



Ref: 24TACD2018

Redacted

Appellant

V

REVENUE COMMISSIONERS

Respondents

DETERMINATION

Introduction

1. The issue in this appeal is whether the transfer of rights attaching to a class of shares owned by **Company Name Redacted (Co. C)** in **Company Name Redacted ("Co. B")** to another class of shares in **Co. B** owned by a member of **Co. C**, the Appellant, was chargeable to income tax as a distribution.
2. The Appellant asserted that while there was an alteration of certain share rights held by **Co. C** in **Co. B**, there was no transfer of an asset from **Co. C** to the Appellant and therefore a charge to income tax does not arise pursuant to Taxes Consolidation Act 1997 ("TCA"), section 130(3)(a).
3. The Appellant further contended that the appropriate provisions governing the disposal of rights between **Co. B** and **Co. C** are contained with TCA, sections 543. Furthermore, TCA, section 547 operates to ensure that no liability arises as market value consideration is deemed to apply where the asset is acquired otherwise than by means of a bargain made arm's length.
4. The Respondent submitted that there was a transfer of share rights by **Co. C** and as such was a transfer of assets to its member, the Appellant, giving rise to charge to income tax pursuant TCA, section 130(3)(a).

Background

5. **Co. C** which was incorporated on 6 May 1985 and the Appellant was the sole shareholder. The Appellant and **Individual's Name Redacted** were directors of C and the Appellant acted as secretary.



6. **Co. B** was incorporated on 30 November 2005. On that date, the Appellant and **Individual's Name Redacted** were appointed directors of **Co. B** and the Appellant was appointed company secretary and retained those positions until the date of **Co. B's** dissolution, on 2 February 2007. **Co. B** was, at all material times, a subsidiary of **Co. C** when it acquired 100 ordinary shares in **Co. B**.
7. On 17 January 2006, **Co. C** as controlling member of **Co. B** passed an Ordinary Resolution whereby the authorised share capital of **Co. B** was increased from 1,000,000 Ordinary shares of €1.00 each to 1,000,000 Ordinary shares of €1.00 each and 1,000,000 'A' Ordinary shares of €1.00 each by the creation of an additional 1,000,000 'A' Ordinary shares of €1.00 each, with rights attaching thereto as set out in the new Articles of Association of **Co. B**.
8. The Articles of Association of **Co. B** provided that the Ordinary shares alone conferred the right to receive notice of, attend, speak and vote at general meetings of **Co. B**. The Articles provided that the holders of the 'A' Ordinary shares had no right to receive notice of or to attend, speak and vote at any general meetings of **Co. B**. On a winding up of **Co. B**, its assets were to be divided as follows:
 - a) First, the holders of the 'A' Ordinary shares were entitled to the return of the capital paid up or credited as paid up thereon in priority to the prepayment of capital on any other class of shares
 - b) Next the holders of the Ordinary shares were entitled to the return of the capital paid up or credited as paid thereon
 - c) Then the share premium account (if any) was to be distributed to and amongst the holders of the Ordinary shares
 - d) Finally, any surplus remaining was to be distributed to and amongst the holders of the Ordinary shares in proportion to the amount of the capital paid up or credited as paid up upon their respective Ordinary shares.
9. On 17 January 2006, **Co. B** allotted 200 'A' Ordinary shares to the Appellant at par value. The total paid in respect of the Appellant's "A" Ordinary shares was €200.
10. On 26 January 2006, **Co. B** allotted 100 Ordinary shares to **Co. C** at a premium of €6,700 per share. The total paid in respect of C's Ordinary shares was €670,100.
11. On 27 January 2006, the controlling member of **Co. B**, **Co. C** as holder of the Ordinary shares, voted to pass a Special Resolution amending the Articles of Association of **Co. B** whereby the rights attaching to the 'A' Ordinary shares and the Ordinary shares were altered as follows:

"Resolved as Special Resolutions

(i) Alteration in Share Class Rights



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

A. VOTING RIGHTS

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

B. RIGHTS TO DIVIDENDS

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

C. WINDING UP

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

- (a) First, the holders of the Ordinary Shares shall be entitled to the return of the nominal capital paid up or credited as paid up thereon in priority to the repayment of capital on any other class of shares;*
- (b) Next, the holders of the ‘A’ Ordinary Shares shall be entitled to the return of the nominal capital paid up or credited as paid thereon;*
- (c) Then the share premium account (if any) shall be distributed to and amongst the holders of the ‘A’ Ordinary Shares;*
- (d) Finally, any surplus remaining shall be distributed to and amongst the holders of the ‘A’ Ordinary Shares in the Company in proportion to the amount of the capital paid up or credited as paid up upon their respective ‘A’ Ordinary Shares.”*



12. The effect of the resolution was that rights attaching to the Ordinary shares of **Co. B** held by **Co. C** transferred to the 'A' Ordinary shares of **Co. B** held by the Appellant. The rights transferred to the 'A' ordinary shares included, the right to notice, attendance and vote at general meetings, the right to dividends and the right to the distribution of the share premium account on a winding up. The Appellant gave no new consideration for the rights transferred.
13. On 30 January 2006, the Appellant, as holder of the 'A' Ordinary shares and the controlling member of **Co. B**, passed a special resolution whereby it was resolved:
1. *That the Company be wound up as a members' voluntary winding up;*
 2. *That **Name Redacted** be appointed Liquidator for such winding-up;*
 3. *That the Liquidator be authorised under the provisions of Section 276 of Companies Act, 1963 to exercise the powers laid down in Section 231(1)(d)(f) of Companies Act 1963 and to distribute all or any part of the assets of the Company in specie among the Members as she may think fit.*
14. The winding up of **Co. B** facilitated the exercise of the rights attaching to the 'A' Ordinary shares including the right to receive the distribution of the share premium account.
15. The Liquidator's Statement of Account for the period 31 January 2006 up to 27 October 2006, recorded that €631,301.47 was to be returned to contributories on the winding up of **Co. B** with **Co. C** entitled to €200 as holder of the ordinary shares and the remaining €631,101.47 to the Appellant as holder of the "A" ordinary shares.
16. On 16 February 2011, the Respondent issued the Appellant with a Notice of Revenue Investigation letter. This letter advised the Appellant that a Revenue Investigation had commenced into her tax affairs for 2006 and subsequent years.

Amended Assessment

17. On 6 December 2011, the Respondent issued the Appellant with a Notice of Amended Assessment for the year ending 31 December 2006. The amended assessment included a Schedule F distribution of €670,000 representing the value of the share rights that were transferred to the Appellant on 27 January 2006.
18. On 3 January 2012, the Appellant, through her agent **Redacted**, appealed the assessment. The amount of tax payable in respect of the amended assessment is €305,730.



Legislation

Taxes Consolidation Act

19. Section 130 TCA 1997 provides, so far as relevant as follows:

“(1) *The following provisions of this Chapter, together with sections 436, 436A and 437, and subsection (2)(b) of section 816 shall, subject to any express exceptions, apply with respect to the meaning in the Corporation Tax Acts of "distribution" and for determining the persons to whom certain distributions are to be treated as made; but references in the Corporation Tax Acts to distributions of a company shall not apply to distributions made in respect of share capital in a winding up.*

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

(a) any dividend paid by the company, including a capital dividend;

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

...

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

20. Section 20 TCA 1997 provides as follows:

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

Schedule F

- 1. In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 and sections 436, 436A, 437, 816(2)(b) and 817.*
- 2. Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year*



of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.

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

21. The Appellant asserted that TCA, section 543(1) was the appropriate taxing provision which deems a disposal to arise in situations where there is an absence or insufficiency of consideration and states:

"Without prejudice to the generality of the provisions of the Capital Gains Tax Acts as to transactions which are disposals of assets, any transaction which under this section is to be treated as a disposal of an asset –

(a) shall be so treated (with a corresponding acquisition of an interest in the asset) notwithstanding that there was no consideration,

(b) in so far as, on the assumption that the parties to the transaction were at arm's length, the party making the disposal could have obtained consideration or additional consideration for the disposal, shall be treated as not being at arm's length, and the consideration so obtainable, added to the consideration actually passing, shall be treated as the market value of what is acquired.

22. Furthermore, TCA, section 543(2) is also relevant and brings within the charge to tax certain transactions whereby value out of shares or rights over a company are transferred between connected persons and provides:

(a) Where a person having control of a company exercises that control so that value passes out of shares in the company owned by such person or a person with whom such person is connected, or out of rights over the company exercisable by such person or by a person with whom such person is connected, and passes into shares in or rights over the company, that exercise of such person's control shall be a disposal of the shares or rights out of which the value passes into other shares shall be a disposal of the shares or rights out of which the value passes by the person by whom they were owned or exercised.

(b) References in paragraph (a) to a person include references to 2 or more persons connected with one another."

23. The Appellant argued that the application of TCA, section 547 was relevant to this appeal which imposes market value rules to the acquisition of assets between connected parties. Subsection (1) states:



“Subject to the Capital Gains Tax Acts, a person’s acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where –

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

(b) the person acquires the asset by means of a distribution from a company in respect of shares in the company....”

24. The Respondent argued that under the Taxes Acts where the same transaction has the potential to give rise to a charge to income tax and a charge to capital gains tax only the income tax charge will apply. This is provided for by sections 544(7) and 551(2) TCA 1997. Section 544(7) TCA 1997 (prior to Finance (Tax Appeals) Act 2015) states:

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

25. Whereas TCA, section 551(2) states:

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

Statutory interpretation

26. Both parties to this case contended for a literal interpretation based on a long line of authorities including *inter alia*, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449. In this context, a literal interpretation of ‘assets’ is one which applies its ordinary and natural meaning.



Submissions

Appellant

27. The Appellant argued that the proper interpretation of TCA, section 130(3)(a) being a literal interpretation is central to the case and does not apply because there is no distribution from a company to its member.
28. The Appellant thereafter submitted that the application of the literal interpretation by the Respondent of TCA, section 130(3) TCA could not give rise to an income tax charge by way of a deemed distribution. It was submitted that the Respondent was applying a purposive interpretation to TCA, section 130(3)(a) contrary to the principles of statutory interpretation.
29. The Appellant submitted that TCA, section 130(3)(a) is a deeming provision and applies by treating as a distribution the transfer of assets or liabilities by a company to its members. Where such a deemed distribution is made, a charge to Income Tax arises insofar as consideration has not been received in respect of the acquisition of the asset. On this basis it was submitted that there are two essential constituent elements that must be present before the section is applicable. Firstly, an asset of **Co. C** must be transferred and secondly that the said asset must be transferred to its members. It was further submitted that neither of the constituent elements were present. No asset of **Co. C** had been transferred to its members.
30. In order for the transaction to be treated as a distribution, there must have been a transfer of the assets of **Co. C**. Such an event did not occur as the transfer was not of the assets of **Co. C** but of certain rights, most importantly the right to the priority return of share premium on a winding up attaching to the shares of **Co. B** belonging to **Co. C**. This, the Appellant argued, is materially different from the transfer of an asset. The rights are not assets within the meaning of TCA, Section 130(3)(a). It was submitted that, in order for TCA Section 130(3)(a) to apply, it was necessary for the shares in **Co. B** owned by **Co. C** to have been transferred rather than for certain rights in those shares.
31. The only net change was the rights attaching to the 'A' Ordinary Shares in **Co. B** became more valuable and had clearly significance in its winding up. If the Oireachtas had intended that TCA, section 130(3)(a) was to have this effect it would have provided directly for it. To interpret the statute otherwise was to depart from a literal interpretation and to read words into the statute which was not justified.
32. The Appellant submitted that it was necessary to distinguish between the respective rights of the two companies **Co. B** and **Co. C**. To this extent, it is well established in



company law that a shareholder in one company has no interest in the assets of the company in which it holds the said shares.

33. Reliance was thereafter placed on *Attorney General v. Jameson* [1904] 2 IR 644 where at page 671, it was confirmed that a company has exclusive ownership of the money standing in its bank account and no shareholder has a right to the said money. Furthermore, in *Short v. Treasury Commissioners* [1948] 1 KB 116, a case concerning the valuation of shares, the English Court of Appeal rejected the argument that shares should be valued according to the value of the company's assets and undertaking since "*the shareholders are not in the eye of the law part owners of the undertaking. The undertaking is something different from the totality of the shareholdings*".
34. It therefore followed that as a corollary to this principle, which is also in accordance with the fundamental doctrine of separate legal entity set out in *Salomon v. A. Salomon & Co. Ltd.* [1897] AC 22). While the shares held by **Co. C** in **Co. B** were assets of **Co. C**, that company enjoyed nothing more than the bundle of rights associated with those shares.
35. In *Soden v British and Commonwealth Holdings plc* [1997] TLR 515, the concept of "*in a person's capacity as a member of a company*" or "*in a person's character of a member*" was considered and it was held that a person was due a sum "*in his capacity as a member of a company*".
36. The Appellant accepted that certain share rights can be transferred by shareholders' agreements. However, shareholders' agreements are agreements between shareholders governed by the law of contract. Such agreements were clearly different from company resolutions and there is no jurisprudence which supports the transfer of share rights by way of company resolutions, the Appellant submitted.
37. The Appellant submitted that TCA, section 130 does not have the extended meaning as contended by the Respondent. The reference to "*its members*" in the section must relate back to the company, **Co. C**. On a literal reading of TCA, section 130(3)(a), it was submitted that this is clear and unambiguous, the phrase by a company to its members, used in the section, must be limited to a transfer of an asset of **Co. C** to its members. It was submitted that it has no relevance where there has been a transfer to another member of **Co. C** who was also a shareholder of **Co. B**.
38. It was submitted that the correct approach was to look at the form of the transaction and not the substance which was what the Respondent was essentially doing. If the section was to have a wider meaning, as contended by the Respondent, the statute would have to have made that purpose clear.
39. In light of the foregoing it was submitted that the provisions of TCA, section 130(3)(a) did not catch the transaction. The Respondent was attempting to interpret and implement the provision in a purposive fashion by reading words into it. It was not permitted to do



that in this instance because there was no doubt or ambiguity. If that had been the intention of the legislature, the Appellant submitted that it could easily have been achieved by providing in the statute for a transfer of rights attached to assets and liabilities by a company to its members either directly or indirectly.

40. The Appellant accepted that a share consisted of “a *bundle of proprietary rights which can be sold or exchanged for money or other valuable consideration*” (per Keane J in *Re Sugar Distributors Ltd* [1995] 2 IR 194 at page 207). Further the Appellant accepted that such rights may be sold or exchanged by way of shareholders’ agreements and that the said rights constituted assets for the purpose of the Capital Gains Tax Acts.
41. The Appellant submitted, however, that the said sales or exchanges were effected by way of shareholders’ agreement which are contracts entered into as between individual shareholders. The Appellant argued that there was no jurisprudence which held that such sales or exchanges may be effected by company resolutions. Such company resolutions would have effectively provided that the bundle of rights which constitute a share could be broken up and reallocated by the company which issued them to different members of the said company. The Appellant contended that there was no basis for such a proposition in company law.
42. The Appellant further submitted that, in any event, what occurred in the instant case was not the sale or exchange of share rights as between individual shareholders but the movement of share rights as between different classes of shares. The shareholders in the instant case did not benefit directly from the said movement of share rights as they would have had under a shareholders’ agreement. The said shareholder only benefited indirectly from the said movement of share rights and that was insufficient to bring her into charge to tax under TCA, section 130(3)(a).

Section 543/547 TCA 1997

43. In the alternative, the Appellant submitted that the transfer of rights was subject to capital gains tax pursuant to TCA sections 543 and 547 and as a consequence no tax arose. Furthermore, there was no charge to Schedule F under TCA, section 20.
44. The Appellant submitted that no distribution whether deemed or otherwise was received by the Appellant. However, if an indirect benefit was received, same is properly chargeable to tax under a combination of TCA, sections 543 and 547 as opposed to TCA, section 130. This is the tax treatment under the Capital Gains Tax Acts rather than the Income Tax Acts and was the correct tax treatment applied by the Liquidator, the Appellant submitted.



45. The Appellant argued that this was a liquidation case and therefore the provisions of TCA, section 130 did not apply. Furthermore, it would not be possible to bring the purported transfer of an asset in this instance into charge to Income Tax because the valuation of the asset purportedly transferred could only be known at the time of liquidation.
46. As such, the Appellant submitted that TCA, section 543(1) dealt with these transactions. The Appellant contended that insofar as she received any benefits, she did so by virtue of resolutions passed and actions carried out by companies with which she was connected and over which she could exercise control. In accordance with TCA, section 543(1), the transfer of rights constituted a disposal. Furthermore TCA, section 543(1) brought into charge to capital gains tax indirect benefits received by taxpayers in cases such as the instant case and therefore TCA, section 130 could not tax such indirect benefits by virtue of the literal constructions of taxation statutes. On this basis TCA, section 543 constituted the true charging provision as applied by the Liquidator.
47. However, there was no actual charge to capital gains tax by virtue of TCA section 547(1)(a). This section provides that a person's acquisition of an asset for the purposes of the Capital Gains Tax Acts is deemed to be for a consideration equal to the market value of the asset when acquired otherwise than for a bargain made arm's length.
48. The Appellant argued that the combination of TCA, sections 543 and 547 constituted the correct charging provision and that the Appellant was entitled to have the benefit of same. It was submitted that the fact that the said charging provisions lead to a nil liability for the Appellant resulted simply from the structure of the tax legislation and the Appellant should not be penalised by the Respondent's purported application of TCA section 130(3)(a).
49. It was submitted, on the authority of *Menolly Homes Limited – v – Appeal Commissioners and Another* [2010] IEHC 49 particularly paragraph 21 that the Appeal Commissioners are entitled to examine whether TCA sections 543 and 547 TCA constituted the true charging provisions in this instance.

Respondent

50. The Respondent submitted that in adhering to the principles of interpretation, the transfer of rights attaching to the Ordinary shares in **Co. B** by **Co. C** to the Appellant was a transfer of assets within the meaning of TCA, section 130(3)(a). In the first instance, it was submitted, consideration may be given to the question as to whether the share rights transferred was an "asset" for the purposes of that provision.
51. It was submitted that the rights attaching to the ordinary shares come within the meaning of "assets." In *Zim Properties Limited -v- Proctor*, it was determined that a right to bring



an action, being incorporeal property, was an asset within the equivalent provisions of the UK taxes acts.

52. There was nothing to suggest that the interpretation of “asset” must exclude intangible property as such an interpretation would add exclusions where none existed. Furthermore, for the purposes of CGT, TCA section 532 defines an asset as being “*all forms of property...including options, debts, and incorporeal property generally.*”
53. As there is no particular definition attaching to the word “asset” in TCA, section 130, its ordinary meaning should be applied. “Asset” is defined for linguistic purposes as “*a useful or valuable thing or person*”. In this context, the Appellant received something of value in the transfer of share rights, most significantly the right to vote to liquidate B and to receive the share premium on distribution in the winding up.
54. It was therefore submitted that the share rights are a valuable incorporeal asset that could be sold, transferred or exchanged and indeed were transferred and, as such, fall within the meaning of “asset” for the purposes of TCA, section 130.
55. As to the assertion that share rights are incapable of being divorced from ownership of shares, this was clearly wrong. The following passage from Courtney, the Law of Companies (September 2016 Edition) at paragraph 8.012 is instructive in that there is a clear distinction to be drawn between ownership of shares and the benefit of the bundle of individual contractual rights held in connection with those shares:

“The interests conferred by a share are interests which are protected by the Constitution. In Kerry Co-operative Creamery Ltd v An Bord Bainne Co-Op Ltd, both the Society and Mr Moore, one of its major shareholders, sought a declaration that s 5(2) of the Industrial and Provident Societies (Amendment) Act 1978, which prohibited the Society from accepting or holding deposits, constituted an unjust attack on their constitutional property rights. Carroll J, in the High Court, for reasons discussed in Ch 4, dismissed the Society’s application; but in relation to Mr Moore’s application she said:

‘Mr Moore is a shareholder in the Society. He invested his money with other shareholders in a society incorporated under the law which is entitled to carry on business intra vires. If the business of the society is affected by the Act of 1978 in such a way that the property rights of Mr Moore are affected, then he is entitled, prima facie, to make a claim that his constitutional rights that are protected by Article 40, s 3, and Article 43 have been infringed. Ownership of shares is one of the bundle of rights which constitute ownership of private property: per Mr Justice Kenny at p. 84 of the report of Central Dublin Development Association v The Attorney General (1969) 109 ILTR 69.’



Carroll J's reference to 'ownership of shares' may be taken as a reference to the interests conferred by a share, since there was no question of the offending legislation divesting Mr Moore of his ownership of the shares in question. That was how the Supreme Court approached the matter on appeal. Delivering the Court's judgment, O'Higgins CJ said:

'[A]s a shareholder and to the extent of his investment, Mr Moore has an interest in the Society and contractual rights arising therefrom. This interest and these contractual rights are property rights which belong to Mr Moore and they are capable of being harmed by injury done to the Society. The Court, therefore, rejects the submission made on behalf of the Attorney General that, as a shareholder in the Society, Mr Moore has no property rights capable of being invoked for the purposes of Article 40, s 3, of the Constitution.'

*Apart from providing a convenient mechanism for indirectly enforcing rights which are not available to a company, it has been suggested that the constitutionally protected property rights conferred by shares may also open the door for another exception to the rule in *Foss v Harbottle*, which is discussed in Ch 11, *Shareholders' Remedies*."*

56. In *Re Sugar Distributors* Keane J described a share as "*in effect a bundle of proprietary rights which can be sold or exchanged for money or other valuable consideration.*"
57. The rights so described are not subject to any bar on alienation or transfer. The fact that those rights relate to a share is irrelevant as all intangible assets relate to or attach to something. This is where their value is derived. The Appellant had identified no special rule of law or principle to show that the contractual rights or obligations relating to shares cannot be transferred. On the contrary, it was very clear from this case that they can and were.
58. As such the Appellant was wrong in arguing that there was no transfer of share rights, but rather an alteration or dilution in share rights. It was submitted that the word "transfer" in section 130(3)(a) is to be interpreted in line with the well established principles applicable to statutory interpretation. It was not surprising that the Appellant acknowledged the transfer of value as it was clear that the Appellant received something of value in the transfer of share rights, most significantly the right to vote to liquidate **Co. B** and the substantial share premium on distribution in the winding up.
59. The Respondent argued that there was a transfer of share rights, in the form of assets from **Co. C**, a company, to its member, the Appellant. The Respondent submitted that it was clear that TCA, section 130 did not require a transfer to be made to members *qua* member. The Appellant was a member of **Co. C** who received a transfer of share rights from that company, and that was sufficient. The Respondent submitted that the



Appellant was incorrect in asserting that for TCA, section 130(3)(a) to apply, the transfer of share rights must occur as between **Co. B** and the Appellant.

60. The Respondent submitted that a proper reading of TCA section 130(3) leads inexorably to the conclusion that the transfer of share rights at issue in this appeal was chargeable to income tax. The questions posed by subsection (3)(a) are:

- (a) was there a transfer of assets?
- (b) was the transfer by **Co. C**?
- (c) was the transfer to a member of **Co. C**?

61. In answering all of those questions in the affirmative, the Respondent contended that it had correctly determined that the provisions of TCA, section 130(3)(a) applied and that the amended assessment under appeal ought to stand.

62. The Respondent submitted that, on a proper interpretation of the Taxes Acts, in particular, TCA, section 130, the transfer of assets by a company to its member, in the instant case, the transfer of rights attaching to a class of shares owned by **Co. C** to the Appellant, fell within the charge to income tax.

63. The Respondent argued that under the Taxes Acts where the same transaction has the potential to give rise to a charge to income tax and a charge to capital gains tax, only the income tax charge will apply. This is provided for by sections 544(7) and 551(2) TCA 1997. These provisions, in effect, create an effective hierarchy, where there is a charge to income tax, capital gains tax cannot apply. In the present case, the tax charge which was the subject of the Notice of Amended Assessment was to income tax under TCA, section 130(3)(a). The taxable event was the transfer of the share rights from **Co. C** to the Appellant, as member of **Co. C**. As TCA section 130(3)(a) applied to the transfer it was not necessary to consider whether section 543 applies as well.

Previous determination of the Appeal Commissioners

64. Having regard to the provisions of section 949AN TCA 1997 (as amended) which allows the Appeal Commissioners to have regard to a previous determination made by them in respect of an appeal that raises common or related issues, it is highly relevant to note that the issues which arise in this appeal are the same as those which required to be determined in appeal reference: 10TACD2016. In that appeal, the Appeal Commissioner determined, in relation to a share rights transfer which was, in all material respects the same as that in issue here, that a charge to income tax arose under section 130(3)(a) TCA 1997 for the detailed reasons set out in that determination. The Respondent submitted that it was appropriate to have regard to the detailed reasoning of that determination and the outcome should apply with equal force in this appeal.



Analysis

65. Both parties, relying on a significant body of case law, agreed that a literal interpretation should be applied to the wording of TCA, section 130(3)(a) and that the wording of that provision is plain and unambiguous. The parties also agreed that the settled law endorses the position that a share consists of a bundle of rights. I am in accordance with all of those submissions.

66. In this context it is necessary to consider whether a charge to income tax arises under TCA, section 130(3)(a) which provides:

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

67. Therefore, for the charge to apply pursuant to TCA, section 130(3)(a), there must have been:

- (a) a transfer of assets
- (b) by a company to a member of that company
- (c) of value
- (d) that is in excess of any consideration paid by that member to the company.

a transfer of assets

68. The verb ‘transfer’ describes a process of moving from one place to another. In this case there has been a clear movement of rights including *inter alia*, the right to the share premium account on a winding up, from the Ordinary shares held by Co. C to the ‘A’ Ordinary shares held by the Appellant as a consequence of the Special Resolution passed on 27th January 2006.

69. The meaning of the word ‘asset’ is universally accepted to define a useful or valuable thing. Furthermore, the parties agreed that the rights attaching to shares can be alienated and therefore constituted assets for the purposes of capital gains tax.

70. While assets are not defined for income or corporation tax purposes, the definition for capital gains tax purposes is contained within TCA, section 532 which states:



“All forms of property are assets for the purposes of the Capital Gains Tax Acts whether situated in the State or not, including options, debts and incorporeal property generally.

71. Incorporeal property is a legal right in property having no physical existence and therefore follows that the alienable bundle of rights contained within a share constitutes incorporeal property.
72. I therefore cannot accept the Appellant’s submission that property rights contained in a share are not regarded as assets for the purposes of TCA, section 130(3)(a). Furthermore, as considered by Peart J. in *Director of Public Prosecutions v Perennial Freight Limited* [2015] IECA 252, at paragraph 36, where the same word is used throughout an Act, that word should be given:

“the same meaning unless another meaning is clearly mandated by the context, but having regard also to the principle that when Acts are in pari materia or part of the same family of legislation, the use of the word in that family of legislation may assist in its interpretation in the provisions under review: see BUPA Ireland Ltd. v. Health Insurance Authority [2008] IESC, [2009] IR.

73. In this regard I am of the view that the capital gains tax definition of asset is the same for both income tax and corporation tax purposes and disagree with the Appellant’s assertion the rights attaching to shares are not assets for the purposes of TCA, section 130(3)a) to the extent that such rights were transferred by company resolution and not by shareholder’s agreement.
74. Furthermore, there is no substance to support the Appellant’s assertion there is no basis in company law to permit a bundle of rights associated with a share to be “broken up” by way of company resolution. On the contrary, the passing of the Special Resolution clearly alienated the share rights constituting the movement of significant rights from the Ordinary shares to the ‘A’ Ordinary shares.
75. It is therefore quite clear that a transfer of rights to dividends and the entitlement to the share premium account on a winding up from the Ordinary shares held by **Co. C** to the ‘A’ Ordinary shares held by the Appellant had significantly increased the value of the Appellant’s shares. Furthermore, it is also clear and something acknowledged by the Appellant, the ‘A’ Ordinary shares held by the Appellant after the passing of the Special Resolution on 27th January 2006 became more valuable resulting in an immediate and direct benefit for the Appellant.
76. Fortification for my view is derived from the previous determination of this Commission, Determination 10 TACD2016, which dealt with a similar appeal, where it was observed at paragraph 35:



“In my view, there is no basis for excluding intangible rights attaching to shares from the meaning of ‘assets’ in section 130(3)(a) TCA 1997. Rights attaching to shares can be alienated and are frequently transferred and exchanged via shareholders’ agreements. Such rights are thereby treated as assets in normal commercial and business transactions. I do not accept that for the word ‘assets’ to include intangible share rights, the legislation required the insertion of any additional statutory language as contended by the Appellant.”

77. Finally, for the provisions of TCA, section 130(3)(a) to apply, there must have been a transfer of assets irrespective of how that transfer occurred. Clearly in this case, there was a transfer of assets that included the sole entitlement to a distribution of the share premium account on a winding up from C to the Appellant.

company to a member of the company

78. The Appellant argued that TCA, section 130(3)(a) could only apply if the shares in **Co. B** as opposed to the rights held by **Co. C** in the shares in **Co. B** were transferred by **Co. C** to the Appellant.
79. I cannot agree with this such assertion. The significance of passing the Special Resolution had the effect of transferring significant rights from the Ordinary shares held by **Co. C** to the ‘A’ Ordinary shares held by the Appellant. These rights, as already acknowledged by the Appellant, are assets and constituted incorporeal property.

of value

80. The discernible value of the rights transferred by **Co. C** to the Appellant by the passing of the Special Resolution on 27th January 2006 mandating the share premium account standing in the sum of €670,000 be paid to the Appellant as holder of the ‘A’ Ordinary shares is without doubt.

that is in excess of any consideration paid by the member to the company.

81. The transfer of rights from **Co. C** to the Appellant was achieved by Special Resolution as opposed by way of shareholder’s agreement or indeed by way of bespoke contract. As such, the method achieved by the Special Resolution did not require an obligation to pay any consideration. Therefore, the value received by the Appellant was in excess of any consideration paid by her to **Co. C**.
82. It is therefore beyond doubt that there was a transfer of assets in the form of a movement of share rights by **Co. C** to its member, the Appellant, for a value that was in excess of any consideration paid by the Appellant to **Co. C**. In this regard the Appellant is within the charge to tax pursuant to TCA, section 130(3)(a) on the value received which has been quantified at €670,000.



Application and interaction between TCA, section 543 and 547

83. The Appellant also relied on the application and interaction of TCA, sections 543 and 547 in support of the assertion that while there was a disposal of an asset for capital gains tax, that charge was extinguished as the Appellant was deemed to acquire the asset at market value.
84. TCA, sections 543 (1) & (2) deem there to be a disposal of an asset notwithstanding that there is no or inadequacy of consideration and the passing of value or rights out of shares between connected parties to be a disposal and TCA, section 547 applies market value rules to a person's acquisition of an asset from a connected party.
85. To the extent that the transfer of rights from the Ordinary shares to the 'A' Ordinary shares was achieved by Special Resolution in the absence of consideration and that significant value had passed out of the shares held by **Co. C**, a disposal for capital gains tax purposes was deemed to have taken place.
86. It is therefore difficult to reconcile the Appellant's argument. The passing of value from **Co. C** to the Appellant is regarded as a disposal pursuant to TCA, section 543(2) and as a consequence **Co. C** may have had to pay capital gains tax. TCA, section 547 values the acquisition of the asset at market value relating to transactions between connected parties. If anything, TCA, section 547 confirms that on a subsequent disposal of those rights, the Appellant's base cost is calculated on the market value of the asset at date of acquisition. As a consequence, it was unlikely that the Appellant would have had an exposure to capital gains tax on the disposal of the shares as a result of the liquidation process. However, the taxable event was the transfer of the share rights from **Co. C** to the Appellant, as a member of **Co. C** and not the liquidation of **Co. B** as contended by the Appellant. Therefore, the Appellant's reliance on the application and interaction of TCA, sections 543 and 547 is irrelevant.
87. Notwithstanding the above, the Respondent submitted that under the Taxes Acts where the same transaction has the potential to give rise to a charge to income tax and a charge to capital gains tax only the income tax charge will apply. In the present case, the tax charge which was the subject of the Notice of Amended Assessment was to income tax under TCA, section 130(3)(a).

Conclusion

88. The taxable event in this appeal was the transfer of share rights from **Co. C** to the Appellant as a result of the passing of the Special Resolution on 27th January 2006 for a value that was in excess of any consideration paid by the Appellant to **Co. C**. In this regard the Appellant was within the charge to tax pursuant to TCA, section 130(3)(a) on the value received which has been quantified at €670,000.



89. This appeal is therefore determined in accordance with TCA, section 949AK.

Appeal Commissioner
October 2018

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