THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 279

Record Number: 2016/18

Finlay Geoghegan J.
Peart J.
Hogan J.

Between:

ROBERT STANLEY

APPLICANT/APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 26TH DAY OF OCTOBER 2017

Introduction

1. By order dated the 16th December 2015 the High Court (Hedigan J.) refused the appellant's application by way of judicial review to quash a notice of assessment for Capital Acquisitions Tax, interest and penalties which was issued by the Revenue Commissioners on the 5th December 2013. The appellant argued in the High Court that this assessment was invalid, being made ultra vires the powers of the Revenue Commissioners since it was issued outside a period of four years from the date on which the appellant had delivered what he believed to be a correct CAT return, and therefore contrary to s. 49(6A) of the Capital Acquisitions Tax Consolidation Act 2003 as amended (CATCA). The trial judge concluded that the appellant had not delivered a correct return, and that the time limit therefore did not apply given the provisions of s. 49(6B) of CATCA. The appellant appeals against the refusal to quash the notice of assessment, and essentially argues that the trial judge's interpretation of the relevant statutory provisions is incorrect. For the reasons appearing hereunder, I consider that the trial judge erred in his conclusions and that this appeal should be allowed.

Summary of Factual Background

2. The transactions which have given rise to the notice of assessment sought to be quashed can be usefully described by reference to the description usefully contained in the appellant's written submissions, and with which the Revenue Commissioners take no issue.

3. The Stanley family has a long history of land dealing and house construction in Dublin. Mr. Joseph Stanley Snr. together with his brother and a key associate owned and managed the firm which traded for decades under the name 'Shannon Homes'. Mr .Stanley Snr. effectively retired in the early 2000's. While he retained ownership of his stake in Shannon Homes, the Dublin business was effectively carried on by his five sons (including the appellant) in conjunction with the other shareholders.

4. Sometime around 2007 it was decided that the Shannon Homes business would be transferred to the appellant and his four brothers.

5. On the 2nd April 2007 the appellant purchased 80 Ordinary Shares in Kitara Properties Ltd ('Kitara') from his father (being 1/5 of the company's share capital) for the sum of €3,421,807. This and four similar purchases by the appellant's siblings effected a purchase by the appellant and his four brothers of the entire issued share capital of Kitara (being 400 shares), the then market value of which was €85,545,185. Accordingly, the appellant paid a sum of €3,421,807 in respect of a shareholding valued at €17,109,037 (i.e. 20% of €85,545,185), with the result that he received a gift of €13,687,230 from his father. There were certain tax consequences arising from these transactions.

6. Firstly, Mr. Stanley Snr. incurred a Capital Gains Tax (CGT) liability calculated by reference to the market value of his shares at the time of the disposal. This liability was calculated on the difference between the base cost of those shares (€0) and the market value at the date of disposal. The CGT payable by the appellant's father was therefore 20% of the entire market value of Kitara (€85,545,185) being €17,109,037.

7. Secondly, as a result of the gift of €13,687,230 received by the appellant, a potential liability to Capital Acquisition Tax (CAT) arose by reference to this element of the transaction, i.e., the difference between the market value of the shares received by the appellant and the money that he paid for the purchase of those shares.

8. The rate of CGT at the relevant time was 20% and the rate of CAT was also 20%. Accordingly, the CGT payable by the appellant's father in respect of the 80 shares sold to the appellant was €3,421,807 (being €17,109,037 x 20%) and the CAT payable by the appellant (absent the provisions discussed below) was €2,737,445 (being 20% of the gift of €13,687,230).

9. However, in accordance with s. 104(1) of CATCA because the CAT and the CGT arose on the same transaction (the sale/gift of the shares by Joseph Stanley senior to his sons) a credit was available to the appellant (and his brothers) for the CGT paid by his father. As the CGT paid by his father exceeded the appellant's CAT liability, no liability to CAT arose.

10. Had matters rested there, there would be no dispute between the parties since it is common ground that, up to that point, the provisions of s. 104 of CATCA have the effect outlined above. It is the transaction described in the ensuing paragraph below which gave rise to the notice of assessment of CAT issued by Revenue on the 5th December 2013 in which the appellant's liability for CAT, interest and penalties was assessed in the amount of €7,064,630. The appellant strongly disputes the amount of this assessment and has lodged an appeal to the Appeal Commissioners. However, these proceedings and the present appeal do not concern the amount of the assessment, but rather a challenge to the jurisdiction of the Revenue Commissioners to raise an assessment some six years and one month after the appellant had completed and delivered a CAT self-assessment return in the light of the provisions of s. 49(6A)(a) of CATCA which I have set forth below, which, in essence, provides that an assessment may not be made by Revenue after the expiry of four years from the date on which a correct CAT return is received by Revenue from the taxpayer. The question as to what

constitutes a correct return for the purposes of the legislation is at the heart of this appeal, and I shall return to that question and the relevant statutory provisions in due course.

11. On the 10th April 2007 Belmayne Ireland Limited ("Belmayne") subscribed for 3,600 ordinary shares in Kitara. As a result of this share subscription, Belmayne owned 90% of the issued share capital in Kitara and the appellant's 20% share in the company had been diluted to just 2%. By this means, the appellant and his brothers cumulatively owned 10% of the share capital in Kitara. The appellant was paid €14,452,636 by Belmayne as an "Equalisation Payment" under the terms of Share Subscription Agreement.

12. All parties agree that the appellant did not sell any of his shares in Kitara to Belmayne. Rather, Belmayne became the majority shareholder in Kitara through the issue of additional shares. Accordingly, the appellant retained precisely the same shareholding as before.

13. Of central importance to the position of the Revenue Commissioners in relation to the notice of assessment which they issued on the 5th December 2013 and their contention that the appellant was not entitled to the benefit of the CGT credit already referred to, by virtue of which he self-assessed his CAT liability at nil, are the provisions of s. 104 of CATCA which provide for a clawback of the said CGT relief where "… the asset is *disposed of* within two years after the date of the gift …". [Emphasis provided]

14. The appellant maintains that the Belmayne transaction does not constitute a disposal for CAT purposes. The Revenue Commissioners maintain that it does by virtue of s. 543(2)(a) of the Taxes Consolidation Act, 1997 (TCA) which deems certain steps to amount to a "disposal" of shares. There is no equivalent section within the CATCA, and in such circumstances the appellant argues that s. 543(2)(a) TCA has no application to the transaction at issue herein. I repeat that these proceedings are not concerned with determining whether the appellant or the Revenue Commissioners is correct on that question. The issue is a jurisdictional one, namely whether the notice of assessment which issued on the 5th December 2013 some six years and one month after the appellant filed his CAT self assessment return in November 2007 is ultra vires the powers of the Revenue Commissioners given the time limit of four years provided for by s. 49(6A) CATCA, and is therefore unlawful and of no effect, or whether that limit is dis-applied in this case by virtue of the provisions of s. 49(7B) CATCA on the basis argued by Revenue, namely that the CAT return delivered by the appellant in November 2007 was not a correct return within the meaning of s. 46(2)(a) CATCA. Those statutory provisions are set out below and will be examined in some detail later in this judgment.

15. The appellant points to the fact that the Revenue Commissioners have not explained why it was only some six years after he filed his self assessment CAT tax return that they contested his entitlement to the CGT credit shown in the assessment part of the return form and which resulted in a CAT liability of nil. In this regard he points also to the fact that the Belmayne transaction took place on the 10th April 2007, and that just eight days later on the 18th April 2007 his tax advisers wrote to Ms. Kilduff of the Revenue Commissioners (the same person to whom in due course the CAT self-assessment tax return form was sent in November 2007) and explained the Belmayne transaction in detail - albeit in the context of seeking a CGT Clearance Certificate for the share transaction - stating, *inter alia*:

> *"Each of the five individuals owns 20% of the ordinary share capital in Kitara Properties Ltd. Kitara Properties Ltd ultimately derives its value from land. As a result of the subscription for shares by Belmayne Ireland Ltd in Kitara Properties Ltd value passed out of the shares held by the individuals in Kitara Properties Ltd and consequently they are treated as* ***disposing of an asset for Capital Gains Tax purposes*** *by virtue of section 543 TCA 1997." [Emphasis provided]*

16. It is also not disputed that a copy of the executed Share Subscription Agreement was enclosed with that letter. The appellant maintains that in such circumstances it is clear that full particulars of the Belmayne transaction were provided immediately to the Revenue Commissioners, and, in addition, they were specifically informed that the transaction triggered a deemed disposal under s. 543 TCA 1997. In this way, it is submitted, there is no fault to be attributed to the appellant for the fact that the notice of assessment issued only some six years after the appellant filed his self assessment CAT return, and therefore well outside the four year time limit provided for by s. 49(6A) CATCA.

17. The appellant refers also to a letter dated the 17th February 2014 from the Revenue Commissioners to the appellant's tax advisers (KPMG) which, he submits, makes it clear that it is precisely because a disposal was triggered for the purposes of s. 543 TCA that Revenue formed the view that a disposal was also triggered by means of the same section for CAT purposes. In that regard he refers to the fourth paragraph of the said letter which states:

"The subsequent dilution of your client's shareholding by way of the share subscription agreement between Belmayne Ireland Ltd and Kitara Properties Ltd dated 10 April 2007 is a disposal for the purposes of section 543 (2) Taxes Consolidation Act 1997 which deals with transfers of value derived from assets. Where a person who has control of the company takes action or fails to take action with the result that value passes from the shares owned by that person or by persons connected with that person into other shares in the company, that exercise of that person's control shall be a disposal of the shares out of which the value passes by the person by whom they were owned. The letter dated 18th April 2007 from McFeely & McKenna supports this position."

18. That same letter from the Revenue Commissioners went on to state that the credit for CGT is withdrawn where the asset is disposed of within two years of the gift or inheritance, and further that Revenue considered that the CGT credit claimed against the appellant's (and his brothers') CAT liability was not due and should not have been claimed on the forms I.T. 38 CAT self-assessment form, and that in these circumstances the appellant (and his brothers) had not delivered "a correct relevant return". It will be evident from the statutory provisions set forth below that the failure by the taxpayer to deliver a correct relevant return constitutes "neglect" for the purposes of dis-applying the four-year time limit for the raising of an assessment by Revenue under s. 49 (6A) and (6B) CATCA.

19. As can be seen from the above, the central question for determination is ultimately whether or not the appellant delivered a correct relevant return in November 2007 which conformed to the requirements of such a return specified in s. 46(2)(a) CATCA. If he did, the four year time limit for the raising of an assessment by Revenue applies. If he did not, that time-limit is dis-applied, and the Notice of Assessment raised by Revenue on the 5th December 2013 was not *ultra vires* and is lawful.

The relevant statutory provisions

20. The following provisions of CATCA are relevant to the issues which arise in this appeal:

> Delivery of returns:
>
> 46.(1) In this section:

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

(b) a reference to a donee includes a reference to a successor

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

(a) deliver to the Commissioners a full and true return of:
(i) every gift in respect of which that person is so accountable,

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

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

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

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

(c) duly pay the amount of such tax.

Four-year time limit:

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

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

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

(6B) The time limit referred to in subsection (6A) shall not apply where the Commissioners have reasonable grounds for believing that any form of fraud or neglect within the meaning given in s. 46(7B)(b)) has been committed by or on behalf of any accountable person in connection with or in relation to any relevant return (within the meaning given in subsection (6A) which is the subject of assessment. [Emphasis provided]

Meaning of "neglect" for the purposes of (6B) above:

46 (7B)(b) In this subsection "neglect" means negligence or a failure to deliver a correct relevant return (within the meaning given in section 49 (6A) (b).

Return form to be used:

47(a) A return or additional return delivered under this Act shall be made on a form provided, or approved of, by the Commissioners.

The High Court judgment
21. Having set out the general background to the case, the arguments of the parties, and having referred to certain of the relevant statutory provisions, the trial judge stated his conclusions in the following way:

"5. … Thus, argues the applicant, what is at stake here is a net legal issue: what is the meaning and effect of s. 49 (6B) (read as it must be with s. 46 (7B)(b)) and, specifically, does it mean (as the Revenue contends) that the four year time limit in s. 49 (6A) is disapplied whenever the Revenue forms the view that the relevant return was incorrect in the sense of identifying a CAT position on the part of the taxpayer concerned with which the Revenue disagrees. If the Revenue are wrong (as the applicant contends) then it follows that the notice of assessment issued out of time, is invalid and must be quashed. If the Revenue are correct, then it follows that the notice of assessment is not out of time and the liability (if any) of the applicant under it will fall to be determined by the appeal commissioners in the ordinary way. This is the core issue in the case.

6. Limitations are to be found in all common law countries and in most systems of jurisprudence. Where that period has expired the potential defendant should be entitled to assume that he is no longer at risk and to order his affairs accordingly. See Hegarty v. O'Loughran [1991] 1 I.R. 148 at 157. But these limitation periods are subject to conditions e.g. fraud which may set a limitation period aside or cause it to be extended. In this instance, fraud or neglect, which may be manifested by the filing of an incorrect return, is such a condition. The issue between the tax payer and the Revenue Commissioners is the correctness of the return made. If it is correct, then no extension of the limitation period will be allowed and the assessment will fall.

7. I do not believe that any question of statutory interpretation arises in this case. I can find no obscurity or ambiguity, nor does any absurdity flow from a literal interpretation of the statute. The statute means what it says i.e. an *assessment may issue outside before year limitation period if the return made by the tax payer is found to be incorrect. The exception does not in my view swallow the general rule as the applicant contends. The reason I think this is because if the tax payer believes that the assessment issued outside the four year limitation period and is not covered by the exemption because it is not incorrect, then he can appeal to the Appeal Commissioners. If after a full hearing they conclude that the return was not incorrect then the assessment falls under the general rule because the exemption does not apply. It is a matter of mixed fact and law as to whether a correct return was filed that is classically a matter for decision by the Appeal Commissioners who I am satisfied have ample jurisdiction so to do. It is no function of this court in these proceedings to enter into any disputed tax issues concerning a CAT liability of the applicant. That is for the Appeal Commissioners. It is they who will determine whether the CGT tax credit claimed against CAT liability was not you and should not have been claimed on the form IT 38.*

8. Thus, on what the applicant himself has, I think correctly, described as the core issue in the case, I cannot find with him. The clear interpretation of the exemption clause does not in my view swallow the general rule. Where the Revenue have held that a return was incorrect and the tax payer disagrees, he may appeal and it is for the Appeal Commissioners to determine, as a matter of mixed law and fact, whether the return was in fact incorrect. If it was, then the four year limitation period does not apply. If the return was correct then the assessment falls because the four year limitation period applies. This was the choice of the Oireachtas and it is clearly expressed in the statutory provisions. In the light of this decision it is not necessary for the court to address any of the other issues that arose in this case."

The parties' submissions

The time limit issue
22. The appellant argues that if the trial judge is correct in his interpretation of the relevant statutory provisions, the protection intended by the Oireachtas to be given to the taxpayer by the four year time limit for the raising of a notice of assessment by Revenue is illusory and meaningless, since it would apply only in cases where the taxpayer assessed his/her CAT liability in a sum which Revenue at some undefined point in time considers to be correct. It is urged that this cannot have been the intention of the legislature, since such a person does not need the protection intended to be provided by the time limit since where his assessment is correct no notice of assessment would be issued by Revenue. It would be meaningless and illusory, in the appellant's submission, and it is submitted that the trial judge fell into error when he stated that "an assessment may issue outside the four year limitation period if the return made by the tax *payer is found to be incorrect.*" [Emphasis provided]

23. The appellant argues that it cannot be correct that Revenue may at any time in the future, perhaps ten years or even longer, decide that the return delivered by the taxpayer contains an incorrect assessment the liability for CAT, and then issue a notice of assessment outside the four year time limit provided for in the legislation on the basis that the return is incorrect return. He argues that it is only where the CAT return does not satisfy the requirements of s. 46(2)(a) CATCA (see above) and therefore that a "form of … neglect has been committed" by the tax payer (see s. 49(7B)(b) above) that the time limit of four years is dis-applied as provided for by s. 49(6B) CATCA.

24. In the present case there is no suggestion by Revenue that the appellant committed any form of fraud. As evidenced by their letter dated the 17th February 2014 to KPMG, their sole ground for issuing the notice of assessment is their opinion that the return delivered by him was an incorrect return because a credit for CGT was claimed to which in their view the appellant was not entitled, and therefore that he committed "neglect" as defined. The appellant submits that his return was a correct return, since it satisfied the requirements of s. 46(2)(a) CATCA, and that in accordance with the requirement of s. 46(2)(b) CATCA he made *"on that return an assessment of such amount of tax as, to the best of [his] knowledge, information and belief, ought to be charged, levied and paid …"* [Emphasis provided]. It is urged that it is necessary to distinguish between the return, and the assessment made on that return, when considering whether or not a correct return was delivered, and that only by doing so can the protection intended to be provided by the Oireachtas against a notice of assessment being raised outside the four year time limit be interpreted correctly so as to provide a meaningful protection to the tax payer.

Respondents' submissions
25. Revenue's submissions in response hinge on their view that the appellant did not deliver a correct return, and that the four year time limit therefore does not apply. They made clear in their letter dated the 17th February 2014 that the return was not considered to be a correct return by reason of the fact that the amount of tax shown to be payable was incorrect because the CGT credit was wrongly claimed as a deduction.

26. However, it has also been argued on this appeal that the return was not a correct return because by failing to disclose the details of the Belmayne transaction in the Part 8 assessment section of the I.T 38 self-assessment form itself to explain the basis for the claimed CGT credit, the appellant's return failed to comply fully with the requirements of s. 46(2)(a) and in particular with subparagraph (iv) thereof which requires that a full and true return must contain "such particulars as may be relevant to the assessment of tax in respect of such gift". I have referred already to the fact that details of the Belmayne transactions together with a copy of the Share Subscription Agreement itself had been provided by letter to Revenue dated the 18th April 2007 just eight days after that transaction was completed, and that it was addressed to the same person in Revenue to whom the CAT return was later sent in November 2007.

27. In response to that submission the appellant has referred the Court to the prescribed I.T. 38 CAT self assessment form which must be used when making a CAT return, and to the fact that there is no area or space provided on the assessment part of the prescribed form (Part 8) where such details are intended to be inserted, in contrast to the return parts of the form which contain questions the answers to which will provide the particulars required to fulfil the requirements of s. 46(2)(a) CATCA. The assessment part of the form (Part 8) simply indicates a space for the inclusion of "credits deducted", but does not ask for, or provide a space for the provision of details of that credit, or indeed a footnote urging that those details be provided perhaps on a separate sheet or in an accompanying letter. Again, the appellant states that in any event full information in relation to the Belmayne transaction had already been provided in the letter dated the 18th April 2007 sent to Ms. Kilduff. In other words Revenue had all the information needed in order to form a view that the assessment of CAT liability made on the return was correct or incorrect, and that when some six years later it reached its view that the assessment was incorrect, it did so only on the basis of the information already provided in 2007, since no further particulars were sought from or provided by the appellant.

28. Revenue submits also that by making an incorrect assessment of CAT liability by availing of a CGT credit to which he was not entitled the appellant failed to deliver a correct return, and that the assessment cannot be considered to be separate from the return

since they are both contained on the one I.T 38 self-assessment return. In such circumstances it is submitted that the four year time limit does not apply, and that the statutory provisions are clear and unambiguous in this respect. Revenue submit that the trial judge was correct in his conclusion that this is what the Oireachtas has provided for in very clear terms.

29. In relation to the appellant's submission that the word "neglect" used in s. 46(7)(b) CATCA implies that there must have been some culpability on the tax payer's part in the completion of the return before the four year limit is dis-applied, Revenue submit that there is nothing in the section that imports any requirement of culpability. It is submitted that all that is required for the time limit not to apply is that the return turns out, in Revenue's opinion, to be not correct – for whatever reason. That interpretation is, in Revenue's submission, the only interpretation open on the words used by the Oireachtas – "neglect" being defined in s. 46(7B)(b) CATCA as " … a failure to deliver a correct relevant return …". They submit that in this case, albeit without culpability, the fact is that the return did not in their view contain a correct assessment of the liability, and therefore the return was not correct. Thus they submit that the trial judge was correct when he stated that the statute was clear and that Revenue may issue a notice of assessment outside the four year time limit "if the return made by the taxpayer is found to be incorrect".

The forum issue

Appellant's submissions
30. The appellant also submits that the trial judge was incorrect when he stated that if the tax payer considers that an assessment has issued outside the four year time limit, and is invalid, he may lodge an appeal to the Appeal Commissioners, who, they say, have ample jurisdiction to determine whether or not the return delivered by the tax payer was a correct or incorrect and therefore whether the time limit is dis-applied. The appellant argues that the question of whether the filed return is a correct return is a question that goes to the jurisdiction of the Revenue to issue a notice of assessment, and that the Appeal Commissioners' function is confined to determining whether the quantum of a lawful assessment is correct, and not whether the notice of assessment itself is lawfully issued. That jurisdictional issue, it is submitted, is quintessentially an issue to be determined by way of judicial review in the High Court, and one that the Appeal Commissioners have no jurisdiction to determine. The appellant relies upon the judgment of the Supreme Court (Finlay C.J.) in *Deighan v. Hearne* [1990] 1 I.R. 499. I will refer to this as the 'forum issue' and will return to it in due course.

Revenue's submissions
31. Revenue submit that where the appellant claims that he is entitled to deduct a CGT credit against the CAT arising on the gift from his father as described above, and where the Revenue have formed a different view, the statutory scheme provides a mechanism for the determination of that issue by way of appeal to the Appeal Commissioners, and that this is the appropriate way for the appellant to proceed, rather than by attempting to quash the notice of assessment by way of judicial review. They agree with the trial judge's conclusions in this regard.

Conclusion on the 'Forum issue"
32. It is convenient to now express my conclusions on the forum issue, before those on the four year time limit issue.

33. The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.

34. A lawful assessment is a pre-requisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment. As the appellant has submitted, it is only where the notice is a valid notice of assessment that the issues of quantum of tax fall to be determined by the Appeal Commissioners on appeal. Where as in this case the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to seek to have that issue determined by way of the present judicial review proceedings. This is clear from the judgment of Finlay C.J in *Deighan v. Hearne* [1990] 1 I.R. 499 where the Chief Justice expressed his agreement with what had been decided by the High Court, by stating the following at p. 506:

> "The learned High Court judge decided that having regard to the provisions of the income tax code and the procedure for assessment in default of the making of returns which has been outlined in the decision of the Court, that the Court could only intervene to set aside or vary an assessment otherwise than under the procedure provided by the Income Tax Acts *if it were established either that the procedure carried out was ultra vires the statutory provisions or that one or other of those statutory provisions was invalid having regard to the provisions of the Constitution*. The court could not try an issue of fact arising from an assessment made in default of a return otherwise than through the appeal procedure provided in the income tax code." [Emphasis provided]

35. In my view, therefore, the trial judge fell into error in concluding that the appellant's appropriate remedy was to pursue his appeal to the Commissioners.

Conclusions in respect of the time limit issue
36. Section 49(6A) CATCA clearly evinces an intention on the part of the Oireachtas to ensure that where the donee of a taxable gift has delivered a return to the Commissioners as required by s. 46(2)(a); has self-assessed the liability to CAT arising on that gift on that return (s. 46(2)(b)), the Revenue Commissioners may, notwithstanding, issue a notice of assessment within four years from the date on which they received the relevant return, but after that period only where they have reasonable grounds for believing that some fraud, or neglect (as defined), is subsequently found to have been committed by the tax payer.

37. The legislative provisions give the Revenue a reasonable period to examine the return and self assessment and raise a different assessment if they consider appropriate and also give certainty to tax payers so that they can order their tax affairs. Without that protection, there could be no way of knowing whether a donee's own self-assessment of CAT liability made on an otherwise correct return is accepted by Revenue, or whether perhaps five, ten, fifteen or even more years down the road a notice of assessment might, so to speak, issue out of the blue, not only in respect of a liability to tax which the Revenue have decided arises, but also exposing the taxpayer to the prospect of substantial interest and penalties going back to the date on which the return was delivered. It is reasonable and a matter of fundamental fairness that a state body such as the Revenue Commissioners, who exercise statutory powers, should be subject to some restraint in the form of time limits within which to exercise their considerable powers to raise assessments of tax, particularly where those assessments may also give rise to a liability for additional interest and even penalties going back to the date of delivery of the CAT return.

38. If the Revenue Commissioners' interpretation of the relevant statutory provisions is correct it must mean, as the appellant submits, that the intention of the Oireachtas to provide for such a protection has been rendered nugatory or illusory by the use of

words whose plain and ordinary meaning fail to express that intention, or are at least ambiguous or unclear, and where the recognised canons of construction cannot come to their rescue. I have already referred to Revenue's submission that no ambiguity exists and that the words used do indeed express the intention of the Oireachtas, namely, where the tax payer has made an assessment of CAT liability which turns out not to be correct in the opinion of the Revenue Commissioners, the time limit will not apply because the tax payer has been found not to have delivered a "correct return", and they rely on the fact that "neglect" as used in s. 49(6B) CATCA includes where a tax payer has not delivered a correct return. They submit that there need have been no culpability on the part of the tax payer in the delivery of an incorrect return. All that is necessary for the dis-application of the time limit of four years is that the self-assessment on the return as delivered has been found to be incorrect as to the calculation of CAT.

39. While I agree with Revenue that the section is clear that where there has been neglect, as defined, refers only to where an incorrect return has been delivered, and that there is no need for any culpability on the part of the tax payer, I disagree with their submission that the return as required by s. 46(2)(a) CATCA, and the assessment of liability made by the tax payer "on that return" as required by s. 46(2)(b) CATCA *are to be considered together to comprise the return*. At the relevant time the Revenue had prescribed the use of I.T 38 self-assessment form which is divided into 8 parts. In relation to that form, I consider instead that Parts 1-7 comprise the return to be furnished pursuant to s. 46(2)(a) CATCA, and that the assessment to be made "on the return" pursuant to s. 46(2)(b) CATCA is a separate element done pursuant to a separate statutory obligation notwithstanding that it is made on part 8 of the same form. That distinction is evident from the provisions themselves, and is critical to the determination of this appeal. An appreciation of that distinction, evident from the plain words of s. 46(2)(a) and (b) themselves, enables an interpretation which provides the protection that is so obviously the intention of the Oireachtas to provide, and one which provides a meaningful benefit to a person in the position of the appellant, and not the illusory benefit yielded by the interpretation contended for by Revenue.

40. In the present case Revenue have never suggested or otherwise relied upon any failure by the appellant to provide correct details of the gift or of any other information sought by the Revenue in Parts 1-7 in the I.T. 38 form return delivered on the 5th November 2007. It is the assessment by him of his liability at €nil on foot of that return with which Revenue disagree (because they consider the appellant not to be entitled to claim credit for the CGT liability shown in the Part 8 assessment section of the I.T. 38) which has caused them to issue the notice of assessment some six years later on the 15th December 2013.

41. The form I.T 38 was at the time the return form provided by Revenue for completion by tax payers who wish to comply with their statutory obligation to make a return for CAT purposes. Section 47 (1) (a) CATCA mandates the use of form I.T. 38 by providing that "a return or additional return delivered under this Act shall be made on a form provided, or approved of, by the Commissioners". The form is composed of a number of Parts. Parts 1–7 seek information such as the name of the donor and donee, the nature of the gift (is it an inheritance or a gift), whether any previous gifts were received within three years, whether the donor is paying any of the tax due, details of the benefit (i.e., the 80 ordinary shares in Kitara), the consideration paid, and finally the taxable value of the gift. It is not until Part 8 that the tax payer comes to self-assess the CAT liability on foot of the return made in the previous Parts. Part 8 is headed "Self-Assessment of Capital Acquisitions Tax (including interest) payable. One of the sections within part 8 is headed "Credits Deductible". Beneath that heading are a number of options, one of which is Capital Gains Tax. Here the appellant inserted the figure of €3,421,807 opposite the words Capital Gains Tax already printed on the form, which he was claiming as a deductible credit against the CAT otherwise payable.

42. In my view, the plain and ordinary meaning of the words used in s. 46(2) CATCA demonstrate clearly a distinction between a return, the requirements for which are set forth in s. 46(2)(a), and an assessment which is to be made "on that return" as stated in s. 46(2)(b). The return and the assessment on that return are therefore different things. For the four year time limit to be dis-applied there must be either fraud or neglect (as defined) committed by the tax payer. There is no question of fraud being alleged by Revenue in this case. Neglect has been given a very specific definition in s. 46 (7B)(b) as meaning "negligence or a *failure to deliver a correct relevant return* (within the meaning given in section 49 (6A) (b)". In the present case negligence is not relied upon by Revenue. The only matter relied upon by Revenue is the failure to deliver a correct relevant return. Specifically, Revenue's letter to KPMG dated the 17th February 2014 stated that the return was considered to be not correct because the CGT credit had been wrongly claimed. During oral submissions on this appeal counsel stated that Revenue also relied upon a failure to comply with s. 46(2)(a)(iv) by failing to provide in the return "such particulars as may be relevant to the assessment of tax in respect of such gift". In that regard they say that there was a failure to set out in Part 8 of the I.T. 38 or on a separate sheet or in an accompanying letter the basis on which the appellant was claiming to entitled to take credit for the CGT arising on the Belmayne transaction. In my view, that submission must be rejected. Firstly, the I.T. 38 form is Revenue's own prescribed form, and where a CGT credit is being claimed against a CAT liability it simply requires the amount to be inserted in Part 8. The form is specific in that regard, giving a CGT credit as one of the possible credit deductibles which the taxpayer may indicate. Secondly, the requirements for insertion of particulars in Parts 1-7 mirror to a large extent what is specified in s. 46(2)(a)(i) to (iv) as being required for a correct return. There is nothing within Parts 1-7 to indicate that within those parts the tax payer must set out details therein of any CGT credit being claimed as a deduction in Part 8. Part 8 of the form makes no provision for the giving of those details, nor sought them. What was asked was simply the amount of any credit being claimed by way of deduction for, *inter alia*, CGT paid. It is not contended by Revenue that the notice of assessment issued six years later because of some new material or information that was discovered or came into the possession of Revenue after the 5th November 2007. This may be explained by the fact that the tax payer had, of course, already provided Revenue with full details of the Belmayne transaction in April 2007. A copy of the Share Subscription Agreement was even provided. These were provided to the very same person to whom a few months later the I.T 38 return was delivered. But, in any event, Reliance upon a failure to comply with the requirements of s. 46(2)(a)(iv) is, in my view, misplaced, and it is noteworthy that this was not the basis set forth in their letter dated 17th February 2014.

43. A correct relevant return is one which complies with the requirements of s. 49(6A)(b) and hence s.46(2)(a), which as already set forth, requires that the tax payer "deliver to the Commissioners *a full and true return of*:-

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

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

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

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

44. The matters required to be inserted into the return are provided for in Parts 1 – 7 of the prescribed I.T 38. One can see that from the manner in which those Parts are worded and constructed. Provided that the tax payer has fully and correctly completed those Parts, omitting no relevant detail that ought to be provided therein, he/she will have complied with the requirements of s. 46(2)(a). The next required step to be taken in accordance with s. 46(2)(b) is to self-assess the CAT which the tax payer "to the best of

[his/her] knowledge, information and belief, ought to be charged". That requirement does not mean that this figure must coincide with the figure that Revenue in due course considers to be the correct figure, but is simply the amount which the tax payer honestly believes is the amount of tax which "ought to be paid". The wording of subsection (b) makes it clear that it is not what was referred to in submissions as "the out-turn" which determines whether there has been compliance with s. 46(2)(b). Provided that the assessment of CAT specified in Part 8 is the amount which the tax payer considers to the best of [his/her] knowledge, information and belief, ought to be charged, then there has been compliance with the requirement in that subsection. It is worth noting in the present case that the assessment of CAT on the I.T. 38 return was one which was made by the appellant's tax consultants. It is reasonable to assume that when he self-assessed his CAT liability at nil, he did so in reliance upon his expert tax advisers' advice, and that this assessment was therefore made to the best of his knowledge, information and belief. At all events, the Revenue have never contended to the contrary so far as the taxpayer's knowledge, information and belief are concerned.

Conclusions

45. I am satisfied, therefore, that the appellant had delivered a correct relevant return, and that the four year time limit in s. 49(6A) CATCA applied. It follows in turn, therefore, that the notice of assessment in this case, being out of time, was issued ultra vires the powers of Revenue, and must therefore be quashed. The time limit was not dis-applied, and if Revenue disagreed with the amount of CAT self-assessed by the appellant on foot of his correct return, they were required by law to issue a notice of assessment not later than four years from the date on which they received the return.

46. For all these reasons I would allow the appeal.