TAX APPEALS COMMISSION

47TACD2019

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The Appellant is one of 31 Appellants and it has been agreed between the parties that this Appellant would take the lead appeal.

2. The primary issue in this appeal concerns interest relief claimed by the Appellant in the tax years ending 31 December 2005, 2006, 2007 and 2008 pursuant to Taxes Consolidation Act 1997 (TCA), section 248 as extended by section 250. A claim for interest relief was claimed as follows:

(a) Year Ended 31st December 2005	€79,317
(b) Year Ended 31st December 2006	€68,776
(c) Year Ended 31st December 2007	€58,674
(d) Year Ended 31st December 2008	€49,764

3. The Respondent has challenged the Appellant's interest relief claims based on the non-compliance with four statutory provisions, namely:

   (a) TCA, section 248(3);
   (b) TCA, section 817A;
   (c) TCA, section250(2)(a), and
   (d) TCA, section 248(2)(c).

4. The Respondent therefore denied the relief by amending the notices of assessment for the years ended 31st December 2005 to 31st December 2008 inclusive. Those assessments were appealed on 17th January 2011.

Background

5. On 5 December 2005, prior to subscribing for shares in **Name of Company Redacted (NCR),** the Appellant was invited and accepted an invitation to become a non-executive director of that company.

6. On 6 December 2005, the Appellant subscribed €500,000 for 500,000 new ordinary shares issued by NCR. NCR was raising finance for the purpose of investing in a Georgian building on Location Redacted and also investing in a wholly owned subsidiary company, **Subsidiary Name Redacted** ("SNR") which in turn was investing in a financial derivative ("the Derivative") issued by **Related Company Redacted** ("PS") that tracked the performance of the European Property Real Estate (EPRA) Index. The investment was promoted by **Promoter Name Redacted** ("Promoter").

7. The Appellant borrowed Turkish Lira ("TRY") from Promoter, for the purpose of funding his investment in NCR (the "FX Loan"). TRY800,000 was borrowed under the FX Loan which was the equivalent of €500,000. The borrowings were made in TRY as it was expected to depreciate against the Euro and thus there was a potential to realise a gain on the repayment of the loan.

8. Interest on the FX Loan was payable in Euro which was calculated by reference to an agreed forward exchange rate included in the FX Loan agreement. Interest was payable annually in advance. Under the provisions of TCA, section 250, the Appellant claimed relief for interest paid on the FX Loan in his income tax returns for the years ending 31 December 2005, 31 December 2006, 31 December 2007 and 31 December 2008.

9. The Appellant hedged his foreign currency exposure relating to the repayment of the FX Loan by entering into a spot trade and financial spread bet (the "Hedging Transactions") with Promoter.

10. The Appellant also invested €250,000 in a bond that paid interest annually and a further return on maturity that was dependent on the performance of a basket of commodities (the "Commodities Bond"). The investment in NCR and the Commodities Bond were non-correlated. The Appellant funded this investment using a loan (the "Bond Loan") of €200,000 from Promoter and €50,000 from his personal resources. The Appellant withdrew principal from the Commodities Bond annually to fund the interest payments due under the FX Loan. Interest earned on the Commodities Bond was included in the Appellant's income tax returns for all relevant years. Interest paid on the Bond Loan was not tax deductible.

11. The Appellant entered into a put option agreement ("the Put Option") with Promoter, which enabled him to realise his investment by calling upon Promoter to purchase his

shares. The price payable by Promoter for the shares was set at the original amount subscribed for the shares plus a proportionate share of 25% of any increase in the value of Main Investment Property Name Redacted over the initial reference level (being the acquisition cost of €8m) and a proportionate share of 75% of any increase in the value of the Derivative acquired by SNR over the investment period.

12. The Appellant entered into a Limited Recourse and Interest Rate Agreement dated 5 December 2005.

13. On 6 December 2005, the Appellant drew down a loan in the sum of €200,000 from Promoter and instructed Promoter to pay it to the account of PS to fund the Bond Investment.

14. On 6 December 2005, the Appellant made the first withdrawal of principal and interest under the Commodities Bond Agreement in the sum of €79,317. In the Payment Instruction to Name of Bank Redacted, the Appellant instructed the bank to transfer from his Euro account the following amounts:

Date	**Euro amount**
6 December 2005	79,317
30 November 2006	68,776
30 November 2007	58,674
30 November 2008	49,764

15. The Appellant claimed interest relief under sections 248-250 TCA 1997 on the aforesaid amounts.

16. A Loan Statement from Promoter shows corresponding payments of interest in TRY:

Date	**TRY**
6 December 2005	126,907
30 November 2006	129,028
30 November 2007	129,382
30 November 2008	129,028

17. On 30 November 2009, by agreement between the parties, the Appellant's shares were redeemed by NCR. As a result of the financial crisis, the value of Main Investment Property Name Redacted and the EPRA Index were below their respective December 2005 values. Consequently, the price payable for the shares in NCR was equal to the original amount subscribed for the shares.

18. On 30 November 2009 the Hedging Transactions matured. Due to the exchange rate fluctuations over the investment period, the cost of repaying the FX Loan was €350,171 which was €149,829 lower than the Euro equivalent of the FX Loan on drawdown (i.e. €500,000). As the gain arose on the repayment of a liability, it was not subject to Capital Gains Tax ("CGT"), as CGT only applies to gains arising on the disposal of chargeable assets. A profit of €87,663 was generated on the maturity of the financial spread bet. No tax liability arose on this profit as betting gains are not regarded as chargeable gains under the provisions of TCA, section 613(2).

19. In December 2009 the Appellant resigned as a director of NCR and his shares were redeemed, with the result that NCR reduced its share capital. A majority of the investors in NCR resigned and had their shares redeemed at about the same time as the Appellant.

20. By letter dated 24 December 2009 Promoter informed the Appellant that the final amount due to him as a Final Floating Amount of the PS Bond was €2,146.99.

The Hedging Transactions

21. On 5th December 2005, the Appellant and Promoter entered into a Spot Trade Agreement under which, on 30th November 2009:

    a) Promoter was to pay the Appellant TRY 800,000 and,

    b) The Appellant was to pay Promoter the EUR equivalent of TRY 800,000 calculated using the EUR/TRY spot rate on the termination of the arrangements, being 28th November 2009.

22. The other part of the hedging arrangements was a Financial Spread Bet Agreement entered into on 5th December 2005. Under this agreement, on 30th November 2009:

    a) for every Euro 0.000001 that one Turkish Lira on the 28th November 2009 was, translated at the TRY/EUR Spot Rate on 28th November 2009, worth more than Euro 0.328135 the Appellant was to receive from Promoter Euro 0.80, and

    b) for every Euro 0.000001 that one Turkish Lira on the 28th November 2009 was, translated at the TRY/EUR Spot Rate on 28th November 2009, worth less than Euro 0.328135 the Appellant was to pay Promoter Euro 0.80.

23. The effect of these terms acted as a 100% hedge of the TRY 800,000 loan. The economic effect of the 100% hedge was for the Appellant to realise a fixed gain.

Promoter and Loan Funding

24. The Appellant was one of 35 investors who obtained loans from Promoter to buy shares in NCR. The aggregate value of the share loans was €40 million. Promoter obtained the funding for the loans by borrowing €40 million from Name of Bank Redacted ('NBR'). NBR is the private banking arm of Name of Bank Redacted Group. The following movements of funds took place on 6 December 2005:

(a) A total of TRY 64 million was transferred out of a TRY Call Deposit account held by Promoter with NBR;
(b) A total of TRY 64 million was lodged into the TRY Call Deposit accounts individual investors held with NBR. This included the Appellant who drew down his TRY 800,000 share loan into a TRY Call Deposit Account with NBR;
(c) The Appellant paid TRY 800,000 out of this account for 500,000 ordinary shares of Euro 1 each in NCR;
(d) The amounts which the Appellant and other investors had subscribed for shares in NCR (totalling TRY 64 million) were lodged into a call deposit account held by NCR with NBR;
(e) NCR exchanged TRY 64 million for €40 million m at the prevailing exchange rate;
(f) NCR lodged €40 million m to a Euro Call Deposit Account with NBR;

25. Also, on 6 December 2005, NCR lent €36.3 million m to SNR and transferred €3.7 million to Name of Investment Company Redacted ('GR'). Both Company Name Redacted and GR were 100% subsidiaries of NCR.

26. On the same day, SNR used the €36.3m to purchase the Property Derivative from PS. Also, on 6 December 2005, the money was lodged to PS's account in AIB.

27. Promoter' account in AIB shows two credits on 6 December 2005 labelled 'Intercompany Loan', one for €36.3 million and the other for €3.7 million. It would appear, therefore, that the €40 million funds lent by Promoter to the Appellant and the other investors in NCR were returned to Promoter on the same day (6 December 2005).

Legislation

Taxes Consolidation Act

28. TCA, section 248 provides for a deduction for interest paid on a loan against total income in certain circumstances where, *inter alia*, the individual holds a material interest in the company and has worked for the greater part of his time in the management or conduct of the business of the company or a connected company from the application of the loan proceeds until the interest is paid. TCA, section 250 provides

for circumstances where, notwithstanding that the individual does not comply with some conditions in TCA, section 248, interest relief is available.

29. TCA, section 248 provides:

(1) *This section shall apply to a loan to an individual to defray money applied –*

(a) *in acquiring any part of the ordinary share capital of –*

(i) *a company which exists wholly or mainly for the purposes of carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D, or*

(ii) *a company whose business consists wholly or mainly of the holding of stocks, shares or securities of a company referred to in subparagraph (i),*

(b) *in lending to such a company referred to in paragraph (a) money which is used wholly and exclusively for the purposes of the trade or business of the company or of a connected company, or*

(c) *in paying off another loan where relief could have been obtained under this section for interest on that other loan if it had not been paid off (on the assumption, if the loan was free of interest, that it carried interest).*

(2) *Relief shall be given in respect of any payment of interest by the individual on the loan if –*

(a) *when the interest is paid the individual has a material interest in the company or in a connected company,*

(b) *during the period taken as a whole from the application of the proceeds of the loan until the interest was paid, the individual has worked for the greater part of his or her time in the actual management or conduct of the business of the company or of a connected company, and*

(c) *the individual shows that in the period referred to in paragraph (b) he or she has not recovered any capital from the company or from a connected company, apart from any amount taken into account under Section 249.*

(3) *Relief shall not be given in respect of any interest by an individual on a loan applied on or after the 24th day of April 1992, for any of the purposes*

specified in subsection (1) unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.

(4) *Subsection (1) shall not apply to a loan unless it is made in connection with the application of the money and either on the occasion of its application or within what is in the circumstances a reasonable time from the application of the money, and that subsection shall not apply to a loan the proceeds of which are applied for some other purpose before being applied as described in that subsection.*

(5) *Interest eligible for relief under this section shall be deducted from or set off against the income of the borrower for the year of assessment in which the interest is paid and tax shall be discharged or repaid accordingly …"*

30. TCA, section 250 provides the rules regarding extension of relief under TCA, section 248 to certain individuals in relation to loans applied in acquiring interest in certain companies and provides:

(1) *In this section –*

"90 per cent subsidiary" has the meaning assigned to it by section 9;

"full-time employee" and "full-time director", in relation to a company, mean an employee or director, as the case may be, who is required to devote substantially the whole of his or her time to the service of the company;

"holding company" has the same meaning as in section 411;

"part-time employee" and "part-time director", in relation to a company, mean an employee or director, as the case may be, who is not required to devote substantially the whole of his or her time to the service of the company;

"private company" has the meaning assigned to it by section 33 of the Companies Act, 1963.

(2) *Notwithstanding that an individual does not satisfy one or both of the conditions set out in paragraphs (a) and (b) of section 248(2), the individual shall be entitled to relief under section 248 for any interest paid on any loan to him or her for a purpose specified in Section 248(1) if –*

(a) the company part of whose ordinary share capital is acquired or, as the case may be, to which the money is loaned is –

(i) both a company referred to in paragraph (a)(i) of section 248(1) and a company in relation to which the individual was a full-time employee, part-time employee, full-time director or part-time director during the period taken as a whole from the application of the proceeds of the loan until the interest was paid, or

(ii) both a company referred to in paragraph (a)(ii) of section 248(1) and a private company in relation to which, or in relation to any company which would be regarded as connected with it for the purposes of section 248, the individual was during that period a full-time director or a full-time employee,

and

(b) the company or any person connected with the company has not, during the period specified in paragraph (a)(i), made any loans or advanced any money to the individual or a person connected with the individual other than a loan made or money advanced in the ordinary course of a business which included the lending of money, being business carried on by the company or, as the case may be, by the person connected with the company.

(3) In relation to any payment or payments of interest on any loan or loans applied–

(a) in acquiring any part of the ordinary share capital of a company other than a private company,

(b) in lending money to such a company, or

(c) in paying off any other loan or loans applied for a purpose specified in paragraphs (a) and (b),

no relief shall be given for any year of assessment by virtue of this section other than to a full-time employee or full-time director of the company and no such relief shall be given to such employee or director on the excess of that payment, or the aggregate amount of those payments, for that year of assessment over €3,050.

(4) Where relief is given by virtue of this section to an individual and any loan made or money advanced to the individual or to a person connected with the individual is, in accordance with paragraph(c) of subsection (5) and by virtue of subparagraph (ii), (iii), (iv) or (v) of that paragraph, subsequently regarded as not having been made or advanced in the ordinary course of a business, any relief so given, which would not have been given if, at the time the relief was given, the loan or money advanced had been so regarded, shall be withdrawn and there shall be made all such assessments or additional assessments as are necessary to give effect to this subsection.

(5) For the purposes of this section –

(a) any question whether a person is connected with another person shall be determined in accordance with section 10 (as it applies for the purposes of the Tax Acts) and paragraph (b),

(b) a person shall be connected with any other person to whom such person has, otherwise than in the ordinary course of a business carried on by such person which includes the lending of money, made any loans or advanced any money, and with any person to whom that other person has so made any loan or advanced any money and so on,

(c) a loan shall not be regarded as having been made, or money shall not be regarded as having been advanced, in the ordinary course of a business if –

(i) the loan is made or the money is advanced on terms which are not reasonably comparable with the terms which would have been applied in respect of that loan or the advance of that money on the basis that the negotiations for the loan or the advance of the money had been at arm's length,

(ii) at the time the loan was made or the money was advanced the terms were such that subparagraph (i) did not apply, those terms are subsequently altered and the terms as so altered are such that if they had applied at the time the loan was made or the money was advanced subparagraph (i) would have applied,

(iii) any interest payable on the loan or on the money advanced is waived,

(iv) any interest payable on the loan or on the money advanced is not paid within 12 months from the date on which it became payable, or

(v) the loan or the money advanced or any part of the loan or money advanced is not repaid within 12 months of the date on which it becomes repayable,

(d) the cases in which any person is to be regarded as making a loan to any other person include a case where –

(i) that other person incurs a debt to that person, or
(ii) a debt due from that other person to a third party is assigned to that person;

but subparagraph (i) shall not apply to a debt incurred for the supply by that person of goods or services in the ordinary course of that person's trade or business unless the period for which credit is given exceeds 6 months or is longer than normally given by that person,

(e) a company other than a private company shall be deemed to be a company referred to in section 248(1)(a)(i) if it is a holding company and is resident in the State, and

(f) an individual shall be deemed to be a full-time employee or full-time director of a company referred to in paragraph (e) if the individual is a full-time employee or full-time director of any company which is a 90 per cent subsidiary of that company.

31. TCA, section 817A is an anti-avoidance provision which seeks to deny relief for interest paid on a loan where a scheme has been effected or arrangements have been made such that the sole or main benefit expected to accrue to the borrower from the transaction under which the interest is paid is a reduction in liability to tax. TCA, section 817A(1) provides:

"*Relief shall not be given to any person under Part 8 in respect of any payment of interest, including interest treated as a charge on income, if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid is the obtaining of a reduction in tax liability by means of such relief.*"

32. TCA, section 955 contains the rules regarding time limits for the making and amending of assessments. Section 955(2) provides:

(a) "Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an

assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return……".

(b) Nothing in this subsection shall prevent the amendment of an assessment -

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),
(ii) to give effect to a determination on any appeal against an assessment,
(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,
(iv) to correct an error in calculation, or
(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person…"

Evidence

33. *Appellant*

The Appellant gave the following evidence:

(a) he works as a solicitor and has been in practice for 30 years;

(b) he had an interest in property investment and had viewed a number of properties in the late 90s and early 2000s, but did not proceed to purchase a property as he did not have a significant amount of money at his disposal;

(c) he made a number of tax-based film investments and BES investments over the years. He confirmed that these investments were almost guaranteed, unless something happened to the operator;

(d) he took half of a €100,000 investment unit in the NCR investment opportunity. His recollection as to how he became aware of the investment was imprecise, and that he could have received the documentation either from Tax Advisor Name Redacted or from Promoter directly;

(e) he recollected seeing the information memorandum but could not recall if it issued in generic form or whether it was addressed to him. He confirmed he had also received a tax opinion letter from Tax Advisor Name Redacted and a number of slides in relation to a "Tax Efficient Leveraged Commercial Investment Proposal";

(f) he explained that he was aware there was a potential for uplift in the capital in terms of a 25% share in any uplift in value of Main Investment Property Name Redacted and to a 75% share in any increase in value of the EPRA derivative. He could not recollect informing himself in a specific way of the possibility of returns in relation to the EPRA derivative. He confirmed that he was not familiar with the EPRA index at the time he made his investment. He indicated that he had limited exposure to European property, other than that he was aware that a couple of his clients had invested in places in Europe;

(g) when directed to slides relating to price movements over time of the selected commodities, he confirmed that he probably would only have had a cursory look at the slides;

(h) there was a general expectation in 2005 that the property market would continue to perform and that there was an "exuberant" attitude to both residential and commercial property. Also, there was "giddiness" that if one did not get on the curve that one would lose pace with everybody else;

(i) there was no downside in investing in NCR other than theoretically he could lose money. He stated that the property market was an "unstoppable train" at the time of the investment. He said it was plainly obvious from the information memorandum that there was a tax benefit from the transaction;

(j) he thought he was going to get "some kind of increment on the capital" but that he did not do precise calculations. He verified that he had expected a recovery of the €50,000 and a return on top of this. He stated the investment memorandum restricted the level of return, but given the trends at the time "it was reasonable to expect that there would be quite a significant return over 4 years". However, this view could look foolish with the benefit of hindsight;

(k) he had a destination for some funds and that he wanted to invest in property. He indicated that the NCR investment was attractive to him as there was good potential for uplift with a low risk profile. He also confirmed that he anticipated that his income would continue at the same level as in previous years, and hence the tax efficiencies potentially achievable appealed to him;

(l) he was aware that the gearing aspect allowed him to enhance the potential uplift available to him. He stated that the tax relief on the interest on the borrowings was a significant factor in prompting his investment but it was not his "sole motivator". He said he was naive as to the structure of the investment;

(m) he became a director in NCR, however he "*wasn't required to do very much in that regard*". He recalled attending 2 meetings and said that he received notifications of what seemed to him to be very routine type meetings. It was never brought to his attention that any serious matter would have to be addressed at any of the meetings. He was never notified that he was at risk of being disqualified as a director;

(n) he notified the company of his intention to resign as director, which to the best of his recollection was by means of a signed letter of resignation;

(o) he visited the property prior to his investment and that he considered the property, Main Investment Property Name Redacted, to be a "magnificent building". He said that "*it was very beautifully restored*" and that his only other impressions were that "*it existed*", that "*it was quite large*" and that "*it was in very good nick*";

(p) he did not have a close relationship with any of the other investors other that his co-investor Name Redacted. He confirmed that they both attended the final meeting of directors in November/December 2009 where he resigned as director. He indicated that it was never suggested to him that he was not a director. When making his professional indemnity returns, he said that he would have confirmed that he was a director;

(q) he signed a number of legal documents including a power of attorney. He indicated that he could recollect receiving invitations to board meetings but that he did not have any documentation to support this;

(r) the director's report and financial statement for the year ended 13 November 2006 showed that he was recorded as a director and that the company considered him to be a director. He gave evidence that he could recall seeing the documentation, but he did not know when he had seen it;

(s) he referred to Form B10 which recorded his resignation as a director with the CRO in relation to which he gave evidence that the company was obliged to update the particulars with the CRO;

(t) he recalls seeing his personal tax returns and confirmed that they were submitted to the Respondent by his accountant. He signed the declaration in the return to the effect that the information transmitted on the return was to the best of his knowledge and belief correct. The return was true in so far as he was concerned, both at the date of signing of the returns and at the present time. He had no reason to doubt the accuracy of the return;

(u) it was his understanding that of the €40 million raised, only a small part of it, specifically €8 million, was invested in the property. He suspected that his investment and his acceptance of the position of directorship coincided, but that in any event he accepted the events came close together. He did not benefit from the rental income and that it did not affect the price of the share redemption;

(v) in cross examination he confirmed that on reflection, he had only attended one board meeting. He possibly was mistaken about any prior meeting and that his attendance at Investment Property Name Redacted could be in relation to his inspection of the building with Name Redacted;

(w) he recollected 2 phone conversations with Tax Advisor in relation to the performance of his investments. However, he could not recollect the specifics of the call. The calls related to "*how things were going*" in the sense of how the overall investment was performing, rather than in relation to the Respondent's inquiry. He understood the latter was a request for information only, rather than the disallowance of relief. He did not take notes of any phone conversation and could not recall the content of the calls;

(x) on re-examination, he confirmed the phone calls with regard to his investment were with Name Redacted and that by the end of quarter one of 2007, it became evident that his expectation as to the profitability of his investments was not going to materialize;

(y) he could not recollect whether he obtained information on the derivative or the property from the board minutes. He said he doubted whether he referred to the relevant website in relation to the EPRA index. He based his investment predominantly on the information memorandum. He agreed he would have to make a return of €50,000 to recoup his investment of €50,000;

(z) when cross-examined as to whether the after-tax return of 126% was a significant factor in his investment, he confirmed that it was "*certainly a factor*". He accepted that it was a very attractive investment based solely on tax and that a very large part of the return on the investment was €215,613 tax saved on interest. When re-examined as to whether he would have made the investment unless he was assured a very high return on the other elements of the investment, given that absent the tax saving, the numbers turned negative he stated; "*I suppose if I had looked at this as carefully as we are now one might have taken that view but I obviously didn't*";

(aa) his understanding of the information memorandum may have been incorrect in that if tax is taken out of the equation, he would be dependent on the non-tax returns being sufficient to make up his loss and give him a profit for the 4 years that his money was out of his pocket. He stated that "*I assumed that if there was a continuing growth that I would end up with a return, in addition to my €50,000*.". It was not explained to him that his return was fundamentally predicated on the tax saving;

(bb) he recalled looking at the trends in property values and the trends in commodity prices, such that he had an expectation of profit he could not pre-determine. He acknowledged that there was a difference in buying an asset which produced income and that this investment was not similar to buying an income producing asset. He understood the income would be used to pay the interest;

(cc) on re-examination, he could not recall seeing Name of Valuer Redacted valuation in relation to Main Investment Property Name Redacted but he could recall a figure of €10 million being mentioned. The 25% capital appreciation relative to the €8 million value at the time of purchase was consistent with his expectations in 2007. Shortly thereafter it became clear that things had "*changed utterly*";

(dd) when questioned as to the fairness of the fact he put his money at stake but only received 25% of the increase in the investment, he stated that he did not anticipate negotiation and he did not pursue the matter. He admitted that the property derivative did not coincide with his investment proclivities in that it tracked property in Europe rather than Ireland. The reason he thought the return on 75% rather than 100% of the derivative was related to the costs of the promoter. He thought the reason the promotors got a greater share of the investment related to the fact they had to buy back the shares;

(ee) he confirmed that he had no recollection of considering the requirement for movement in the EPRA index to make a profit. In relation to his expectation of profits on the commodities, he said *"I don't recall expecting to make substantial gains on those. But I think they were part of the bundle, as it were, of things I was expecting to increase in value during the term of the investment. But I can't be specific about that*";

(ff) on re-examination, he had an expectation of a significant positive return in relation to the EPRA index. He stated *"It was important, I suppose on a scale of naught to ten, it would have been at the high point. But it was a significant factor.";*

(gg) he could not recall being consulted about the choice of borrowing in Turkish lira;

(hh) in relation to his directorship, he had no expectation of being paid as a director "*Because I believe I wasn't expected to do much work, if any*";

(ii) he was not consulted in relation to the purchase of Other Property Name Redacted for €4 million;

(jj) in relation to his attendance at the board meeting in November 2009, the reason he attended the meeting was to consider whether he was going to remain on as director and that it was possible that he was encouraged to attend this meeting on the basis that his directorship was coming to an end. This encouragement came from Name Redacted rather than Promoter as his directorship was also coming to an end;

(kk) when questioned as to the whether his directorship was of a nominal nature he stated "*Well I think looking back on it that looks to be the case, but that I didn't know that …in December 2005*".

(ll) he confirmed that at the time of the investment, he considered the loan was applied for "*bona fide*" purposes and was "*not as part of a scheme or arrangement, the main purposes or one of the main purposes of which is the avoidance of tax"* and that this was still his belief. Based on the advice he received, he was investing in commercial property in relation to which there was a likelihood, albeit not a guarantee of, an entitlement to tax allowances on the interest.

34. *Expert Witness for the Appellant- Mr Des Peelo*

Mr Peelo gave the following evidence:

(a) he is a chartered accountant for more than 50 years. He was largely engaged in specialist professional practice which in simple terms comprised of forensic accounting/expert evidence. He was engaged in merchant banking in Dublin and London. He had been engaged with Hilton hotels and the World Bank in Africa and the Far East. He was also involved in financial journalism, writing columns for the Irish Times and the Sunday Independent on politics, economics and business. He had been a university lecturer in Trinity College. He was a government political advisor and that he advised a number of politicians. He had been a director to a number of companies and acted as an expert witness in numerous cases of litigation in the Four Courts;

(b) he agreed that he was happy to adopt his report as his evidence;

(c) he referred to his letter of engagement and confirmed that his function was to "*Review the investment of commercial aspects of the particular transaction*";

(d) the review was based on the documentation which he confirmed to be the information memorandum, limited recourse and interest rate agreement, presentation slide desk and actual final cash-flow schedule which he confirmed he had reviewed;

(e) in cross-examination, he confirmed that his review was limited to the documents set out in the letter of engagement. He could not think of any factors which might change the opinion in his report;

(f) he was referred to his letter of engagement which expressly stipulated that his function did not include any review of the tax aspects;

(g) he agreed that he was not able to determine whether tax was a main benefit of this scheme as the tax aspects were not within the scope of his engagement. He also accepted he could not compare this tax scheme with other tax schemes such as enterprise relief or capital allowances;

(h) he accepted the repayment in the amount of €474,984 was equal to the profit from the financial spread bet and the profit on the currency exchange rate;

(i) the investor "*shelled out €100,000*" and needed to recoup this amount before he could even start talking about a profit;

(j) in relation to the 4 sources of return being the tax deductions, the profits on the commodities bond profits, the redemption of shares comprising property derivative return and profits on the redemption of shares comprising the property increase, he indicated that he did not address such issues in his review;

(k) he confirmed that his summary and opinion based on his review related to the investment market in 2005. He understood the investment, the subject of the appeal, was made towards the end of 2005, early 2006 and the investment was considered as tax deductible investments;

(l) he confirmed the boom peaked in 2005 and 2006 due to the euro and low interest rates. He described this period as "absolutely booming". Behind the scene there was a lot of worries, due the fact that construction had reached 16% of GDP, being twice the typical percentage, with 8% being the "norm on construction to keep the economy going";

(m) in relation to investments in the period in question, the major banks and other companies were "pushing" investments. He indicated that in America in this period they were developing securitisation and contracts for difference. It was appealing to invest in derivatives in this period and that this activity led to the collapse of Lehman Brothers in September 2008. He indicated that investment expectations were high when this investment took place;

(n) there was a loan investment of €400,000 and a cash investment of €100,000 by the investors. The bond was to be cashed in yearly instalments over 4 years. At the end of the 4 years he indicated that the bond was gone, having been cashed in and the loan of €400,000 was still there unless there were some means of paying it off in the investment structure. He understood there was no guarantee that the loan would be paid off, but in the circumstances of the investment in NCR, it was paid off through a combination of profits from the financial spread bet and the profits from the currency exchange. He said he may have misunderstood that there was no guarantee;

(o) in cross-examination, he indicated that on his review of the documentation, it appeared to him as a matter of interpretation that the borrower could have an exposure in respect of the loan. He conceded that there could be an alternative view. He did not comment on whether an investor would require some mechanism to repay the loan in the event tax deductions did not materialise;

(p) the investment in NCR was attractive to investors in providing diversity and lowering risk. Other investment products like tracker funds were not available at the time of the investment, so the only option to invest in a diverse way was via unit linked funds. He referred to paragraph 4 of his summary relating to geared/leveraged investments which he read as follows:

> *"The primary focus in making such an investment particularly to a portfolio investor would have been access to €1.5 million of innovative and diversified investment on an outlay of 100K, though with an additional risk of a €100K loss excluding any tax benefit"*

(q) the investment was attractive in terms of competition and that the anticipated tax benefits were an additional benefit. The typical investments at the time involved flipping investments. He differentiated the former from the investment in NCR on the grounds that the investment in NCR had a span of realisation that was shorter than the typical 5 to 7-year lifespan of other investments;

(r) in cross-examination, he confirmed that experienced investors look for diversity and said that the credibility of the promotors and a common sense approach were also factors in selecting a particular investment. He agreed that capital appreciation was also a factor in terms of assessing investments. He also indicated that he could only speculate as to whether an investor in a transaction giving rise to a tax deduction would want a tax opinion from a reputable firm. He did not wish to comment on whether investors would look at a history of property increases and he stated that the EPRA index was not within the scope of his review;

35. *Expert Witness for the Appellant- Mr Barry Smyth*

Mr Smyth gave the following evidence:

a) he confirmed he was an auctioneer with De Vere, White & Smyth and agreed that the parameters of his engagement was to advise on the realistic possibility in late 2005, that Main Investment Property Name Redacted would increase in value by 30 November 2009;

b) In relation to the property market in 2005, the whole economy had strengthened greatly and property investment was absolutely the flavour of the month and the years, and it was difficult for valuers as they found it very hard to keep up;

c) there was increasing values, certainly quarterly, and probably more frequently than that and that there was a very strong and confident market at that time;

d) Georgian buildings were very popular, particularly with medium size professional practices as office accommodation with strong demand at that time due to a shortage of space. Capital growth in relation to property was linked to yields of the rent and the cost of money;

e) the property owned by NCR, Main Investment Property Name Redacted was let as a serviced office. The value of similar buildings was undertaken to arrive at a value of €9 million for Main Investment Property Name Redacted;

f) on re-examination, he confirmed his familiarity with the areas in which the market transaction referred to. He was involved in valuing but not selling Georgian buildings and said that the valuation used was pre-conversion and that you could add the costs on the conversion;

g) in relation to the buoyancy of the market, he concluded it was reasonable to anticipate growth. He referred to the SCS/IPD index and he explained this was an index in the increase in capital value of properties. He confirmed that in the 12 months to March 2007, the total return for property was 23.4%, emphasising strong growth in the market in terms of both income and capital appreciation. The index could not be applied to Georgian buildings and the figures for Georgian buildings would not be as good as modern buildings. He stressed the importance of cheap borrowing as a significant factor in the office market;

h) in cross-examination, he stated that the property was purchased for €8 million but that he had no way of knowing whether this was an arm's length transaction. He confirmed he accepted the rental figure from Name of Valuer Redacted report;

i) in relation to the sample of buildings he used to arrive at his valuation he thought that there were only 4 other similar properties sold in the period. He had inspected the properties from the outside. He accepted the interior of the building could affect its value. He had been in the building on one occasion as it was the Redacted building;

j) he confirmed that he did a calculation based on the purchase price minus the average mews site. He indicated that the mews site at the rear of Georgian houses is pretty standard. He accepted that the further forward you are predicting growth rates, the greater the level of uncertainty;

k) he confirmed that he had only commenced his involvement on receipt of instruction on 31 May 2019 and that he had not advised the investors;

36. *Witness for the Appellant- Name of Director of Promoter Redacted*

Name of Director of Promoter Redacted gave the following evidence:

a) he was a director of Promoter;

b) an opportunity was provided to investors to invest in a company that included, *inter alia*, to participate in acquisitions of assets to include the purchase of Main Investment Property Name Redacted. The property was acquired in 2005 and €1 million to €1.5 million was spent on refurbishment to bring the building back to its original form, while also modernising it for practical use;

c) the intention was to manage the property as a serviced office as it was capable of being more profitable;

d) as the restoration project tied up a lot of capital, a decision was made to bring in other investors to make capital available for other investments;

e) there was *"a lot of enthusiasm"* in the market at that time. While around 2007/2008 "*things went really wrong*", that in 2005 there was "*extreme enthusiasm.*";

f) he had invested in the property in a personal capacity and thought the investment was fair in that it provided an interesting mix of opportunities. For example, the investor had an upside but had no downside in the building and there was an upside in the EPRA index with no downside due to capital protection. He stated that it was an illiquid investment as the investors were tied in for 4 years. He gave evidence that the counterparty to the transaction was a private company, Promoter, rather than a big bank;

g) in the year 2005, there was a tax deduction available for borrowers who invested in rental companies. He said that as the serviced office would be in receipt of rent, and that it would make sense to tie the interest deduction into the transaction;

h) with regard to the 25% level of participation by the investors, he thought this was fair as the investor got to invest in a property without the costs of buying or selling a property. He said the investor participated for 4 years with a guaranteed exit and did not have the void periods or the responsibility of managing the property. He also said that the capital gains tax remained a latent liability of the company;

i) the investors' contribution represented 40% of the purchase price of €8 million, with the balance funded by bank borrowings that the company undertook itself. He stated that at a certain point when things got bad the bank did foreclose and there was no loss to the investors;

j) in relation to the rationale for not giving the investors a 100% uplift in the EPRA index, he said that as the company would suffer a 25% tax, the investors were getting 100% of the after-tax profit of the company;

k) it would be wrong to look at the investment with the benefit of hindsight as at the time it was anticipated that the property would significantly increase in value. In support of this, he said that they had got a valuation from Name of Valuer Redacted and they were told that the property was worth in the region of €12 million and that it increased in value quickly thereafter. He stated that they had an expectation that the property might go to €14 or €15 million at some point;

l) the EPRA index was very diverse, having a broad basket of property related companies across Europe. Likewise, he said the same could be said with regard to the commodities which were linked with GDP and hence grew as the economy grew. With regard to the 2 derivatives with Barclays which were in the region of €600,000, he pointed out that they were worth €2.6 million within 18 months, representing a gain of €2 million over that period;

m) as such the investment provided different and diversified source of returns for investors, whilst also allowing NCR to retain ownership and control of Main Investment Property Name Redacted. He pointed out that the investors would exit after 4 years such that NCR would regain ownership of Main Investment Property Name Redacted and run it as it saw fit. Thus, he said they saw the investment provided a balance of commercial interest which would be attractive to investors, which proved to be the case;

n) in relation to the Appellant's directorship between 2005 and 2009 as recorded in the company's Financial Statements, he confirmed he was invited to attend meetings;

o) he confirmed that he invested in the transaction personally and was also a director of the company and that he claimed tax relief in the same manner as other investors. He said the Respondent had subsequently queried his interest deduction by notice of opinion under TCA, section 811 but ultimately withdrew the opinion;

p) he acknowledged that as director of Promoter he played a role in developing and implementing the transactions;

q) he confirmed the total tax deduction sought in the amount of approximately €20 million equated to the commodities bond. When referred to the slide entitled "financial return", he agreed that there was €8.6 million saved in tax through the arrangements. He said that there was no requirement that the borrowings had to be in any particular currency but simply an assumption was made for the purpose of the financial model that it was Turkish lira. He said the tax savings would be lower if they borrowed in euros;

r) in relation to the after-tax saving of 126%, he could not recollect if it was in the slide pack given to the investors. He acknowledged that he would have played a significant role in preparing the information memorandum together with Name of Director of Promoter Redacted. He agreed that all 33 of the investors became non-executive directors of NCR. He also confirmed that all 33 investors withdrew principal from the bond on 30 November to fund the annual interest payments on the share loan. He said he thought that all investors exercised the option on 30 November 2009 of selling their shares but that he was not 100% sure they all did so. On further cross- examination, he testified that only 1 of the investors did not exercise the option to sell the shares in November 2009;

s) he confirmed that all of the investors drew down the share loan and they all chose the same foreign currency, namely Turkish lira. He confirmed that the investor chose the hedging option to lock in the exchange rate rather than running the risk of a future depreciation in the exchange rate. He verified that rather than borrowing in euros the investors borrowed in Turkish lira to secure a higher tax deduction and that it made sense for any investor borrowing in foreign currency to hedge that transaction. He stated that all investors chose to borrow to fund 80% of the bond loan. He confirmed that there was an expectation of making a gain rather than a loss on the foreign currency but there was the potential to make a loss in the event the foreign currency appreciated;

t) he said that a subsidiary to NCR first acquired Main Investment Property Name Redacted which was subsequently transferred to NCR post refurbishment. He said that while the property was used within the Promoter group it was primarily used as a serviced office. He said it was rented out to lots of third parties including Name of Bank Redacted which lent the mortgage on it;

u) when referred to a board minute of Promoter, he confirmed the property was let on a 4-year 9-month lease to Name Redacted Investments Ltd who managed the serviced offices. He said that the idea was to pre-empt void periods for investors. He confirmed that the reason it was put into NCR and then leased back to Promoter was to generate rental income;

v) he said that the investors had choices, for example, they could have borrowed in euro. He stated that there was optionality inbuilt in the information memorandum such that an investor could enter into one leg of the transaction without entering into the other leg of the transaction. He verified that the commodities bond was a standalone investment. He stated that Promoter would not have had a problem if the borrower did not wish to proceed with the loan or the Turkish lira currency;

w) in relation to the interest deduction guarantee provided by Promoter, he said he was confident as to the commercial upside of the transaction and therefore happy to guarantee an effective minimum commercial return such that the investor would break even. He also said that they were willing to say to investors if they did not get the tax deduction for some reason they would top up the commercial return. He said he had confidence as to the availability of the interest deduction;

x) he pointed out that Promoter did not underwrite the fact that any capital gain was not taxable and that this was simply a feature of tax law. He stated that Promoter did not underwrite all the risks associated with the investments such as changes in tax rates or legislation or general changes in the law. Likewise, he said that the level of income required was a matter for the investors;

y) when questioned as to the expectation that it was presupposed that the agreement in relation to the bond loan, the spot trade, the spreadbet and the put option would be entered into simultaneously, he referred back to the optionality in the information memorandum. He agreed that if the investors did not take all the options, they would not get a tax saving of €215,000. He said that if an investor took out the loan in euros the investor would not get the tax saving but would have got the commercial return;

z) he agreed if the loan was taken out in euro, there would be a *prima facie* loss of 100%. However, he said that arguably they were giving the property at undervalue so investors may have been happy with that;

aa) when put to him that all of the transactions were planned from the outset to operate together as they did, he accepted that it was intended that they operate as a cohesive unit. He said that it was intended to minimise upfront capital expenditure for investors to make the investment commercially attractive to investors, as borne out by the subsequent facts;

bb) in relation to the non-executive directorship, he was directed to the letter relating to the unwind of the investment dated 13 November 2009 which stated as follows:

> *"You are due to receive an amount of €2,250 on the unwinding of these investments on 30 November 2009. To facilitate the payment of this amount please sign and return the enclosed letter of resignation of company director."*

cc) he stated that the letter indicated the intention that the directorship would only continue during the lifespan of the investment. He said they did not contemplate that anyone would stay on the board of directors;

dd) he acknowledged that there was no necessity for 33 non-executive directors to run the company and he explained that 33 was the number of investors required to release the desired level of capital for investment purposes. He said that tax motivations prompted the requirement to be a director. Name of Director of Promoter Redacted also pointed to the non-tax reasons for being a director such as the fact it provided a degree of security for shareholders of an unlimited company. He also pointed to the risk of the company taking on liabilities. He stated that being on the board gave the investors knowledge as to what the company was doing. He acknowledged that part of the reason for the requirement to be a director was attributable to tax;

ee) when put to him that the Appellant was not on notice of the acquisition of the Other Property Name Redacted, he stated that he had received notice of the meeting where the acquisition was going to be discussed and that he could have attended this meeting had he so wished. He also indicated that there were discussions relating to that acquisition with the advisers for the investors. He said he did not believe that he had discussed the matter with the Appellant. He stated that he did not know why shareholders who had been on notice of the meeting of 20 August 2007 did not turn up. He said this could be attributable to the fact that they thought the acquisition of the Main Investment Property Name Redacted was a straightforward commercial transaction, or that their primary concern as investors was to ensure their return was not affected;

ff) in relation to the cashflows with regard to the €16 million commodity bond loan, €4 million of the shares issued in the amount of €40 million, he acknowledged that there was a degree of circularity in the movement of funds. However, he emphasised this was typical of any leveraged capital guaranteed product with a bank;

gg) he described the return of €4 million made by Promoter as capital that they wanted to release from the project to do other things. He did not accept that it was a fee for making the arrangement in question, as they were bearing the costs by relinquishing a quarter of the increase in value of the property. In addition, he pointed to the latent capital gains tax in the company;

hh) he said they did not do any surveys in relation to the likely upturn in valuation of the property as it was inherently unknowable. He conceded that NCR had made a €2.25 million profit from the transactions even if the property increased to €15 million and they had to pay over a quarter of the uplift;

ii) with regard to the share of any uplift in value of the Main Investment Property Name Redacted, he said that the directors were not in the course of ordinary events entitled to any equity. He said the directors did benefit from the Main Investment Property Name Redacted to the extent it increased the equity of the company and hence reduced risk. He stated that it would only be in the event that Promoter got into financial difficulty that the directors would benefit;

jj) he confirmed that Promoter was struck off in the property downturn in 2007. He said the directors had a contractual right to be indemnified in the event that the interest deductions were withdrawn. He agreed that the investors would be out of pocket in the latter eventuality;

kk) he said that Promoter would not be paying anything out under the top up arrangement unless the project was unsuccessful and the interest relief was withdrawn. He said the project was very successful in the first 18 months to 2 years and that they were informally told by Name of Valuer Redacted of a 50% increase in value in that period. He said that but for the global credit crisis in 2007 the investors would have made a very good return;

Respondent

37. *Expert Witness for the Respondent - Mr Marcus Stanton*

Mr Staunton gave the following evidence:

a) he is a chartered accountant having qualified in Arthur Anderson. He was a director with Hill Samuel and at Robert Fleming which was an investment bank;

b) he specialised in structured financing. Since he left banking, he was a non-executive director of a number of quoted companies. He said he was currently chairman of Jersey Oil & Gas which was involved in drilling and exploring in the North Sea;

c) he had acted as an expert witness having done work for various banks and governments in relation to complicated transactions;

d) in his report, it was necessary to understand the various transactions before analysing them. He gave an example by way of illustration of the Appellant getting a loan from Barclays for €8. He said that if one could assume a borrowing of €100 by the Appellant from Promoter, a payment of €100 to Barclays in return for a derivative based on €8 that the investor is guaranteed payment in 4 years' time. He said the Appellant had started with a derivative of €8 to which he had added €92 which he had placed on deposit with Barclays. He indicated that this was the way capital guaranteed products typically work;

e) He confirmed that the €92 is not being made to work as such rather it is placed on deposit. He said that if the derivative does well the investor gets paid and if it does not, the exposure is confined to €8;

f) he referred to the slides prepared by Name Redacted for investors. He said that there was an investment of €40 million of share capital into NCR and a bank loan of €4.75 million. €8 million of the funds were used to acquire Main Investment Property Name Redacted and €36.3 million was invested in the property derivative;

g) the rent paid to Promoter was calculated to exceed the interest payable by NCR to ensure that there was always rental income in NCR. He said the bank had no recourse to the shareholders of NCR or to the derivative of any other asset of NCR with the exception of Main Investment Property Name Redacted;

h) with regard to the funding of the investors, he explained that there was a loan in the amount of €40 million from Promoter with a foreign currency hedging contract;

i) he stated that the combination of the foreign currency loan and the foreign currency hedging contact comes to €40 million which was going to provide new capital for NCR. He said Promoter lent some money and with the investors' own funds bought an instrument which acted like an annuity to pay the interest over a 4-year period. He said the foreign treasury loan plus the hedge constituted the tax damage of the transactions;

j) the commodities bond was a mechanism to avoid paying interest over the period. He said the interest was paid up front. He said the interest on the loan was payable at

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the rate of 15.9% and totaled an amount of €256,631 and the interest was payable annually over 4 years;

k) he explained that there were 2 aspects of the hedging contract one of which is the spot trade agreement and the other being the financial spread bet, the combination of which from an economic perspective converted the Turkish lira loan to euros. He said that the Appellant had a put option in relation to the redemption of shares in NCR;

l) the repayable amount of the loan was fixed from the very beginning. He said that by hedging the Appellant was buying himself out of risk. He said that the option of putting NCR shares back at original cost gave rise to a no gain or no loss situation;

m) the cost of the loan repayment was €262,508 to repay TRY 800,000 giving rise to a non-taxable gain of €237,592. He concluded that the Appellant's net outgoings were €19,039. He said that on one hand you had tax deductible interest and on the other had a non-taxable hedge gain. In relation to the final leg of the transaction he said the only outlay from a cash flow perspective is €50,000 at the beginning of the transaction as all other amounts were pre-determined;

n) 10% of the subscription monies in the amount of €40,625 went to the property acquisition with the balance being applied for the property derivative and then the commodities bond. He stated there were 3 property related cash flows one related to the profit of any increase in value of Main Investment Property Name Redacted, the other to the increase in value of the EPRA index and lastly the uplift in value of the commodities bond;

o) reference was made to his report where he concluded that the tax deductions were driving the benefits sought as in the absence of the tax saving and absent any profits related payment there is a monetary loss of €50,000;

p) having analysed in the report the annual return rate of the EPRA index he stated that the derivative would have to work very hard even to break even. He said that one would expect that in the information manual there would be figures which demonstrate what the return would be should the index rise;

q) out of the Appellant's total investment of €453,750 in the property derivative only €34,000 was doing the work on the property side, the rest was just being placed on deposit to give him his principal back;

r) moving on to the Turkish lira loan, he concluded that the benefits of the hedging was to morph a treasury loan to a euro loan. He referred to an extract from his report where he opines that:

> *"neither the Turkish lira loan nor the Turkish lira itself had any economic functionality in their arrangements and I therefore see no commercial purposes to the Appellant borrowing in Turkish lira and, at the same time, taking 100% hedge back into euros".*

s) he pointed out that the investor could simply have borrowed in euros;

t) he referred to PS taking out a derivative with Barclay's Capital. He concluded that the money has gone around in a circle and the money went back to Promoter. He concluded that due to the offsetting provisions in all the agreements whereby Promoter was on both sides of the transaction, that the Appellant's sole exposure was to €50,000 which he had lost at the outset;

u) he stated that he was not convinced in relation to the indemnity. Promoter was a company with 2 euro in share capital owned by an Isle of Man company for which there were no published accounts that he could see. He expressed the view that this was a factor you would expect the Appellant's adviser to take into account;

v) he said that if the tax was disallowed, to the extent there is interest payable on the tax, that would *"knock out"* the top up payment;

w) on referring to the Barclay's valuation which he did not have at the time of making the report, he concluded that of the €50,000 invested by the Appellant only €6,250 went into the commodities bond. He pointed out that the Appellant could have simply got the EPRA option and the commodities bond directly from Barclays;

x) in cross-examination, he indicated that his reference to the tax damage was not meant in a pejorative sense. He denied that it was indicative of a particular mindset in terms of his approach to his engagement. He explained that what he was trying to do was to focus the Commissioner on key parts of the transaction which caused the tax in dispute;

y) in cross- examination, he indicated that he does not give investment advice. He referred to 2005 as being a *"bubbly time and markets were very strong*". He acknowledged that if anyone could have foreseen the subsequent financial crisis, they would be very rich because they would have bet the other way. He agreed that you cannot imbue the benefit of hindsight to a decision made at that time. He said he could not comment on *Name of Director of Promoter Redacted* or the Appellant's expectation in 2005 as to a positive outcome;

z) he stated that investors make investments typically to make a pre-tax profit;

aa) he agreed that it was necessary for promotors of investments to advise as to the features of the investment as well as the probable tax treatment of the investments. He accepted that it was legitimate for promotors to be mindful of tax efficient considerations when structuring investments;

bb) in relation to investments having certain tax features such as pension funds, he accepted that the tax consequences depended on the availability of a certain level of income;

cc) when cross examined as to the nature of the transactions in question, he acknowledged they were "*real world transactions with real world consequences*". He accepted that there was a stated potential for upside both in relation to the property and the index;

dd) he agreed that it was a feature of capital protected investment for money to be placed on deposit. He accepted such products were in the market;

ee) he did not disagree that the Appellant, in his evidence, stated that he valued the prospect of making a leveraged investment. He stated that in his report he is making the point in relation to the risk or reward on such investment that only a very small portion of the investment is working. He said there was no reason you could not simply make the deposit directly;

ff) he agreed that it would be much riskier to put 100% into the derivative. He said that it is not so much the appetite for risk that would influence investors in making capital protected investments, rather it related to the degree of sophistication of different investors. He acknowledged such products could be attractive to unsophisticated investors;

gg) in relation to the loan, he accepted that there was a Turkish lira loan. He said he agreed interest payments were made. However, he stated that from an economic perspective he considered the interest payments were not made;

hh) he did not dispute the loan was in Turkish lira and was post the hedging transaction repaid in Turkish lira and that the interest rate did not change throughout the loan agreement;

ii) in relation to gain at the end of the transaction which reduced the cost of the interest, from an economic perspective the gain reduced the interest costs. On further cross-examination, he agreed that the source of the income which paid the interest was the commodities bond;

jj) the tax driver of the transaction was the non-taxable hedging gain and the tax-deductible interest. He confirmed that the tax in dispute was €256,531. He said the tax damage of the transaction was that if the Appellant had borrowed in euros, he would have had an effective interest cost of €19,039;

kk) he accepted that the table in his report headed *"fixed transaction cash flows"* did not account for the possibility of any profits share. He stated that the figures in his report were the figures the investors would have seen in the financial model which accompanied the information memorandum and that these were figures given by Tax Advisor Name Redacted to the Respondent. He said the investors would have taken account of the likelihood of profits in relation to the property, the derivative and the commodities bond;

ll) in relation to section 9 of his report he stated absent any profit related payments the Appellant was reliant on having sufficient taxable income in order to take advantage of the tax deductions. He confirmed that he did not appreciate the Irish tax implications of the profit related payments;

mm) he agreed that the requirement to have sufficient income tax to avail of a tax advantage did not give rise to any suspicion about the motive of the transaction, rather it was a basic fiscal or revenue fact;

nn) in relation to the view expressed in his report that tax was the predominate driver of the arrangements, he said that if the only way to make a profit was by way of the tax benefits then you need the tax benefits to make a profit. He acknowledged that it was not the only way of making a profit;

oo) absent any taxable profit related payments, the investors were reliant on the tax benefits to make a profit. He said the Appellant lost €50,000 by participating in the arrangements. He said the returns on the investments would have to be exceptionally good to cover the cost on the Appellant's investment. He said he could not comment on other peoples' expectations as to return on investments;

pp) he explained in his report that there was a crash after 2007 and prior to that period, there had been an exceptional and consistent pattern of very significant growth in the EPRA which formed the backdrop to the investment decision on December 2006. However, he said past performance is not an indication of how the investment would perform in the future;

qq) he acknowledged that there was significant growth in the index over a period of 2.5 years but he pointed out that this investment had a lifespan of 4 years. He stated that he would have expected a matrix or graph to be included in the information memorandum in relation to the performance of the EPRA index, rather than the 2 examples given;

rr) in relation to the nature of capital guaranteed products, he said the Appellant's investment had the hallmarks of such products;

ss) he said that it could not be said that the hedge generates a gain in its own right, as he said in economic terms it just neutralises a variable on the other side of it. He stated that if you just take out the hedge side of the transaction but do not take out the Turkish lira loan, you have got a currency exposure. He said he could not see the economic purpose of the Turkish lira loan apart from the tax;

tt) the hedging produced a gain to the hugely expensive interest cost that would not have arisen if the borrowings were in euro. He acknowledged that the focus of the appeal was in relation to an actual rather than a hypothetical transaction. He agreed that the transaction could have been structured differently;

uu) he acknowledged that the commodities bond was attractive in capping the investors exposure to loss/downside on the investment;

vv) in relation to the circularity of any form of capital protected investment, he accepted it was a common feature of such products;

ww) he stated that when he referred to the economic costs of the transaction, he was not suggesting the interest disappeared in any way. He confirmed the actual interest payments totaled €256,531. He said that his characterisation of the interest related to the economic substance of the transaction. He agreed that the tax treatment of the transaction was based on the *de facto* transaction as documented and Irish tax legislation;

xx) when referred to the effective rate of interest, he clarified that he meant this in the well-known banking terms as the net cash payments out;

yy) what the Appellant had lost on Main Investment Property Name Redacted was recouped on the index relating to Irish and European property. He acknowledged that an investor would be looking at all income streams. He said that in his report he was merely pointing out that in December 2006, when the products were in the money taking the 3 pistons of the engine, there was not enough profits to cover the Appellant's €50,000 investment;

zz) with regard to the indemnity, he stated the effect of the indemnity rather than the motivation behind it, was that in the event of the non-deductibility of the interest, Promoter would make up the difference in the event there were no profit related payments;

Submissions

Appellant

The Appellants made the following submissions:

38. *2005 – Amended Assessment – Time Bar*

(a) On 5th January 2011 a notice of amended assessment for the 2005 tax year, dated 20th December 2010, was received in the ROS inbox of the Appellant's agent.

(b) While the Appellant accepted that the 2005 notice of amended assessment made by the Respondent was within the required statutory time limit of 31st December 2010, the Appellant contended that the receipt of that notice on 5th January 2011 meant that the tax payable on foot of the amended assessment became due and payable after 31st December 2010;

(c) On this basis, the earliest date that the tax could become due and payable was on 5th January 2011. Accordingly, no tax was payable by the Appellant having regard to the provisions of TCA, section 955(2)(a) which provides:

> *"Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –*
>
> *(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*
>
> *(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*
>
> *by reason of any matter contained in the return……".*

(d) The prohibition on the collection of tax outside of the statutory time limit prescribed in TCA, section 955(2)(a)(i) was confirmed in the Supreme Court by Clarke J in *Revenue Commissioners -v- Droog* [2016] IESC (at paragraph 7.4):

> *"….section 955(2)(a)(i) says that no additional tax shall be payable by the chargeable person after the end of the relevant four year period. That provision is expressed in clear and unambiguous terms. It is in addition to the*

prohibition on raising further assessments. The section clearly prohibits the imposition of any additional tax burden outside the four year period in the case of a person who has made a fully compliant return…."

(e) The Appellant therefore argued that if the time limit is missed by 4 days or by 4 years the same principles apply. If no communication by way of assessment was made by the Respondent to a taxpayer seeking the additional tax, then the assessment is out of time. Therefore, the liability to pay the tax is all dependent upon there being a communication of an asserted liability to additional tax issuing before the 4 year period.

Full and True Disclosure

(f) The 2005 tax return did not contain a full and true disclosure of all material facts necessary for the making of the 2005 assessment is unfounded and without basis as the Appellant's 2005 tax return included all relevant details in relation to his interest relief claim that were required to be included on that return. As such, the Appellant did not know the material inaccuracy or omission which the Respondent was relying on.

(g) It was the Respondent who decided what information needed to be disclosed on tax returns as it designed the relevant forms which taxpayers are obliged to complete. In the present case, all the 2005 Form 11 required the Appellant to disclose in relation to his interest relief claim was the amount borrowed and the quantum of interest paid on which relief was being claimed.

(h) The case of *Robert Stanley v The Revenue Commissioners* [2017] IECA 279 considered this very point. In that case, Respondent contended that the taxpayer had not delivered a correct Capital Acquisitions Tax (CAT) return because the taxpayer claimed a credit for Capital Gains Tax (CGT) in his return which the Respondent did not believe was due. One of the arguments advanced by the Respondent was that there was a failure to set out in the CAT return or on a separate sheet or in an accompanying letter the basis on which the taxpayer was claiming to be entitled to take credit for CGT. This assertion was rejected by Peart J who stated:

42 "*In my view, that submission must be rejected. Firstly, the I.T. 38 form is Revenue's own prescribed form, and where a CGT credit is being claimed against a CAT liability it simply requires the amount to be inserted in Part 8. The form is specific in that regard, giving a CGT credit as one of the possible credits deductible which the taxpayer may indicate. Secondly, the requirement for insertion of particulars in Parts 1-7 to mirror to a large extent what is specified in s. 46(2)(a)(i) to (iv) as being required for a correct return. There is nothing within Parts 1-7 to indicate that within those parts the taxpayer must set out details therein of any CGT credit being claimed as a deduction in Part 8. Part 8 of the form makes no provision for the giving of*

those details, nor sought them. What was asked was simply the amount of any credit being claimed by way of a deduction for, inter alia, CGT paid…….

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

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

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

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

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

44 *The matters required to be inserted into the return are provided for in Parts 1 – 7 of the prescribed I.T 38. One can see that from the manner in which those Parts are worded and constructed. Provided that the tax payer has fully and correctly completed those Parts, omitting no relevant detail that ought to be provided therein, he/she will have complied with the requirements of s. 46(2)(a). The next required step to be taken in accordance with s. 46(2)(b) is to self-assess the CAT which the tax payer "to the best of [his/her] knowledge, information and belief, ought to be charged". That requirement does not mean that this figure must coincide with the figure that Revenue in due course considers to be the correct figure, but is simply the amount which the tax payer honestly believes is the amount of tax which "ought to be paid". The wording of subsection (b) makes it clear that it is not what was referred to in submissions as "the out-turn" which determines whether there has been compliance with s. 46(2)(b). Provided that the assessment of CAT specified in Part 8 is the amount which the tax payer considers to the best of [his/her] knowledge, information and belief, ought to be charged, then there has been compliance with the requirement in that subsection."*

(i) The Appellant complied with TCA, section 951 and made a return in a prescribed format and by declaring the interest it fulfilled its statutory obligation. As such, the Respondent has unfairly categorised the appeal as a negligence case.

(j) As a consequence, the Appellant's 2005 tax return contained a full and true disclosure of all material facts necessary for the making of the 2005 assessment and therefore the prohibition on the collection of tax outside of the statutory time limit prescribed in TCA, section 955(2)(a)(i) applied. This is an absolute bar to the recovery of the tax in issue and the 2005 amended assessment should therefore be vacated on this basis alone.

(k) In relation to the information provided to the Respondent in 2008 in the form of the protective notice, very detailed information was provided to the Respondent who did not seek to act on this information for many years thereafter. There is no requirement for 2 different levels of disclosure to satisfy the provisions of TCA, section 951 and section 955. Furthermore, the obligation to provide information in relation to a protective notification has no bearing on the requirement to file a return under TCA, section 951.

(l) The Respondent was not consistent by issuing a TCA, section 811 notice of opinion to 2 other investors and not with respect of the Appellant. Also, the Respondent's invocation of TCA, section 811 in respect of 2 investors was an implicit admission that the interest was otherwise deductible. Hence, it was argued the tax benefit cannot be negatived by a TCA, section 811 notice.

(m) The Respondent was using a plethora of *ex post facto* objections which were not identified in the 2005 Notice of Assessment and which were not communicated to the Appellant.

39. *Part-Time Directorship*

(a) Article 20 of the NCR Articles of Association provided:

> *"The office of a Director shall be vacated:*
>
> ……….
>
> *(e) If he absents himself from the meetings of Directors for a period of six calendar months without special leave of absence from the other directors….*
>
> *But any act done in good faith by a Director whose office is vacated as aforesaid shall be valid unless, prior to the doing of such act, written notice shall have been served upon the Directors or any entry shall have been made in the Director's Minute Book stating that such Director has ceased to be a Director of the Company."*

(b) The Appellant served as a director of NCR from 5th December 2005 until 7 December 2009. During this period, a total of nine board meetings were held on the following dates 5 December 2005, 11 May 2006, 21 February 2007, 10 July 2007, 20 August 2007, 6 March 2008, 16 April 2009, 19 May 2009 and 5 November 2009. The Appellant attended the 5 November 2009 board meeting.

(c) While a special leave of absence in respect of his non- attendance at board meetings was not formally documented, such a special leave was implicitly granted as evidenced by the following:

(i) the Appellant received invitations to attend all board meetings which were held during the period that he served as a director of NCR (i.e. 5 December 2005 to 7 December 2009);

(ii) the Appellant was listed as a director in NCR's financial statements for all periods that he served as a director;

(iii) the Appellant was listed as a director in NCR's annual returns for all periods that he served a director of NCR;

(iv) the Appellant was listed as a director of NCR on company headed paper for all periods that he served as a director of NCR;

(v) the Appellant considered himself a director of NCR at all times during the period and never sought to distance himself from the obligations and accountability this imposed;

(vi) the company at all material times listed the Appellant as a director. He was listed as a director in the company's register throughout the period. No notice was sent to the Registrar, pursuant to section 149(a) of the Companies Act, 2014 of any change in the particulars contained in the register; and

(vii) the company accepted the Appellant's formal resignation as a director on 7 December 2009 and subsequently notified the Companies Registration Office of this fact.

(d) These facts are consistent with the company permitting leave of absence. Alternatively, they are consistent with the company waiving Article 20 and requiring the Appellant to continue as a director. Based on the foregoing, the provisions of Article 20(e) of the NCR Articles of Association were not in point.

(e) Alternatively, it was clear from the above that the Appellant was a *de facto* director and must be so regarded at law.

(f) The Respondent's assertion that the role of a part-time director simply involved attending board meetings was incorrect. At the time the Appellant was a director of NCR he had both statutory duties under the Companies Act and fiduciary duties derived from common law. As such in all circumstances, the provisions of TCA, section 250(2)(a) were complied with.

(g) The automatic disqualification of the Appellant as a director was only relied on by the Respondent for the year 2007 and 2008.

(h) It was argued that the facts in *Re London and Northern Bank* [1901] Ch 728 are different to the facts under appeal as in the latter case the director was notified of his disqualification unlike the Appellant who received no such notice. Furthermore, while he did not insist on being reinstated he could have done so. The evidence of

Name of Director of Promoter Redacted, the company secretary, was that he believed the Appellant retained the role of director. It was submitted the company represented to the Appellant and the world at large that he remained as director based on the CRO filings.

(i) The relevance of the *Bodega Company Ltd [1904]* 1 Ch 27 was disputed as in that case involved the secret interests of a director which is not pertinent to the facts under appeal. In this regard, it was submitted that the unlike *Bodega*, the power to re-elect does not arise at all in relation to the Appellant as a view could be taken that he should not be disqualified notwithstanding non-attendance.

(j) *The Revenue Commissioners -v- O'Flynn Construction Company Limited, John O'Flynn and Michael O'Flynn* [2013] 3 IR 533 is the authority for the position that it was open to the Oireachtas to define a minimum/ engagement/participation requirement and it did not do so.

(k) *Vowles v The Commissioners for Her Majesty's Revenue & Customs* [2017], UKFTT 704 (TC) was not relevant as that case was concerned with whether there was a requirement to be a director and employee.

(l) The Appellant questioned whether an inference can be drawn from the fact that the information memorandum informed the investors that they would be invited to act as non-executive directors for tax deductibility purposes. It was submitted that this was done simply to meet the requirements of TCA, section 250.

40. *Interaction of TCA, section 248(3) and TCA, section 250*

(a) TCA, sections 250 (3) and (4) made clear the Appellant's entitlement to relief arises by virtue of TCA, section 250. Accordingly, TCA, section 248(3) has no application.

(b) TCA, section 250(2) provides that subject to compliance with its terms:

> *"….the individual shall be entitled to relief under Section 248 for any interest paid on any loan to him or her applied for a purpose specified in Section 248(1) if…".*

(c) TCA, sections 250(3) and (4) specifically refer to relief being given "*by virtue of this section*". It is apparent therefore if there is compliance with the requirements of TCA, section 250, to the extent that if the conditions specified therein are met, the entitlement to relief is mandatory.

(d) There is no mention whatever in TCA, section 250(2) of a further requirement for compliance with TCA, section 248(3), and thus TCA, section 250(2) is not open to an interpretation that the availability of relief is subject to some other conditions specified in TCA, section 248, namely TCA, section 248(3). Consequently, TCA, section 248(3) was not in point and is irrelevant.

(e) It is also clear from a consideration of section TCA, section 250 that where the section intends to import wording, conditions or definitions from TCA, section 248, it does so specifically as follows:

(i) TCA, section 250(2) clearly imports that the loan must be *"applied for a purpose specified in TCA, section 248(1)",* thus importing just the purposes set out in that subsection into TCA, section 250;

(ii) in TCA, section 250(2)(a), the specific purposes dealt with in TCA, section 248(1)(a) are specifically referred to.

(f) No other stated provisions of TCA, section 248 are specifically imported into TCA, section 250. In particular the following provisions are instructive in this regard:

(i) there are extensive provisions in TCA, section 250(2)(b) covering any money loaned or advanced to the individual or a connected party by the company or a person connected with the company. These conditions are further elaborated on in subsections (4) and (5) and are much more comprehensive, and within their wording, include the matters covered in TCA, section 248(2)(c). It is clear therefore that Section 248(2)(c) did not apply.

(ii) TCA, section 248 provides relief in respect of interest on "*a loan to an individual to defray money applied"* for the purposes set out in that section. This makes sense given the purpose of TCA, section 248, which can cover cases where money is raised by loan but cannot be immediately invested, and this matter and the extent of any delays is dealt with clearly in TCA, section 248(4). The relationship between the loan and the purpose for which it is applied is much more direct in TCA, section 250, where it states that relief is granted for interest paid "*on any loan to him or her applied for a purpose specified in TCA, section 248(1)*". This replaces, without specific reference, the phrase used in TCA, section 248(1) referring to "*a loan to an individual to defray money applied*", which is a more indirect relationship in the money flows. Therefore the wording in TCA, section 250 does not envisage a possibility of a delay between the drawdown of the loan and its application, as the wording simply refers to the application of the loan, and therefore there is no need for an equivalent to TCA, section 248(4) to be imported into TCA, section 250.

(g) Any specific provisions of TCA, section 248 which are required for the operation of TCA, section 250 are explicitly repeated in TCA, section 250. All other provisions in TCA, section 248 are ignored.

(h) Furthermore, TCA, section 250 is unambiguous and is complete on a standalone basis in that it sets out the detailed tests/conditions as follows:

- (i) the company is defined at subsections (1) and (2);
- (ii) the individual is defined at subsections (1) and (3);
- (iii) recovery of capital provisions are dealt with in subsection (2)(b) and further expanded at subsection (5)(d);
- (iv) definition of connected parties is within subsection (5)(a); and
- (v) *bona fide* type test (i.e. ordinary course of a business) are in subsections (4) and (5).

(i) TCA, section 250 operates so as to afford relief "*by virtue*" of that section where the conditions set out therein are satisfied in a separate and discrete set of circumstances from TCA, section 248. The latter provision operates separately and is merely the mechanism by which relief is applied to the taxpayer. Provided that the claimant has satisfied the conditions in TCA, section 250 nothing further is required in order to secure relief. In that regard, it should be noted that TCA, section 250(4) refers to relief "*given by virtue of this section*".

(j) Notwithstanding the foregoing, even if the Respondents were to contend that there was an inconsistency between the language of TCA, section 250(2) and TCA, section 248(3), the Appellant submitted that TCA, section 250(2) must have primacy as it is more specific and also applying the reasoning of Laffoy J. in *Droog:*

- (i) The words of TCA, section 250 are clear and unambiguous;
- (ii) The status of the provision as a standalone provision, is consistent with the plain intent of the provision; and
- (iii) The standalone status of TCA, section 250 does not give rise to an absurdity.

(k) Similarly, the language of TCA, section 250 is complete and standalone in setting out the conditions for relief. Following the decision of O'Donnell J in in *O'Flynn* at paragraph 74:

> *"…in some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. In other cases the provision may be so technical in detail so that no more broad or general purpose can be detected or may have its own specific anti-avoidance provisions…."*

(m) In the present case, TCA, section 250 has its own specific anti-avoidance provisions and there is no mandate to apply, by implication or otherwise, a further anti-avoidance provision such as TCA, section 248(3).

(n) In all circumstances, TCA, section 248(3) is irrelevant to a claim for relief under TCA, section 250.

41. *Recovery of Capital; TCA, section 248(2)(c) -*

(a) The contention that the derivative between SNR and PS was a loan documented as a derivative violates fundamental legal principles. It is clear from the wording of the derivative that it is not a loan. The wording of the derivative is clear and the meaning of those words is undisputable. A document must be interpreted by reference to what the words convey to a reasonable person. The words of International Swaps and Derivatives Association Master Agreement are unambiguous. They are entirely consistent with a derivative contract.

(b) It is not possible for the instrument in question to simultaneously be a loan and a derivative. The fact that there is not payment of interest is consistent with the fact there is not loan between the parties.

(c) Mr Stanton as an expert witness in relation to structured finances and transaction did not express a view as to the nature of the derivative and whether this fact constituted a loan.

(d) Without prejudice to the Appellant's submission that the derivative was not a loan, the Appellant submits that even if the derivative were a loan, the provisions of TCA, section 248(2)(c) would have no application.

42. *Repayment of Loan*

(a) The argument that the repayment of the commodity bond constitutes repayment of the loan was refuted. The payments made to the Appellant were not a repayment of a loan rather they constituted contractual amounts payable pursuant to a contractual form of investment. It was submitted that the counterparty, paid the fixed amount in consideration for which the payers agreed to pay the floating amount of €36,300,000 or a greater amount. The obligation to pay the floating amount crystallised on 30 November 2009 long after all the interest payments were made on the loan and at which time there was no loan liability between SNR and PS. Even if it could be said that there was a loan liability there was nothing payable to the counterparty and hence there was no right to participate as of those dates.

43. *Control/Connected Party Issue*

(a) There was no default on the loan and there was no winding up and even if these were theoretical possibilities whereby control could be gained for the purposes and TCA, section 10 never happened and were not in place the time the interest payments were made. The Appellant denied that the control test is theoretical in nature.

(b) TCA, section 250 operates so as to afford relief where the conditions set out therein are satisfied in a separate and discrete set of circumstances from TCA, section 248. TCA, section 250 has its own standalone recovery of capital provisions. Indeed, as the provisions of TCA, section 250(2)(b) are far wider and while encompassing any recovery of capital, they also extend to all other loans and advances from the company or a connected company. Consequently, the provisions of TCA, section 248(2)(c) are not relevant.

(c) Furthermore and independently of the above, if SNR lent money to PS, the provision of such a loan would not make SNR and PS (and by extension NCR and PS) "connected", for the purposes of TCA, section 249, thus the provisions of TCA, section 248(2)(c) would have no application to the annual withdrawals of principal on the Commodities Bond. In this regard:

(i) PS was a wholly owned subsidiary of **Name of Corporate Tax Advisors Redacted** ("TA").

(ii) TA was wholly owned **Name of Holding Company Redacted** ("PGHL").

(iii) PGHL was wholly owned by **Name of 2nd Holding Company Redacted** ("PGHL2")

(iv) PGHL2 was controlled by two individuals (neither of whom is the Appellant).

(v) Based on the above, the two individuals that controlled PGHL2 were regarded as having control of PS in accordance with the provisions of TCA, section 432 and therefore those individuals were regarded as connected with PS by virtue of subsection 7 of TCA, section 10.

(vi) NCR had an issued share capital of 40,000,002 ordinary shares of €1.00 each. The individuals that controlled PS owned 2,000,000 ordinary shares (1m shares each) and a company connected with those individuals owned 2 ordinary shares. The remaining 38,000,000 ordinary shares were held by individuals that were not connected with the aforementioned individuals (or companies connected with those individuals).

Consequently, the individuals that controlled PS did not control NCR and therefore NCR and PS were not connected companies.

(d) No explanation was provided by the Respondent as to the circumstance in which Promoter might be entitled to receive the greater part of the assets other than in the context of a winding up.

(e) In *Menolly Homes Limited-v- Appeal Commissioners and Revenue Commissioners* [2010] ITR 75, caution was expressed therein as to the precedent value of UK caselaw in this jurisdiction wherein the differences in wording between the legislation in both jurisdictions was highlighted. The Appellant sought to challenge the approach taken by the Respondent in relation to the adoption of UK law to the facts under appeal on the basis that the UK provision is not analogous to TCA, section 248(3). The Appellant challenged the reliance on a couple of paragraphs from lengthy decisions turned on specific facts and not on all fours with the statutory provisions at issue in this appeal.

(f) In all circumstances, TCA, section 248(2)(c) does not apply in the present case.

44. *TCA, section 248(3) – Test*

(a) Without prejudice to the Appellant's submission that TCA, section 248(3) is not relevant to relief claimed under TCA, section 250, the Appellant submitted that the test in TCA, section 248(3) is not failed on the facts. The loan monies were applied for the purchase of company shares. Accordingly, the foreign exchange (FX) Loan was applied for bona fide commercial purposes. Shares were acquired, with the loan monies, on commercial terms and held for a considerable period. The shares were in a company which had an investment in both an office premises and a property index. While the commerciality is not dependent on the shares increasing in value, the shares had appreciated considerably by 2007 and if those gains had been maintained, a profit on the disposal of the shares in 2009 would have resulted. It was irrelevant that a profit did not ultimately materialise as this was due to the onset of the financial crisis, in respect of such risk the Appellant had sensibly eliminated his downside exposure. Furthermore, the Respondents never explained in detail what was alleged to be the non-commercial purpose or the tax avoidance scheme or arrangement.

(b) TCA, section 250 as applied to the Appellant, grants relief in respect of a payment of interest actually incurred by the Appellant on the loan and the commercial transaction entered into was not part of any scheme that enables any tax to be avoided. The obtaining of the relief cannot in itself be the tax avoidance contemplated by TCA, section 248(3) particularly in circumstances where a real interest liability was incurred in respect of the loan. The mere availing of the relieving provisions of TCA, section 250 cannot in itself be tax avoidance. The making of the loan was not part of a scheme designed to obtain some distinct and additional tax benefit. Obtaining the very relief granted by the section was not tax avoidance.

(c) As a matter of principle and interpretation, the non-avoidance condition must refer to some other tax event being objectionable avoidance rather than the availing of the relief itself. Otherwise, for instance, Employment and Investment Initiative ("EII") relief (formerly BES relief) could be simply withdrawn by the Respondent under TCA, section 500 in very many cases, which has very similar anti-avoidance provisions to TCA, section 248(3). In the case of EIIS relief, it cannot be the relief itself which was the alleged avoidance contemplated by the anti-avoidance provision as the relief was very undoubtedly one of the main purposes of making an EII investment. In the present case, there was no avoidance of income tax at this or at other point in the investment.

(d) While there was no equivalent in TCA, section 250, the only way relief can be given under TCA, section 248 and TCA, section 250 is under TCA, section 248(5) which provides:

> "*Interest eligible for relief under this section shall be deducted from or set off against the income of the borrower".*

(e) The loan which attracts relief under TCA, section 250 is a loan made for the purposes of TCA, section 248(1). TCA, section 250(2) provides:

> *"Notwithstanding that an individual does not satisfy one or both of the conditions set out in section 248(2), the individual shall be entitled to relief under section 248 for any interest paid on any loan to him or her applied for purposes specified in section 248(1)."*

(f) TCA, section 248(3) denies relief under TCA, section 248(5) to a loan applied for any of the purposes specified in TCA, section 248(1) and then the conditions are stated.

(g) The Respondent disagreed that the words in TCA, section 250(2) which provides that the *"individual shall be entitled to the relief"* confers an entitlement to relief on standalone basis.

(h) Without prejudice to the foregoing, even if the anti-avoidance test could apply to the interest relief claim itself, the Appellant submitted as follows:

(i) availing of TCA, section 248 relief itself, and the application of the condition in subsection (3), are both premised on the loan being applied for one of the purposes in subsection (1);

(ii) the clear thrust of the subsection (3) test is the purpose of the loan application, i.e. in this case the investment in a property rental company. The investment in this case made by the Appellant was in shares in NCR, and the loan was clearly applied for a purpose set out in TCA, section 248(1);

(iii) the underlying assets acquired by NCR were real assets that carried a real potential for profit. At a point in time the shares were worth in excess of the amount at which they were acquired and if sold a profit would have been realised. This is the essence of a commercial investment. The protections entered into to limit the potential downside are consistent with this being a commercial investment. The mechanisms were available at a commercially affordable price in late 2005 to allow the downside to be protected, and as a sensible investor the Appellant had these protections implemented.

(i) The existence of these protections is not detrimental to the availability of the relief. The relief was available to make investments of the nature made by the Appellant in NCR, and the Appellant took advantage of the statutory relief available when borrowing to invest in the shares, which investment was clearly, and it is not disputed, was for a purpose set out in TCA, section 248(1). It is entirely incorrect to assess the investment by reference to the knowledge available in hindsight following the financial collapse.

(j) Furthermore, and separately, availing of interest relief in the present case amounts to tax mitigation rather than tax avoidance. In that regard, Lord Nolan in *IRC v Willoughby [1997] STC 995 at 1003-1004* said:

> *"In order to understand the line thus drawn, submitted Mr Henderson, it was essential to understand what was meant by 'tax avoidance' for the purposes of s741. Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of the fiscally attractive option afforded to him by tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed*

to mitigation), it follows that tax avoidance must be at least one of the taxpayer's purpose in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.

My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the illusive concept of 'tax avoidance'….

In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax is one of the main attractions. But it would be absurd in the context of s741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of s741 is a course of action designed to conflict with or defeat the evident intention of Parliament."

(k) In the present case, the Respondents cannot contend that the intention of the Oireachtas was defeated by the transaction entered into by the Appellant. That is because the Appellant clearly met the conditions for the relief and suffered the economic consequences (risk/reward) of being a shareholder in NCR and of taking out a loan to finance the acquisition of that shareholding. The facts of the case involve a relationship between the parties over a number of years rather than a short-term circular flow of money. There cannot be any objection to the put option buy-back arrangements in place which are not at all unusual to facilitate or require the future exiting by a shareholder from an investment. The intention of the Oireachtas is not defeated when an investment is made in a trading/rental company which is funded by loan finance. The fact that the FX Loan was denominated in a foreign currency is not relevant. The FX Loan was applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which was the avoidance of tax.

(l) Furthermore, and separately, the Respondents, by issuing TCA, section 811 opinions, accepted that the provisions of TCA, section 248(3) were not applicable to 2 of the 35 individuals that borrowed money to invest in NCR on the basis that all 35 individuals participated in the investment on identical terms. As such, the Respondent cannot seek to argue that the provisions of TCA, section 248(3) are in point. This conclusion does not involve any consideration of, or intrusion into the tax affairs of any of the other individuals which tax affairs are entirely irrelevant for the assessment of this transaction which is the matter in issue on this appeal. As a matter of fundamental principle and independently of any other person's tax affairs, the very same transaction cannot be treated by Revenue with reference to taxpayer A, as a transaction caught by TCA, section 248(3) and at the same time treated by them by reference to taxpayer B, as a transaction not so caught.

(m) Such an inconsistent application of the tax code would be contrary to the principle of good administration and would be discriminatory and unlawful. It is a fundamental principle of Irish law that the same legislative provision must be applied in the same way, to the same facts. The only relevant facts in the context of the matter in dispute are the facts relating to these particular transactions and issues relating to the other aspects of the tax affairs of other taxpayers are of no relevance.

(n) It is neither lawful nor credible that a differentiated technical approach be taken to some of these investors. The Tax Appeals Commission is being asked to ignore this unequal and unjustified treatment. The investment either amounted to a scheme or arrangement that fell within the provisions of TCA, section 248(3) or it did not and it cannot be both. The Respondents through their actions clearly formed the view that it did not. As a statutory authority the Respondent cannot exercise powers in an inconsistent contradictory and discriminating manner in relation to the same transaction.

(o) Furthermore, and separately, there was no avoidance in the present case as there was simply a reduction in tax (rather than an elimination of tax) by virtue of interest relief being available against total income. There is a difference between avoidance and reduction and such is expressly recognised, for example, in the definition of *"tax advantage"* in TCA, section 546A(1) and TCA, section 811C(1).

(p) Furthermore, and separately, under the provisions of TCA, section 248(5) relief is afforded by discharge or repayment of tax. In those circumstances, there cannot be "*avoidance*" of tax arising from claiming the relief itself.

(q) TCA, section 811 is the only legislative provision which allows the Respondent to reconfigure transactions and hence for TCA, section 248(3) to apply the transactions would have to come squarely within the four walls of the provision. While on face value the wording in TCA, section 248(3) appears to have a two-part test in essence there is a single test that is whether the loan is applied for *bona fide* commercial purposes.

(r) The critical focus is on whether the loan is applied for "*bona fide*" commercial purposes. This test is met as the loan was deployed in acquiring shares in NCR and was taken out in the expectation of significant commercial return.

(s) The Appellant denies that he was involved in tax avoidance on the grounds that he was merely availing of a relief ordained by the Oireachtas and on the basis there was no evidence to substantiate tax avoidance.

(t) It is primarily a subjective test as to whether the main purposes or one of the main purposes is the avoidance of tax. In the alternative, if it was a dual test involving appraisal of the transactions from both a subjective and objective perspective, the evidence fell short of establishing that the loan was not used for *bona fide* commercial purposes and that the loan was used as part of an arrangement of which the main purpose, or one of the main purposes, was tax avoidance.

(u) In relation to the tax avoidance test, the evidence provided outlines the subjective motivations of the promotors. With regard to the objective test it is argued that evidence of Mr. Smyth and Mr. Peelo as to the general investment market in Ireland in 2005 satisfied this test.

(v) The application of the loan to acquire a valuable asset with the expectation of profit cannot be ignored when establishing the purpose of the transaction. It was further argued that merely because the Appellant gave evidence that he previously invested in a tax efficient investment and of his awareness of the tax aspects of the investment the subject of the appeal did not lead to a justification of the conclusion that the main purposes or one of the main purposes of the transaction was tax avoidance.

(w) The tax deduction was not one which can be rolled forwards and this made it more imperative that the borrower have a sufficient income to absorb the relief.

(x) Further, presumably if TCA, section 248(2)(c), as well as TCA, section 248(3), were disapplied simply because the taxpayer did not work for the company, such the taxpayer would be free to extract capital while still claiming relief, in breach of s248(2)(c) on the basis that entitlement to relief was made unconditional by the wording of TCA, section 250(2) was absurd.

(y) In all circumstances, TCA, section 248(3) does not apply on the facts in the present case.

45. *TCA, section 817A*

(a) TCA, section 817A provides that relief shall not be given to any person under Part 8 in respect of any payment of interest, including interest treated as a charge on income, if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest was paid was the obtaining of a reduction in tax liability by means of any such relief.

(b) The test in TCA, section 817A was not failed on the facts and it was clear that the transaction was a *bona fide* commercial transaction. Shares and a bond were acquired on commercial terms and held for a considerable period.

(c) Furthermore, and separately, the sole or main benefit of the transaction cannot have been the obtaining of a reduction in tax liability as the loan proceeds were applied to acquire a valuable asset, the NCR shares. In this regard, as the investment provided downside protection, the value of the NCR shares could never fall below €500,000, whereas the value of the tax relief obtained in the years under appeal was €106,658. Overall, there was substantively more value in the commercial investment acquired than there was in either the tax relief claimed or in the interest cost actually incurred.

(d) TCA, section 817A was introduced by Finance 2000 to counter specific schemes involving the prepayment of interest thus bringing forward the availability of the tax deduction for the interest paid at a time when corporation tax rates were falling, and intra-group lending with no associated commercial objective. The transaction which the Appellant entered was not the type of transaction which the Oireachtas intended the provisions of TCA, section 817A to apply.

(e) TCA, section 817A is copied from TCA, section 787 ICTA 1988 in the UK, which was introduced for similar purposes, and in this context, the view of the UK Inland Revenue as to the circumstances in which the anti-avoidance measure is likely to be invoked. At the time of the introduction of TCA, section 787 ICTA 1988 undertakings were given by UK Ministers to the effect that the Inland Revenue would not seek to use the legislation to deny relief in cases of genuine commercial arrangements designed to minimise the burden of tax. An important distinction was drawn between tax planning involving a judiciously arranged borrowing scheme and an out and out avoidance scheme. The Inland Revenue indicated that the section would not therefore easily be invoked.

(f) In the present case, the Appellant drew down the FX Loan to finance his investment in NCR and suffered the economic consequences of the borrowing by incurring an interest liability on a loan taken out to finance a genuine commercial investment with real prospects of generating a profit on same.

(g) Furthermore, and separately, the Respondents, by their own actions, by issuing TCA, section 811 opinions, accepted that the provisions of TCA, section 817A were not applicable to 2 of the 35 individuals that borrowed money to invest in NCR.

(h) TCA, section 817A is broader in its application than TCA, section 248(3) as it covers interest relief claim under Part VIII of the TCA. Furthermore, the section it refers to the "*sole" or "main benefit*" as opposed the purpose of the loan and hence it is a more objective test than that applied in TCA, section 248(3).

(i) TCA, section 248(3) and TCA, and TCA section 817A can be differentiated on the grounds that it refers to the words in TCA, section 817A "*that might be expected to accrue to that person"* which import a more objective assessment.

(j) In relation to the reference to interest paid in TCA, section 817A the Appellant contrasted this with the reference in TCA, section 248(3) to the loan.

(k) The Appellant pointed to the fact TCA, section 817A refers to a reduction in tax whereas TCA, section 248(3) refers to tax avoidance. In light of the differences in terminology used in TCA, section 817A and TCA, section 248(3), the Respondent's position was that it can rely on either provision, in circumstances where there was no clarity on how the provisions are intended to interact.

(l) The Appellant denied that the interest deduction is the main benefit to derive from the transactions in circumstances where the evidence demonstrates the acquisition of the shares was the commercial benefit stemming from the transaction carrying an expectation of profit and hence TCA, section 817A did not apply to the transactions in question.

(m) The caselaw opened by the Respondent was out of context in that it related to whether a business was carried on with a view to profit which can be contrasted with the language used in TCA, section 248(3) and TCA, section 817A.

(n) The case of *Garrett Paul Curran -v- HMRC [2012] UKFTT 517 (TC)* indicated that it was the loan which must be looked at.

(o) In relation to *The Brain Disorders Research Partnership and another -v- Revenue and Customs Commissioners* [2015] SFTD 1043 case can be distinguished on the facts from those under appeal as the latter case involved a sham transaction which was not pertinent to the facts under appeal.

(p) In all circumstances, TCA, section 817A does not apply on the facts in the present case.

Respondent

46. The Respondent made the following submissions:

47. *2005 – Amended Assessment*

(a) The Appellant's grounds of appeal in relation to the 2005 amended assessment were as follows:

> *"The Notice of Amended Assessment was made outside the statutory time limit imposed by the provisions of Section 955(2)(a), TCA 1997, i.e. after the end of four years commencing at the end of the chargeable period during which the return was submitted.*
>
> *The Notice of Amended Assessment does not grant relief under Section 248, TCA 1997 (as extended by Section 250, TCA 1997) for interest paid of €79,317, resulting in an excess tax charge of €33,313."*

(b) The second of those grounds was the sole ground of appeal in respect of the 2006, 2007 and 2008 amended assessments. The Appellant alleged invalidity of the amended assessments on three bases:

(i) The 2005 assessments were invalid on the basis that they sought to collect tax outside the 4-year time limit in TCA, section 955(2)(a).

(ii) The assessments were invalid on the basis that a stated reason for their issuance (non-compliance with TCA, section 250(5)) was incorrect.

(iii) The assessments were invalid on the basis that by issuing TCA, section 811 opinions to two other investors in NCR, the Respondents acknowledged that the provisions of TCA, section 248(3) and TCA, section 817A were not breached with the effect that the Respondents now cannot contend that they were breached by other scheme participants.

(c) Any of those challenges did not provide an adequate basis for the invalidity of the assessments. The TCA, section 955(2) time limit for the amendment therefore expired 4 years from 31 December 2006, on 31 December 2010. The assessment for the tax year ending 31 December 2005 that was made on 20 December 2010 was accepted by the Appellant and therefore in time. This was accepted by the Appellant.

(d) The Appellant asserted however that the due date for payment of the tax arising on foot of the amended notices of assessment was 19 January 2011, was outside the statutory time limit prescribed in TCA, section 955(2)(a)(i) since the tax payment falls due after 31 December 2010. Therefore, the Appellant asserted that the tax due cannot be collected. The Respondent asserted that it was only the making of the assessment which needs to be done by 31 December 2010.

(e) The Appellant accepted that the amendment to the assessment was made in time. To the extent that the Appellant sought to pursue an argument about collection of tax being unlawful was not a matter within the jurisdiction of the Appeal Commissioners.

(f) In any event the argument was manifestly flawed. The reference in TCA, section 955(2) *to "no additional tax shall be payable by the chargeable person after the end of the that period of 4 years…. by reason of any matter contained in the return"* was setting out a consequence of the prior wording which states that, where full and true disclosure has been made, no assessment or amendment of an assessment under TCA, section 955(1) may be made after the 4-year period mentioned. Tax is made payable by an assessment or amendment of an assessment – that is the immediate effect whether or not the tax itself is immediately payable. In *Droog*, at paragraph 7.6 it was noted that:

> *"In ordinary cases the raising of an assessment gives rise to an obligation to pay the tax or additional tax assessed subject only to the fact that, in certain cases, that obligation may be postponed or ultimately removed as a result of the appellate process."*

(g) Therefore, the obligation to pay tax arises as soon as the assessment is raised. Since no assessment or amendment of an assessment can be made after the 4-year limit, in cases where a full and true disclosure of all material facts had been made, no further tax can become payable or repayable, beyond that which results from an assessment or amendment to an assessment made within the 4 year time limit.

(h) The wording did not set out a further limitation on assessments such that an assessment issued within 30 days of the end of the 4-year period was deprived of effect. This would be absurd and would have been set out quite differently and expressly if that was the intended effect.

(i) The witness statement provided by a member of the Respondent's IT team clearly supported the position that there was a difference between a Notice of Assessment and an Assessment. It was argued that a Revenue/tax person raised the assessment and thereafter and independently of the assessment the notice of assessment was raised by a member of the IT team of the Respondent.

(j) The witness statement establishes 3 processing steps in the Respondent's computer system the first 2 of which were done by the general tax staff in Revenue and last of which was the raising of the Notice of Assessment performed by the IT teams. The fact there are 3 steps involved does not detract from the fact that there was a single process in so far as the application of TCA, section 955 was concerned.

(k) The witness statement unequivocally established that the assessment the subject matter of this appeal was raised by way of nightly computer batch programme on the night of 17 December 2010 and the Notice of assessment followed in early January 2011.

(l) It was argued that the Appellant was now seeking to resile from the fact that it had previously accepted that the Respondent was within time in relation to the 2005 tax year and hence this ground of appeal should not be allowed.

(m) The Respondent contended that on reading the wording of TCA, section 918 it was evident that there was no time limit specified for the Inspector to raise the Notice of Assessment and that power to do so was open-ended in nature.

(n) The Respondent relied on the UK cases of *Honig and other v Sarsfield* [1986] STC 246 and the more recent case of of *Corbally-Stourton* [2008] STC (SCD) 907. As authority for the proposition that there was a distinct difference between the Assessment and the Notice of Assessment.

(o) In Honig, Lord Justice Fox stated in his decision at page 247:

> *"Before turning to the law, it is necessary to deal with what actually happened. The Special Commissioners found, on the facts, first, that there were provided to them assessment books for the former Tax District of Walworth for 1970; second they found (reading from the Case Stated):*
>
> > *'Volume 2 of the assessments books contains the seven originals of the assessments under appeal numbered consecutively 2583 to 2589. They are in essentially the same form as the notices of assessment issued to the appellants and each states that it was "issued" on 16 March 1970. Volume 1 contains a certificate signed by an inspector of taxes and dated 16 March 1970, stating that he had "made" a number of assessments contained in Volume 2, including numbers 2583 to 2589 inclusive."*
>
> *Third, the Special Commissioners found that the seven notices of assessments were posted first of all to the last-known address of Mrs. Honig (the widow). They were returned undelivered to the Tax Office and re-addressed to Mr. Honig's last-known address. Once again they were undelivered and returned to the Tax Office. On 7 April 1970 they were sent to Mr. Honig's current address – that being after the last date when the assessments were required by the statute to be made. There was no*

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specific finding as to when the notices were sent to Mrs. Honig, nor when they were re-addressed and sent to Mr. Honig.

Having dealt with the facts I turn to the law. The first question to be dealt with is: Is an assessment effectively made until notice of it has been given to the taxpayer? Section 29(1) of the Taxes Management Act 1970 enacts as follows:

> *(1) Except as otherwise provided, all assessments to tax shall be made by an inspector...'*
>
> *(5) Notice of any assessment to tax shall be served on the person assessed and shall state the time within which any appeal against the assessment may be made.'*
>
> *(6) After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts'."*

It seems to me that the words in sec. 29(5) 'notice of any assessment to tax...' necessarily imply that there is a difference between the notice and the assessment. One cannot have a notice of an assessment until there has been an actual and valid assessment. In subsection (6) one finds the words 'After the notice of assessment has been served on the person assessed...'. The reference there to 'the person assessed' implies to my mind that there has been an assessment. It is clear that that subsection contemplates that an assessment is different from and will be followed by the notice of assessment and that its validity in no way depends on the latter. They are two *wholly different things. The judge referred to s 114(2) of the 1970 Act, which provides:*

> *'An assessment shall not be impeached or affected—*
>
> *(a) by reason of a mistake therein as to—*
>
> *(i) the name or surname of a person liable, or*
>
> *(ii) the description of any profits or property, or*
>
> *(iii) the amount of the tax charged, or*
>
> *(b) by reason of any variance between the notice and the assessment.'*

(p) With regard to the time limit imposed by the statute Fox LJ concluded at page 248:

"For the reasons which I have indicated, the time limit imposed by the statute relates only to the making of assessments, and not to the service of assessments; and the statute draws a very clear distinction between the making of assessments and the giving of notices for the making of those assessments. Mr. Honig referred to the possible dangers of giving notice of assessment long after the assessment itself was made. No such situation arises in this case."

(q) In *Corbally Staunton v HMRC* [2008] STC (SCD) 907, the Special Commissioner referred to the system of assessing tax when observing at page 926;

90. *"In the days before widespread computer use, when an inspector made an assessment he did so by writing it in the assessment book. In Honig -v- Sarsfield [1981] STC 247 the Court of Appeal held that for the purposes of the then provision of section 29 Taxes Management Act (which differ from those relevant to this appeal) an assessment had been made when the inspector signed the certificate in the assessment book stating that he had made an assessment. In Barford -v- Durkin [1991] STC 7 the Court of Appeal held that an assessment was made by an inspector who took the decision to assess even though the assessment book was signed, at his direction, by another.*

91. *Dr. Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the Appellant. Once keyed into the computer the amount appears a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the Appellant's statement which showed an entry for an 'adjustment from [self-assessment] return 18 October 2004' recording the entries made when the Appellant was notified that she would be assessed.*

92. *Mr. Barnett put the Respondents to proof that the Appellant had been assessed.*

93. *It seems to me that Dr. Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made."*

(r) In Ireland as in the UK, a very important distinction between the assessment on the one hand and the notice of assessment on the other, the assessment and the time limit for the assessment being dealt with in TCA, section 955, which does not mention notices, and the requirement to issue a notice being referred to in that section or being established by TCA, section 918 which does not mention a time limit and that the time limit applies to the making or amendment of the assessment but it does not apply to the issue of the notice.

48. *Full and True Disclosure*

(a) The TCA, section 955-time limits only apply where full and true disclosure of all the facts necessary for an assessment has been made. It was the Respondent's view that in light of the facts that emerged at the hearing, it was clear that a full and true disclosure was not in fact made.

(b) In relation to the Appellant's argument that the Respondent was inconsistent in raising a TCA, section 811 assessment against 2 of the investors and not the others, it was submitted that the subsequent withdrawal of such notices was entirely consistent with the Respondent's position in this appeal that the Appellant failed to meet the requirement under the basic legislation being TCA, section 248, TCA, section 250 and TCA, section 817A.

(c) The Appellant's argument that the Respondent was precluded from raising the Notice of Assessment when it did, on the grounds it was unfair as it would create uncertainty for the taxpayer, in a manner contrary to the intention of the Oireachtas, was not tenable. It was submitted that this interpretation was at variance with clearly established canons of statutory interpretation on the grounds that it was an attempt to reverse the accepted steps in statutory interpretation, of firstly looking at the legislation to ascertain the intention of the Oireachtas and then apply that to the facts. The Appellant was seeking to change the accepted sequence of steps in statutory interpretation, by looking firstly at the decision and secondly seeking justification for what the Appellant wanted read into the legislation.

(d) The application of the *Stanley* decision to the facts was not accepted as Mr. Justice Peart used somewhat confused language in his judgement which would indicate he did not appreciate the distinction between an Assessment and a Notice of Assessment and it was submitted this was supported by the fact he used the terms interchangeably throughout his decision. Furthermore, the Appellant disputed the relevance of the *Stanley* decision on the basis it was a decision in relation to a different tax code namely Capital Acquisition Tax and hence it was not relevant to the construction of TCA, section 955.

(e) The Appellant's contention that as tax becomes payable 30 days after the assessment curtails the 4-year time limit in TCA, section 955(2)(a)(i) was not tenable. It was argued that there are 2 ways of construing the word payable. In one context, this meant a situation where one looked at whether something was due and whether payment should be made, but also a situation where a liability has arisen that will require payment, albeit not immediately.

(f) TCA, section 955(2)(a) was predicated on full and true disclosure. The *Stanley* case relates to neglect which was not at use in this appeal, and what was material to the construction of TCA, section 955(2)(a) was whether all facts necessary for making an assessment were disclosed.

(g) In relation to the level of disclosure, there was a distinction between the law and the facts. In relation to the law it was pointed out that there was an expression of doubt facility open to a taxpayer but in relation to level of disclosure the requirement was different in that to benefit from the time limits, all facts necessary for making an assessment must be disclosed.

(h) The Appellant should have disclosed that the loan was in Turkish lira due to the fact it had a higher interest rate and it was the absence of this information which led to delays.

(i) Reliance was placed on the *Droog* case to support this position. Reliance was also placed on the Australian case *Levy* where the relevant legislative provision was similar to TCA, section 955. In that case, the taxpayer being a trader who was defrauded was deemed not to have made a full and true disclosure and could not rely on the time limit as he could have checked why his income was understated. Similarly, it was argued that the Appellant knew there was a risk the interest might not be available and it should have been clear to him that the facts omitted from his return were necessary to allow the Respondent form a view as to whether it was appropriate to raise an assessment.

(j) The Respondent refuted the relevance of the *Stanley* case on the basis it related to neglect. Furthermore, it was not possible to set out in every respect of every relief or taxing provision all material relevant facts. It was submitted that this was a matter of judgement in relation to which the taxpayer needed professional help.

(k) The denomination of the loan in Turkish lira, the information memorandum and the high interest rate should have been disclosed to the Respondent. The Respondent concluded that the choice of Turkish lira and the high interest rate was part of an arrangement of which tax was a main purpose.

(l) The requirement to make full disclosure to achieve certainty was not met and hence the requirement in TCA, section 955 was not met. TCA, section 951 and TCA, section 955 are standalone sections which must be read independently of each other.

49. *Assessments stating the incorrect basis*

(a) The Appellant alleged that the assessment was invalid on the basis that a stated reason for its issuance (non-compliance with TCA, section 250(5)) was incorrect for the following reasons:

(i) this ground of appeal was not included in the Appellant's notice of appeal. TCA, section 957(6) and TCA, section 949I(6) therefore preclude the argument from now being made.

(ii) the legal remedy for a procedurally flawed assessment was by way of judicial review and not by way of an appeal to the Appeal Commissioners as noted in *Menolly Homes Limited-v- Appeal Commissioners and Revenue Commissioners* [2010] ITR 75 at 92, paragraph 37);

(iii) there was no legal basis for the Appellant's contention that the Respondents are bound by the grounds set out in correspondence.

(iv) there was no statutory obligation to state the basis on which an assessment was made. It would be absurd if the absence of a reason did not preclude the making of an assessment but then meant that any defence to a challenge by the taxpayer would automatically fail.

(v) The lack of any statutory requirement to give reasons was sensible when viewed in the context that an Inspector may have to make an assessment without the full knowledge of the taxpayer's affairs. The Appellant's construction of the requirement would mean that the Respondent would be precluded from challenging the assessment on a more serious and less obvious basis just because a more obvious and less serious basis for challenge was discovered sooner.

(b) In the present case, correspondence between the parties consistently referred to the fact that relief was being claimed under TCA, section 248 as extended by TCA, section 250. The Appellant should therefore have been in no doubt that he was required to satisfy the conditions of TCA, section 248 as well as those of TCA, section 250. Furthermore, the letters from the Inspector notifying the Appellant that the relief was being withdrawn stated clearly that the claim for interest relief did not comply with all the requirements of TCA, section 248 as extended by TCA, section 250.

(c) Once the assessment was validly made, the scope of the appeal was not determined by the Inspector's initial thoughts. The position in Ireland was the same as the UK position. In the Tribunal decision of *Clark v- The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 392 (TC), the Tribunal said in relation to the UK direct tax legislation:

"[41] Section 29(1) speaks in terms, not of conclusion, but of opinion. That is apt in the context, as we have described, of discovery of what appears to be an insufficiency, or loss of tax, from an incomplete picture, both as regards the facts and with respect to the legal analysis that might be applied in the appeal process. The assessment that results from that process cannot be expected to be definitive in the way Mr Jones has argued that it is.

[42] Nor, on the other hand, as Mr Davey accepted, can an assessment be regarded as nothing more than a figure of tax due, without any relevant context, which can apply generally to impose any liability to tax on the taxpayer. In the same way as for a closure notice, an appeal against a discovery assessment does not open a general roving enquiry into the tax position of the appellant.

[43] The scope of the assessment, and consequently of the appeal, must therefore have some limitation. We consider that it is consistent with s29, taken as a whole, for the scope of the assessment to be limited to a charge of the particular nature which is considered to have given rise to the loss of tax for a particular year of assessment, and which arises out of the factual matrix that is found to have been associated with the loss of tax that gave rise to the assessment on the basis of the officer's opinion. That too will be the scope of the appeal. On an appeal, by virtue of s 50(6) and (7), the Tribunal is not confined to the reasons for the opinion of the officer when coming to the opinion that there had been a loss of tax, nor is it confined to examination only of the facts on which that opinion was based, or the legal analysis applied at that time. As Henderson J said, and as equally applicable to a discovery assessment as to a closure notice, the Tribunal, acting fairly, may apply the law to the facts as it finds them, and is not constrained by the arguments put forward by the parties whether before or at any stage in the proceedings. The public interest in taxpayers paying the right amount of tax is as strong as, if not stronger or at least more evident than, it has ever been, and the duty of the Tribunal remains to determine whether the assessment undercharges or overcharges the appellant."

(d) There was accordingly no bar to the Respondents' challenge to the Appellant's claim to relief under TCA, section 248 as extended by TCA, section 250.

50. *Legitimate expectation*

(a) The Appellant submitted that the assessments were invalid on the basis that the Respondents acknowledged that the provisions of TCA, section 248(3) and TCA, section 817A were not breached in the TCA, section 811 opinions that issued to two other investors in NCR. As above, the Respondent sought to challenge the assessment on a basis that was not included in the notices of appeal. TCA, section 957(6) and TCA, section 949I(6) precluded the Appellant from making this argument.

51. *Part-Time Directorship*

(a) The Appellant could not satisfy the requirement to be a part-time director of NCR, as required by TCA, section 250(2)(a), given the provisions of Article 20(e) of the NCR Articles of Association and the fact that the Appellant only attended one board meeting.

(b) The availability of relief on the basis that TCA, section 250, even if sufficient *per se,* had not been met.

(c) The Appellant was invited to be a director of NCR on 5 December 2005. Identical letters were sent to the other Appellants. The Appellant accepted and became a director following a board meeting on that day at 6:15pm.

(d) If the Appellant was appointed as a director, he automatically vacated the office of director as a result of his absence from board meetings. Article 20(e) of the Articles of Association for NCR provides as follows:

> *"The office of a Director shall be vacated: …(e) if he absents himself from the meetings of Directors for a period of six calendar months without special leave of absence of the other directors."*

(e) From appointment, the Appellant was absent from the following meetings:

    (a) A meeting on 21 February 2007 at 6:30pm;

    (b) A meeting on 2 May 2007 at 6:30pm;

    (c) A meeting on 20 August 2007 at 11:00am;

    (d) A meeting on 19 May 2009 at 4:30pm;

    (e) A meeting on 7 December 2009 at 6:30pm, and

    (f) A meeting on 7 December 2009 at 7:30pm at which the Appellant resigned.

(f) Article 20(e) was in point wherever the director did not personally attend the board meeting. The Appellant was not rendered present at the meeting where he appointed another to vote on his behalf.

(g) There was a period of absence of six months wherever a six-month period could be identified in which the Appellant was absent from all board meetings. The time period starts to run from the date upon which the individual was absent from a board meeting (*Re London and Northern Bank* [1901] 1 Ch 728 per Wright J at 732). The office was immediately vacated by operation of law; no further act by the members was required for the vacation to become effective *Re Bodega* per Farwell J at 283.

(h) The six-month test was met for the period from 21 February 2007 to 21 August 2007.

(i) The disqualification under Article 20(e) precluded the Appellant from being a director for the entirety of the period from application of the loan to payment of the interest with respect to the assessments for 2007 and 2008.

52. *Director within the meaning of the Act*

(a) It is uncontroversial that a taxing statute must be construed in accordance with its purpose. In *O'Flynn,* O'Donnell J, delivering the majority decision of the Supreme Court, stated:

> *"[72] The suggestion that the principles in McGrath v McDermott [1988] IR 258 preclude a "purposive approach" is also perplexing. In the first place the express words of s.86 require the Commissioners to have regard to the "purposes for which it [the relief] was provided". Furthermore, the decision in McGrath v McDermott itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay CJ restated at p.276 the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a "consideration of the purpose and intention of the legislature". Indeed, if McGrath v McDermott stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters. As Lord Steyn observed in the Northern Ireland case of IRC v McGuckian [1997] NI 17, 16 p.166, there has been a tendency to treat tax law, almost uniquely in the civil law as continuing to be the subject of a strict literalist interpretation:-*
>
>> *"During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminster doctrine tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words*

used regardless of the purpose of the statute…[t]ax law was by and large left behind as some island of literal interpretation."

[73] In Barclays Finance Ltd v Mawson [2004] UKHL 51, [2005] 1 AC 684 the House of Lords emphatically reaffirmed that the same principles of statutory interpretation applied to taxation statutes as to other non-criminal statutes. Indeed, it was the realisation in Lord Steyn's words in IRC v McGuckian [1997] NI 157 at 166 that "those two features – literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately – [which] allowed tax avoidance schemes to flourish" which led the United Kingdom courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in McGrath v McDermott [1988] IR 258, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes."

(b) Lord Nicholls explained the correct approach in *Barclays Mercantile Business Finance Ltd -v- Mawson* [2005] 1 AC 684 in the following terms:

"[36] Cases such as these gave rise to a view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46, para 35:

"the driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

…[38] MacNiven shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute…

[39] The present case, like MacNiven, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires…"

(c) In light of the purpose of TCA, section 250(2), a *de facto* directorship as well as *de jure* directorship was required. To read TCA, section 250(2) as applying solely to *de jure* directorships would be inconsistent with its purpose as elucidated from the following:

(i) The fact that TCA, section 250 expressly requires the role to be performed "part-time" or "full-time" illustrates that *de jure* directorship alone will not suffice. The two share the characteristic that time must be spent on the directorship duties; they differ only in terms of the extent to which time must be so spent;

(ii) The definition of "part-time director" in TCA, section 250(1) was ambiguous in that it sets an upper limit for the time spent in the performance of directorship duties which, if surpassed, would render the role one of "full-time" directorship. It does not, however, set out any lower limit for the time required to be devoted to the company. In the context of this ambiguity, it was appropriate to evaluate the ordinary meaning of the words "part-time director" chosen as the definitional term (see *MacDonald -v- Dextra Accessories Limited* [2005] UKHL 47 per Lord Hoffmann at [18]). "Director", when given its ordinary meaning, refers to those who perform directorship duties, and

(iii) TCA, section 250(2)(a)(i) provides an alternative condition to those contained within TCA, sections 248(2)(a) and (b). As a matter of common sense, it cannot have been the legislature's intention for the need to have a material interest in the company or to have worked in the management of the company to be effectively replaced by a requirement that the individual was nominally a director.

(d) The Appellant was not a "part-time director" within the meaning of TCA, section 250(2)(a)(i) merely because the relevant appointment formalities have been met. The context and purpose of the legislation indicates that more than a mere formal nomination as director, and some degree of carrying out director's duties, would be necessary in order to satisfy TCA, section 250(2).

(e) Furthermore, the Appellant's role was required to be viewed realistically (see, for example, *UBS AG -v- HMRC [2016] UKSC 13* at [66]). The Appellant's directorship was purely nominal and should be disregarded.

(f) The case of *Vowles -v- The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 704 (TC) was relevant. In that case, it was held (obiter) the taxpayer's directorship was not sufficiently active to constitute an "office" or "employment" within s5(1) ITEPA. The FTT explained at [93]:

> *"ITEPA provides at s 5(1) that 'offices' are 'employments', and references to being employed must be taken to include holding an office. Was she an employee and/or an office holder? She clearly held office as director, but we accept her evidence that her directorship was nominal and, in reality, she did not act as a director…"*

(g) In the context of TCA, section 250(2)(a), directorship was intended to refer to an active role in managing the company which the Appellant did not have.

(h) On a realistic view of the facts, the Appellant falls far short of this. His role was unremunerated and, in accordance with the appointment letter, the only specific duties he had as "non-executive director" were to prepare for and attend at board meetings, which he did not do. That the appointment was for nothing other than tax reasons was reflected in there being no fewer than 35 board members (comprised entirely of scheme participants). In the "Information Memorandum" given to prospective scheme participants, page 1 states: "Prior to making the Share Investment, the investors will be invited to become non-executive directors of PropCo. This was required to meet certain criteria for tax deductibility of the interest payments". The letter to investors dated 13 November 2009, concerning the unwinding of the PS Commodities Bond investment, also states "*You are due to receive an amount of €X on unwinding these investments on 30 November 2009. To facilitate the payment of this amount, please sign and return the enclosed Letter of Resignation of Company Director*". This shows that both the appointment and the termination of the appointment are wholly formalistic, a function of tax and nothing else.

(i) The Appellant attended one board meeting only in relation to a discussion regarding his resignation. The Respondent pointed to the evidence that the Appellant agreed that it was possible that he was encouraged to attend that meeting. The Respondent pointed to the fact that the Appellant, in evidence, agreed that he was not required to do very much as a director and that nothing was brought to his attention about any serious matter to be discussed at board meetings.

(j) With regard to the role of directorship, the Respondent submits that such a role was undertaken to secure the tax relief.

(k) The Appellant did not become a director to protect his interest as shareholder as borne out by the fact that he only attended one board meeting and emphasised that the role of a director was of a fiduciary to the company. It was a requirement to act in the interest of the company rather than the shareholder. The Respondent refers to the *Bloxham* case which stresses that the predominate duty of a director was to serve the interest of the board of directors.

(l) The Appellant had no interest in performing the duties of a director and did not in fact perform them. It was further submitted that all he did was have his name on the list of directors and that his was not sufficient to confer status on him as a part-time director.

(m) The definition of a part-time employee and part-time director in TCA, section 250(1) as:

> *" an employee or director, as the case may be, who is not required to devote substantially the whole of his or her time to the service of the company*".

(n) A director was required to spend some of this time in the service of the company to qualify as a director. It was contended that the legislature could have used a different phraseology had it simply wanted to cover someone on the role of directors.

(o) In relation to the purposes of the relief, it was submitted that this was to allow an interest deduction and that to ensure that tax avoidance was not entered in relation to the relief was jealously guarded.

(p) Reliance was placed on *McGrath v McDermott* as authority that a purposive approach may be taken to the interpretation of legislation in case of doubt or ambiguity. It was submitted that ambiguity was not simply confined to instances where the language used has two meanings, but also extends to situations where the *prima facie* meaning of the words used was at variance with the statutory context. On this basis it was not accepted that it was the intention of the Oireachtas to allow nominal director to fall within TCA, section 250.

(q) Furthermore, it was contented that the definition of the term *part-time director* sheds light on the ordinary meaning of the term. Reference was made to the UK case of *Vowles* which held a nominal director was not a director. It was accepted that there was a low threshold in relation to the level of performance required to qualify as a part-time director but it was argued that the Appellant did not meet the threshold.

(r) Reference was made to the *London & Northern Bank* and the *Bodega* cases. In relation to the latter case where a director lost his office pursuant to the articles of association on entering into an illegal contract it was emphasised that the articles of the company did not provide for any *locus poenitentiae* for him by means of which the disqualified director would become re-instated. It was stated that the fact there was no re-instatement was indicative that the role was essentially irrelevant.

(s) The Appellant referred to TCA, section 250(2)(a)(i) which stipulates that both full-time and part-time directors are required to act as such throughout the period from the application of the loan proceeds until the interest was paid. It was argued that the Appellant was never a director and even if he was his office was vacated and not reinstated and therefore he did not meet the requirement to act as part-time director throughout the requisite 2- year period.

(t) The Respondents submit that TCA, section 250(2)(a) was not met and accordingly for this reason alone relief was not available.

53. *Interaction of TCA, section 248(3) and TCA, section 250*

(a) TCA, section 250 does not provide an independent test for interest relief, but an alternative set of conditions to that set out in TCA, section 248(2)(a) and (b). This was supported by the following:

(i) the title to TCA, section 250 ("Extension of relief under TCA, section 248 to certain individuals in relation to loans applied in acquiring interest in certain companies") puts beyond doubt that TCA, section 250 was intended to extend TCA, section 248. Satisfaction of TCA, section 248 was therefore necessary unless otherwise stated;

(ii) TCA, section 252(1) identifies TCA, section 248 as the "principal section" and TCA, section 250 as an extension. That was inconsistent with TCA, section 250 being a free-standing provision;

(iii) it would be odd for the legislation to exclude the operation of TCA, section 248(2)(a) and (b) were it the case that TCA, section 248, more generally, was irrelevant. A more natural reference to TCA, section 248, or alternatively no reference to TCA, section 248, would have been adopted were TCA, section 250 to have the effect suggested by the Appellant;

(iv) the Appellant's construction of TCA, section 250 had the effect that a tax avoidance motive will preclude interest relief where the taxpayer had a material interest in the company and had worked full time in the management of the company, but not where the taxpayer has worked part time and/or does not have a material interest in the company. As a matter of common sense that cannot be what the legislature intended.

(b) For these reasons, the position was clearly different from that contended by the Appellant. The correct analysis was that TCA, section 248(3), as with TCA, section 248(4) and succeeding provisions, operate as a qualification of TCA, section 248(1). Entitlement to relief was conditional and only ever subject to meeting the requirements of TCA, section 248, apart from those expressly disapplied by TCA, section 250, namely TCA, section 248(2)(a) and (b).

54. *TCA, section 248(3)- Test*

(a) TCA, section 248(3) provides as follows:

> *"Relief shall not be given in respect of any payment of interest by an individual on a loan applied on or after the 24th day of April, 1992, for any of the purposes specified in subsection (1) unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax."*

(b) On the requirement that there must be a scheme or arrangement, case law in an analogous context illustrated that this only required a moderate degree of planning. See, for example*, Bird -v- The Commissioners for Her Majesty's Revenue and Customs* [2009] STC (SCD) 81 which concerned the meaning of 'arrangement' in the context of the settlement's legislation which, similarly, contained no definition of "arrangement". At [20] and [21], Sir Stephen Oliver QC said the following:

> *"[20] "Arrangement" has the ordinary meaning of "a structure or combination of things for a purpose" (the shorter Oxford English Dictionary) or "a number of objects arranged or combined in a particular way" (New SOED).*
>
> *[21] In Jones v Garnett the House of Lords endorsed the broad concept of "arrangement" as developed in the earlier line of cases from IRC v Payne 23 TC 610 to Butler v Wildin supra. These cases make it clear that there is no need for any formal legal trust or settlement for these provisions to apply. The cases are also authority for the proposition that a definite plan (including a relatively simple plan), to use a company's shares to divert income, falls within the meaning of an arrangement: see paragraphs 48-49 per Lord Walker. In this connection it will be noted that Lord Hoffman expressly approved the "realistic view" that the Court should take of the matter: see paragraph 11." [underlining added]*

(c) The Appellant was offered the opportunity by the promoter to enter these transactions and they were subsequently entered into on 5 December 2005. Undoubtedly, this was the result of a pre-meditated series of transactions that, accordingly, comprise an arrangement within the meaning of TCA, section 248(3).

(d) As to the requirement that tax avoidance was not one of the main purposes, case law in the context of identically worded provisions highlights a number of points on the identification of a main purpose.

(e) A main purpose can be elucidated by reference to an inevitable consequence or the objective characteristics of the transaction as well as to subjective intent. In the context of the UK's s74ZA Income Tax Act 2007 with respect to a film scheme, Nugee J explained the point in *Seven Individuals -v- The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 132 (TCC) at [104]:

> *"I have not found this entirely easy but I am inclined, despite what was said in these cases, and despite the high authority of Brebner, to accept Mr Davey's submission and hold that in considering what the object of a set of arrangements are, one can look more widely than what was in the taxpayer's own mind. The reality is that complex arrangements such as were involved in the Icebreaker partnerships are not devised by the taxpayer. They are devised with considerable care and sophistication by those who are responsible for coming up with the idea and turning that idea into a series of transactions or arrangements. They are then promoted to members of the public, who are invited to participate in them. It does seem to me that when the statutory question is whether the main purpose, or one of the main purposes of the arrangements, is the obtaining of reduction in tax liability by means of sideways relief, it would be surprising if that question were intended to be answered by looking at the intentions, motives or purposes of the individual taxpayer alone without regard to the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work, and the way in which they were promoted to potential participants."*

(f) This point was supported by Lord Nolan's judgment in *Inland Revenue Commissioners -v- Willoughby* [1997] STC 995 at 1001:

> *"…where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation) it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax…"*

(g) See also *AH Field (Holdings) Limited -v- Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 104 (TC) at [135] – [137] and *Vodafone Cellular Ltd -v- Shaw* 69 TC 376:

> *"…some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made…"*

(h) This was cited with approval by Budd J in the case stated for the Supreme Court in *MacAonghusa (Inspector of Taxes) -v- Ringmahon Company Ltd* [1999] IEHC 48.

(i) The existence of a commercial rationale did not preclude identification of the avoidance of tax as a main purpose (see *AH Field (Holdings) Limited* at [126], *Conegate Limited -v- The Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 82 (TC) at [95], *Anne Fisher, Stephen Fisher, Peter Fisher -v- The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 804 (TC) at [541] and [541] and *Versteegh Limited and others -v- The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 642 (TC) at [158]).

(j) Where there was a commercial purpose, the taxpayer's main purposes are a question of fact. Lord Upjohn makes this point in *Inland Revenue Commissioners – v – Brebner* [1967] 2 AC 18 at 30:

> *"My Lords, I would only conclude my judgment by saying, when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out — one by paying the maximum amount of tax, the other by paying no, or much less, tax — it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax…The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence."*

(k) The question to ask was whether the avoidance was the "icing on the cake" or more integral (see *Inland Revenue Commissioners -v- Trustees of the Sema Group Pension Scheme* [2002] STC 276 EWHC 94 per Lightman J at [53]).

(l) The burden of proof was on the taxpayer to establish that the avoidance of tax was not a main motive. See *John Hardy, Richard Moxon -v- The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 754 (TC) at [324], *Field Holdings Ltd.* at [114], *Conegate* at [324], *Coll -v- Revenue and Customs Commissioners* [2010] STC 1849 at 1857 and *Hasloch -v- Commissioners of Inland Revenue* [1971] 47 TC 50.

(m) It was sufficient that the promoters had as a main purpose the avoidance of tax (for the taxpayers). See *Addy -v- Inland Revenue Commissioners* [1975] STC 601, cited with approval in *Conegate* at [333].

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(n) Applying those points, TCA, section 248(3) was not met. The loan was applied as part of a scheme or arrangement the main purpose or one of the main purposes of which was the avoidance of tax. Nor was it applied for *bona fide* commercial purposes. As such reliance was placed on inter alia the following:

   (i) The pricing of the overall transaction.

   (ii) The provision in the Limited Recourse and Interest Rate Agreement dated 5 December 2005 that the amount of interest payable would be reduced if the tax relief on the interest was restricted.

   (iii) The marketing documentation, and results obtained, which all make clear that the interest relief was what made the transactions profitable, on a post-tax basis.

   (iv) The circular movement of the funds, which was considered to be an indicator of a main purpose of tax avoidance in *AH Field (Holdings) Limited* at [132].

(o) The following features are notable:

   (i) The Share Loan was used to subscribe for shares in NCR. NCR subsequently lent more than 90% of the funds subscribed to a subsidiary, SNR which used the loan to invest in a so-called 'property derivative' issued by PS, a subsidiary of Promoter;

   (ii) SNR paid the counterparty, PS, €36.3m to enter into the derivative. PS immediately lent these funds back to Promoter. Thus, almost the entirety of the funds lent moved in a circle from Promoter to the Appellant (and the other investors) to NCR and back to Promoter on the same day (6 December 2005). The Respondents understand that the balance of the monies subscribed for shares was paid on by NCR to GR as part payment for the transfer of ownership of the property at Main Investment Property Name Redacted which had occurred prior to the Appellant's investment in NCR.

   (iii) At the outset, under the agreements originally entered into in 2005, the Appellant's liabilities were hedged and matched so that the only amount for which he was at risk was the €50,000 of his own resources used to subscribe for the Commodities Bond. As stated in the 'Information Memorandum' provided to the Appellant in advance of investment, the Appellant was not exposed to any exchange rate risk. As the interest rates were fixed, the Appellant was also not exposed to movements in interest rates. Furthermore, the Appellant was not at risk for non-payment of principal and interest on the Commodities Bond as such payments could be offset against interest on the Share Loan.

(iv) Absent the tax relief, there were two ways in which the Appellant could earn a return on the overall transaction.

- The first was on the Commodities Bond: the final payment by Promoter was to include an amount linked to any rise in the value of the basket of commodities.
- The second was by exercising his Put Option and selling his shares to Promoter. The proposed purchase price of the shares was a base amount of €500,000 plus two additional amounts, dependent on (i) any appreciation in the value of Main Investment Property Name Redacted and (ii) the market value of the Derivative, which in turn depended on movement in the EPRA Index. As stated in the 'Information Memorandum' provided to the Appellant in advance of investment, the Appellant was not exposed to any decline in the value of Main Investment Property Name Redacted or the Derivative. As the Appellant had invested €50,000 of his own funds in the Commodities Bond, the combined profit on the Commodities Bond and the sale of the shares would have had to exceed €50,000 before the Appellant could make a pre-tax profit on the overall transaction. These profits were at best uncertain so that the Appellant entered into the transaction on the basis of a known loss of at least €50,000, which might or might not be mitigated when the transaction concluded in 2009.

(v) There was no commercial reason for the Appellant to borrow in TRY in order to invest in shares in NCR. The only rationale for borrowing in TRY rather than Euro was to pay a higher interest rate and thus inflate the amount on which tax relief could be claimed.

(vi) There are two limbs to TCA, section 248(3), one was that the loan must be applied for bona fide commercial purposes and the second was that it must not be part of a scheme or arrangement the main purposes or one of the main purposes of which was the avoidance of tax. It was accepted that if there were some commercial purposes the first limb of TCA, section 248(3) was met.

(vii) Reliance was placed on the objective nature of the main purpose test. It was argued that based on the authorities of the *UK case of Seven individuals*, *Willoughby* and *Field* that when assessing whether the main purpose test, an objective approach should be taken regardless of the subjective motivations of the taxpayer. In this regard, per the *UK case of Sema Pension,*" *if the tax advantage is merely the icing on the cake it will not constitute a main object*".

(p) In relation to the main purpose test:

(i) arrangements should be tested by what have could have been done which was to borrow in euro which as confirmed by Name of Director of Promoter Redacted could have been done. If that was not the case, it was argued that "everyone *would go Turkish the whole time*" and hence the main purpose was the avoidance of tax;

(ii) furthermore, it was relevant that the transaction changes in alignment with any variance in the tax treatment. In addition, the choice of the Turkish loan was dictated by the high interest rate;

(iii) €50,000 was the only part of the investment which was not capital protected so that implied the investors were not solely driven by capital protection motivations and that the gearing was important to the tax and was not fully explained by any commercial benefit;

(iv) the requirement to become a director pointed to tax being the main purpose;

(v) the investor could have put in €50,000 and achieved the same effect without the other features of the arrangements;

(vi) subjective intent was not relevant, and

(vii) there was no requirement to establish that tax was the main purpose rather it suffices if it was a main purpose. In this regard, the Appellant stated he was naïve and that it was clear that there was gearing of some type. He said the tax relief was significant factor but it was not his sole motivator. He stated that he understood the loan was applied for bona fide commercial purposes at the time of the investment and that this was still his belief. He said the investment had a number of factors one of which was the likelihood of tax relief on the interest which was a factor which was promoted to him.

(q) In light of the above, it was argued that the requirement that the arrangements did not have the main purposes of tax avoidance was not met.

(r) Further arguments were made as follows:

(i) The €50,000 investment was not correctly described as an option premium rather it was a fee paid to the scheme promotor which was paid predominately to achieve a tax benefit. When viewed objectively that was certainly the main purpose of the Appellant;

(ii) In relation to tax- free gain of €237,000 on the spreadbet and spot rate, it was argued that there was no objection to the tax-free nature of the gain but this does not mean the interest side of the transaction should be ignored. Furthermore, the gain was not retained by the investor which can be contrasted with the interest deduction which the investor kept;

(iii) In addition, it was argued that the "interest *deductions are the tail wagging the dog*" which was simply a consequence of having used the Turkish loan to get the interest deduction as confirmed by Name of Director of Promoter Redacted. The advantage of paying a higher interest rate was to amplify the interest deduction and rather than facing a foreign currency exposure most investors would want to hedge. The appeal did not relate to a non-taxable gain rather it relates to tax deductible payments of interest;

(iv) No evidence was provided in relation to how BES and other schemes work. The test to apply as drawn by TCA section 248(3) and TCA, section 817A was to ensure that the relief was jealously guarded to prevent abuse;

(v) The fundamental difference between this arrangement and "*normal*" i.e. non-tax driven arrangements was that the relief was for €250,000 and the expense was for €50,000;

(vi) It was agreed that a taxpayer can engage in transactions as he/she deemed fit with the important caveat that this was subject to the boundaries set out in legislation which was, this instance, set out in TCA, section 248(3) and TCA, section 817A. In relation to the latter provision it was pointed out that it simply looked at whether there was a benefit and that there was no requirement for tax avoidance to be established unlike TCA, section 248(3);

(vii) Reference was made to the *Willoughby* case which differentiates between tax avoidance and tax mitigation the latter which involves the tax payer availing of a fiscally attractive option afforded to him by tax legislation where he suffers the economic consequences that the Parliament intended to be suffered by those taking advantage of the option. It can be deduced in this regard that what the Oireachtas intended was that taxpayers who claimed relief for interest of €250,000 had incurred an expense as otherwise everyone would be doing Turkish loans in the future;

(viii) Reference was made to the *Seven Individual's* case as authority that alternative transactions should be considered in the wider context of the transactions in question;

(ix) The fact that the information memorandum presupposed the investors would have a sufficient level of income to absorb the relief was an indication that the scheme was tax motivated;

(x) It was argued that the criticisms levelled at Mr. Stanton were unfounded in that he viewed the transactions as a totality in reaching his conclusion that the returns would have to be very high to recoup the outlay of €50,000 and that gearing was significant as to the tax effect of the transactions.

55. *The absence of TCA, section 811 opinions*

(a) The absence of a response to the Appellant's TCA, section 811A Protective Notifications does not preclude reliance on TCA, section 248(3). The filing of a Protective Notification only affects the application of TCA, section 811 and TCA, section 811A.

(b) Furthermore, this ground was not included in the Appellant's notices of appeal. TCA, section 957(6) and TCA, section 949I(6) preclude the Appellant from raising it at this point.

(c) The Respondents have put the Appellant to proof that all the conditions of TCA, section 248 as extended by TCA, section 250 are complied with. In particular, the Respondents asserted as follows:

(a) the facts did not support the application of TCA, section 248(3) which applied to interest relief claimed under TCA, section 250(2). Under TCA, section 248(3), relief was denied unless the loan was applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which was the avoidance of tax;

(b) TCA, section 250(2)(a) was not met since this requires that the Appellant was a "part-time director" or a "full-time director" and that was not the case, and

(c) relief under TCA, section 250 was restricted as a result of TCA, section 248(2)(c).

56. *TCA, section 817A*

(a) The Respondents submitted that the sole or main benefit that was expected to accrue from the transaction in question was the availability of interest relief. TCA, section 817A was therefore in point and relief under TCA, section 248, as extended by TCA, section 250, was accordingly unavailable. There was no difference between TCA, section 817A and TCA, section 248(3) as to the meaning of 'scheme'.

(b) The correct application of the test set out in s817A was set out in *Curran* in the context of the UK's s787 Income and Corporation Taxes Act 1988. This was summarised by the First-tier Tribunal, upheld on appeal at [2017] STC 1170, in The *Brain Disorders Research Limited Partnership, Neil Hockin -v- The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 325 (TC) at [138] and [139]:

> *"[138] The Appellants' counsel claimed that section 787 was a provision of very narrow scope. He also contended, in reliance on Judge Berner's decision in Garrett Paul Curran v HMRC UKFTT 517 (TC), a decision that we were told that HMRC were not going to seek to overturn on appeal, that the right approach was that we should put onto scales the tax benefit on one side of the scales and the other benefits on the other side, and see which were the greater benefits. Only if the tax benefits outweighed any other benefits would section 787 then disallow the interest.*
>
> *[139] While the section addresses "the sole or main benefit that might be expected to accrue", and it does not address the taxpayer's main purpose, we consider it worth addressing the "scheme" notion implicit in the section by noting that between 2 March 2007 and 2 April 2007, the steps in the present scheme were materially changed. The reason they were changed was entirely to seek to circumvent the £25,000 limit for offset of losses against other income implicit in the original version of the scheme, by ramping up the borrowings, procuring a massive (and somewhat unrealistic) early payment of fixed royalties (i.e. the 57) which was entirely to be applied in pre-paying interest. One scheme for maximising the claim for capital allowances was thus to be blended with another scheme, for pre-paying interest. There was therefore clearly a "scheme"."*

(c) The benefits to be balanced are judged objectively.

(d) Objectively speaking, there are two possible advantages namely the availability of interest relief and exposure to a profitable property market. As to the first of those benefits, it was notable that the Appellant and the other Appellants partaking in the scheme all have income against which the relief can be offset meaning that the benefit can accurately be valued at the quantum of the relief. Placing these potential advantages on the scales, the evidence showed clearly that the tax advantage of a deduction of €256,531 outweighed the property market exposure.

(e) The Respondent made 8 points as to the parameters of TCA, section 817A as set out below;

(i) an objective test should be applied to determine what sole or main benefits of the transaction as established by the *Curran* case discussed above;

(ii) while it was not appropriate to apply hindsight to the transaction, one needs to assess the likely returns at the outset and compare them. *Name of Director of Promoter Redacted* was the only person who spoke about the valuation and that the anticipated value of the property could go to €15 million. There was no contemporaneous evidence provided. It was argued that it was in the interest of the promoters to keep the value low as this they would keep more of their €4 million fee;

(iii) the Appellant said he based his decision on the information memorandum and that he did not do any research in relation to Main Investment Property Name Redacted;

(iv) calculating the Appellant's share of the uplift in value of the property based on an increase in value to €15 million would be €21,875 which had to be compared to €110K in terms of the various returns;

(v) Mr. Smyth gave evidence that the further forward the prediction of growth rates the greater level of uncertainty arises;

(vi) Mr. Stanton gave evidence that derivative would need exceptional growth just to break even and that no contrary evidence was adduced;

(vii) the Appellant cites the slide in the bundle but this relates to a different derivative namely the derivative between PS and Barclays. Mr. Stanton's report concluded that at the peak of the index on the derivative from the return was €21,875 which when added to the return on the property gave on overall return of €43,000 which fell far short of the tax return of €110,000, and

(viii) the return on the commodities bond could be only €6,250.

(f) No evidence was provided in relation to the commodities bond and subjective intent was not relevant in this regard. The Appellant stated that he did not expect to make substantial gains on the commodities bond.

(g) In relation to the sole of main benefit of the transactions, the financial information did not suggest a return anywhere near as good as the tax. If the capital gains tax was factored in, the return of €43,000 would be further reduced.

(h) All those who participated in the investment did it for the tax and had the commercial return been attractive it could be expected to have investors who did not have the tax capacity to absorb the €250,000 interest deduction.

(i) Absent the tax the transaction was expensive. The Appellant's share of the of the capital guaranteed derivative between PS and the subsidiary was €34,000. He could have gone out and bought that derivative himself or Promoter could have organised this for €6,250 plus a return. The fact he paid a lot more indicated that he was paying for the tax benefit. This had to be considered in light of what happens on the other side of the transaction in terms of what was earned by Promoter which was €4 million less costs of implementing the scheme less 25% of the property increase which turned out to be nil. Assuming an increase in value of Main Investment Property Name Redacted to €15 million Promoter would be making a profit of €2.25 million less the costs of implementation.

(j) Risk needs to be considered and the possible returns on the investment carrying difference risk profiles. There was an indemnity solely in relation to the tax saving. In relation to the other returns there was considerable risk such that even after discounting the return of €43,000 for tax a further discount should be applied in light of the risk factor. When put to The Appellant that the return turned negative absent the tax saving he agreed that with the benefit of hindsight, he would not have proceeded unless he was assured a of very high return on the investments. He said he might have taken that view had he looked at it as carefully as he was currently doing.

(k) The scheme was marketed with emphasis in the information memorandum of a return of 126% all derived from tax. This was supported by a tax opinion. In contrast, there was only a handful of graphs in relation to the EPRA index and the commodities and nothing of significance was provided in relation to the value of Main Investment Property Name Redacted. The marketing material thus lead to the inference that the main benefit of the scheme was the interest relief and hence the lack of enquiry in relation to the other returns.

(l) The transaction mutated if the tax deduction was not obtained. In this eventuality, the interest rate on the commodities bond and the share loan adjust. Hence, the transaction changed in real time to meet the tax. The fact that there was an indemnification solely in relation to the tax saving indicated it was the main benefit of the transaction. The interest rate adjusts to ensure the return of €50,000 equity. Furthermore, *Name of Director of Promoter Redacted* was so confident as to the availability of the tax deduction he thought the indemnity would never be called on. The fact that a typical investor would have been attracted by the guaranteed tax saving was indicative that the tax was the sole or the main benefit of the transaction.

(m) An inference can be drawn from the non-production of the tax opinion.

(n) In light of the above points, TCA, section 817A was met as even without assessing the commercial benefits that the Appellant could have accessed these with the euro loan instead of which he went with the Turkish option. Hence, the sole or main benefit of the arrangements was tax. Looking at the wider transactions, the sole or main benefit read objectively was also the tax.

57. *Recovery of Capital; TCA, section 248(2)(c)*

(a) Relief, had it been available, would also have been affected by a failure of TCA, section248(2)(c). TCA, section 249(2)(a)(ii) explains the recovery of capital in the following terms:

> *"The investing company or the individual as the case may be (in this paragraph referred to as the "borrower") shall be treated as having recovered an amount of capital from the company concerned or from a connected company if –*
>
> *…(ii) the company concerned or a connected company repays that amount of a loan or advance from the borrower…"*

(b) The derivative between SNR and PS was in fact a loan documented as a derivative and therefore established a connection between SNR (and therefore NCR) and PS. As a result, they further contend that the annual withdrawals of principal from the Commodities Bond, which was issued by PS, represented "recoveries of capital" and therefore under the provisions of TCA, section 248(2)(c) the withdrawals would reduce the quantum of interest relief available.

(c) The "derivative" agreement was, as a matter of legal analysis, a loan as was evident once the labelling was put to one side:

(d) As a matter of cash flow, SNR make a payment of €36.3m on 5 December 2005 in return for a promise of a payment back by PS on 30 November 2009 again of €36.3 million plus an additional amount.

(e) It was noted in the Information Memorandum that: "*the original investment of €36,300,000 was 100% guaranteed by PS. Therefore, irrespective of the movement of the underlying index, the minimum value of the derivative at 30 November 2009 would be €36,300,000".*

(f) There was therefore a legal obligation to repay the principal sum. The agreement therefore related to money borrowed. SNR was therefore a loan creditor of PS for the purposes of TCA, section 432.

(g) Mr. Stanton was not asked to give evidence on the nature of the derivative as this was a matter of law. It was argued that a debt does not necessarily involve interest.

(h) It was submitted that PS derivative was a debt for money borrowed. The payments under the Commodities Bond made by PS to the Appellant amount to repayments of capital within TCA, section 249(2)(a) for the purposes of the 2005, 2006, 2007 and 2008 assessments on the basis that PS was connected to NCR during those periods. This analysis was clear from the following three points:

(i) there was no requirement that there be a nexus between the repaid loan or advance and the investment made in the ordinary share capital of the company;

(ii) PS and SNR were connected as a result of the Derivative Agreement, and

(iii) the Bond repayments were a recovery of capital by a party connected to the lender.

(i) As to the first point, that there was no requirement for there to be any nexus between the repaid loan or advance and the investment made in the ordinary share capital of the company. The Respondent noted that this interpretation was echoed in the broad wording used in much of the academic commentary on what constitutes a recovery of capital for the purposes of the almost identically worded UK provision, Section 407(1)(a)(iii) Income Tax Act 2007.

(j) Simon's Taxes at E1.831 explains the rule as follows:

> *"Where a loan has been applied in acquiring an interest in a close company, a co-operative, an employee-controlled company or a partnership, the relief may be restricted or discontinued if the claimant recovers any amount of capital from that body at any time after the loan is used…"*

(k) The same point was raised in Whiteman & Sherry on Income Tax at 18.207:

> *"Accordingly, it is provided that if at any time after the application of the proceeds of the loan the borrower has recovered any amount of capital from the close company, etc., or partnership without using that amount in repayment of his own borrowing, he is treated as if he had at that time repaid that amount out of the loan. Thereafter, relief will only be available on the total amount of interest payable less interest on the amount of capital so recovered."*

(l) The reference in the commentary to "any capital" was indicative of the breadth that this provision was intended to have.

(m) Various commentaries also include reference to the purpose of the amendments incorporated in the ITA 2007 when transposing the source legislation (s363, ICTA

1988). The change was explained in the ITA 2007 Explanatory Notes to TCA, section 406:

> *"The source legislation restricted the application of this rule to cases where the recovered capital was not applied in making a loan repayment. In cases where the recovered capital was so applied relief was, in strictness, lost completely. The rule has been rewritten to ensure that it applies in all cases where capital is recovered. See Change 74 in Annex 1."*

(n) This explanation indicated that capital recovery was not intended to be construed narrowly.

(o) In light of the commentary on analogous provisions, the correct approach was that there was no necessary nexus between the recovery of capital and the investment in the company. Indeed, it would be striking if this were the case and would give rise to a clear opportunity for abuse.

(p) For the purposes of the 2005, 2006, 2007 and 2008 assessments, SNR had control over PS as defined in TCA, section 432(2)(c) with the result that the payments made to the Appellant under the Commodity Bond fall within TCA, section 248(2)(c), thus reducing the availability of interest relief for those periods in accordance with TCA, section 249(1).

(q) The property derivative entitles SNR to the assets of PS. Control was established under TCA, section 432 where, on the winding up of PS, SNR would be entitled to the greater part of PS' assets distributable amongst participators. If SNR was entitled, from 5 December 2005 onwards, to €36,300,000, that will constitute the greater part of PS' assets for all material periods.

(r) In the Company Accounts for PS for the period ended 30 December 2005, PS had total assets less current liabilities of €59,500,024, all of which was divisible amongst "participators". On a winding up, SNR would be one such participator and entitled to 61% of these assets.

(s) In the Company Accounts for PS for the period ended 30 December 2006, PS had total assets less current liabilities of €54,284,676, all of which was divisible amongst "participators". On a winding up, SNR would as one such participator and entitled to 66% of these assets.

(t) In the Company Accounts for PS for the period ended 30 December 2007, PS had total assets less current liabilities of €49,773,442, all of which was divisible amongst "participators". On a winding up, SNR would as one such participator and entitled to 72% of these assets.

(u) In the Company Accounts for PS for the period ended 30 December 2008, PS had total assets less current liabilities of €45,205,589, all of which was divisible amongst “participators”. On a winding up, SNR would as one such participator have been entitled to 80% of these assets.

(v) It was submitted that the control test could be applied in the event of default or on a winding up and reliance was placed on the wording the derivative which referred to “ *in any other circumstances*” which indicated the wide breath to be given to the control test.

(w) The purposes of the control test in TCA 1997 subsection (10)(7) clearly applied to individuals and companies and that a company which controls another company was connected with that company.

ANALYSIS

58. The parties in the appeal raised 5 distinct issues:

Issue 1: Whether the 2005 Tax Assessment was made within time
Issue 2: The interaction of TCA, section 248 and TCA, section 250
Issue 3: The application of anti-avoidance provision TCA, section 817A
Issue 4: The effect of breaching Article 20e of Articles of Association of NCR
Issue 5: Was the Appellant a part-time director pursuant to TCA, section 250?

59. Before engaging in a review of the issues, it is appropriate to consider the Appellant's investment in NCR.

Investment Structure

60. The arrangements entered into by the Appellant were extremely complicated, a view shared by the Respondent's witness Mr Stanton, a leading expert in structures involving complex funding methodology.

Share Acquisition

61. The Appellant borrowed 800,000 Turkish Lira (TRY), on 5th December 2005 equivalent to €500,000, from Promoter to fund the acquisition of shares in NCR. Those funds were applied by NCR to acquire a Georgian building on Location Redacted and to acquire a financial derivative that tracked the performance of the European Property Real Estate Index (EPRA). Based on bank statements for NCR, the TRY 800,000 received from the Appellant was immediately converted by NCR into Euro.

62. Therefore, the proportion of the Appellant's investment relating to the acquisition of the Main Investment Property Name Redacted property and property derivative was €40,625 and €453,750 respectively.

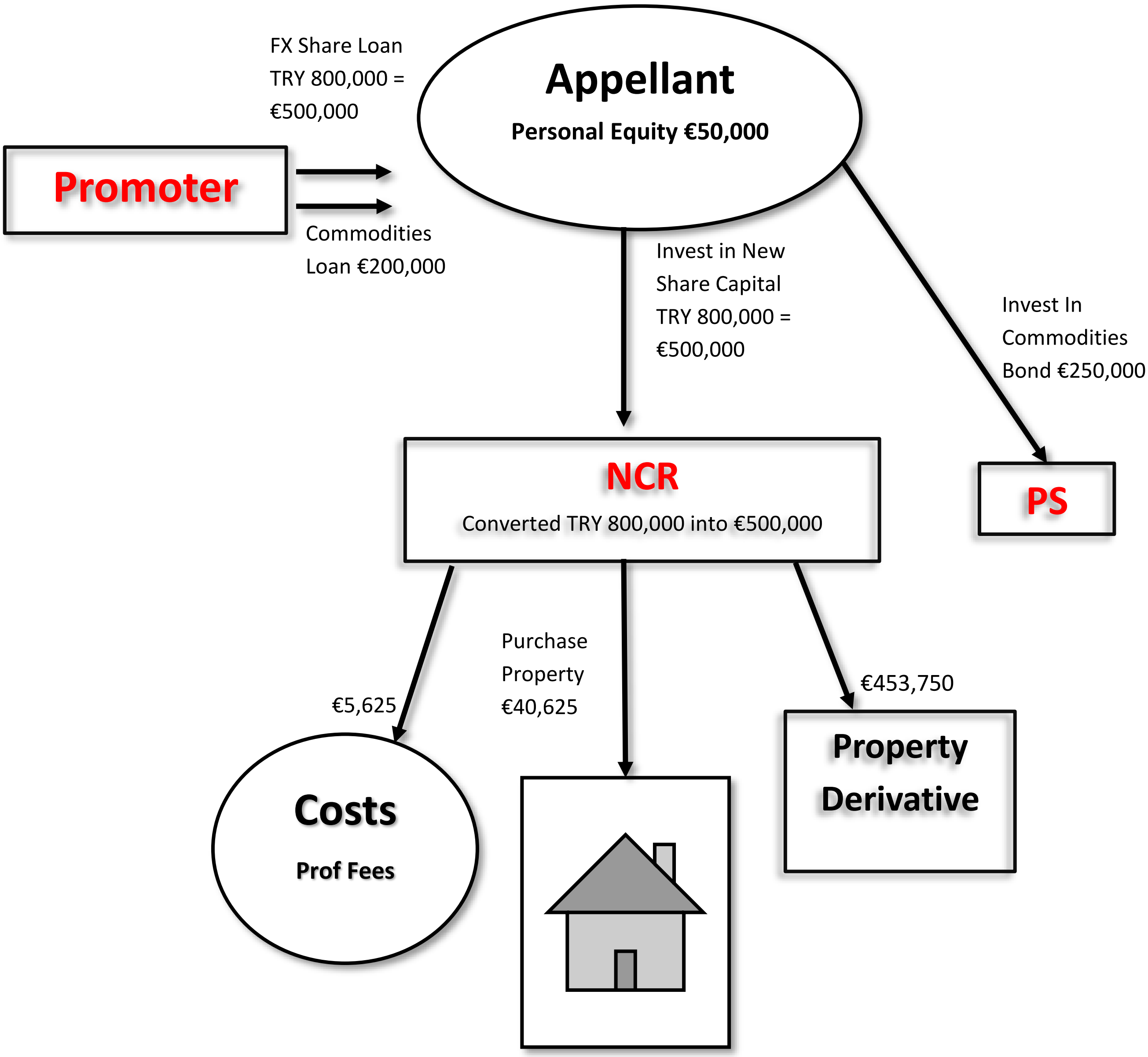
63. Interest on the share loan was payable in Euro and calculated with reference to an agreed forward exchange rate included in the loan agreement. Under the provisions of TCA, sections 248 and 250, the Appellant claimed relief for interest paid on the foreign exchange loan in his income tax returns for the years ending 31 December 2005, 31 December 2006, 31 December 2007 and 31 December 2008.

Commodities Bond to fund interest

64. In a connected but separate transaction, the Appellant also invested €250,000 in a bond with PS that paid interest annually and a return on maturity that was dependent on the performance of a basket of commodities. The Appellant funded this investment using a loan of €200,000 from Promoter and €50,000 from his personal resources. Thereafter,

the Appellant made annual withdrawals of principal from the Commodities Bond to fund the interest payments due under the foreign exchange loan. Interest earned on the Commodities Bond was included in the Appellant's income tax returns for all relevant years. Interest paid on the bond loan was not tax deductible by the Appellant.

65. In this regard, the relevant transactions undertaken by the Appellant can be summarised as follows:



Hedging Arrangement

66. In a further separate transaction, the Appellant hedged his foreign currency exposure on the share loan by entering into a spot trade and financial spread bet with Promoter.

67. The foreign currency loan of TRY 800,000 from Promoter carried an exchange rate risk, in that the Euro cost of repaying the TRY loan principal would not be known until the EUR/TRY exchange rate was set, which would only be known at the date of repayment. Whilst a high interest, depreciating, currency such as TRY, would be expected to realise a gain on repayment, the amount of gain, or indeed the possibility of this reversing into a loss were the risks inherent in taking out such a loan.

68. The hedging transactions matured on 30th November 2009. Due to the exchange rate fluctuations over the investment period, the cost of repaying the foreign exchange loan was €350,171 which was €149,829 lower than the Euro equivalent of the loan of €500,00 on drawdown. As the gain arose on the repayment of a liability, it was not subject to Capital Gains Tax as that tax only applies to gains arising on the disposal of chargeable assets. A profit of €87,663 was generated on the maturity of the financial spread bet. No tax liability arose on this profit as betting gains are not regarded as chargeable gains under the provisions of TCA, section 613(2).

69. In this regard, the currency fluctuation risks were removed by taking out a 100% hedge with Promoter such that the currency gain on repayment was fixed at the outset. The effect of the hedging transactions acted as a 100% hedge of the TRY 800,000 loan. The economic effect of the 100% hedge was to realise a fixed gain.

Wind up of Investment

70. On 5th December 2005, the Appellant entered into a put option agreement with Promoter, which enabled him to realise his investment by calling upon Promoter to purchase his shares. The price payable by Promoter for the shares was set at the original amount subscribed for the shares plus a proportionate share of 25% of any increase in the value of Main Investment Property Name Redacted over the initial reference level and a proportionate share of 75% of any increase in the value of the derivative over the investment period.

71. On 30 November 2009, by agreement between the parties, the Appellant's shares were redeemed by NCR. The price payable for the shares in NCR was equal to the original amount subscribed and a return of €2,147 was generated on the maturity of the Commodities Bond. This was in addition to the annual interest which was earned on the Commodities Bond.

***Issue 1:* Whether the 2005 Tax Assessment was made within time**

72. Notwithstanding the acceptance that the 2005 notice of amended assessment made by the Respondent was within the required statutory time limit of 31st December 2010, the Appellant argued that the receipt of that notice on 5th January 2011 meant that the tax payable on foot of the amended assessment became due and payable after 31st December 2010. Therefore, in accordance with the provisions of TCA, section 955(2)(a)(i), the earliest date that the tax could become due and payable was on 5th January 2011 and therefore the 2005 assessment was unlawful. Support for such an assertion was derived from *Droog* where at paragraph 7.4 Clarke J. determined that:

> *"section 955(2)(a)(i) says that no additional tax shall be payable by the chargeable person after the end of the relevant four year period".*

73. The Respondent also relied on the same judgment but placed significance on paragraph 7.6 where Clarke J. opined:

> *"In ordinary cases the raising of an assessment gives rise to an obligation to pay the tax or additional tax assessed subject only to the fact that, in certain cases, that obligation may be postponed or ultimately removed as a result of the appellate process."*

74. Notwithstanding both parties' submissions, the judgement in *Droog* must be considered in context. In that case, Clarke J. was concerned with the interaction between TCA, section 955 and TCA, section 811 and concluded at paragraph 9.1:

> *"For the reasons analysed in this judgment I am, therefore, persuaded that the trial judge was correct to conclude that the time limits contained in s.955 of the TCA apply in the case of s.811 and are not dis-applied by any sufficiently clear and unambiguous language in that section."*

75. Furthermore, the transactions in *Droog* were challenged approximately 9 years after the taxpayer had filed his tax return whereas in this appeal, the 2005 assessment raised on the Appellant was made on time. It is also relevant that the taxpayer in *Droog,* at the end of the 4 year period, thought that his affairs were closed whereas the Appellant never got that closure in relation to his tax affairs because he knew that the transaction was still under review by the Respondent.

76. In this context and contrary to the Appellant's submission, the wording of TCA, section 955(2)(a) is clear to the extent that it provides that:

"an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered"

77. Therefore, the restriction on the making or amending of an assessment within the prescribed 4 year period is with reference to the date the assessment was made or amended and not the date on which the notice of the assessment was served on the taxpayer.

78. Therefore, I agree with the Respondent that the wording of TCA, section 955(2)(a) did not set out a further limitation on assessments such that an assessment issued within 30 days of the end of the 4-year period is deprived of effect. This would be absurd and would have been set out quite differently and expressly if that was the intended effect.

79. Furthermore, the interpretation of TCA, section 955(2)(a) as impressed upon me by the Appellant would restrict the Respondent from making or amending an assessment to a period of 3 years and 11 months commencing at the end of the chargeable period in which the return was delivered to ensure that the tax becomes due within 4 years from the end of the tax year in which the return was filed. Such an interpretation would require that I ignore the express wording of the statute and to act contrary to the statutory wording.

80. In this regard, I am satisfied from the unchallenged evidence, that the assessment for 2005 dated 20th December 2010 was made within the prescribed time period notwithstanding it was only received by the Appellant's agent on 5th January 2011.

81. Fortification for my determination is derived from 2 UK cases of *Honig v Sarsfield* [1986] STC 246 and *Corbally-Stourton* [2008] STC (SCD) 907 which dealt with the interpretation of a corresponding restriction placed on HMRC officials. In *Honig*, Fox LJ determined at page 248 that "*the time limit imposed by the statute relates only to the making of assessments, and not to the service of assessments".* In *Corbally Staunton,* it was noted at page 926 that:

"in Barford -v- Durkin [1991] STC 7 the Court of Appeal held that an assessment was made by an inspector who took the decision to assess even though the assessment book was signed, at his direction, by another."

82. As such, tax is made payable by an assessment or amendment of an assessment irrespective of whether the tax itself is immediately payable. Therefore, I have found that the 2005 tax assessment was lawfully made on 20th December 2010 and within the time prescribed.

Issue 2: Interaction of TCA, section 248 and TCA, section 250

83. The application of the provisions of TCA, sections 248 in respect of the years under appeal, provided relief to an individual in respect of, *inter alia*, the interest paid on a loan to acquire shares in a trading or Irish rental company where that individual held an interest of more than 5% of the ordinary share capital of the company and had worked for the greater part of his or her time in the management or conduct of the business.

84. TCA, section 250 on the other hand, extends the entitlement to the relief, *inter alia*, to part-time directors and removed the requirement to hold more than 5% of the ordinary share capital.

85. The Respondent argued that the anti-avoidance and recovery of capital provisions within TCA, section 248 are to be applied to TCA section 250. However, I do not accept such an argument.

86. TCA, section 250 operates so as to afford relief "*by virtue*" of that section where the conditions set out therein are satisfied in a separate and discrete set of circumstances from TCA, section 248. The latter provision operates separately and is merely the mechanism by which relief is applied to the taxpayer. Therefore, provided that the claimant has satisfied the conditions in TCA, section 250 nothing further is required in order to secure relief.

87. It is also clear from a consideration of section TCA, section 250 that where the section intends to import wording, conditions or definitions from TCA, section 248, it does so to the extent that TCA, section 250(2) provides that the loan must be "*applied for a purpose specified in TCA, section 248(1)",* thus importing the purposes set out in that subsection into TCA, section 250.

88. Furthermore, TCA, section 250 is unambiguous and complete on a standalone basis in that it sets out the detailed conditions as follows:

    (i) the company is defined at subsections (1) and (2);

    (ii) the individual is defined at subsections (1) and (3);

    (iii) recovery of capital provisions are contained in subsection (2)(b) and further expanded at subsection (5)(d);

    (iv) definition of connected parties is set out in subsection (5)(a); and

    (v) *bona fide* type tests are considered in subsections (4) and (5).

TAX APPEALS COMMISSION

89. It is also relevant that specific provisions of TCA, section 248 which are required for the operation of TCA, section 250 are explicitly repeated in TCA, section 250. All other provisions in TCA, section 248 are ignored. In this context TCA, sections 250(3) and (4) specifically refer to relief being given "*by virtue of this section*". It is also apparent that if there is compliance with the requirements of TCA, section 250, to the extent that if the conditions specified therein are met, the entitlement to relief is mandatory.

90. The submission of the Respondent requires that I import wording from TCA, section 248 into TCA, section 250. However as observed by Finlay CJ in *McGrath v McDermott* [1988] IR 258 at page 566, the interpretation of:

> *"a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provision so as to achieve objectives which to the courts appear desirable"*

91. Furthermore, the language of TCA, section 250 is complete and standalone in setting out the conditions for relief. As expressed by O'Donnell J in *O'Flynn* at paragraph 74 that:

> *"…in some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. In other cases the provision may be so technical in detail so that no more broad or general purpose can be detected or may have its own specific anti-avoidance provisions…."*

92. Therefore, as TCA, section 250 has its own specific anti-avoidance and recovery of capital provisions, there is no mandate, by implication or otherwise to import such provisions of TCA 248 into TCA, section 250 without the express statutory authority.

Issue 3: The application of anti-avoidance provision TCA, section 817A

93. TCA, section 817A(1) is an anti-avoidance provision and provides:

> "*Relief shall not be given to any person under Part 8 in respect of any payment of interest, including interest treated as a charge on income, if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid is the obtaining of a reduction in tax liability by means of such relief."*

94. To determine whether the tax relief was "*the sole or main benefit that might be expected to accrue to that person from the transaction*", the parties agreed that an objective analysis be conducted.

95. In undertaking such an analysis, it is not necessary to find conclusive proof of the person's intent but to determine whether it was reasonable to conclude that the sole or main benefit of an arrangement was to obtain a reduction in a tax liability. If an arrangement was undertaken as part of a core commercial activity and the form of the arrangement was not driven by tax considerations or by obtaining a reduction in tax, it is unlikely that the sole or main benefit was to obtain a tax advantage. However, if an arrangement or transaction can only be reasonably explained by a tax advantage, it seems likely that the sole or main benefit was to secure the tax advantage.

96. Therefore, any potential investor seeking to invest in NCR would have placed significant reliance on the Information Memorandum prepared by the promoters. The Executive Summary on page 1 contains the main characteristics of the investment opportunity together with an outline of the following potential returns:

(a) 12.5% of the increase in the value of the commodities bond,

(b) 25% of the increase of the value of Main Investment Property Name Redacted,

(c) 75% of any profit arising from the property related capital guaranteed derivative and

(d) an after-tax return of 126.15% per annum on personal sums invested.

97. The Information Memorandum also contained a slide deck that included a slide entitled 'Financial Model' detailing cashflows predicting an after-tax return of €210,000 based on a share loan of €1,000,000 and a bond loan of €500,000. This analysis was predicated on the basis that the investor contributed €100,000 from his own personal funds.

98. However, the after-tax return of €210,000 was adjusted at the hearing when the Respondent highlighted an error in the slide to the extent that the after-tax return should be €110,000 as opposed to €210,000.

99. Notwithstanding the above, while the Information Memorandum was prepared on the basis that an investor had personal funds of €100,000, the promoters relaxed that requirement and permitted individuals including the Appellant to make a personal equity contribution of €50,000. Based on such a contribution, the following table is a modification of the 'Financial Model' slide included in the Information Memorandum of

the net cashflow of €110,000 to incorporate the Appellant's investment of €50,000 and the associated net cashflow of €55,000:

Financial Model Slide

	Personal Invest	Personal Invest
	€	€
	100,000	**50,000**
Share Investment	(1,000,000)	(500,000)
Sale of Shares	1,000,000	500,000
Bond Investment	(500,000)	(250,000)
Repayments of Principal from PS Bond	500,000	250,000
Payments of Interest from PS Bond	13,364	6,682
Drawdown of Share Loan	1,000,000	500,000
Principal Repayments on Share Loan	(519,926)	(259,963)
Interest Payments on Share Loan	(513,364)	(256,682)
Drawdown of Bond Loan	400,000	200,000
Principal & Interest Repay on Bond Loan	(480,074)	-240,037
Tax on Bond Investment Income	(5,613)	(2,807)
Tax Saved on Interest Paid on Share Loan	215,613	107,807
Net Cashflow	**110,000**	**55,000**

IRR After Tax 126.15%

100.Therefore, based on an objective review of the financial return, it is clearly evident that the Appellant would derive a gross income from the PS Bond of €6,682 and a tax benefit of €107,807 giving rise to an ultimate net gain of €55,000.

101.The Appellant would also have been entitled to 1.25% of:

(a) 25% of the uplift in the market value of Main Investment Property Name Redacted,
(b) 75% of the uplift in value of the property related capital guaranteed derivative and
(c) 12.5% of the increase in the value of the Commodities Bond at the end of the investment cycle.

102.No projections of potential returns from property and derivate investments were included in the Information Memorandum. However, and notwithstanding the lack of information, an objective investor would have considered the restriction on the returns and the limited opportunity to participate in the value of those investments. Furthermore, even if there was no return from such investments, the tax benefit was sufficiently attractive to persuade an objective investor to participate in the NCR scheme.

103.In determining whether the sole or main benefit was derived from a reduction in a tax liability, recourse can be made to *Brain Disorders Research Limited Partnership*, *Neil Hockin -v- The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 325 (TC), a decision involving a consideration of the corresponding UK provision to TCA, section 817A, where the following the test was formulated at paragraph 138:

> *"the right approach was that we should put onto scales the tax benefit on one side of the scales and the other benefits on the other side, and see which were the greater benefits."*

104.In the absence of projections relating to a return on Main Investment Property Name Redacted and the derivative, it is difficult to undertake the appropriate comparison. However as noted at the hearing by the Respondent, even if at the end of the investment cycle, Main Investment Property Name Redacted had nearly doubled in value to €15 million, the Appellant would have derived a gain of €21,875.

105.Correspondingly, exceptional growth would have been required in the property derivative but even at the peak of the index, the Appellant may have derived a return of €21,190 which when added to the return on the property would have given an overall return of €43,065 or €32,299 after the application of capital gains tax. Therefore, an estimate of the Appellant's total after-taxed return including the income from bond of €3,875 could have been €36,174.

106. Therefore, by placing on one side of the scales the tax benefit of €107,807 and generous expectations of the commercial benefits of €36,174 on the other, it is clear that the scales are disproportionately weighted in favour of the tax benefit. Therefore, one could only conclude that the sole or main objective of investing in NCR was to obtain a reduction in a tax liability and relief should be denied accordingly.

***Issue 4:* The effect of breaching Article 20e of Articles of Association of NCR**

107. The Appellant was appointed as a director of NCR on 5th December 2005. From the evidence adduced, he only attended one director's meeting on 7th December 2009 at which he resigned. However, and notwithstanding receiving notification of director's meetings, he failed to attend any of the following meetings:

(a) 21 February 2007

(b) 2 May 2007

(c) 20 August 2007, and

(d) 19 May 2009

108. The consequence for failing to attend the director's meetings from February 2007 invokes the application of Article 20 of the Articles of Association for NCR which provides, *inter alia*:

> *"The office of a Director shall be vacated:*
>
> ………..
>
> *(e) If he absents himself from the meetings of Directors for a period of six calendar months without special leave of absence from the other directors…."*

109. As such, the review of the six-month period of absence began on 21st February 2007 and ceased on 20th August 2007. During that period, the Appellant failed to attend 3 directors' meetings and failed to procure special leave of absence from the other directors. As such, his office was immediately vacated by operation of law.

110. I do not accept the submissions of the Appellant that special leave of the other directors was implicitly granted to the extent that the Appellant continued to receive notification of the directors' meetings and was listed as a director on all statutory documents up until the time of his resignation on 7th December 2009.

111. I also do not accept that the Appellant continued to act as a director by complying with his statutory duties under the Companies Act and fiduciary duties derived from common law. Such submissions bypass the mandatory obligation on a director of NCR not to be absent *"from the meetings of Directors for a period of six calendar months without special leave of absence from the other directors".* No evidence was adduced that the other directors approved special leave of absence.

112. The Appellant is therefore unable to rely on the failings of NCR to have notified the Companies Office or indeed to have amended its financial statements recording the fact that the Appellant had ceased to be a director. Furthermore, there was no evidence of any action to re-instate the Appellant as a director following his automatic disqualification in August 2007.

113. Therefore, under Article 20(e) of NCR's Articles of Association, a mandatory provision imposed on all directors of NCR, the Appellant was disqualified from acting as a director in respect of the years of assessments for 2007 and subsequent years due to his failure to attend a directors' meeting "*for a period of six calendar months without special leave of absence from the other directors*." Therefore, the relief pursuant to TCA, section 248 as extended by TCA, section 250 is denied in respect of the years of assessments for 2007 and subsequent years under appeal.

Issue 5: Whether the Appellant was a part-time director pursuant to TCA, section 250

114. TCA, section 250(1) provides the following definitions:

> *"full-time employee" and "full-time director", in relation to a company, mean an employee or director, as the case may be, who is required to devote substantially the whole of his or her time to the service of the company;*
>
> *"part-time employee" and "part-time director", in relation to a company, mean an employee or director, as the case may be, who is not required to devote substantially the whole of his or her time to the service of the company;*

115. The relief afforded by TCA, section 250 expressly requires that the role of a director is to be performed by an individual engaged as either a "*part-time*" or "*full-time*" director. The two classifications share the characteristic to the extent that time must be spent on the directorship duties but differ only in terms of the extent to which time must be so spent.

116. The definition of "*part-time director*" sets an upper limit for the time spent in the performance of directorship duties which, if surpassed, would render the role as one of *"full-time"* director but does not set out any lower limit for the time required to be devoted to the company. Therefore, while a "*full-time*" director is required *"to devote*

substantially the whole of his or her time to the service of the company" the level of time input, though while reduced, is not extinguished for "*part-time*" directors. Therefore, there is a statutory obligation to at least perform some duties.

117. As such the Appellant was not a "*part-time director*" merely because the relevant appointment formalities were met. The context and purpose of TCA, section 250 indicate that more than a mere formal nomination as director is required.

118. Furthermore, from a review of the evidence, the Appellant's role was unremunerated and, in accordance with the appointment letter, the only specific duties he had as a "*non-executive director*" were to prepare for and attend at board meetings, which he did not do. Indeed, the Appellant agreed that he was not required to do very much as a director. The fact that his name appeared on the list of directors was not sufficient to confer on him the status as a *"part-time director"*.

119. Therefore, as the Appellant did not perform any duties as a *"part-time director"* as required by TCA, section 250, the relief for the interest paid on the loan to acquire the shares in NCR is not available for all years under appeal.

Determination

120. Having considered the evidence and the submissions of the parties, I have found that:

a) the 2005 tax assessment made by the Respondent was lawfully made within 4 years from the end of the chargeable period in which the return was delivered and therefore the tax arising on same is due and payable in light of my findings below;

b) to import the anti-avoidance and recovery of capital provisions within TCA 248 into TCA, section 250 as submitted by the Respondent would be to act contrary to the express statutory wording contained within TCA section 250 and therefore contrary to the Constitutional scheme;

c) the marketing material on which an objective investor would have placed reliance, shows that the Investor's return on investment was predominately generated by the tax relief. In this regard, one could only conclude that the sole or main objective of investing in NCR was to obtain a reduction in a tax liability. As a consequence, the relief is denied pursuant to TCA, section 817A for all years under appeal;

d) under Article 20(e) of NCR's Articles of Association, the Appellant was disqualified from acting as a director in respect of the years of assessments for 2007 and subsequent years due to his failure to attend a directors' meeting *"for a period of six calendar months without special leave of absence from the other directors"*, and therefore relief is denied in respect of the years of assessments for 2007 and subsequent years under appeal;

e) the Appellant did not perform any active duties as a "*part-time director"* as expected by TCA, section 250 and therefore could not be considered to be a "*part-time director*." As such, the relief for the interest paid on the loan to acquire the shares in NCR for all years under appeal is denied.

Conclusion

24. In light of the above, the assessments for the years ended 31st December 2005 to 31st December 2008 inclusive stand. This appeal is therefore determined in accordance with TCA, section 949AK.

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Conor Kennedy
Appeal Commissioner
15th October 2019

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