

High Court Decision Provides Clarity to Foreign Shareholders

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William Fry's Tax Litigation & Disputes team was involved in a landmark tax case that considered if a Spanish company's 2016 sale of unquoted shares in an Irish PPP company was within the charge to Irish capital gains tax. In the recent High Court case of *Cintra Infraestructuras Internacional SLU V The Revenue Commissioners* William Fry acted for Cintra in defending Revenue's appeal of a Tax Appeals Commission (**TAC**) determination. In 2021 the TAC determined that the 2016 sale by Cintra of shares in Eurolink Motorway Operations Limited (**Eurolink**) (an Irish PPP company) was not within the charge to Irish capital gains tax (**CGT**) on the basis that the Eurolink shares disposed of did not derive their value directly or indirectly from "land in the State" (i.e. Irish land and buildings). Revenue appealed this TAC determination to the High Court, and the hearing occurred in May 2022. Ms Justice Butler issued Judgment dismissing Revenue's appeal on 14 February 2023.

BACKGROUND TO TAX APPEAL

The crux of this tax appeal concerned whether Cintra (a Spanish-incorporated and resident infrastructural company) was within the charge to CGT on a 2016 disposal of shares in Eurolink.

A non-Irish resident company is only within the charge to Irish CGT on the disposal of what are known as 'Irish specified assets', which include land in the State (i.e. Irish land and buildings) and/or unquoted shares that derive their value or the greater part of their value directly or indirectly from land in the State.

The term "land" is defined broadly in the Interpretation Act 2005 as including "tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land" and narrowly in section 5 of the Taxes Consolidation Act 1997 (**TCA**) as including "any interest in land". Before this case, the generally accepted meaning of "land" for CGT purposes was any of the freehold or leasehold estates in land or one of the lesser interests in land set out in the Land and Conveyancing Law Reform Act 2009 (**LCLRA**). This is the first case to consider the meaning of "land" for CGT purposes.

In 2016 Cintra entered into a contract to sell shares in Eurolink, an Irish-resident company that finances, designs, builds, maintains and operates toll booths on an Irish motorway (**Motorway**) on behalf of the NRA/TII. Eurolink does not have a proprietary interest in Irish land. It had a licence to access the Motorway to perform its obligations under the PPP contract. One of the completion deliverables included in the sale contract was that Cintra had to provide a CGT clearance certificate (**Form CG50A**) or a letter from Revenue confirming that a Form CG50A was not required concerning the sale of the Eurolink shares. Before completion, Revenue contended that Cintra's proposed disposal of the Eurolink shares would be subject to CGT. The Eurolink shares were sold, and Revenue assessed Cintra to CGT on the chargeable gain. Cintra appealed the CGT assessment, and the TAC heard the tax appeal in 2018.

In 2021 the Appeal Commissioner, in a considered determination, found in favour of Cintra.

Revenue appealed the TAC determination on points of law to the High Court, and the hearing occurred in May 2022.

The six questions that the High Court was asked to consider were as follows:

- a. Was the Appeal Commissioner correct in finding or inferring that a proprietary interest in land was necessary for non-residents to be charged to tax pursuant to section 29(3) TCA?
- b. Was the Appeal Commissioner correct in finding that when construing the word "land" for the purposes of section 29(3)(a) TCA, the Appeal Commissioner should confine himself to considering the meaning given to that word by section 5 TCA?
- c. Was the Appeal Commissioner correct in finding that "land" for the purposes of section 29(3)(a) TCA means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in section 11(4) of LCLRA?
- d. Was the Appeal Commissioner correct in finding that Eurolink had a limited and non-exclusive contractual licence to use the lands under and adjacent to the Motorway?
- e. Was the Appeal Commissioner correct in finding that the PPP contract between the NRA and Eurolink did not confer or grant to Eurolink an estate in land and was not an interest in land?

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- f. Was the Appeal Commissioner correct in finding that the value of the Eurolink shares sold by Cintra derived their value or the greater part thereof from Eurolink's rights under the PPP contract between the NRA and Eurolink, and not directly or indirectly from land in the State?

SUMMARY OF MAIN HIGH COURT ARGUMENTS

INTERPRETATION OF 'LAND IN THE STATE' FOR CGT PURPOSES

Both parties disagreed on whether a proprietary interest in land is necessary for CGT to be charged on the disposal of assets. Cintra's position was that Eurolink had no estate or interest in land. Instead, it had a non-exclusive licence to enter the Motorway for its PPP contract, and Cintra claimed that this did not fall within the definition of 'land' for CGT purposes. Revenue accepted that Eurolink did not have a proprietary interest in the land but argued that the interpretation of 'land' is not restricted to proprietary interests.

Cintra argued that land for CGT purposes was restricted to estates and interests in and as set out in the LCLRA, arguing that because the LCLRA represents a codification of the common law, its treatment of the concept of land reflects the legal understanding of that concept as used in section 5 TCA. Revenue argued that the meaning of 'land' was contained in the Interpretation Act, 2005 (rather than section 5 TCA). The definition of land in the Interpretation Act 2015 is wider as it includes "any estate, right or interest in or over land". The question to be determined was whether the definition of land in the Interpretation Act 2005 was displaced by the definition of land in section 5 TCA?

WHAT TYPE OF INTEREST DOES EUROLINK HAVE IN THE MOTORWAY, AND COULD IT CONSTITUTE 'LAND IN THE STATE' FOR THE PURPOSES OF SECTION 29(3)(A) TCA?

Cintra claimed that Eurolink, by virtue of the PPP contract, had a 'limited, non-exclusive licence' to use the relevant Motorway and Cintra submitted that this licence did not provide Eurolink with an 'interest in the land'. Revenue contended that the clauses in the PPP contract established that Eurolink's interest in the land was greater than that of a licensee.

DID THE SHARES IN EUROLINK DERIVE THEIR VALUE FROM LAND IN THE STATE?

Both parties disagreed as to where the value of the shares arose from. Revenue argued that the non-proprietary rights of Eurolink were sufficient for it to be said that Eurolink shares constitute shares which derive their value indirectly from land in the State. Cintra disagreed, arguing that Eurolink merely collects the Motorway tolls on the NRA/TII's behalf.

SUMMARY OF THE HIGH COURT DECISION

Butler J concluded that the Appeal Commissioner correctly decided the tax appeal before the TAC.

The High Court decided, after reviewing how the sections in the TCA were framed, that the definition of land for CGT purposes in section 5 TCA took precedence over the definition of land in the Interpretation Act 2005. The Judge concluded that 'land' for the purposes of section 29(3)(a) TCA should be confined to the meaning of the wording in section 5 TCA 1997 and that 'land' for that purpose means a freehold or leasehold estate or one of the lesser interests formerly recognised by the common law and now codified in section 11(4) LCLRA.

Butler J held that Eurolink has a limited and non-exclusive contractual licence to use the relevant Motorway land, which will last for the duration of the PPP contract. This contractual licence was held not to be an "interest in land" for CGT purposes. The Judge also commented that it does not necessarily follow just because the value of the shares derives from these contractual rights that it is not also at least indirectly attributable to "land in the State."

MEANING OF "INDIRECTLY"

Of particular interest were the Judge's comments on the meaning of "indirectly" in section 29(1A)(b) TCA.

The Judge noted that Revenue made a "somewhat discrete" argument that the payment of tolls by motorists is linked to the use by the motorist of the Motorway and, thus, the use of land. In this way, Revenue contended that the income derived by Eurolink under the PPP contract was in fact, indirectly based on land use.

The Judge indicated some “immediate difficulties” with this argument. Firstly, it interposes additional wording into Section 29(1A)(b), namely “the use of.” Thus, the argument is not that Eurolink’s shares derived their value from land in the State but from “the use of land in the State”. Secondly, the use which is identified as generating the income is not use by Eurolink, but use by third parties (i.e., Motorway users).

It is worth quoting in full paragraph 74 of the Judgement as it indicates, in the Judge’s view, when the connection between a company’s shares and Irish land becomes too remote:

“Accepting that the phrase “directly or indirectly” necessarily means that the connection between the company’s shares and the land does not have to be immediate, when the connection is not immediate an issue necessarily arises as to the point at which it becomes too remote to be said to arise even indirectly. This is something which has to be closely examined and determined on a case-by-case basis. For example, the court queried whether shares in a haulage company engaged in the business of transporting goods in vehicles over the exact same stretch of motorway could be said to derive their value from land because they are using the motorway. On one level the connection would be more direct since it is use of the road by the company whose shares are in issue. Revenue conceded that on the case it was making, the use by a haulage company of the road in those circumstances would mean that the value of its shares was derived at least in part from land. Almost all businesses in the State “use” land in this sense, being physically based in premises on land or, at very least, passing over land including over or through infrastructure on land. In my view reading the phrase “use of” into the text before “land” for the purposes of section 29(1A) makes the section impermissibly vague and indeed almost completely open-ended.

Thus, the Judge concluded that the use of land by third parties is too remote to attribute the value of Eurolink’s shares as arising even indirectly from such use.

Butler J did note at the end of her Judgment that she did not think it was necessary to conclude definitively that in all circumstances, there must be a proprietary interest in the land before a company can derive its value indirectly from land. However, she was satisfied with the decision reached by the Appeal Commissioner in this case. As on the facts of this case, the shares in question did not derive their value directly or indirectly from land in the State but derived their value from Eurolink’s rights under the PPP contract.

FINAL REMARKS

This is a landmark tax case and a welcome clarification of the circumstances when a non-resident is within the charge to Irish capital gains tax on the disposal of unquoted shares in companies that have business operations relating to Irish land.

If Revenue's arguments had been successful, it would have led to much uncertainty and an overly broad application of the CGT charging provisions. With this decision the general understanding of the taxation position prior to this case is maintained. That said, if the opportunity presents itself, Revenue may challenge a case where a target company does not have a proprietary interest in Irish land, but the connection between the value of a target company's shares and Irish land is "immediate".

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