THE HIGH COURT

[2024] IEHC 85

[Record No. 2021/1R]

BETWEEN

JOHN MCMAHON

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 16th day of February 2024

Introduction

1. This judgment concerns a case stated for the opinion of the court pursuant to s.949AQ of the Taxes Consolidation Act 1997, as amended ('**TCA 1997**'), in relation to a determination by a tax commissioner of 02 October 2020 in an appeal by Mr John McMahon ('**the appellant**'). The case stated recites that a notice requesting Ms Lorna Gallagher ('**the Commissioner'**) to state and sign a case for the opinion of the High Court was requested on 20 October 2020 by notice in writing in accordance with s.949AP (2) TCA 1997. On 22 October 2020, the respondent ('**Revenue**') requested the inclusion of a ground by way of cross-appeal. The Commissioner accordingly drafted and signed a comprehensive case stated for the opinion of this Court pursuant to s.949AQ of the TCA on 14 January 2021.

2. The case stated summarises the evidence heard by the Commissioner at the Tax Appeals Commission ('**TAC**'), and also summarises the facts proved or admitted and the submissions of the parties. It sets out the portions of the determination which address the central issues of the appeal, together with the questions of law submitted for the opinion of this Court.

3. The appeal concerned two assessments to Capital Gains Tax ('**CGT**') raised in 2016 in relation to a payment of €1,174,498.72 received by the appellant from a non-resident discretionary trust in April 1999. The assessments were as follows:

- On 02 August 2016, the respondent raised an assessment to CGT in the sum of €234,645 in relation to the payment in respect of the tax year of assessment ended 05 April 1999, in accordance with s.590 of the TCA 1997;
- On 24 November 2016, the respondent raised an alternative assessment to CGT in the sum of €234,645 in relation to the payment, in respect of the tax year of assessment ended 05 April 2000, in accordance with s.590 and s.579A TCA 1997.

4. The assessment of the Commissioner on 02 October 2020 was that the assessment dated 24 November 2016 should stand and that the assessment dated 02 August 2016 should not stand.

Evidence

5. The appellant gave evidence at the hearing before the TCA. This is summarised at paras. 21 and 22 of the Commissioner's determination as follows:

- The appellant, a chartered accountant by profession, joined Meadowsfreight (Ireland) Limited ('**MIL**'), a freight business, in 1981. At that time the managing director was Mr Gerry Cunningham. The appellant stated that his

relationship with Mr Cunningham was very difficult, describing it as "fraught" around 1999.

- In 1987, the appellant was part of the senior management team when he learned that Berisford Freight Limited ('**BFL**') was the new parent company of MIL. The appellant stated that he did not own or acquire shares in MIL at any time, that he did not pay any money into any trust and that he did not make capital contributions to either MIL or BFL. He stated that in 1988 he was told of the existence of the trust and that he was named as a beneficiary.
- The appellant stated that he was told by Mr Cunningham in March 1999 that he was going to receive a gift from the trust. On 07 April 1999, he received the sum of €1,174,498.72 by bank transfer. He was told by Mr Cunningham that tax advisers had received legal advice that the sum was not subject to tax and that there was no need to include it in his tax return.
- The appellant stated that he met Mr Lennart Holboll ('**the settlor**') approximately 30 years ago and that he did not know him personally but knew he was the managing director of a Danish company which employed approximately 1500 people. The appellant stated that the Berisford trust incorporated BFL in the Island of Man, which in turn acquired an 80% shareholding in MIL.
- The appellant stated that he saw the trust deeds for the first time in 2014, prior to a meeting with the respondent's officials.
- The appellant's evidence was that the earliest date on which there could have been a trust gain was 04 March 1999, based on the completion of the sale, and that he received the payment of €1,174,498.72 on 07 April 1999.

6. The Commissioner records at para. 5 of the case stated that, in cross-examination, the appellant accepted that:

- The letter of 15 April from Deloitte & Touche which stated that a copy of the resolution of the trustees had been requested was not followed up.
- He did not seek the legal opinion until 2014 or 2015 but he was informed of the existence of the opinion by Mr Cunningham in 1999.
- When the appellant received the capital payment he did not ask Mr Cunningham who the settlor of the trust was or who the trustees were.
- The appellant did not make contact with the trustees of the discretionary trust in advance of the hearing.

Facts proved or admitted

7. At para. 6 of the case stated, the Commissioner states the following facts to have been admitted or proved:

- A discretionary trust incorporated and resident in the Isle of Man – the Berisford Trust – was established on 04 December 1987 by the settlor, who was at that time resident and domiciled in Denmark. The settlor settled a sum of 28,000 Danish Krone on the trust. The appointed trustees were at all times resident in the Isle of Man.
- The trust deed, dated 31 December 1987, lists as beneficiaries of the trust a number of persons including the appellant.
- BFL held an 80% shareholding in MIL with the remaining 20% of the shares held by Danza Holding Limited. The shares in BFL were held by the Berisford Trust.
- By sale agreement dated 04 March 1999, BFL and Danza Holding Limited disposed of their shareholdings in MIL to a third freight company, DFDS.

- Shortly after the disposal of the shares, the Berisford Trust exercised it's discretion and made an appointment to the appellant in the sum of €1,174,498.72 which was received by the appellant on 07 April 1999. In order to put the trustees in funds, BFL provided a loan to the trustees from the proceeds of sale of the disposal of shares in MIL.
- The appellant did not include this payment in his return for either 1998/1999 or 1999/2000 and did not pay tax in respect of the payment.
- In 2014, pursuant to proceedings in accordance with s.908 TCA 1997, High Court orders were obtained by the respondent against various financial institutions as part of an investigation into the use of offshore bank accounts. Under the terms of the High Court orders, the financial institutions were obliged to provide the respondent with details of transactions involving certain foreign jurisdictions. Information furnished to the respondent pursuant to these court orders contained details of the payment of €1,174,498.72 received by the appellant in April 1999.
- On 28 March 2014, the respondent wrote to the appellant querying the payment. The parties engaged in correspondence for a period and in 2016, the respondent raised the two assessments to CGT to which reference is made above.

Preliminary point

8. At para. 8 of the case stated, the Commissioner refers to a preliminary point raised by the appellant in relation to "impermissible pleading". The Commissioner states that s.956 TCA 1997 provides that enquiries and/or actions "cannot be made by the respondent outside of a four-year statutory limitation period unless, at that time, the Revenue Inspector had reasonable grounds for believing that the return was insufficient due to its having been

completed in a fraudulent or negligent manner". The appellant raised a preliminary point to the effect that the respondent, in making enquiries or taking actions outside the statutory limitation period, was statute barred from doing so in accordance with s.956.

9. The Commissioner records that the respondent "contended that there were reasonable grounds for believing that the return was insufficient due to its having been completed in a negligent manner, due to the fact that details of the payment were not included in the appellant's return for the relevant tax years of assessment".

10. The preliminary point was the subject of considerable debate – both before the TAC and before this Court – by way of written and oral submissions. The Commissioner determined that the appellant should not succeed in relation to the preliminary point, and her reasoning, findings and determination in this regard are contained at paras. 23 to 50 of her determination of 02 October 2020.

Questions for determination

11. In the case stated, the questions of law for the opinion of the High Court are set out as follows:

> "I Whether, upon the evidence adduced and/or admitted and the facts found, I was correct in law in my construction, analysis and application of ss. 590 and 579A TCA 1997.
>
> II Whether, I was correct in law in my determination that the payment received by the appellant on 07 April 1999, in relation to the chargeable gain accruing to the trustees on 04 March 1999, falls within ss. 590 and 579A TCA 1997 and is therefore subject to chargeable gains tax for the tax year of assessment 1999/2000 and in so determining, whether I was correct in my determination that the assessment dated 24 November 2016, shall stand.

III Whether I was correct in not determining that it is the attributed trust gain which is assessable and not the capital payment.

IV Whether, upon the facts proved or admitted and the evidence adduced and upon my interpretation and analysis of s.590 TCA 1997, I was correct in law in my determination that the assessment dated 02 August 2016, shall not stand.

V Whether, upon the facts proved or admitted, I was correct in law in my determination that the scope and jurisdiction of an Appeal Commissioner being confined to the determination of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner, does not extend to a determination as to the permissibility or legality of the respondent's raising of two contradictory assessments having been raised on an alternative basis.

VI Whether, upon the facts proved or admitted, I was correct in law in my determination that the burden of proof rested on the Appellant in relation to each of the assessments in circumstances where two contradictory assessments were raised in the alternative.

VII Whether I was correct in law in my determination in relation to the appellant's submission regarding impermissible pleading and whether my reasons were adequate in relation thereto.

VIII Whether, upon the facts proved or admitted, I was correct in law in my determination that the High Court order obtained pursuant to s.908 TCA 1997, did not constitute an enquiry for the purposes of s.956 TCA 1997.

IX Whether I was correct in law in my determination that the respondent was entitled to have regard to information obtained on foot of proceedings pursuant to s.908 TCA 1997, in meeting the test of 'reasonable grounds'

contained in s.956(1)(c) TCA 1997 notwithstanding that the information was obtained beyond the statutory time limit in s.956(1)(c) TCA 1997.

X Whether, upon the facts proved or admitted, I was correct in law and my determination that due to the failure to disclose the payment of €1,174,498.72 in the Appellant's returns, the inspector had *'reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner'*.

XI Whether, I was correct in law in my determination that the respondent was not precluded from making enquiries beyond the statutory limitation period contained in s.956(1)(c) TCA 1997 in the circumstances.

XII Whether I was correct in law to determine that the appellant's return for the tax year of assessment 1999/2000, did not contain a full and true disclosure of the facts in accordance with s.955(2)(b)(i) TCA 1997.

XIII Whether I was correct in law to determine that the Appellant did not make a full and true disclosure in his tax return in circumstances where the return was made with the benefit of professional tax advice.

XIV Whether I was correct in law in that I did not make the following determination; that where a taxpayer has brought all relevant matters to the attention of his professional tax adviser his should be considered to have taken due care in the preparation of the return and made a full and true disclosure.

XV Whether I was correct in law in my determination that the within assessment was not statute barred" [Italics in Original].

Documentation and submissions

12. The case stated sets out the documentary evidence which was admitted or proved at the hearing before the TAC. The submissions of the parties before the TAC are exhibited to the case stated and form part of it. They are summarised briefly at para. 8 of the case stated.

13. Very substantial written submissions were proffered to this Court in respect of the case stated. The hearing took place over two days, in the course of which further detailed oral submissions were made by both parties.

14. I do not propose to summarise the submissions, but will include reference to them as appropriate in discussion of the issues below.

Legal principles generally

15. The principles governing the conduct of an appeal by way of case stated are well settled and do not require to be set out here in any detail. In *DA MacCarthaigh*, *Inspector of Taxes v Cablelink Limited* [2003] 4 IR 510, the Supreme Court cited with approval the following summary of principles by Blayney J in *Ó Culachain v McMullan Brothers Limited* [1995] IR 217 at 223:

> "(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.
>
> (2) Inferences from primary facts are mixed questions of fact and law.
>
> (3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.
>
> (4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.
>
> (5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the Court does not agree with them, for we are not retrying the case) unless

they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law".

16. As regards the TAC hearing, the burden of proof is on the taxpayer; as Charleton J put it in *Menolly Homes Limited v The Appeal Commissioners & Anor.* [2010] IEHC 49 at para. 22:

> "The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".

Preliminary point re enquiry: Questions VIII to XI

17. Questions VIII to XI relate to the issue of whether a High Court order obtained by Revenue pursuant to s.908 of the TCA 1997 constituted an enquiry for the purpose of s.956 of that Act, and whether or not Revenue was in breach of the statutory time limit in s.956, together with other related matters. If the issue were resolved in the applicant's favour, Revenue would not be entitled to rely on the assessments at issue.

18. As set out at paras. 30 to 32 of the Commissioner's determination, ss. 955 and 956 TCA 1997 were repealed by s.129 of the Finance Act 2012 and replaced by s.959AD. However, as the current appeal relates to years of assessment prior to 2013, the provisions of ss. 955 and 956 still apply to the facts of the present case.

19. In as far as is relevant, s.956 is as follows:

> "(b) The making of an assessment…shall not preclude the Inspector –
>
> (i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular…

> (c) any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of four years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the Inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner."

20. The Commissioner at para. 34 of the determination identifies the first question in this regard as "whether the respondent was entitled to raise queries outside the statutory time limit contained in s.956(1)(c) TCA 1997". As we have seen, Revenue had obtained a court order in 2014, pursuant to proceedings which invoked s.908 TCA 1997, under which various financial institutions provided Revenue with details of certain transactions, as a result of which Revenue engaged in correspondence with the appellant, and ultimately raised the two assessments at issue in 2016.

21. The appellant argues that the respondent was "not permitted to embark upon an enquiry or investigation pursuant to s.908 TCA 1997 beyond the statutory time limit in s.956 TCA 1997 and was not permitted to use information discovered in that enquiry to meet the test of reasonable grounds for the purposes of an out of time enquiry…" [para. 43, written submissions]. The appellant cited the following passage of the Supreme Court in *Revenue Commissioners v Droog* [2016] IESC 55 (para. 4.7):

> "…A person who makes a full and true disclosure and pays their tax on foot of an assessment raised thereon cannot have their tax affairs reopened after four years have elapsed. An inspector is given wide power to enquire into the accuracy of any return but is precluded from engaging in such enquiry outside the four year period unless the inspector has reasonable grounds for believing that the original return was fraudulent or negligent and thus not a full and true disclosure. An inspector is not, therefore,

entitled to engage in a purely 'fishing' exploration of whether old returns (*i.e.,* returns more than four years previous) were inaccurate but rather is required to have some reasonable basis for considering that the return was fraudulent or negligent before embarking on enquiries…".

22. The appellant argues that the High Court order made pursuant to s.908 "is the very definition of a fishing expedition as described in *Droog* "[para. 43]. It is suggested that this is apparent from the wording of s.908 itself, which requires an authorised officer to be satisfied that there are "reasonable grounds" for suspecting that the taxpayer or class of taxpayer may have failed to comply with the Tax Acts. It is submitted that the s.908 application "…based as it is on an existing suspicion in respect of the taxpayer himself or where "the taxpayer is a group or class of persons" constitutes the making of an enquiry by the Inspector for the purposes of s.956(1)(b)(i)." It is suggested that the word "enquiry" in s.956(1)(b)(i) "…clearly encompasses the application under s.908 and it is submitted that the Commissioner was incorrect to determine that the enquiry, in which an order was obtained in the High Court against various financial institutions…did not constitute an enquiry for the purposes of s.956(1)(b)(i) TCA 1997" [para. 46 written submissions].

23. The appellant submits in any event that the determination by the TAC that the failure by the appellant to disclose the payment received from the trust meant that the Inspector "had reasonable grounds for believing that the return was insufficient due to its having been completed in a … negligent manner" is incorrect; the return had been filed on the basis of advice from the appellant's tax advisers, and the appellant was of the understanding that the return filed was a full and true disclosure of his affairs for the year.

24. It was an uncontested finding of TAC that €1.174m had been received by the appellant and not included in his return. The Commissioners found – at para. 41 of the determination – that "the information received on foot of orders pursuant to s.908 TCA 1997,

in relation to the existence of a payment of €1,174,498.72 received by the appellant on 07 April 1999, provided the Inspector with "reasonable grounds" for the purposes of s.956(1)(b) TCA 1997, which allowed the making of enquiries beyond the four year statutory limitation period". The point is made that s.956(1)(c) does not require proof of negligence, but that the Inspector – in the words of the Supreme Court – is required to have "some reasonable basis for considering that the return was fraudulent or negligent before embarking on enquiries…", and that this requirement was satisfied by the absence of inclusion of the payment in the applicant's returns: see para. 43 of the determination.

25. The respondent, not surprisingly, endorses these findings, suggesting that the grounds relied upon by the Inspector – primarily, that the payment discovered as a result of the s.908 order had not been included in the applicant's return – were "reasonable" in that they were not irrational, absurd, or ridiculous and that this fact could not be "wiped from the mind of Revenue and/or disregarded by TAC…" [para. 5.5 written submissions]

26. The respondent also submits that "…even if TAC's conclusion that Revenue had reasonable grounds is treated as a mixed question of fact and law, rather than a finding of primary fact, it is not possible to say (given the totality of the information placed before TAC by the appellant) that no reasonable decision-maker could have made such a finding" [para. 5.8 written submissions]. In making this submission, the respondent invokes the fourth criterion set out by Blayney J in *Ó Culachain* set out at para 15 above.

27. The TAC drew a distinction at paras. 39 to 40 of its determination between s.956 and 908. The former section relates to enquiries for a particular tax year of assessment in relation to a particular return delivered by a taxpayer; the statutory limitation period of four years in s.956 applies to enquiries made in accordance with s.956(1)(b) TCA 1997, namely the "making of such enquiries or taking of such actions within [the Inspector's] powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise" of a

statement or particular contained in a return delivered. The proceedings pursuant to s.908 were taken by the respondent in relation to a class of taxpayers in the context of an investigation into the use of offshore bank accounts, with the s.908 orders directing certain actions on the part of a number of financial institutions. While s.908 requires an authorised officer to be satisfied that there are "reasonable grounds" for suspecting that a taxpayer or class of taxpayers may have failed to comply with the Tax Acts, TAC expressed the view that the "reasonable grounds" test under s.908 is a broad test which is satisfied in relation to a class of persons where it is demonstrated in respect of any person belonging to that class, whereas the test of "reasonable grounds" set out in s.956(1)(c) "is expressly [applied] in respect of a specific chargeable person for a specific chargeable period".

28. In view of this distinction between the two sections, the Commissioner concluded that the High Court proceedings pursuant to S.908 did not constitute the making of enquiries by the Inspector for the purposes of s.956(1)(b)(i) TCA 1997, so that the information received on foot of the s.908 orders provided the Inspector with "reasonable grounds" for the purposes of s.956(1)(c) which allowed the making of enquiries beyond the four statutory limitation period.

29. I consider that this conclusion drawn by the TAC is a valid one. Section 908 in my view performs a different function to those set out in s.956. Section 908 is headed "Application to High Court seeking order requiring information: financial institutions". It specifically provides that "taxpayer" may include "a person whose identity is not known to the authorised officer, and a group or class of persons whose individual identities are not so known…". Section 956 prohibits enquiries pursuant to s.956(1)(c) "in the case of any chargeable person for any chargeable period after the expiry of the period of four years commencing at the end of the chargeable period in which the chargeable person has delivered

a return for the chargeable period…", unless there are reasonable grounds for believing that the return is insufficient due to having been completed in a fraudulent or negligent manner.

30. This wording makes it clear that s.956 is directed to a specific "chargeable person" who, in the absence of fraud or negligence, is entitled to regard their tax affairs as concluded after four years from the end of the chargeable period for which they have delivered a return, so that those affairs cannot be reopened by a specific enquiry as to their affairs, other than in the circumstances set out in s.956(1)(c). This is consistent with the rationale for the section proffered by Clarke J (as he then was) in *Droog* as quoted above. That is quite different to a situation where information discovered in the course of a s.908 investigation comes to light which gives rise to "reasonable grounds" under s.956. In my view, TAC was correct to conclude that the "enquiries and actions" prohibited in the case of an individual chargeable person under s.956 are not intended to include an application for orders under s.908 which give rise to the discovery of information regarding a taxpayer.

31. In addition, it seems to me that the failure by the appellant to include in his return such a substantial payment from an offshore discretionary trust provided the Inspector with "reasonable grounds for believing that the return is insufficient due to its having been completed in a … negligent manner…". Under the section, the Inspector must have "reasonable grounds" … "at that time", *i.e.,* at the point at which the "enquiries and actions" are made. Section 956(1)(c) does not require proof of negligence in advance of raising enquiries; in the words of Clarke J in *Droog*, the Inspector "is required to have some reasonable basis for considering that the return was fraudulent or negligent before embarking on enquiries".

32. In any event, it does not seem to me that the TAC's conclusion that reasonable grounds existed is one which could not have been made by a reasonable decision-maker in all the circumstances.

33. In the premises, I conclude that the answer to each of questions VIII to XI inclusive of the case stated is "yes".

The assessment of 24 November, 2016: questions I – III

34. The TAC addressed the validity of the assessment of 24 November, 2016 to the tax year ended 5 April, 2000 at paras. 55 to 68 of the determination, and questions I to III of the case stated concerned the TAC's findings in that regard.

35. The determination of the TAC considered the interplay between ss. 590 and 579A TAC 1997 in some detail. In both written and oral submissions before this court, counsel considered these sections exhaustively and their effect on the assessment question.

36. There was no dispute between the parties as to the relevance of the sections; I propose therefore to spare the reader an exposition of the somewhat tortuous legislative history of both provisions, and s. 579A in particular, save to record – as the TAC does at para. 57 of its determination – that the Finance Act 1999 enacted the two sections by ss. 88 and 89 of that Act, each of which amended TAC 1997, and that s. 89(2) of the Finance Act of 1999 provides that "…[T]his section [i.e. section 590] shall apply as respects chargeable gains accruing to a company on or after the 11th day of February, 1999". Section 88(2) of the same Act, which enacts, inter alia, s. 579A, provides that the section "shall apply from the 11th day of February, 1999".

37. The TAC sets out the terms of s. 590(13) at para. 59 of its determination, and concludes, at para. 60, that the trustees of the Berisford Trust, being a non-residential discretionary trust which holds the shares in BSL, were to be treated as "participators" in accordance with s.590(13). The TAC points out at para. 61 that "in accordance with s. 590(4) TCA 1997 a participator in a company is treated as if part of the company's chargeable gain had accrued to the participator and under s. 590(5), that part corresponds to the extent of the participator's interest in the company". The subsections are as follows:

"(4) Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person.

(5) The part of the chargeable gain referred to in subsection (4) shall be equal to the proportion of that gain that corresponds to the extent of the participator's interest as a participator in the company."

38. The TAC accordingly concludes that *"... the chargeable gain accruing to BFL on the disposal of the shares in MIL is thus deemed to be the chargeable gain of the trustees in accordance with the provisions of s.590 TCA 1997..."* [para. 62], and sets out the provisions of s.579A(4) and (5):

"*(4) Subject to this section, the trust gains for a year of assessment shall be treated for the purposes of the Capital Gains Tax Acts as chargeable gains accruing in the year of assessment to beneficiaries of the settlement who receive capital payments from the trustees in the year of assessment or have receive such payments in any earlier year of assessment.*

(5) The attribution of chargeable gains to beneficiaries under subsection (4) shall be made in proportion to, but shall not exceed, the amounts of capital payments received by them."

39. The determination then recites ss. 579A (2) and (10) TAC 1997, while pointing out that subsection (10) was repealed by s.47(1) of the Finance Act 2002, its provisions incorporated in subsection 2 by way of amendment:

"(2) Subject to subsection (10), this section shall apply to a settlement for any year of assessment during which the trustees are, at no time, neither resident nor ordinarily resident in the State.

(10) Subsection (2) shall not apply in relation to any year of assessment beginning before the 6th day of April, 1999, and the references in subsections (4) and (5) to capital payments received by beneficiaries do not include references to any payments received before the 11th day of February, 1999, or any payments received on or after that date so far as they represent a chargeable gain which accrued to the trustees in respect of a disposal by the trustees before the 11th day of February, 1999."

40. The TAC concludes as follows:

"67. In this appeal, the evidence is that the chargeable gain was realised on 4 March, 1999 and the capital payment was received by the appellant on 7 April, 1999. Thus the chargeable gain and the capital payment arose post 11 February, 1999. This gain is attributable to the trustees in accordance with s.590 TCA 1997.

68. Based on the evidence and on the provisions of ss. 590 and 579A TCA 1997, the capital payment received by the appellant on 7 April, 1999, in relation to the chargeable gain accruing to the trustees on 4 March, 1999, falls within s.590 and 579A TCA 1997, and the payment is therefore subject to chargeable gains tax for the tax year of assessment 1999/2000."

Discussion

41. It is not disputed that the appellant, at the time when the chargeable gain accrued – 4 March, 1999 – was domiciled in the State, or that the trustees of the Berisford Trust were "participators" in the company BFL, to whom the chargeable gain accrued. The real issue for decision is whether a gain accruing (on 4 March, 1999) in the tax year ending 5 April, 1999 in respect of which the appellant became the beneficiary (on 7 April, 1999) of a settlement in

the following year of assessment can be validly subject of an assessment for the tax year commencing 6 April, 1999.

42. The appellant argues that the assessment is inconsistent with the terms of s.579A; it is submitted that the capital gain in the trust on 4 March, 1999 could not be attributed to the appellant as such a gain arose prior to 6 April, 1999; s.579A (10) provides that the section only applies to a non-resident settlement for any year of assessment beginning on or after 6th April, 1999.

43. The respondent stands over the determination of the TAC; counsel submitted that the reasoning by the TAC "can't be faulted" [Day 2 page 26 lines 15 to 16]. The respondent endorsed the conclusion of the TAC that, as both the chargeable gain and the capital payment arose after 11 February, 1999, the gain was attributable to the trustees, and the applicant liable in respect of the settlement.

44. In my view, s. 579A (4) and (10) require particularly close analysis. The interpretation of section 579A (4) benefits from an application of the facts of the case to the wording of the subsection:

> *"... the trust gains [**4th March, 1999**] for a year of assessment **[year ending 5th April, 1999]** ...*
>
> *... shall be treated ... as chargeable gains accruing in the year of assessment **[year ended April 5th 1999]** ...*
>
> *... to beneficiaries of the settlement [the appellant] who received capital payments from the trustees **[on 7th April, 1999]** ...*
>
> *... in the year of assessment **[year ended 5th April, 1999]** ...*
>
> *... or have received such payments in any earlier year of assessment ... **[N/A]**".*

45. The wording of the section, broken down in this way, would appear to suggest that the interpretation of the appellant is correct. The trust gain accrues in the tax year 1998/99; the

capital payment by which the trust gain is attributed to the beneficiary is not however made to the appellant until the following tax year, whereas the subsection requires that the chargeable gain and the payment to the beneficiary must take place in the same year or that the payment must take place in an earlier year than the year of assessment.

46. Section 579A (10) appears to suggest that:

"• The section does not apply to "any year of assessment beginning before the 6th day of April, 1999";

- "Capital payments" in subsection (4) and (5) do not include payments received prior to 11 February, 1999:
- Nor does the term include a payment received on or after that date in respect of a disposal by the trustees prior to that date.

47. One can infer from this that the first year of assessment in which capital payments could be assessed in accordance with s.579(4) TCA is 1999/2000, i.e. the year ending 5 April, 2000. It would appear that, while no capital payment received prior to 11 February, 1999 (the date of commencement of both s.590 and s.579A) could be assessed, a payment received after that date, but before 06 April 1999 – say, on 15 March, 1999 – could be taxable for CGT purposes as long as the chargeable gain by the trustees did not predate 11 February, 1999.

48. The TAC concludes that the gain "is attributable to the trustees in accordance with s.590 TCA 1997" [para. 67]. The appellant does not dispute this. He argues however that a 1999/2000 assessment cannot impose liability on him in circumstances where the gain which gives rise to the liability occurs in a previous tax year, in circumstances in which s. 579A (4) requires the trust gains and the capital payment to be in the same year, or the latter in an earlier year. The TAC is of the view that, as the chargeable gains and the capital payment both take place after 11 February, 1999, the payment is subject to chargeable gains for 1999/2000.

49. It does not seem to me that the TAC's analysis takes sufficient account of the wording of s. 579A (4) as broken down at para 44 above. The capital payments from the trustees to the beneficiaries must have been received in the same year as assessment of the trust gains, or in any earlier year of assessment. The latter proviso does not apply to the present case. However, the capital payments (7 April, 1999) were not received in the same year of assessment in which the trust gains occurred (4 March, 1999).

50. In my view, the literal interpretation of s. 579A is clear. Section 579A (10) suggests that the legislature intended that the attribution of a trust gain to a beneficiary such as the appellant should not occur "in relation to any year of assessment beginning before the 6th day of April, 1999" …. That subsection does envisage that, where the gain and the capital payment took place between the 11 February, 1999 and 5 April, 1999 – as in the example at para. 47 above – the payment to the beneficiary could be taxable in the year of assessment ending 5 April, 2000. The intention of the Act clearly was that all such capital payments would be taxable from the date of commencement of the section, but that assessments of same could not be raised until the tax year commencing on 6 April, 1999, the first complete tax year after the commencement of the section.

51. The effect of making the payment on 7 April, 1999 may well be that this payment would not have been assessable for tax until the tax year commencing 6 April, 2000, at which point the payment would have been made in an "earlier year of assessment", and thus taxable in accordance with s. 579A (4). However, it was not open to the respondents to assess the payment for tax in respect of the year commencing 6 April, 1999, as the payment did not occur in the same year of assessment as the trust gain, nor was it received in an "earlier year of assessment".

52. In the premises, I conclude that the answer to each of the questions I to III inclusive of the case stated is "no". In relation to question III, there was some debate as to whether it was

the "attributed trust gain" or the "capital payment" which was assessable. The wording in s.579A(4) suggests to me that it is the trust gain which is treated as the chargeable gain accruing to a beneficiary when a capital payment is received. The answer to question III would appear to me therefore to be "no", although there was in fact no trust gain in the year of assessment commencing 6 April, 1999 which would have allowed the capital payment to be taxable.

53. In these circumstances, the answer to question III appears also to be "no".

Question 4: the assessment of 02 August 2016

54. This assessment was raised on the basis that the appellant was the beneficial owner of shares in MIL and that the payment received on 7 April, 1999 represented the proceeds of the disposal of this shareholding. The assessment was raised on the basis that the payment was subject to capital gains tax in accordance with s. 590 TCA 1997. The Revenue's position was that it envisaged this assessment and the assessment of 24 November, 1999 as alternative assessments; questions V to VII of the case stated dealt with whether it was permissible for the Revenue to proffer two contradictory assessments on an alternative basis.

55. The appellant submitted that he was not a shareholder or participator in MIL and that he was not therefore subject to capital gains tax. He gave evidence that he did not own or acquire shares in MIL at any time, nor did he pay money into any trust or make capital contributions to either MIL or BSL.

56. The TAC found as a fact that there was "insufficient evidence" to conclude as a matter of fact that the applicant was the beneficial owner of shares in MIL, or that the payment received by him represented the proceeds of disposal of his shareholding.

57. This finding was a primary finding of fact by the TAC and was not contested. In the circumstances, the answer to question IV is "yes".

Conclusions.

58. Given the conclusions which I have reached on questions I to IV inclusive, I must conclude that the two assessments of 2 August, 2016 and 24 November, 2016 cannot stand. Accordingly, I find that, whereas the determination at para. 75 in relation to the assessment of 2 August, 2016 that it should not stand is correct, the determination at para. 74 that the assessment of 24 November, 2016 is valid and should stand is incorrect.

59. These conclusions seem to me to dispose of the substantive issues in the appeal, with the result that it is not necessary to answer questions V to VII and XI to XV. I propose therefore to confine my answers to the following questions in the case stated as follows:

I. No.

II. No.

III. No.

IV. Yes.

VIII. Yes.

IX. Yes.

X. Yes.

XI. Yes.

60. I shall hold a brief hearing on 22nd day of February 2024 at 10.15 am to address the form of the order and the issue of costs.