THE HIGH COURT

[2022] IEHC 558

[Record No. 2021/38 R]

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

AND

ROBERT STEWART

RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 10th day of October, 2022

Introduction

1. This is a judgment on an appeal by way of case stated under s. 949AQ of the Taxes Consolidation Act 1997 ("TCA") in which the Appeal Commissioner, at the request of the Revenue Commissioners, raised a number of questions of law for the opinion of the High Court arising out of a determination delivered by him on 21st May 2021. The questions, which are set out in full below, concern the interpretation of s. 571, subs. (5), (7) and (9), of the TCA. In brief, the issues raised query whether the specific collection mechanism provided for under s. 571 in circumstances where a capital gain is made on the disposal of an asset by way of forced sale by a person (often a financial institution) entitled to a security or charge over the asset is an exclusive one or, alternatively, whether the Revenue Commissioners have a discretion to elect between the use of this machinery and the recovery of the taxes due directly from the owner of the asset.

2. Mr. Stewart (whom I will refer to as "the taxpayer") contends that s. 571 precludes the Revenue Commissioners from seeking to recover directly from him in lieu of the bank which sold his asset, albeit as his agent. The Revenue Commissioners (or "Revenue") contend that the mechanism provided under s. 571 is in addition to and not in substitution for the powers otherwise provided for in the TCA. Consequently, not having recovered the taxes in question from the bank, Revenue claims an entitlement to recover directly from the taxpayer and a consequent liability on his part to pay. From this brief overview, it is clear that the parties take diametrically opposed positions as to the meaning and effect of s. 571. Needless to say, there is also a large sum of money at stake, as the amount of the taxes in issue, which is undisputed, is nearly €1.7 million.

3. Notwithstanding these significant differences, the parties are largely *ad idem* on the approach the court should take on a case stated such as this and also as to the principles of statutory interpretation that should be applied to the interpretation of the TCA as a revenue statute. Since the questions raised are pure questions of law there is no need for the Court to address the limited extent to which findings of fact made by the Appeal Commissioner can be overturned on an appeal of this nature. As it happens, there have been two recent, definitive decisions of the Supreme Court on the interpretation of revenue statutes, leaving little scope for disagreement as to those principles. Instead, the parties differ as to what should be the result when those principles are applied to the facts of this case.

Background to the Case Stated

4. Section 571 of the TCA was introduced to deal with the specific circumstances where an asset is sold by a liquidator, or other person having a security or charge over the asset, to meet the indebtedness of the taxpayer to that person – although as Counsel for the taxpayer pointed out it has a potentially broader application in that the owner of the asset might not be

actually indebted before a third party has the right to dispose of the asset. It had become apparent and is evident from the decision of Carroll J. in *Bank of Ireland Finance Ltd v. Revenue Commissioners* (Unreported, 13 October 1989) that although an impecunious taxpayer on whose behalf an asset is sold by a liquidator or a charge holder in theory remains liable to pay tax on any capital gain made as a result of such sale, as the proceeds of sale will usually be in the hands of the liquidator or charge holder it may prove difficult, if not impossible, for the Revenue to actually recover the tax due from the taxpayer. Consequently, provision was made for the recovery of any capital gains tax due directly from the liquidator or charge holder who, having sold the asset, is in possession of the proceeds of sale. A corollary obligation is imposed on such person to pay the tax out of those proceeds.

5. As there is no dispute between the parties as to the facts, these can be stated briefly. In 2007 and 2008, the taxpayer, who was resident and domiciled in Ireland, entered into a series of loan agreements with a French bank, Société Générale, which carried on business in Ireland through an Irish branch ("the Bank"), under which he ultimately drew down the sum of approximately €7.4 million. The loans were entered into for the purpose of financing the purchase of shares in a publicly listed French company, namely Veolia ("the Company"). In addition to shares purchased by the taxpayer, he also received shares issued by the Company by way of scrip dividend and, at various times, he held a total of over 400,000 shares. It was a term of the loan agreements that the shares would be held by the Bank as security for the loans and formal pledges and guarantees were entered into in parallel with the loan agreements. It was a term of these security agreements that all taxes would be paid by the client (i.e. the taxpayer) and that the sums repayable by the borrower (i.e. the taxpayer) would be net of tax.

6. The taxpayer fell into arrears with his loan repayments as a result of which the Bank enforced its security. A tranche of shares was sold in 2008, another tranche in 2010 and, finally, in April 2011, the bank activated a guarantee provided by the taxpayer in respect of a 2008

loan and sold a sufficient number of shares to ensure that the loans could be repaid in full. The Bank sold the shares as the nominee of the taxpayer but did so under the terms of the security and not on the taxpayer's express instructions. Each of the sales was a forced sale.

7. It is not disputed that each of the sales of the shares or the disposals resulted in a capital gain giving rise to a capital gains tax liability under Irish law. As it happens, the taxpayer made returns and paid capital gains tax on the disposals in 2008 and 2010 and Revenue has retained the amounts paid. The taxpayer states that this was done in error as his agent was unaware of the circumstances and of the fact that the shares had been sold through the enforcement of a security. There was also a miscalculation as to the amounts due and the amounts paid are significantly less than the amount actually due. Nothing turns on this as the error is acknowledged and the subsequent calculation by Revenue of the amount due is accepted.

8. It appears that no steps were taken by the Bank to retain funds from the proceeds of sale for the purpose of paying the capital gains tax due nor to actually pay that tax. The Bank is not a party to these proceedings and the court can only assume that it relied on the terms of the agreement between it and the taxpayer pursuant to which the security was provided and under which the taxpayer accepted liability for payment of any taxes due. Equally, no steps were taken by the Revenue to recover the amounts due from the Bank. At some stage in 2015, the taxpayer's agent became aware of their error and wrote to the Revenue Commissioners identifying the provisions of s. 571 of the TCA and seeking a refund of the capital gains tax already paid by the taxpayer. The Revenue Commissioners disagreed with this analysis and, instead of making that refund, in January 2016 they issued amended notices of assessment for the years 2008 and 2010 and subsequently issued an amended notice of assessment for the year 2011 in August 2016. The issue outlined above arises on the basis of these facts.

9. Before looking at the statutory provisions relevant to the determination of the Appeal Commissioner, it might be useful to identify a number of matters which it was expressly agreed

were not in issue on this appeal. The first, as noted above, is the calculation of the amount of capital gains tax due. The second is any question as to the extraterritorial application of Irish law which might arise due to the fact that the forced sales were ones undertaken by a French bank of shares in a French company. Counsel for the Revenue was careful to reserve the position of the Revenue on this issue for the purpose of other cases but accepted that, as it had not been raised before the Appeal Commissioner, it was not a live issue on this appeal. Thirdly, counsel for the taxpayer made it clear that he was not contending that the Revenue were estopped from adopting the position they have on this appeal either because of any failure on their part to make the claims now made prior to 2016 or indeed because their own Guidance Note on s. 571 adopts the interpretation relied on by the taxpayer rather than that now urged by the Revenue Commissioners upon the Court. Reliance was placed by the taxpayer on this Guidance Note before the Appeal Commissioner, but it was not referred to by the Appeal Commissioner in his analysis or his determination and, although brief mention was made of the Guidance Note, the argument was not pursued before this Court. Finally, both sides accepted that the terms of the agreement between the taxpayer and the Bank under which the taxpayer was liable for payment of all taxes could have no bearing on the proper interpretation and application of s. 571.

Legislative Framework

10. Before looking at the decision of the Appeal Commissioner and the questions of law raised by him, it may be useful to outline the legislative framework within which s. 571 is located. Again, there was very little dispute between the parties either as to the relevant provisions or as to their usual meaning and effect. Rather, the issue is whether certain of these provisions continue to apply to the taxpayer once the sale of the asset giving rise to the chargeable gain fell within s. 571.

11. Although now consolidated into the TCA 1997, capital gains tax was introduced as a separate tax under the Capital Gains Tax Act 1975. Under s. 28 of the TCA, capital gains tax, computed at a rate fixed by statute, is charged on any capital gain (i.e. profit) arising on the disposal of an asset and it is assessed and charged for the year of assessment in which the gain accrued. Section 29 provides that the person to whom the gains accrue *"shall be chargeable"* to capital gains tax if that person is resident or ordinarily resident in the State. There is an exclusion under s. 29(4) in respect of gains arising on the disposal of assets situated outside the State by an individual who is not domiciled in the State but, as previously noted, the parties were agreed that the court did not have to determine any issue as to extraterritoriality on this appeal. The amount that is chargeable is determined by s. 31 which allows certain losses accruing to the chargeable person to be set off against any gains made.

12. Counsel for Revenue described the imposition of a tax as occurring in three stages being, firstly, the declaration of liability under statute (also known as the charge); secondly, the assessment or quantification of that liability in a particular case; and, thirdly, the recovery of the tax. These three stages were recently summarised by Murray J. in *Kenny Lee v. Revenue Commissioners* [2021] IECA 18 at para. 22 of his judgment as follows:-

> *"As explained by Lord Dunedin in Whitney v. Inland Revenue Commissioners [1926] AC 37, at p. 52 there are three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery. The liability is declared by statute, which determines what persons are liable in respect of which property. The assessment particularises the exact sum which a person has to pay in the light of the applicable statutory charge."*

The balance of the *Kenny Lee* judgment - which concerned an assertion that a Revenue inspector did not have the power to raise an assessment where the taxpayer's liability had, allegedly, been settled with the Revenue and the jurisdiction of the Appeal Commissioner in

respect of that issue - focused naturally on the issues of liability and assessment. This case is primarily concerned with the question of recovery and, specifically, the person from whom recovery may be made in the particular circumstances.

13. In terms of these three stages, ss. 28 and 29 of the TCA declare, in principle, the liability of persons to whom certain capital gains have accrued to capital gains tax. Section 31 provides the overarching provision within which liability to that tax is assessed and quantified. Leaving aside for a moment the particular provisions of the TCA which deal with the sale of an asset by a mortgagee or person in a similar position, the detailed machinery for the making of an assessment is contained in later provisions of the TCA. Section 931 provides that assessments under the Capital Gains Tax Act may be made by inspectors of the Revenue Commissioners and sub-section (2) applies the provisions of the Income Tax Acts, with any necessary modification to capital gains tax. Specific reference is made to ss. 918, 920, 922, 924, 928,929 and 930 of the TCA. These sections confer various powers on inspectors to make assessments and additional assessments, including in the absence of a return or where there is insufficient information in the return, and to grant allowances, deductions and reliefs and to transmit particulars of the sum to be collected to the Collector General.

14. Parallel to these provisions, Part 41 of the TCA provides for self-assessment by taxpayers. Under s. 951 of that Part, taxpayers, described as *"chargeable person"*, to which definition I shall return, must make what is, in effect, an annual return to the Collector General of the matters and particulars required in a statement or return in respect of income tax, capital gains tax and corporation tax. In effect, save for persons working exclusively under the PAYE system, each taxpayer is liable to assess themselves in respect of the taxes, if any, due under each of these headings and to include in the return a calculation of the amount of tax due on foot of that assessment. However, under s. 954(3), an inspector may exercise power to make an assessment under the provisions mentioned in s. 931 in the event a taxpayer defaults in

making a return or the inspector is not satisfied with the return which has been delivered. Under s. 955, an inspector has power to amend an assessment at any time by making such alterations or additions as they consider necessary notwithstanding that the tax may already have been paid on foot of the original assessment. This is, in effect, what occurred here as the inspector issued amended assessments in 2016 in respect of the charge to capital gains tax for 2008 and 2010 notwithstanding that the taxpayer had already paid the tax which was (admittedly erroneously) calculated as being due in the return submitted by his agent on his behalf.

15. The Revenue places particular reliance on s. 950(1) which is the definition section for Part 41, which Part is applied to the assessment of capital gains tax by virtue of s. 931(2). The definitions in s. 950 are prefaced by the usual proviso that they are to apply *"except where the context otherwise requires"*. The key definition relied on by the Revenue is that of *"chargeable person"* which is as follows:-

> *""chargeable person" means, as respects a chargeable period, a person who is chargeable to tax for that period, whether on that person's own account or on account of some other person but, as respects income tax, does not include a person…"*

There follows a series of exclusions, none of which are relevant to this case and in which s. 571 is not specifically mentioned.

16. The Revenue also relies on s. 950(2) which provides as follows:-

> *"Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts."*

To a large extent, the Revenue's argument is premised on the application of Part 41 to the taxpayer as a chargeable person notwithstanding the provisions of s. 571 on the basis that s. 571 does not disapply Part 41 in sufficiently clear and precise terms. Reliance was placed on the High Court and Supreme Court decisions in *Revenue Commissioners v. Hans Droog* [2011] IEHC 142 and [2016] IESC 55, although these decisions were not opened to the court nor

contained in the agreed book of authorities. In my view, this was unfortunate as the court in that case had to consider an issue with certain parallels to this case, namely the extent to which two separate provisions of the TCA, both of which contained the word *"notwithstanding"* (and one of which was s. 950(2)) disapply the other and the court might have benefited from greater elucidation of this point. Instead, the judgment was relied on, in passing, to emphasise the need for an *"express and clear provision"* to disapply Part 41.

17. Revenue relies on the applicability to the taxpayer of machinery of the self-assessment scheme as set out in the subsequent sections of Part 41. Some of these provisions have been amended or deleted since the years in which the disputed charge to capital gains tax arose and are considered in the form in which they stood at the relevant time. Under s. 951, a chargeable person is obliged to make a return in respect of a chargeable period which is a year of assessment in respect of income tax and capital gains tax. Under s. 954(3), an inspector may make an assessment where the chargeable person has defaulted in the delivery of a return or where the inspector is not satisfied with the return delivered or has received information as to its insufficiency. Where the inspector makes an assessment under s. 954(3), the notice of assessment need only state the amount of the tax to be paid by the chargeable person and no further particulars are required (s. 954(5)). Under s. 955(1), an inspector may amend an assessment notwithstanding that the tax has already been paid on foot of the original assessment or that the assessment was itself previously amended. This is subject to a four-year time limit provided by s. 955(2). However, the application of this time limit is itself subject to a number of exceptions, most notably if the original return does not contain a full and true disclosure of the material facts necessary for the making of an assessment. An inspector has the right to make enquiries and to amend assessments under s. 956 subject again to a four-year time limit running from the end of the chargeable period within which the original return was delivered. The

assessments in this case were amended by an inspector but no issue arises as to the amendment being out of time.

18. Returning to the provisions of the TCA specific to capital gains tax, s. 537(1) provides that the conveyance or transfer as security of an asset or of any interest in or rights over an asset shall not be treated as a disposal of the asset for the purposes of capital gains tax. This means that the pledging to the Bank by the taxpayer of the shares as security for his loans was not itself a disposal capable of giving rise to a capital gains tax liability. Parallel to this, under s. 537(2), where the charge holder deals with an asset for the purpose of enforcing the security, those dealings (whether conducted directly or through a receiver/manager) are to be treated as if they were done by the charge holder as the nominee of the person entitled to the asset. Finally, s. 537(3) provides that, in calculating the liability arising on the disposal of an asset, the existence of the security and the debt to which it relates is to be disregarded.

19. Section 571 is a lengthy and complex provision and I propose setting out only the relevant parts in full. Many of the omitted parts refer to corporation tax or to circumstances where a chargeable gain has accrued to a company and have no bearing on the particular facts of this case:-

> *"**571 Chargeable gains accruing on disposals by liquidators and certain other persons**.*
>
> *(1) In this section—*
>
> *"accountable person" means—*
>
> *(a) ...*
>
> *(b) any person entitled to an asset by means of security or to the benefit of a charge or encumbrance on an asset or, as the case may be, any person appointed to enforce or give effect to the security, charge or encumbrance;*

...

"the debtor" has the meaning assigned to it by subsection (5);

"referable capital gains tax" has the meaning assigned to it by subsection (2);

For the purposes of this case it is not disputed that the taxpayer was "the debtor" and the Bank "the accountable person".

(2) In this section—

(a) in a case where no chargeable gains other than the chargeable gains mentioned in subsection (5)(a) (in this subsection referred to as "the referable gains") accrued to the debtor in the year of assessment, "referable capital gains tax" means the amount of capital gains tax which apart from subsection (5) would be assessable on the debtor in respect of the referable gains;..."

Where the debtor has accrued other chargeable gains in the year of assessment, there is a formula set out in s. 571(2)(b) and (c) for the calculation of the amount of capital gains tax which will constitute referable capital gains tax. Subsection (3) contains a similar formula applicable to companies. Section 571(4) deals with the apportionment of deductions or reliefs where other chargeable gains are factored into a calculation under s. 571(2) or (3). On the facts of this case, no other chargeable gains accrued to the taxpayer during the relevant period and, thus, the applicable provision is s. 571(2)(a).

"(5) Where section 537 (2) or 570 applies in respect of the disposal of an asset in a year of assessment by an accountable person, then, notwithstanding any provision of the Capital Gains Tax Acts—

(a) any referable capital gains tax in respect of any chargeable gains which accrue on the disposal shall be assessable on and recoverable from the accountable person,

(b) the referable capital gains tax shall be treated as a necessary disbursement out of the proceeds of the disposal and shall be paid by the accountable person out of those proceeds, and

(c) referable capital gains tax paid by the accountable person shall discharge a corresponding amount of the liability to capital gains tax, for the year of assessment in which the disposal is made, of the person (in this section referred to as "the debtor") who apart from this subsection is the chargeable person in relation to the disposal

...

(7) Notwithstanding any provision of the Capital Gains Tax Acts…, the amount of referable capital gains tax ...which under this section is assessable on an accountable person in relation to a disposal, shall be recoverable by an assessment on the accountable person to income tax under Case IV of Schedule D for the year of assessment in which the disposal occurred on an amount the income tax on which at the standard rate for that year of assessment is equal to the amount of the referable capital gains tax…

...

(9) Subject to subsections (5)(c) and (6)(c), nothing in this section shall affect the amount of chargeable gains on which—

(a) the debtor is chargeable to capital gains tax,…"

20. The scheme provided under s. 571 is ostensibly straightforward, especially where, as here, the taxpayer has no other chargeable gains which have to be factored into the assessment. The tax dealt with under the section is described as referable capital gains tax which means the amount of capital gains tax to which the taxpayer would be liable were it not for s. 571(5). Under s. 571(5), where an asset is disposed of by a person entitled to it by way of security or

charge (*"the accountable person"*) then the referable capital gains tax is assessable on and recoverable from that person, in this case the Bank. The Bank was under a statutory obligation to treat the referable capital gains tax as a necessary disbursement out of the proceeds of sale and, specifically, was under an obligation to pay that tax. Once paid by an accountable person, the amount of referable capital gains tax paid discharges a corresponding amount of the capital gains tax liability of the debtor, i.e. the taxpayer who is otherwise the chargeable person in respect of the disposal. The amount of referable capital gains tax due is recoverable by an assessment on the accountable person under Case IV, Schedule D. The operation of s. 571 does not affect the amount of the chargeable gain on which the debtor is chargeable to capital gains tax nor, by extension, the amount of tax to be paid.

Decision of the Appeal Commissioner

21. It is unnecessary to set out in detail the determination of the Appeal Commissioner, much of which in turn sets out the applicable legislative provisions and the material – and undisputed – findings of fact on which the determination is based. It also recites the submissions made by both sides which are largely identical to the arguments made to this Court, although some more minor arguments made to the Appeal Commissioner were not pursued on the case stated. The operative part of the determination commences with the Appeal Commissioner's analysis of the issues at para. 70 leading to a three-paragraph determination commencing at para. 80.

22. The Appeal Commissioner agreed with the taxpayer's submission that the statutory scheme was clear and unambiguous. He noted that, on the disposal of a secured asset by a creditor, the charge to capital gains tax applies to the debtor and not to the creditor who enforced the security. He then went on to define the issue between the parties as follows:-

> *"However as agreed by the parties, the matter for consideration in this appeal is the identification of the person to be assessed and pursued for the collection of the capital gains tax pursuant TCA, section 571."*

A similar, although not identical, formulation appears at para. 80, the key distinction being that, at this point, the Commissioner framed the issue as being the identification of the person to be assessed and pursued for the collection of "*referable capital gains tax"* pursuant to s. 571 rather than capital gains tax. Revenue contends that the Appeal Commissioner erred in his identification of the issue on the appeal which in turn led to his erroneous conclusions. Needless to say, Revenue disputes the characterisation of the parties having agreed that this was the issue between them. In particular, Revenue points out that the tax to be assessed and recovered under s. 571 is not capital gains tax but referable capital gains tax. The structure of s. 571 is such that only the Bank could ever be liable to pay referable capital gains tax under its provisions. As a corollary of this, no person is liable to pay capital gains tax *simpliciter* under s. 571, that liability arises under other sections of the TCA. In my view, despite the manner in which the Appeal Commissioner has framed the issue (and the fact that it is framed slightly differently as between paras. 71 and 80 of his determination), it is clear that the crux of the issue is whether the liability of the taxpayer to pay capital gains tax under other provisions of the TCA persisted notwithstanding the Bank's liability to pay and the Revenue's obligation to recover referable capital gains tax under s. 571. The extent to which this argument has merit does depend to some extent on whether it is correct to characterise referable capital gains tax and capital gains tax as completely different things, a point to which I shall return. I should also note that Revenue disputes the contention that s.571 placed it under an obligation to recover referable capital gains tax from the accountable person arguing that the language used is permissive rather than mandatory as far as revenue is concerned, although not as far as the accountable person is concerned.

23. The Appeal Commissioner's analysis continues by acknowledging the *prima facie* obligation under s. 958(3) on the taxpayer to discharge his liability to capital gains tax on the disposals of the shares. However, having referred to s. 571(5) and (7), the Appeal Commissioner rejected Revenue's argument on the basis of the absence of an express statutory machinery under which referable capital gains tax could be assessed or recovered from the taxpayer. At a further point in the analysis, the Appeal Commissioner points to the absence of any legislative provision which would allow Revenue to pursue the taxpayer for a secondary liability to capital gains tax on the forced sale of shares. The Appeal Commissioner's analysis focuses on the use of the word *"notwithstanding"* in s. 571(5) which he describes as having a *"primacy quality"*. He regarded the use of the word *"shall"* in conjunction with *"notwithstanding"* as imposing an obligation on Revenue not just to raise an assessment on the bank but also to recover the tax from the bank. In his view, the combination of the two subsections left no ambiguity as to the statutory obligation on Revenue to assess and recover the referable capital gains tax from the bank as the accountable person. The core part of the Appeal Commissioner's determination appears at para. 81 which is as follows:-

> *"In this regard, TCA, section 571(5) mandates that that the "referable capital gains tax" arising from a forced sale by the Bank of the Shares "shall be assessable" and recoverable solely from the Bank. Furthermore, TCA, section 571(7) imposes the obligation on the Respondent to raise assessments to capital gains solely on the Bank acting as the "accountable person" for the years 2008, 2010 and 2011 and thereafter seek to recover that tax solely from the Bank. Therefore in the event of a forced sale falling within the provisions of TCA, section 571 and "notwithstanding any provision of the Capital Gains Tax Acts", the responsibility to be assessed and to account for the "referable capital gains tax" moved from the Appellant to the Bank."*

As a result of this conclusion, the Appeal Commissioner reduced the amended assessment served on the taxpayer for the years 2008, 2010 and 2011 to nil.

24. On the request of Revenue, the Appeal Commissioner agreed to state a case for the opinion of the High Court. The questions, each of which ask whether the Appeal Commissioner erred in law, are as follows:-

> *"(a) By misinterpreting TCA, sections 537 and 571, in particular by incorrectly finding that when "referable capital gains tax" becomes assessable on and recoverable on an accountable person in relation to a disposal under TCA, section 571(5), the debtor taxpayer is no longer chargeable to, and assessable to, capital gains tax in relation to that disposal;*
>
> *(b) in finding that when "referable capital gains tax" becomes assessable on and recoverable on an accountable person under TCA, section 571(5), the debtor is, as a consequence, not chargeable to, and assessable to, capital gains tax in relation to that disposal until and unless assessments to "referable capital gains tax" are first raised on the accountable person, and*
>
> *(c) by incorrectly applying or failing to correctly apply, TCA, section 571(9)."*

25. In their written submissions, the parties frame the case stated as involving four and not three questions. The additional question appears at number one in both sets of submissions and asks whether the Appeal Commissioner erred in *"finding that* [the taxpayer] *was not liable to capital gains tax on the relevant disposal"*. It seems to me that this question adds little to the issues raised by the other three as the correctness of the Appeal Commissioner's general finding that the taxpayer was not so liable depends on whether he was also correct in the more specific findings which are the subject of the questions.

The Arguments of the Parties

26. Revenue accepts that on the facts of this case, under s. 571(5), referable capital gains tax is assessable on and recoverable from the bank but distinguishes between referable capital gains tax and capital gains tax *simpliciter* which it is contended remains assessable on, and recoverable from, the taxpayer under the machinery provided for in Part 41. In effect, it is argued that the language and text of s. 571 is not sufficiently clear or precise to disapply the provisions of Part 41 under which the taxpayer is so liable. Counsel described this in terms of an absence of words in s. 571 capable of supporting the meaning that the taxpayer was *"exempted or relieved from being assessed, or being subject to recovery"* and which disapplied the statutory machinery for such assessment under Part 41. In this regard, counsel pointed to the judgment of the Supreme Court in *Revenue Commissioners v. Doorley* [1933] IR 750 as set out in a summary of the principles applicable to the interpretation of revenue statutes by McDonald J. in *Perrigo Pharma International DAC v. McNamara* [2020] IEHC 552 at para. 74. The principle in issue is that any exemption from a tax imposed by a statute *"must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes"*. Kennedy C.J. explained the rationale for this strict approach as being to preclude a court extending any exemption from the burden of a generally imposed tax beyond its expressly defined scope.

27. Whatever the correct construction of s. 571, I am not convinced that it is accurate to describe its effects in terms of an exemption for the taxpayer from capital gains tax. Section 571 does not exempt a taxpayer from liability to capital gains tax. Under s. 571, it is the taxpayer's liability which is assessed and such deductions or reliefs as may be available to the taxpayer are set off as against this liability. The amount of capital gains tax due is entirely referable to the taxpayer's acquisition of the asset and its disposal on his behalf and to the taxpayer's circumstances. What s. 571 does is to allow recovery of the tax due by the Revenue

from the entity which has in fact disposed of the asset acting as the nominee of the taxpayer under s. 537(2). Recovery from this entity does not relieve the taxpayer of the burden of the tax. If s. 571 is operated as intended, then the tax due should be treated as a necessary disbursement and paid by the Bank out of the proceeds of sale prior to the discharge of the taxpayer's debt to it. Consequently, the proceeds of sale, and by extension the amount available to set off against that debt or, alternatively, to return to the taxpayer after the debt has been discharged, will be reduced by the amount of capital gains tax the Bank has paid to the Revenue on the taxpayer's behalf. The operation of s. 571 does not impact on the declaration or the assessment of the taxpayer's liability. Instead, it alters the identity of the person from whom the assessed tax is recoverable. Therefore, the taxpayer does not benefit financially through the operation of the mechanism provided under s. 571 and is not exempted from nor relieved of the burden of the tax. The mechanism is intended primarily to benefit the Revenue by facilitating collection of the tax due from the person in whose hands the proceeds of sale of an asset actually are.

28. Of course, it does not follow from my view that s. 571 is not properly characterised as an exemption from capital gains tax for the taxpayer, that the arguments made on behalf of the Revenue as to the proper construction of s. 571 in light of the provisions of s. 950 and, in particular, s. 950(2) are incorrect.

29. In parsing out the text of s. 571, counsel for the Revenue argued that the use of the word *"notwithstanding"* in subs. (5) and (7) did not come close to satisfying the threshold of being an express, unambiguous provision disapplying the assessment machinery of Part 41. (I note that although the language of s. 571(5) refers to any provision of the Capital Gains Tax Acts, counsel accepted that this referred to any other provisions of the consolidated legislation applicable to capital gains tax including Part 41). Although s. 571(5) is ostensibly phrased in mandatory terms – and counsel accepted that its application to the accountable person is

mandatory – it was nonetheless contended that its application to the Revenue was discretionary. In this regard, a distinction was drawn between the phrase *"shall be assessable"* as used in s. 571(5)(a) and the phrase *"shall be assessed"* which is not used. Presumably the same distinction, if it is of merit, would apply to the phrase *"shall be… recoverable from"* which is used as opposed to *"…recovered from"* which is not used. I struggle to see a meaningful difference between those phrases, all of which are governed by the verb *"shall"* which, in drafting terms, is invariably used to denote something which is mandatory rather than something which is discretionary which is generally denoted by the use of the verb *"may"*.

30. However, counsel supported this argument by pointing to a distinction between referable capital gains tax which is dealt with under s. 571 and capital gains tax *simpliciter*. Although s. 571(5)(c) provides that referable capital gains tax paid by an accountable person discharges the taxpayer's liability to capital gains tax, if the referable capital gains tax is not paid by the accountable person, then it is contended that that taxpayer's liability remains. That liability is not dependent on s. 571 as it arises instead by virtue of ss. 28, 29, 31 and 537(2).

31. In responding to these arguments, counsel for the taxpayer acknowledged that it is a crucial feature of s. 571 that the taxpayer remains the chargeable person. The computation of referable capital gains tax under the section depends on the circumstances of the taxpayer and on an analysis of his transactions. By extension, the continued application of the self-assessment provisions of Part 41 and the obligation on the taxpayer to make a return of liability to capital gains tax on the disposals made by him were also accepted. Equally, it was accepted that the import of s. 537 is that, if a charge holder disposes of a mortgaged property, they are deemed to do so as the agent of the mortgagor.

32. There was, however, a sharp divergence between the parties on the interpretation of s. 571 and, indeed, on the issue of whether s. 571 was clear in its terms or ambiguous. Looking at the explanation of the term *"referable capital gains tax"* in s. 571(2), the taxpayer argued

that this was not a separate species of tax but was a quantifying phrase referring to the amount of capital gains tax which would, apart from subs. (5), be assessable on the debtor in respect of the referable gains. In the taxpayer's view, the description of referable capital gains tax as the amount of capital gains tax which *"apart from subsection (5)"* and *"would be assessable"* on the debtor is crucial. Put simply, the taxpayer argued that referable capital gains tax is the amount of capital gains tax that would normally be assessable on him and payable by him but, because of subs. (5), it is no longer assessable on him nor payable by him.

33. Turning to para. 571(5), counsel for the taxpayer emphasised that the use of the word *"shall"*, particularly in sub-para. (a), does not simply make referable capital gains tax assessable on and recoverable from the accountable person, but requires that it be assessed on and recovered from the accountable person. Thus, the section is not only mandatory as regards the accountable person but also as regards the Revenue. Similarly, sub-para. (b) does not simply empower the payment of referable capital gains tax by the accountable person out of the proceeds of sale of an asset subject to the section but requires such payment. Finally, under sub-para. (c), the referable capital gains tax which must be paid shall discharge the liability of the taxpayer who, under s. 537, is deemed to have authorised the transaction.

34. The taxpayer relied on the use of the word *"notwithstanding"* in s. 571(5) and (7) which, it was submitted, meant that in the particular circumstances of s. 571 those provisions overrode other provisions of the TCA regarding liability and assessability. The taxpayer did not contend for the complete disapplication of Part 41. It remains relevant and applicable to the determination of the amount of capital gains tax for which the taxpayer would be *prima facie* liable - but the liability to pay and the power of the Revenue to recover that tax shifts from the taxpayer to the bank by virtue of s. 571.

35. The taxpayer disputed the Revenue's reliance on s. 571(9) as a provision which preserves the charge to capital gains tax of the taxpayer as the debtor under the section. The

taxpayer described s. 571(9) as a provision dealing only with the quantification of the debtor's liability and not with liability *per se*. Consequently, it is not one which preserves the Revenue's right to assess and recover from the debtor. Reverting to the three stages of the imposition of tax, whilst accepting that the chargeable person who is liable for the tax will normally also be the person subject to assessment and obliged to pay, the taxpayer argued that s. 571 altered that position in respect of cases coming within s. 537(2). It does so by making the accountable person liable to be assessed and obliged to pay, albeit an amount calculated by reference to the circumstances of the chargeable person and the amount is that which the taxpayer, as chargeable person, would have been liable to pay were it not for s. 571. In essence, s. 571(9) cannot be read in isolation but must be read in conjunction with s. 571(5) and (7) both of which apply *"notwithstanding"* other provisions of the Act.

36. Finally, the taxpayer disagreed with the Revenue's contention that, while s. 571 applies to referable capital gains tax, the taxpayer continues to be liable to pay capital gains tax which, for the purposes of the argument, must be understood as a materially different thing. The taxpayer says that this is a distinction without a difference. Starting from the premise that if s. 571(5)(b) makes it mandatory for the accountable person to pay referable capital gains tax equivalent to the taxpayer's liability to capital gains tax, it cannot also be mandatory for the taxpayer to pay the capital gains tax to which it refers. Under s. 571(2), referable capital gains tax is identified as that which would be assessable on the debtor by reference to the chargeable gain which is made by the debtor on the forced sale of an asset under, *inter alia*, s. 537(2) were it not for s.571(5). As a result of s. 571, that liability is no longer assessable on the debtor because it has become assessable on and recoverable from the accountable person. It remains the same liability in terms of quantification, allowances, etc., but liability to pay is referred or transferred to the accountable person. On this construction *"referable"* is merely an adjective

connoting that the tax to be paid by the accountable person is referable to the liability of the debtor, but it does not alter the nature or essence of the tax itself.

<u>Interpretation of Revenue Statutes</u>

37. The parties were largely agreed on the correct approach to the interpretation of revenue statutes based on the recent decisions of the Supreme Court in *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50 and *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60 and the summary of those principles in *Perrigo Pharma* (above). Because of this, I do not have to examine the development of the approach taken by the courts to this issue nor to consider the extreme arguments historically made with, at one end of the spectrum, the urging of a hyper-strict literal approach treating revenue statutes as equivalent to criminal legislation under which no liability could be imposed unless it is expressed in the clearest of terms and, at the other, a purposive approach designed to achieve the assumed objective of the Legislature, even when it is not clearly supported by the text of the statute under consideration. The position ultimately reached by the Supreme Court in the cases referred to (and, indeed, in the earlier case of *Revenue Commissioners v. O'Flynn* [2011] IESC 47) lies somewhere between these two extremes, but not by any means at the midway point.

38. In *Revenue Commissioners v. O'Flynn*, the Supreme Court rejected the notion that there was a special rule for the interpretation of revenue statutes as opposed to normal statutes. Whilst it favoured a strict interpretation and precision in considering the ordinary meaning of words, it held that this should not result in revenue statutes being construed more narrowly than other statutes.

39. In finding that a literal interpretation of the ordinary words of a statute should generally prevail, McKechnie J. in *Dunnes Stores* emphasised the need to have regard to the context in which those words are used. He stated:-

"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such a case best declare the intention of the lawgiver" (Edgar, Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 65). In conducting this approach "…it is material to inquire what is the subject matter with respect to which they are used, and the object in view" Direct United States Cable Company v. Anglo American Telegraph Company [1877] 2 App. Cas. 394 at p.412. Such will inform the meaning of the words, phrases or provisions in question. McCann Ltd v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that."

40. However, McKechnie J. recognised that in some instances (and, perhaps inevitably, instances which are disproportionately reflected in the case law), a literal approach will not readily yield up the meaning of the provision. In those cases, resort to other principles of interpretation including, on occasion, a purposive interpretation, is permissible:-

"65. Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation,

remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

66. When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."

41. In *Bookfinders*, O'Donnell J. framed the issue before the court as being a consideration of the order in which the canons of statutory interpretation should be applied. He continued:-

"It is clear that the plain, ordinary meaning of the provisions must first be considered, but failing that, the parties are in dispute as to whether a purposive approach can be applied, or if the principle of doubtful penalisation should immediately be applied. Further, there is debate over the meaning of the strict interpretation to be applied to tax statutes, and whether it applies equally to general principles as to exceptions."

42. In considering the applicability of the Interpretation Act 2005 to the interpretation of revenue statutes, O'Donnell J. held that s. 5 of that Act, which permits the adoption in certain cases of a wide-ranging purposive approach designed to give effect to the *"plain intention of the Oireachtas"* did not apply to revenue statutes as they came within the exempted category of acts of "*relating to 'the imposition of a penal or other sanction'"*. However, that does not mean that a court has to exclude from its consideration the purpose of such legislation when attempting to construe it. He put the matter thus, at para. 48:-

"It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the purpose of the

provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes."

He concluded (at para. 52):-

> *"It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed "strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language"."*

43. The effect of these judgments was usefully summarised as a number of relevant principles by McDonald J. in *Perrigo Pharma* (above), at para. 74. I do not propose to cite the passage in full but note that it moves from the basic principle that the ordinary and natural meaning of the words used should prevail where the meaning is self-evident through the need to consider those words in context, particularly in the context of the act as a whole; the application of other canons of interpretation where the meaning of the provision is imprecise or ambiguous, including a purposive approach; giving each word or phrase used the meaning the Oireachtas intended; the strict interpretation of ambiguous provisions of revenue statutes so as to prevent the unfair imposition of a fresh liability; and, as a corollary, the need for exemptions from liability to be expressed in clear and unambiguous terms.

Application of Principles to the Present Case

44. The interpretive issue in this case presents particular difficulties as it concerns what s. 571 does not say as much as what it does. There is no doubt but that the ordinary meaning of the section allows Revenue to recover from an accountable person the capital gains tax that would otherwise be paid by a debtor where the forced sale of an asset belonging to the debtor has taken place under s. 537(2), the asset being one over which the accountable person has a charge or security. The issue is whether the collection mechanism provided under s. 571 is mandatory in the sense that Revenue may only recover that tax from the accountable person or whether it is discretionary in the sense that Revenue retain the right to recover the tax from the debtor if, for whatever reason, it is not in fact recovered from the accountable person. Both parties have agreed that the issue cannot be decided by reference to the equities of the situation – being either that the taxpayer is not in possession of the proceeds of sale or, alternatively, that the Revenue has not in fact recovered the significant amount of tax due from the bank.

45. The taxpayer argues that there is nothing in s. 571 to suggest that it is discretionary and there is no mechanism through which such discretion is to be exercised. The Revenue argues that there is no need for an additional mechanism to be provided in s. 571 as it is already available to the Revenue in the other provisions of the TCA, most notably in the self-assessment machinery contained in Part 41. I am not convinced that this is correct. Part 41 provides the mechanism through which capital gains tax can be assessed on and collected from the chargeable person. That is not quite the same thing as a mechanism through which Revenue can exercise a discretion to elect between pursuing the accountable person under s.571 or pursuing the debtor under Part 41. Reliance on Part 41 as the mechanism through which the tax can be assessed and collected assumes that a choice to pursue the debtor - or in other terms not to rely on s.571 - has been made by Revenue but does not itself provide the statutory basis for making that choice.

46. Certainly, if s. 571 is intended to provide an alternative rather than an exclusive mechanism, it has done so in a very ambiguous and a rather sloppy manner. It does not set out the circumstances in which, nor the time at which, Revenue can choose to exercise the discretion which would thereby be conferred upon it. Revenue does not have to notify the debtor or the accountable person of the choice it has made as regards which of those entities it intends to pursue as a result of the exercise of its discretion. There is no provision for the cancellation of the obligations placed on the accountable person under s.571(5)(b) if Revenue opts to pursue the debtor for payment of capital gains tax. That sub-paragraph purports to impose an unqualified obligation on an accountable person to pay the tax involved regardless of the fact that Revenue could, in its discretion, seek to recover the same tax from the debtor. Read literally, the obligation on the accountable person to pay referable capital gains tax would persist notwithstanding the payment by the debtor of capital gains tax. Under the section payment of referable capital gains tax by the accountable person discharges the equivalent liability of the debtor to capital gains tax, but not *vice versa*.

47. Although s. 571 does describe the tax in issue as referable capital gains tax, I agree with taxpayer that this is a distinction without a difference. It is the amount of capital gains tax which would be paid by the debtor on the disposal of his asset by the accountable person were the mechanism in s. 571 not to apply. Liability to pay that tax is, by virtue of the section, transferred or referred to the accountable person but it is, in all material respects, the exact same tax calculated by reference to the debtor's liability: the gain is calculated by reference to the price at which he purchased the asset and the allowances to which he is entitled can be set off as against that liability.

48. Whilst counsel for the Revenue accepted that it would have been preferable for the Oireachtas to have used language more clearly indicative of the discretionary nature of the scheme, she nonetheless contended that the words used were not sufficiently clear and

unambiguous in their own terms to disapply the entirety of the assessment and recovery machinery under Part 41. Section 950(2) and the related case law indicating that the disapplication of Part 41 had to be in sufficiently clear and express terms formed the basis of this argument. She also argued that the operation of s.571 was in the nature of an exemption for the taxpayer which warranted a strict construction of the provision. I have already indicated that I do not think the characterisation of s.571 as an exemption is accurate and therefore the provision does not warrant a stricter interpretation on this basis.

49. The use of the word *"notwithstanding"* as a drafting device was explained by Kearns J. in *Sheedy v. Information Commissioner* [2005] 2 ILRM 374 as follows:-

> *"The use of a "notwithstanding" clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation…*
>
> *Such a clause can clearly operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation…*
>
> *The word "notwithstanding" is in this instance a prepositional sentence-starter which unequivocally means, and can only mean, "despite" or "in spite of" any other enactment. It underlines in the clearest possible manner the free-standing nature of the provision…"*

I have had some difficulty in resolving the conflicting arguments made by the parties as to whether the *"notwithstanding"* used in s. 950(2) disapplies the apparently mandatory provisions of s. 571 or, alternatively, whether the *"notwithstandings"* used in s. 571(5) and (7) disapply the inconsistent provisions of Part 41 which are otherwise of general application.

50. In order to resolve this issue, I think it useful to bear in mind that the provisions of the Income Tax Acts are applied to capital gains tax by virtue of s. 931(2). That subsection is itself qualified in that the Income Tax Acts are applied *"subject to any necessary modifications"*.

The definitions in s.950(1) are likewise to apply to Part 41 *"except where the context otherwise requires"* – although I accept that the provisions of s.950(2) are not qualified by this rider. These provisions emphasise the need, identified by McKechnie J. in *Dunnes Stores,* to read the provisions in question in context, which in this case means in the context of the TCA providing a statutory regime for the charging, assessment and recovery of capital gains tax.

51. In my view, all of this begs the question as to whether the self-assessment machinery contained in Part 41 is necessarily modified by the provisions under consideration in this judgment, namely ss. 537 and 571, which apply specifically and exclusively to capital gains tax in the circumstances of a forced sale. Part 41 contains provisions under which a taxpayer is obliged to make a return containing an assessment in default of which they can be assessed by an inspector and under which an assessment can be amended by an inspector. At the material time, the tax specified in an assessment made on a chargeable person was then due and payable by that person under s. 958(3). However, s. 571 establishes a mechanism applicable specifically to capital gains tax arising on a disposal under s. 537(2) under which the capital gains tax which would otherwise be assessable on and recoverable from the chargeable person becomes assessable on and recoverable from the accountable person but remains referable to the chargeable person's liability. In my view, if the terms of s. 571 create a mandatory mechanism for a specific and discrete set of circumstances, then any otherwise applicable provision in Part 41 is necessarily modified by s. 531 in its application of Part 41 to capital gains tax.

52. Looking at the language used in s. 571, it is difficult to see that it can be read as other than creating a mandatory mechanism for the recovery of capital gains tax from an accountable person. For the reasons set out earlier in this judgment, I do not accept that there is a material difference between referable capital gains tax and capital gains tax such that the taxpayer remains subject to the provisions of Part 41 in respect of the latter, when s. 571 applies in respect of the former. Both terms are used to mean the capital gains tax which, in the particular

case, the debtor would otherwise be liable to pay on the disposal in question, calculated by reference to the debtor's particular circumstances. This capital gains tax is identified for the purpose of the section as referable capital gains tax as it is the tax which, by virtue of the section, the accountable person becomes liable to pay. It is not in any other respect different from the debtor's original capital gains tax liability. This is evident from the phrase *"which apart from subsection (5) would be assessable on the debtor"* in s. 571(2)(a) and consistent with the description of the debtor as being the chargeable person *"apart from this subsection"* in s. 571(5)(c).

53. Significantly, the language used in s. 571(5) and (7) is entirely mandatory in its terms. Under s. 571(5)(a), referable capital gains tax <u>shall</u> be assessable on and recoverable from the accountable person; under s. 571(5)(b), referable capital gain tax <u>shall</u> be treated as a necessary disbursement out of the proceeds of sale and <u>shall</u> be paid by the accountable person; and, under s. 571(5) (c), the tax so paid <u>shall</u> discharge the corresponding liability to capital gains tax of the debtor who, apart from the subsection, would be the chargeable person in respect of the disposal. Similarly, under s. 571(7), the amount of referable capital gains tax assessable on the accountable person <u>shall</u> be recoverable by an assessment on the accountable person. The mandatory nature of these provisions is not qualified in any way and no provision is made for their application only in circumstances where the Revenue has elected to recover from the accountable person rather than the debtor.

54. In my view, the plain and ordinary meaning of s. 571 is that it establishes a particular mechanism applicable in a limited set of circumstances through which a capital gains tax liability chargeable on the debtor is made assessable on and recoverable from the accountable person. It does not vest a discretion in the Revenue but makes it mandatory to assess and recover that tax from the accountable person and, indeed, obliges the accountable person to pay the tax.

55. Even if Part 41 were not to be regarded as being necessarily modified to allow for the operation of s. 571 in its express terms, I note that in *Droog v. Revenue* Clarke C.J. held (at para. 7.2) that there was no absolute requirement that there be a specific mention of the fact that Part 41 or any part of it has been disapplied once the language of the relevant other aspect of the TCA is sufficiently clear to make it obvious that a particular part of Part 41 is being disapplied. In my view, it is clear from s. 571 read as a whole that those aspects of Part 41 under which an assessment would be made on and capital gains tax recovered from the debtor as the chargeable person are being substituted with an alternative mechanism for the assessment on and recovery from the accountable person being provided *in lieu*. This is confirmed and given added weight by the use of *"notwithstanding"* in s. 571(5) which applies the discreet scheme set out in sub-paras. (a) to (c) instead of the otherwise applicable provisions of the Capital Gains Tax Acts to the disposal of an asset by an accountable person under s. 537(2). Similarly, confirmation that this is so is provided by the use of the same word in s. 571(7) which makes the tax chargeable on such disposal recoverable by an assessment on the accountable person. All of this would be otiose if, at the same time, the tax were to remain assessable on and recoverable from the debtor. Certainly, it is not apparent from the legislation as drafted that this is what the Oireachtas intended and, if it were, then it would not be merely preferable that it be expressed in clearer terms, in my view it would be essential to do so.

56. In reaching these conclusions, I am conscious that, in principle, s. 571 makes no difference to the fact that capital gains tax arises on the disposal of an asset under s. 537(2) nor to the amount of capital gains tax chargeable on such disposal. It is a mechanism directed solely at the identity of the person from whom the tax will be recoverable. Therefore, in my view it is not properly characterised by Revenue as an exemption from the tax for the taxpayer. The accountable person is liable to pay the tax out of the proceeds of sale of the taxpayer's asset thereby reducing the fund that would otherwise be available to set against the taxpayer's

indebtedness to the accountable person or to return to the taxpayer if the amount realised by the sale exceeds his indebtedness. There is no reduction in the amount of tax that should be recovered by Revenue and the tax is paid at a cost to – although not directly by – the taxpayer.

57. It is likely that the provision was intended to facilitate collection by the Revenue by making the person most likely to be in possession of the proceeds of sale the person liable to pay the tax. Were it intended as Revenue should have an option of pursuing either the debtor or the accountable person, then no doubt s. 571 would have been expressed in different terms. Instead, it is expressed in ostensibly mandatory terms under which the relevant tax is to be assessed on and recoverable from the accountable person and the accountable person is placed under a statutory obligation to pay that tax. The provisions of Part 41 continue to apply insofar as they relate to the debtor as the chargeable person for the purposes of identifying the liability to capital gains tax in principle and assessing the amount of tax due. They do not apply as regards the form of assessment of that tax nor its recovery as those elements are expressly the subject of s. 571 under which the accountable person is made liable.

Conclusions on the Case Stated

58. Reverting to the questions of law set out in the case stated, in my view, those questions should be answered as follows:-

(a) The Appeal Commissioner did not err in his interpretation of ss. 537 and 571 of the TCA. It was not incorrect to find that when *"referable capital gains tax"* became assessable on and recoverable from an accountable person in relation to a disposal when, under s. 571(5), the debtor/taxpayer is no longer assessable to capital gains tax in relation to that disposal.

I note that the question is framed in a way which suggests that it was incorrect to hold that the debtor/taxpayer was no longer chargeable to and assessable to

capital gains tax. I cannot locate any finding in the determination to the effect that the debtor was not chargeable to capital gains tax. On the contrary, at paragraph 80 the Appeal Commissioner acknowledges that where a security is enforced resulting in the disposal of an asset, a charge to capital gains tax applies to the debtor and not to the creditor who enforced the security. Equally, the taxpayer did not contend that he was not chargeable to capital gains tax on the disposal, but argued that the effect of s. 571 was to mandatorily require assessment on and recovery from the accountable person.

By way of digression, I note that at the outset I was referred to the three stages of the imposition of a tax, namely the declaration of liability, the assessment of liability and the recovery of the tax. In normal course, although not invariably, the chargeable person whose liability is declared at the first stage remains the person subject to the assessment and from whom recovery is made in the subsequent stages. The effect of s. 571 is to split the process. The taxpayer, as debtor, remains the person who is *prima facie* chargeable to capital gains tax. The assessment of that tax is carried out by reference to his circumstances. However, the assessment in the formal sense as the precursor of a liability to pay is then shifted to the accountable person who becomes the only person subject to the third stage, namely recovery.

(b) I have had some difficulty in understanding the question posed at para. (b) of the case stated. It is evident from my judgment that I do not find the Appeal Commissioner to have erred in finding that when referable capital gains tax becomes assessable on and recoverable on an accountable person under s.

571(5), the debtor as a consequence is not assessable to capital gains tax in relation to that disposal. I have noted above that the Appeal Commissioner did not find, as a consequence of s.571(5) or otherwise, that the debtor was not chargeable to capital gains tax. Further, I cannot locate anything in the Appeal Commissioner's determination which qualifies his conclusion that as a result of s.537 and 571 the tax cannot be assessed on or recovered from the debtor, by making the debtor's potential liability somehow contingent (*"until and unless"*) assessments to referable capital gains tax are first raised on the accountable person. The determination not only finds that s. 571(5) imposes an obligation on the Revenue to raise an assessment on and recover the tax from the Bank, but also held that s. 571 did not contain a provision for which permits the taxpayer to be pursued for secondary liability. Given the ambiguous terms of the question, I confirm that I agree with the Appeal Commissioner's conclusion in this regard.

(c) The Appeal Commissioner did not err by incorrectly applying or failing to apply s. 571(9). Section 571(9) cannot be read in isolation from the balance of s. 571. It does not create or reserve a stand-alone entitlement on the part of Revenue to pursue the debtor for the capital gains tax in respect of which he is the chargeable person. Rather, it is a provision directed at ensuring that the amount of chargeable gains upon which capital gains tax is to be assessed is not affected by the provisions of s. 571.

59. It follows from the conclusions that I have reached in respect of these three questions that the more general question as to whether the Appeal Commissioner erred in law in holding

that the taxpayer was not liable to capital gains tax on the relevant disposal should also be answered *"No"*.