OF SON 1 REDACTED**	3,750 shares	10%
(vii)	**NAME OF DAUGHTER REDACTED**	3,750 shares	10%

16. The Appellant gave evidence, which I accept, that it was his intention that he and his wife would retain their 30% shareholding for a period of 6 years following the initial transfer of shares to his children, whereupon it would be divided amongst his children. However, he had been unable to give effect to that intention because of the instant appeal.

17. The Company's auditors and advisors were instructed to draw up the documentation necessary to give effect to these wishes, and duly did so. The draft documentation was furnished to the Appellant by post and comprised the following:-

(i) Minutes of a board meeting of the Company at which its directors resolved to convene an E.G.M. of the Company at which the members would be asked to approve the conversion of 12,500 of the ordinary shares in the Company held by the Appellant into 12,500 redeemable ordinary shares, and the adoption of a revised Memorandum and Articles of Association of the Company;

(ii) Notice of an E.G.M. of the Company at which the members would be asked to approve the conversion of 12,500 of the ordinary shares in the Company held by the Appellant into 12,500 redeemable ordinary shares, and the adoption of a revised Memorandum and Articles of Association of the Company;

(iii) A document signed by the Appellant, his wife and **NAME OF SON 3 REDACTED** as members of the Company and by the Company's auditors consenting to the holding of the E.G.M. notwithstanding the failure to give the requisite notice required by statute;

(iv) A consent signed by the Appellant agreeing to the conversion of 12,500 of his ordinary shares in the Company into redeemable ordinary shares;

(v) Minutes of an E.G.M. of the Company recording that the members had approved the conversion of 12,500 of the ordinary shares in the Company held by the Appellant into 12,500 redeemable ordinary shares, and the adoption of a revised Memorandum and Articles of Association of the Company;

(vi) A Companies Registration Office Form G1 signed by the Appellant's wife as Company Secretary notifying the CRO of the resolutions passed at the E.G.M. of the Company;

(vii) A Companies Registration Office Form 28 signed by the Appellant's wife as Company Secretary recording the conversion of 12,500 ordinary shares in the Company into 12,500 redeemable ordinary shares;

(viii) Minutes of a board meeting at which the directors approved the redemption of 12,500 redeemable ordinary shares in the Company held by the Appellant for cash of €749,000 and their cancellation;

(ix) A Notice of Redemption signed by the Appellant's wife as Company Secretary recording the redemption and cancellation of 12,500 redeemable ordinary shares in the Company, and signed by the Appellant as a record of his consent to the redemption and cancellation;

(x) A Companies Registration Office Form 28 signed by the Appellant's wife as Company Secretary recording the redemption and cancellation of 12,500 redeemable ordinary shares in the Company;

(xi) Declarations made by **NAME OF SON 3 REDACTED**, **NAME OF DAUGHTER REDACTED**, **NAME OF SON 1 REDACTED** and **NAME OF SON 2 REDACTED**, restricting their ability to transfer their shares in the Company;

(xii) Stock Transfer Forms recording the transfer of shares from the Appellant to **NAME OF SON 3 REDACTED**, **NAME OF DAUGHTER REDACTED**, **NAME OF SON 1 REDACTED** and **NAME OF SON 2 REDACTED**, the transfer from the Appellant as trustee to **NAME OF SON 3 REDACTED**, and the transfer from the Appellant's wife to **NAME OF SON 3 REDACTED**; and,

(xiii) Minutes of a board meeting at which **NAME OF DAUGHTER REDACTED**, **NAME OF SON 1 REDACTED** and **NAME OF SON 2 REDACTED** were appointed as directors, and at which the transfer of shares from the Appellant and his wife to their children was approved.

18. The Appellant gave evidence, which I accept as being truthful and accurate, in relation to a meeting held on 21 December 2009 at which those documents were duly executed by the relevant parties. The Appellant, his wife and his children were present in the Company's boardroom and there were no professional advisors in attendance. Following a discussion of the proposed changes, the Appellant signed those documents where his signature was

required and then passed them to other members of his family as appropriate for their signature.

19. For the reasons discussed below, the question of the order in which the documents were executed on 21 December 2009 is of some significance. Accordingly, I believe it is worth recording the evidence of the Appellant on this issue during his examination-in-chief:-

"Q. And what were you told to do by **NAME OF ADVISORS REDACTED** *company to put effect to the transfer of the shares?*

A. It was arranged that on that date we'd have that meeting. **NAME OF ADVISORS REDACTED** *did provide all the paperwork for that meeting on that day and each sheet of paper to be signed had a yellow sticker on it and it said on each sheet where it was to be signed, who was to be signing, who was to sign and that is what we done.*

Q. Can you just describe exactly what happened, you go into the room, just briefly but what happened in the meeting?

A. We gathered in the office in the morning and we had a brief chat about what it was about, what we were about, what we were doing that day. It was a day to remember for myself and the company, the changes that was taking place. You know the changes and passing the company over to the family and all that. So we all then sat down and I had the bundle of documents that I had on that and I took each document and if I was to sign it I signed it, if some other member of the family was to be signing I passed to them to sign it and give it to me back and we went through I think it was 22 documents that morning.

Q. And how long did it take to sign them?

A. Oh I don't know, ten minutes or something.

Q. Do you know which documents, just looking at these documents, can you recall what documents were signed first or last or middle way or anything

like that?

A. No.

Q. How did you divide out which documents were to go first or was there any instruction?

A. No, there was no instruction. We had as I was told, we were presented with all the documents to be signed to complete all these transactions and there was no format, nothing about it, whatever way the documents I had on the table at that day we just signed those documents on. If you asked me which one I signed first, no, we signed all documents that day at the table.

Q. Because you will be aware now that I think part of the reason why we are here today is because your accountant made reference in a letter to firstly one lot, the redemptions were signed and then the others were signed. Did you ever and which he has subsequently corrected but the correction was subsequent to the assessments having been raised in August 2014 but did you ever -- were you ever asked by your accountant as to which documents you signed first or anything like that?

A. There was never any discussion or no discussions about what documents to sign or what documents was to sign first, never.

Q. Are you in a position to say whether you signed the transfers to your family first or the redemption second or vice versa?

A. No, we had the documents on that date at that time six years ago and we did as we were told to do, sign all the documents and return all the documents, that is what we done."

20. The Appellant stood over his evidence as aforesaid during cross-examination and his son **NAME OF SON 3 REDACTED** confirmed this account of events during his evidence.

21. In January of 2011, the Respondents queried the Appellant's claim for retirement relief in his Capital Gains Tax return for 2009 and commenced an audit in respect of 2009 in March of 2012.

22. On the 9th of August 2013, in response to a query from the Respondents, the Appellant's agent wrote to the Respondents and stated *inter alia* that the following had transpired at the meeting:-

> *"**Transfer one***
>
> *On 21 December 2009, the company purchased 25% of the issued shares from* **NAME OF APPELLANT REDACTED** *for €749,000 and cancelled the shares. This reduced the issued shares from 50,000 to 37,500 (see note 14 in the accounts).*
>
> ***Transfer two***
>
> *On 21 December 2009,* ***after the 25% share purchase by the company,*** **NAME OF APPELLANT REDACTED** *transferred the majority of his* ***remaining shares*** *to his family. The layout after the transfers is as follows…"* [emphasis added]

23. Unsurprisingly, the Respondents attach some significance to this letter and characterise it is an accurate record of what actually transpired at the meeting of 21 December 2009, written at a point much closer in time to that meeting than the date of the hearing of this appeal. The Appellant was cross-examined at length in relation to the issue of whether he had given instructions to his agent in relation to the sequence in which documents had been executed by him and the other signatories. It was suggested that it was simply not credible to suggest that a professional such as the Appellant's agent would have made statements such as those contained in the letter quoted above without first obtaining clear instructions from his principal as to what exactly had transpired. Having carefully considered the evidence, I accept the Appellant's testimony that the letter of 9 August 2013 was written without his having given express instructions as to the order in which documents were executed, and accept that he first saw the letter in copy form after it had been sent to the Respondents.

24. Following further correspondence, the Respondents issued an Amended Assessment for 2009 on 14 August 2014 and this was appealed on 9 September 2014. By the letter dated the 18th of November 2014, the Appellant's agent wrote to the Respondents stating as follows:-

*"We attach a clarification of the letter sent to you on 9th August 2013 in response to your wide ranging queries on 25th June 2013. I attach the letter with the clarification shown on page one in **bold italic**.*

We refer to the second point raised in your letter 11 July 2014. We wish to clarify that both transfers referred to on the 9th August 2013 letter were carried out simultaneously on 21 December 2009. The transfer to the children was simultaneous to the redemption of shares by the company and therefore there was never a point in time that **NAME OF APPELLANT REDACTED** *had not substantially reduced his shareholding."*

25. The 'clarified' letter enclosed with the above letter revised the wording of the original letter of the 9th of August as follows:-

*"**The following transfers took place at the same time at the one sitting.***

Transfer one

On 21 December 2009, the company purchased 25% of the issued shares from **NAME OF APPELLANT REDACTED** *for €749,000 and cancelled the shares. This reduced the issued shares from 50,000 to 37,500 (see note 14 in the accounts).*

Transfer two

*On 21 December 2009, **simultaneous to** the 25% share purchase by the company,* **NAME OF APPELLANT REDACTED** *transferred the majority of his remaining shares to his family. The layout after the transfers is as follows…"* [original emphasis]

26. Subsequent to the events of 21 December 2009, the Company has seen a revival in its fortunes. As the new Managing Director, the Appellant's son, **NAME OF SON 3 REDACTED**, has introduced significant changes to the former business model. Perhaps the most fundamental was a deliberate move away from the position in 2008 where five 'level one' clients represented some 89% of the Company's turnover to the position in 2015 where that percentage had reduced to 58%, and a greater number of smaller clients made up the remaining 42% of turnover. **NAME OF SON 3 REDACTED** had also introduced a greater emphasis on acting as a reseller or distributor of products produced by foreign **REDACTED** manufacturers, thereby reducing the Company's reliance on the servicing element of its business. He had furthermore introduced a number of new innovations, including a move

away from the former paper-based system to one which made much greater use of IT systems, rebranding the Company and its products, and changing the manner in which **REDACTED** was issued.

27. **NAME OF SON 3 REDACTED** gave evidence that it had been of benefit to the Company to have his father remain on as a director and act as Chairman post-December 2009, in terms of providing continuity and reassurance to the Company's long-standing customers, as well as being a source of guidance and advice to his son.

28. It would appear that the changes introduced by **NAME OF SON 3 REDACTED** have been of benefit to the Company, with turnover, gross profit levels, employee numbers and volume of new business secured all showing a material increase since 2010.

C. Relevant legislation

29. The relevant parts of section 176 of TCA 1997 provide as follows:-

> *"**Purchase of unquoted shares by issuing company or its subsidiary***
>
> *(1) Notwithstanding Chapter 2 of this Part, references in the Tax Acts to distributions of a company, other than any such references in sections 440 and 441, shall be construed so as not to include references to a payment made by a company on the redemption, repayment or purchase of its own shares if the company is an unquoted trading company or the unquoted holding company of a trading group and either -*
>
> *(a) (i) the redemption, repayment or purchase-*
>
> *(I) Is made wholly or mainly for the purpose of benefiting a trade carried on by the company or by any of its 51 per cent subsidiaries, and*
>
> *(II) does not form part of a scheme or arrangement the main purpose or one of the main purposes of which is to enable the owner of the shares to participate in the profits of the company or of any of its 51 per cent subsidiaries without receiving a dividend,*

and

(ii) the conditions specified in sections 177 to 181, in so far as applicable, are satisfied in relation to the owner of the shares…"

30. Section 178 of TCA 1997 provides as follows:-

*"**Conditions as to reduction of vendor's interest as shareholder***

(1) Where immediately after the purchase the vendor owns shares in the company, the vendor's interest as a shareholder shall, subject to section 181, be substantially reduced.

(2) Where immediately after the purchase any associate of the vendor owns shares in the company, the combined interest as shareholders of the vendor and the vendor's associates shall, subject to section 181, be substantially reduced.

(3) The question whether the combined interests as shareholders of the vendor and the vendor's associates are substantially reduced shall be determined in the same way as is (under subsections (4) to (7)) the question whether a vendor's interest as a shareholder is substantially reduced, except that the vendor shall be assumed to have the interests of the vendor's associates as well as the vendor's own interests.

(4) Subject to subsection (5), the vendor's interest as a shareholder shall be taken to be substantially reduced only if the total nominal value of the shares owned by the vendor immediately after the purchase, expressed as a percentage of the issued share capital of the company at that time, does not exceed 75 per cent of the corresponding percentage immediately before the purchase.

(5) The vendor's interest as a shareholder shall not be taken to be substantially reduced where—

(a) the vendor would, if the company distributed all its profits available for the distribution immediately after the purchase, be entitled to a share of those profits, and

(b) *that share, expressed as a percentage of the total of those profits, exceeds 75 per cent of the corresponding percentage immediately before the purchase.*

(6) In determining for the purposes of subsection (5) the division of profits among the persons entitled to them, a person entitled to periodic distributions calculated by reference to fixed rates or amounts shall be regarded as entitled to a distribution of the amount or maximum amount to which the person would be entitled for a year.

(7) In subsection (5), "profits available for distribution" has the same meaning as it has for the purposes of Part IV of the Companies (Amendment) Act, 1983, except that for the purposes of that subsection the amount of the profits available for distribution (whether immediately before or immediately after the purchase) shall be treated as increased—

(a) in the case of every company, by €100, and

(b) in the case of a company from which any person is entitled to periodic distributions of the kind mentioned in subsection (6), by a further amount equal to that required to make the distribution to which that person is entitled in accordance with that subsection,

and, where the aggregate of the sums payable by the company on the purchase and on any contemporaneous redemption, repayment or purchase of other shares of the company exceeds the amount of the profits available for distribution immediately before the purchase, that amount shall be treated as further increased by an amount equal to the excess.

(8) References in this section to entitlement are, except in the case of trustees and personal representatives, references to beneficial entitlement."

31. Section 180(2) of TCA 1997 provides that:-

"Subject to section 181, the vendor shall not immediately after the purchase be connected with the company making the purchase or with any company which is a member of the same group as that company."

32. Finally, section 186(1) of TCA 1997 provides as follows:-

*"**Connected persons***

(1) Any question whether a person is connected with a company shall, notwithstanding section 10, be determined for the purposes of sections 176 to 183 in accordance with the following provisions:

(a) a person shall, subject to subsection (2), be connected with a company if the person directly or indirectly possesses or is entitled to acquire more than 30 per cent of—

(i) the issued ordinary share capital of the company,

(ii) the loan capital and issued share capital of the company, or

(iii) the voting power in the company;

(b) a person shall be connected with a company if the person directly or indirectly possesses or is entitled to acquire such rights as would, in the event of the winding up of the company or in any other circumstances, entitle the person to receive more than 30 per cent of the assets of the company which would then be available for distribution to equity holders of the company, and for the purposes of this paragraph—

(i) the persons who are equity holders of the company, and

(ii) the percentage of the assets of the company to which a person would be entitled,

shall be determined in accordance with sections 413 and 415, but construing references in section 415 to the first company as references to an equity holder and references to a winding up as including references to other circumstances in which assets of the company are available for distribution to its equity holders;

(c) a person shall be connected with a company if the person has control of the company."

33. It is clear from the legislation that two main issues have to be considered for the purposes of determining this appeal:-

(a) whether the redemption of the Appellant's shares was wholly or mainly for the purpose of benefitting a trade carried on by the Company within the meaning of section 176(1)(a)(i)(I), and

(b) whether the 'substantial reduction' test imposed by section 178(4) has been satisfied.

D. Submissions of the Parties

34. I had the benefit of detailed and helpful written submissions from both parties, which were ably expanded upon by Counsel for the Appellant and by Counsel for the Respondents in the course of the hearing before me.

Appellant's Submissions

35. The starting point for the Appellant's submissions was that the share redemption and the transfer of shares by the Appellant and his wife to their children were effected "*contemporaneously*".

36. In relation to the trade benefit test, the Appellant submitted that the buy-back of shares by the Company was made wholly or mainly for the purpose of benefiting its trade. In support of this argument, it was submitted that the Appellant's age and personal difficulties meant that he no longer had the energy or skills required to run the business successfully. As a result, he believed that it was time to pass the business on to the next generation and that the trade of the Company would benefit and grow as a result of same.

37. It was further submitted that the Appellant's son, **NAME OF SON 3 REDACTED**, had already worked in the Company for a number of years and had shown himself to be a suitable candidate to take over the running of the business. However, having regard to his son's relative youth, the Appellant also believed that it would be prudent for him to remain on as a director and Chairman of the Company, both for the purposes of being available as a resource to his successor and, furthermore, for the purposes of reassuring and remaining as a point of contact for those customers with which the Company had done business for many years.

38. The Appellant further submitted that Revenue Tax Briefing 25 is (February 1997) is supportive of the Appellant's position in this regard, as it states that the trade benefit test may still be satisfied where:-

> *"… a controlling shareholder in a family company is selling his/her shares to allow control to pass to his/her children but remains on as a director for a specified period purely because his/her immediate departure from the company at that time would otherwise have a negative impact on the company's business."*

39. Counsel for the Appellant further submitted that, by openly discussing the future of the business with his family and by making arrangements for the Company's future ownership and management, the Appellant brokered and obtained the agreement of all of his children. It was submitted that the careful level of discussion, consultation and agreement between the Appellant and his family in this regard had benefited the trade very significantly by precluding the likelihood of family disputes in relation to the transfer of control, ownership and management of the business into the future.

40. The Appellant noted that in the case of ***Moody –v- Tyler*** **[2000] STC 296**, which concerned the equivalent UK legislative provisions, it was held that the issue of meeting the trade benefit test was a question of fact. Lightman J stated in the course of his decision:-

> *"The only real issue before me on the substance of the matter dealt with by the commissioners is whether or not the payment was to be treated as a distribution, or whether it was a payment made wholly or mainly for the purposes of benefiting the trade carried on by the company. That was a pure question of fact…"*

41. The Appellant further submitted that there was nothing in the legislation which prohibited him from remaining on as a director or from retaining a shareholding in the company. It was submitted that the effect of the interpretative approach adopted by the Respondents was to write words into the legislation which simply were not there.

42. The Appellant submitted that such an approach was contrary to the well-established principles governing the interpretation of tax statutes, citing Kennedy C.J. in ***Revenue Commissioners –v- Doorley*** **[1933] IR 750** ("*A taxing Act … is to be read and construed as it stands upon its own actual language"*) and the decision of Henchy J in ***Inspector of Taxes –v-***

***Kiernan* [1981] IR 117**, as more recently applied in ***Gaffney –v- Revenue Commissioners* [2013] IEHC 651**, where he stated:-

> *"Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either an extended or narrow connotation, or as a term of art, then in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning."*

43. The Appellant further relied upon the decision of Rowlatt J in ***Cape Brandy Syndicate –v- IRC* [1921] 1 K.B. 64** (cited with approval in the more recent decisions of ***Revenue Commissioners –v- Droog* [2011] IEHC 142** (the decision of the Supreme Court in that appeal not having been given at the time of the hearing before me) and McKechnie J in ***Revenue Commissioners –v- O'Flynn Construction* [2013] 3 IR 533**), where he said:-

> *"… in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

44. The Appellant pointed out that Tax Briefing 25 expressly acknowledged that the retention of some shareholding by a retiring director would not mean that the trade benefit test could not be satisfied, as it stated:-

> *"There may be situations where* [f]*or sentimental reasons a retiring director of a company wishes to retain a small shareholding in the company… In such circumstances, it may still be possible for the company to show that the main purpose is to benefit its trade."*

45. The Appellant submitted that this showed that the Respondents' own Tax Briefing expressly acknowledged that a scenario such as the events in the instant appeal could satisfy the trade benefit test. They further pointed out that while the HMRC Statement of Practice in relation to the equivalent UK legislation made reference to a maximum shareholding of 5%, there was no corresponding limit given in the guidance issued by the Respondents. It was submitted on behalf of the Appellants that the only limit on the percentage shareholding

that could be held by the Appellant was that imposed by subsection 180(2) and section 186, which provide that the relief shall not be available to a 'connected person', who is so connected by virtue of an ownership of or an entitlement to acquire more than 30% of the issued share capital.

46. Turning to the 'substantial reduction' test imposed by subsection 178(4), the Appellant accepted that his and his wife's (as she is an "*associate*" within the meaning of the legislation) combined shareholdings, expressed as a percentage of the Company's issued nominal share capital after the redemption, could not exceed 75% of what it was prior to the redemption.

47. The Appellant submitted that the Respondent's position in relation to this issue failed to take account of the fact that the share redemption and the transfer of shares to the Appellant's children took place contemporaneously at a single meeting on 21 December 2009, and that considering them as two separate transactions was erroneous.

48. In relation to the phrase "*immediately after the purchase*", the Appellant referred me to the decision of Finlay P in ***State (Multiprint Label Systems Ltd) –v- Neylon*** **[1984] I.L.R.M. 545**, where the Court approved and applied the decision of the English Court of Appeal in ***R –v- Inspector of Taxes ex. P. Clarke*** **[1974] QB 220**, which held that, in the context of section 430 of the Income Tax Act, 1967 and its UK equivalent, that:-

> *"The courts have not always considered that they are bound to interpret provisions of this kind with unreasonable strictness, and although the word 'immediate' is no doubt a strong epithet, I think that it might fairly be construed as meaning with all reasonable speed considering the circumstances of the case."*

49. Finlay P further held that having regard to the legislative purpose of section 428, the provision should be regarded as directory and not mandatory.

50. The Appellant further submitted that the Respondents' approach to the interpretation of section 178(4) was to, in effect, substitute for the words "*immediately after*" the phrase "*as a consequence of*", and that this was contrary to the established principles governing the

interpretation of taxing statutes, and again relied upon the decisions in ***Cape Brandy Syndicate***, ***Droog*** and ***Gaffney*** cited above.

51. The Appellant submitted that the fact that the letter sent by the Appellant's agent on the 9th of August 2013 contained the wording it did was unfortunate, but the evidence showed that there was no factual basis for the assertions made in that letter

Respondents' Submissions

52. Counsel for the Respondents first pointed out that section 176(1) is a relieving provision, and consequently any ambiguity ought not to be resolved in favour of the Appellant. They further said regard should be had to the fact that subsequent to the redemption, the Appellant remained on as a director of the Company and, together with his wife, retained a 30% shareholding in the Company. It was submitted that this was inconsistent with any argument that the share redemption was for the benefit of the trade, and not for the benefit of the Appellant.

53. Counsel for the Respondents submitted that the evidence showed that the redemption of the Appellant's shares in the Company had been for the benefit of the Appellant and the benefit of his family, and not for the benefit of a trade carried on by the Company. It was submitted that all of the changes to the Company's business and management could have been effected without the share redemption which took place.

54. The Respondents further submitted that their position in relation to the appeal was consistent with both Tax Briefing 25 and with HMRC Statement of Practice 2/1982 in relation to the equivalent UK legislation. The HMRC Statement of Practice states that the company's sole or main purpose must be to benefit a trade of the company, and that the condition is not satisfied where the transaction is designed to serve the personal or wider commercial interests of the vending shareholder, or where the intended benefit for the company is to some non-trading activity. The HMRC guidance document states that if the company is not buying all of the shares held by the vendor, or if he is retaining some other connection with the company, such as a directorship or consultancy, it would seem unlikely that the transaction could satisfy the trade benefit test. The HMRC Statement of Practice gives the

example of a small shareholding being retained for sentimental purposes, and indicates that such a shareholding should not exceed 5%.

55. The Respondents further submitted that in considering whether the trade benefit test had been satisfied, I should have regard to the fact that the Appellant's shares redeemed by the Company had a value almost double the value of that attributed for Capital Gains Tax purposes to the shares transferred by the Appellant and his wife to their children.

56. The Respondents submitted that I should have regard to the three basic rules of statutory interpretation enunciated by Henchy J in ***Inspector of Taxes –v- Kiernan*** **[1981] IR 117**, and in particular the second rule that:-

> *"… if a word or expression is used in a statute creating a penal or taxation liability, and there is a looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language."*

57. They further cited the Supreme Court decision of Finlay C.J. in ***McGrath –v- McDermott*** **[1988] IR 258** where he stated:-

> *"It is clear that successful tax avoidance schemes can result in unfair burdens on other taxpayers and that unfairness is something against which courts naturally lean.*
>
> *The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective. What is urged upon the court by the Revenue in this case is no more and no less than the implication into the provisions of either s. 12 or s. 33 of the Act of 1975 of a new*

subclause or sub-section providing that a condition precedent to the computing of an allowable loss pursuant to the provisions of s. 33, sub-s. 5, is the proof by the taxpayer of an actual loss, presumably at least coextensive with the artificial loss to be computed in accordance with the sub-section.

In the course of the submissions such a necessity was denied but instead it was contended that the real, as distinct from what is described as the artificial, nature of the transactions should be looked at by the court, and that if they were, the section could not apply to them.

I must reject this contention. Having regard to the finding in the case stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.

In those circumstances, for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers."

58. The Respondents further relied upon the passage from ***Cape Brandy Syndicate*** quoted above and the decision of Kennedy C.J. in ***Revenue Commissioners –v- Doorley*** **[1933] IR 750**, where he stated:-

"The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.

I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

59. In relation to the 'substantial reduction' test, the Respondents submitted that the Appellant had not satisfied the criteria contained in section 178(4) because the Appellant retained an 84.33% stake in the Company immediately after the redemption and cancellation of shares. My calculation is that the Appellant and his wife would have owned 32,000 of 37,500 shares after the redemption and cancellation, which represents 85.33% of the reduced issued share capital; however, nothing turns on this difference in calculation. They point out that the legislation requires that the total nominal value of the shares owned by the vendor immediately after the purchase, expressed as a percentage of the issued share capital of the company at that time, must not exceed 75% of the corresponding percentage immediately before the purchase.

60. The Respondents submitted that while it had been argued on behalf of the Appellant that the redemption of shares took place contemporaneously or simultaneously with the transfer of the Appellant's shares to his children, it had never been asserted that the transfer of shares took place before the share redemption and cancellation. The Respondents submitted that, this being the case, the share redemption took place first and the fact that the share transfers took place on the same day, even within minutes of the redemption, did not change the fact that immediately after the redemption the substantial reduction test had not been satisfied.

61. The Respondents further submitted that it was apparent from the wording of section 178 that the section was concerned with the redemption of shares only, and that I could not have regard to the transfer of shares to the Appellant's family which took place at around the same time.

62. Counsel for the Respondents further submitted that the onus of proof was on the Appellant to show that the requirements of section 178 had been met, and in circumstances where the evidence was that it was impossible to tell whether the share redemption or the share transfer had occurred first, the Appellant clearly could not discharge that burden of proof.

63. They further submitted that it was clear, both from the wording of the transaction documents (particularly the stock transfer forms) and from the letter of the 9th of August 2013, that two separate and distinct transactions had taken place, with the share redemption preceding the share transfers. They submitted that it was simply not credible that the first letter could have been written without clear instructions from the Appellant. They further submitted that the clarification sent in November 2014 did not alter the legal position, because it still made reference to two transfers and to the "*remaining shares*" after the share redemption

64. The Respondents further submitted that the decision in the ***Multiprint Label Systems*** case could be clearly distinguished; they argued that the meaning of the word "*immediately*" depends on its statutory context, and the interpretation of a tax statute regarding the imposition of or relief from a tax liability had to be strictly construed, unlike in the context of an administrative process requirement, where a less strict interpretation might be adopted.

E. Analysis and Findings

Trade Benefit Test

65. It is clear from the legislation and the submissions made thereon that the first question which must be answered in the determination of this appeal is whether the redemption of shares by the Appellant was made wholly or mainly for the purpose of benefitting a trade carried on by the Company within the meaning of section 176(1)(a)(i)(I). I accept as correct the decision in ***Moody –v- Tyler*** that this is a question of fact.

66. I think it is clear that it is possible for a shareholder to retain some shareholding in the company redeeming the shares and/or to remain on as a director of the company while still satisfying the trade benefit test. There is no express bar to either of these occurring in sections 176 to 181 (save for the prohibition on the shareholder being a connected person found in section 180(2)), and I think such an absolute bar cannot properly be implied into the test in the absence of express wording in the legislation. I am supported in this view by the fact that both the Respondents' Tax Briefing and HMRC's Statement of Practice envisage the possibility of the trade benefit test being satisfied in such circumstances, albeit the Revenue authorities in both jurisdictions express the view that it is "*unlikely*" that the test can then be satisfied.

67. In the instant case, it is argued by the Respondents that I ought to take a narrow view of the trade benefit test and conclude that the redemption of 25% of the Appellant's shareholding was not for the benefit of the trade of the Company but was instead for the personal benefit of the Appellant, allowing him as it did to receive from the Company the sum of €749,000 and, furthermore, to do so in a manner which his advisors believed would enable him to receive that sum without the imposition of tax.

68. However, I believe that such an approach would be overly restrictive. There will be a benefit to the vending shareholder in many cases where shares are purchased or redeemed and the existence of such a benefit to the shareholder does not prevent the trade benefit test being satisfied. I am also cognisant of the fact that the 'trade benefit' test can be satisfied if the share redemption is "*mainly*" for the purpose of benefitting a trade carried on by the Company.

69. I think that in order to find the "*purpose*" of the redemption, repayment or purchase, regard must be had to the intentions of the parties in entering into the transaction.

70. In the instant case, I am satisfied on the evidence that the intention of the Appellant and of his family in redeeming and cancelling 25% of his shares was to enable him to retire from his position as Managing Director of the Company and take large step back from its business. The Appellant had worked extremely hard for many years; his age and his personal circumstances had brought him and his family to believe that it was time for him to work less hard and enjoy life more; the Appellant was aware that the market, the economic climate and the needs and expectations of the Company's customers had all changed significantly; and he was aware that the Company needed to adapt to those changes and that his skills were perhaps not best-suited to meeting that challenge.

71. I am also satisfied that it was the intention of the Appellant and his family that he should be financially secure in his retirement and that he should derive some reward for the many years he had spent developing and growing the business. The Appellant gave evidence that he had only ever drawn a basic salary from the Company, and that he had ceased to do so when he began to receive a pension at the age of 65. He further testified that the Company had never paid a dividend to its members, and confirmation of this parsimonious approach is to be found in the fact that the Company had cash in hand and at bank of just under €2,000,000 as of the end of 2008.

72. The evidence of the Appellant, which I accept, was that his professional advisors told him that he essentially had two options on his retirement; either he could liquidate the Company and retain the net proceeds at the conclusion of that process, or else he could redeem some of his shareholding and pass most of his remaining shares to his children. The latter course would obviously enable the Company and its business to continue into the future and to remain a source of employment for members of his family. It was for this reason that the Appellant elected to redeem some of his shareholding as part of his process of stepping back from the Company.

73. It was submitted by the Respondents, correctly in my view, that the Appellant and his family could have effected the necessary changes to the management and ownership of the Company without the redemption by the Appellant of some of his shareholding. However, I do not believe that this alters the purpose of or intention behind the redemption in the

instant case; the Appellant's choice of a different method of achieving the same end does not alter the fact that his purpose and intention would have been the same in both cases.

74. I am satisfied on the evidence that the Appellant understood that redeeming a quarter of his shareholding was a means by which he could obtain from the Company fair financial recompense for his years of work, while still allowing the Company to continue in existence and carry on business while its ownership and control passed on to the next generation of his family in an agreed and harmonious manner. I accept that was his primary intention in causing the Company to redeem those shares. I further accept that in the mind of the Appellant, the redemption of shares was an integral part of a process designed to benefit the Company and the trade it carried on by ensuring its continued existence and viability.

75. Were the intention of the Appellant the sole factor to be considered, I would be satisfied to find that the material benefit test had been satisfied in the instant appeal. However, I also have to consider whether any other factors, such as his continuing as Chairman and as a director, or the extent of the shareholding he retained or the price paid to him for his shares, mean that the test has not been satisfied.

76. I do not believe that the fact that the Appellant remained on as a director prevents the trade benefit test from being satisfied in the instant case. There is no express bar to same in the legislation and it is clearly envisaged as permissible by the guidance document issued by the Respondent if a director's immediate departure would have a negative impact on the business. In the instant case, the Appellant gave evidence, which I accept, that he remained on as a director and as Chairman in order to provide continuity and reassurance to some of the Company's long-standing customers that his years of experience and expertise would not be lost to the Company. I am satisfied that the Company's interests could have been damaged had he not done so.

77. Equally, I do not believe that the retention by the Appellant and his wife of a 30% shareholding in the Company means that the trade benefit test cannot be satisfied in the instant appeal. Again, there is no express bar to this in the legislation and the possibility of a small shareholding being retained is envisaged by the Respondents' Tax Briefing. The Tax Briefing does not specify precisely what the Respondents consider to be a small

shareholding and it appears to me that the 5% guideline used by HMRC could perhaps be criticised as being somewhat arbitrary.

78. It was put to the Appellant in cross-examination that his retaining such a significant shareholding conferred upon him certain benefits in accordance with companies legislation, and that this must have been a factor in his deciding to retain that amount. The Appellant was adamant that this was not the case, that he had never sought or received professional advice on this issue, and that the issue had not formed part of his considerations. He further gave evidence that it was always his intention to distribute his remaining shares amongst his family members at the end of six years from the redemption and share transfers in December 2009, and that it was only the existence of the instant appeal that had prevented him from doing so.

79. There is no doubt but that the extent of the shareholding retained by the Appellant is at the very edge of what is permissible; a single share more would result in his being a connected person within the meaning of section 186, and thus falling foul of the provisions of subsection 180(2). It is also clear that the extent of his shareholding goes some way beyond what the Respondents and HMRC might consider to be acceptable in a trade benefit test context.

80. Nonetheless, the views of the Revenue authorities are not determinative and, having carefully considered the evidence of the Appellant and the context in which the shares were retained, I am satisfied that his retention with his wife of 30% of the shares does not preclude him from satisfying the trade benefit test.

81. Finally, I need to consider the argument advanced by the Respondents that the valuation placed on the shares for redemption purposes was almost twice the value attributed to them for the purposes of the transfers to the Appellant's children. The Respondents correctly point out that no independent valuation of the shares was obtained prior to the redemption. However, I heard evidence as to how the Appellant's shareholding was valued and I am satisfied that the value put on his shares for redemption purposes was reached by a reasoned process, and not arrived at arbitrarily or artificially. I am also satisfied that the lesser valuation placed on the shares for the purposes of the transfers to the Appellant's

children can be explained by the fact that there were significant limitations placed on the recipients' ability to sell or transfer the shares and the fact that the Company does not pay dividends. I am therefore satisfied that the difference in valuation does not prevent the trade benefit test from being satisfied in the instant case.

82. Having regard to all of the foregoing, I am satisfied and find as a material fact that the redemption of shares by the Appellant was made wholly or mainly for the purpose of benefitting a trade carried on by the Company within the meaning of section 176(1)(a)(i)(I).

Substantial Reduction Test

83. Accordingly, the next issue which requires to be determined is whether the Appellant meets the 'substantial reduction' test contained in section 178(4). To do so, he must show that the total nominal value of the shares owned by the Appellant and his wife immediately after the share redemption did not exceed 75% of the corresponding percentage immediately before the redemption.

84. In considering this issue, I must consider the wording of section 178(4) carefully, and I believe that the correct starting point for doing so is the dictum of Kennedy C.J. in ***Doorley***, where he stated:-

> *"If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."*

85. The correct interpretation of section 178(4) in the instant appeal hinges, in my view, on the proper meaning of the word "*immediately*". As stated above, the Appellant urged me to have regard to the decision of Finlay P in the ***Multiprint Label Systems*** case and interpret "*immediately*" in a relatively flexible or less strict fashion. However, I believe that the conclusion reached in that decision was perhaps particular to the section under consideration therein, namely section 428 of the Income Tax Act, 1967, and was a direct consequence of Finlay P's analysis of the purpose of that section.

86. I believe that the ***Multiprint Label Systems*** decision can be distinguished from the test to be applied in the instant case. Section 178(4) contains a condition required to be met in order to be eligible for a relief from income tax and accordingly, I find that it is mandatory in nature, and not directory.

87. I further believe that in interpreting the word "*immediately*", I should also have regard to the decision of Henchy J in ***Inspector of Taxes –v- Kiernan***, more recently cited with approval by Donnelly J in ***Coleman –v- Revenue Commissioners*** **[2014] IEHC 662**, that:-

> *"Where statutory provisions are addressed to the public generally, a word should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily",*
>
> and
>
> *"*[W]*hen the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."*

88. I believe that section 178(4) is addressed to members of the public generally, and that the word "*immediately*" has a widespread and unambiguous currency. I must therefore give it its ordinary and natural meaning.

89. Counsel for the Respondents submitted, correctly in my view, that if I find as a matter of fact that the share redemption took place before the share transfer, then the Appellant cannot satisfy the requirements of section 178(4), because the percentage of the issued share capital owned by the Appellant and his wife prior to the redemption would the be 89% and the equivalent figure immediately after the redemption would be 85.33% (although the Respondents gave the figure of 84.33%).

90. It is therefore necessary to carefully consider what transpired at the meeting held on 21 December 2009, and to assess whether it is possible to reach a finding as to the order in which the documentation was executed.

91. I think it is clear that the professional advisors to the Company and the Appellant envisaged a two-stage process, albeit one in which both stages would take place in immediate succession. The first stage was the redemption of 25% of the Appellant's shareholding and the second stage was the transfer of shares by the Appellant and his wife to his children. This is, in my view, amply demonstrated by the fact that the draft share transfer forms prepared for the meeting were prepared on the basis that the Appellant's shareholding would by the time of their execution have been reduced by 25%. The understanding of the professional advisors is also reflected in the letter of the 9th of August 2013 and the 'clarified' version of that letter sent on the 18th of November 2014, with their references to "*Transfer one*", "*Transfer two*" and "*remaining shares*". The earlier of the letters shows this even more clearly, referring as it does to the transfer of shares to the Appellant's children taking place "*after the 25% share purchase by the company*".

92. However, the intentions and/or understanding of the professional advisors do not necessarily mean that the documents were executed in the manner or sequence which the advisors envisaged prior to the meeting or understood subsequent to the meeting.

93. While the wording of the letter of the 9th of August 2013 in particular was understandably relied upon by the Respondents as an accurate and more contemporaneous description of what had in fact transpired at the meeting, I accept as correct the evidence given by the Appellant that the letter was not written on the basis of instructions given by him, that he was not asked to give such instructions prior to the letter being written, and that he only

saw a copy of the letter after it had been sent to the Respondents. The Respondents strongly made the case that this was, to put it mildly, implausible but, having carefully considered the cross-examination of the Appellant on this issue, I am satisfied that the Appellant's recollection of events and evidence in this regard is correct.

94. I also find that the evidence of the Appellant and that of his son in relation to what transpired at the meeting held on 21 December 2009 was truthful and accurate. I accept that the Appellant was not informed in advance of the meeting that the documents should be executed in any particular order and I am satisfied on the evidence that the Appellant and the other members of his family did not sign the documents in any particular order or sequence. Instead, the documents were first signed by the Appellant in the order in which they came to his hand and were then passed on by him to the other family members for their signature.

95. It follows that I am unable to find on the basis of the evidence before me that the share redemption preceded the share transfers or, alternatively, that the share transfers preceded the redemption.

96. It was submitted on behalf of the Respondents that such a conclusion would necessarily mean that the Appellant could not satisfy the 'substantial reduction' test, as it would mean that the Appellant could not discharge the burden of proof to show that his shareholding and that of his wife prior to the share redemption had been reduced by at least 25% immediately after the share redemption.

97. However, I do not believe this to be correct. There is a third finding open to me, which is that contended for by the Appellant, namely that the share redemption and the share transfers took place contemporaneously or simultaneously.

98. I believe that such a finding is open to me as a matter of law. In this regard, I note that *Halsbury's Laws of England* states (Vol. 32 (2012), para. 376) that:-

> *"When a single transaction is carried into effect by several instruments, they are treated as one instrument, and they must all be read together for the purpose of ascertaining the intention of the parties; this is so whether the instruments are*

actually contemporaneous, that is all executed at the same time, or are executed within so short an interval that the court comes to the conclusion that they in fact represent a single transaction."

99. I am satisfied on the evidence before me that, notwithstanding the intention or understanding of the professional advisors who prepared the necessary documentation, the intention and understanding of the Appellant and his family was that a single transaction would take place whereby the Appellant would obtain from the Company fair financial recompense for his years of work, while allowing the Company to continue in existence and carry on business while its ownership and control passed on to the next generation of his family in an agreed and harmonious manner. The share redemption and the share transfers were two elements of what the Appellant considered to be a single transaction, and were not viewed by him as individual transactions in their own right; as the Appellant put it during his cross-examination:-

"I understood what I was doing was to pass the shares on to the children, pass the shares in the company on to the children and to deal with my retirement from the company. I believed that's what I was doing. I believed that the man gave me the forms to do that and I signed off all on the forms and on that day I was quite happy that's done and dusted and finished."

100. Having regard to the foregoing, I am satisfied that, consistent with the intention and understanding of the Appellant and his family, what was effected at the meeting of 21 December 2009 was in fact and in law a single transaction with two separate elements which occurred simultaneously.

101. It follows from the foregoing that I find that the shareholding owned by the Appellant and his wife immediately before the share redemption took place was 89% of the then-issued share capital of the Company, and that the shareholding of the Appellant and his wife immediately after the share redemption was 30% of the then-issued share capital of the Company.

102. Accordingly, I am satisfied, and find as a material fact, that that the total nominal value of the shares owned by the Appellant and his wife immediately after the share redemption and cancellation, expressed as a percentage of the issued share capital of the

Company at that time, did not exceed 75% of the corresponding percentage immediately before the share redemption and purchase. I therefore find that the Appellant has met the 'substantial reduction' test contained in section 178(4).

F. Determination

103. For the reasons outlined above, I find that:-

(a) The Appellant has satisfied the 'trade benefit' test contained in section 176(1)(a)(i)(I);

(b) The Appellant has satisfied the 'substantial reduction' test contained in section 178(4); and,

(c) Accordingly, the €749,000 received by the Appellant from the Company on the redemption and cancellation of his redeemable ordinary shares was not a distribution by the Company.

104. I will therefore allow the appeal.

105. I consider that the Appellant has, by reason of the Amended Assessment dated the 15th of August 2014, been overcharged and determine, in accordance with section 949AK(1), that the Amended Assessment should be reduced accordingly.

October 2017

APPEAL COMMISSIONER

The parties to the appeal have not requested the Appeal Commissioners to state and sign a case for the opinion of the High Court