AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

103TACD2023

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against a Notice of Determination on the tax treatment of the forgiveness of a loan facility of €6,043,555 for the accounting period ending 31 October 2016. The Notice of Determination was issued by the Revenue Commissioners (hereinafter the "Respondent") on 25 May 2021 and indicated that the Respondent had determined that the forgiveness of the €6,043,555 loan facility should be treated as taxable income.

2. The amount of tax in dispute in this appeal is €755,445.

Background

3. [redacted] (hereinafter the "Appellant") is an Irish registered private company limited by shares which is involved in the purchase and development of lands for residential housing.

4. On 5th December 2006 the Appellant received a loan offer for a bridging term loan of €9,500,000 (hereinafter the "Loan") from [redacted] (hereinafter the "Bank'') to finance the purchase of a site of [redacted] acres at [redacted] (hereinafter the "Site"). The Loan was subsequently drawn down by the Appellant on 29 January 2007.

5. The Loan was approved for a period of 15 months and was to be reduced by way of site fines in the sum of €100,000 per site from the sale of remaining residential units in a separate development owned by the Appellant known as the [redacted] development, also in [redacted]. The security given for the Loan was as follows:

   i. Legal charge/mortgage over [redacted] residential units in the [redacted] development;

   ii. Floating debenture over the Appellant's assets and undertakings to incorporate a fixed charge over the Site; and

   iii. Such insurance as required by the Bank.

6. The Appellant's intention was to develop the Site with residential houses.

7. Following the purchase, the Appellant did not develop the Site and held it instead as trading stock.

8. The Loan was serviced by the Appellant and capital repayments in the amount of in or around €3,500,000 were made.

9. A significant proportion of the Loan remained outstanding before it was forgiven by the Bank in June 2016. An amount of €6,043,555 was forgiven, net of a settlement amount of €250,000 which the Appellant paid to the Bank.

10. In its' income statement for the financial year ended 31 October 2016 the Appellant's gross profit on a turnover of €541,850 was €15,350. The forgiveness of debt was included in the Appellant's income statement as a credit sum below the gross profit line on the basis that the amount of the debt write off did not represent a trading profit.

11. The forgiveness of debt of €6,043,555 was not included as taxable income in the Appellant's Corporation Tax return for the financial year ended 31 October 2016. Trade tax losses were carried forward from the year ended 31 October 2015 in the sum of €7,187,270.

12. A Notice of Determination was issued by the Respondent on 25 May 2021 wherein the Respondent indicated that it had determined that the forgiveness of the Loan amounting to €6,043,555 should be treated as taxable income on the date of the forgiveness, that is to say June 2016.

13. The Respondent's determination resulted in the losses carried forward in the amount of €7,187,270 as at 31 October 2016 being reduced by €6,043,555 to €1,143,714.

14. On 24 June 2021, a Notice of Appeal was submitted to the Commission by the Appellant.

Legislation and Guidelines

15. The legislation relevant to this appeal is as follows:

Section 76(1) of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997")

"*Computation of income: application of income tax principles.*"

"(1)Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment."

Section 76A(1) of the TCA1997

"*Computation of profits or gains of a company – accounting standards*"

"(1) For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes."

Section 87(1) of the TCA1997

"*Debts set off against profits and subsequently released*"

"(1) Where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade or profession arising in the period in which the release is effected."

Submissions and Witness Evidence

Witness Evidence

16. The Commissioner heard oral evidence from Mr [redacted] who is the Finance Director of the Appellant and is also a Chartered Accountant. Mr [redacted] stated that he has worked for [redacted] for 30 years.

17. Mr [redacted] stated that the Appellant is a special purchase company which was set up under the [redacted] group structure. He stated that the Appellant was incorporated in [redacted] for the purpose of buying and developing lands at [redacted] In [redacted] on which planning permission for [redacted] houses was subsequently granted to the Appellant. Mr [redacted] stated that the Appellant was established with 2 shares and €2 of called up capital. He stated that this was not unusual as special purchase vehicles for property development would have been set up for a specific project which would be funded by bank debt. The purchase of the lands was financed by a loan from the Bank.

18. The Appellant appointed [redacted] as the building contractor for the [redacted] project and in or around [redacted] houses per annum were then built. The construction of the houses was financed by additional loans from [redacted]. Following construction of the houses, the Appellant sold the houses and repaid the loans associated with the project

by way of site fines. Mr [redacted] stated that the [redacted] project had gone well from a banking and commercial point of view and the finance had been fully repaid to the Bank.

19. In 2006 the Appellant was successful in a tender process to purchase the Site and the Appellant secured the tender to purchase the site for €8,600,000. There was no existing planning permission on the Site which comprised of [redacted] acres with 19 of those acres already zoned as residential.

20. Following discussions and a brief application process with the Bank, the Loan offer for a Bridging Term Loan of €9,500,000 for the purpose of purchasing the Site was issued to the Appellant on 5 December 2006. The terms of the Loan were as follows:

    i. Loan period of 15 months;

    ii. To be reduced by way of site fines of €100,000 per site from the sale of the remaining residential units in the [redacted] development;

    iii. Interest accruing to be reduced by way of a standing order from the Appellant's current account on a quarterly basis;

    iv. Interest fixed for 15 months at 3.99%;

    v. The following security applied:

        1. Legal Charge / Mortgage over [redacted] residential units in the [redacted] Development which were held in the Appellant's name;

        2. Floating debenture over the assets and undertakings of the Appellant to incorporate a fixed charge over the Site;

        3. Such insurance as required by the Bank.

21. Mr [redacted] stated that following the drawdown of the Loan and the purchase of the Site, it had been the Appellant's intention to apply for planning permission on the Site. However, due to the economic crisis which emerged shortly after the purchase of the Site, the Appellant did not apply for planning permission on the Site.

22. In relation to the repayment of the Loan, Mr [redacted] stated that the term of the Loan was extended on a number of occasions between 2008 (when the initial 15 month term of the Loan elapsed) and 2016. He stated that the interest payments were always made by the Appellant and that, between the drawdown of the Loan until the forgiveness date in 2016, the Appellant had repaid somewhere in the region of €2,100,000 in interest to the Bank. In addition, between 2007 and 2015 the Appellant sold the [redacted] residential units which it

held in [redacted] and had paid 100% of the net value of those sales to the Bank. He stated that the Appellant had repaid the amount of in or around €3,500,000 in capital repayments to the Bank, thereby reducing the balance of the Loan from €9,500,000 at drawdown to €6,043,555 in June 2016.

23. Mr [redacted] stated that all of the houses in the [redacted] project had not sold prior to the economic crash. In circumstances where it was not possible to sell those houses for some time, the Appellant rented the houses out and applied the rental income received to making repayments on the Loan. He stated that once it was possible to do so, the remaining houses in the [redacted] project were sold and the monies received for those properties were applied to the repayment of the Loan. The last of these house were sold in 2015.

24. Mr [redacted] stated that in 2006 the Site was valued at €8,600,000 and in 2016 the Site was valued at between €180,000 and €198,000 which he stated represented agricultural land value at that time. The Site was put up for auction in 2016 with an advised minimum value of €180,000 but did not sell having received one bid of €170,000.

25. Mr [redacted] stated that at that stage there was nothing else the Appellant could do in terms of repaying the capital amount to the Bank. All of the properties at [redacted] had been sold and the Site could not be sold. The only asset which the Appellant held at that point was the Site. Discussions between the Appellant and the Bank took place and the Appellant decided to offer to pay €250,000 to the Bank in order to bring the whole "fiasco" to a close, representing an excess of €80,000 more than the Site could achieve at auction.

26. Mr [redacted] stated that in 2017 the Appellant had transferred the Site to [redacted] He stated that the reason for this was that in 2017 the Appellant had purchased another site in [redacted] for which it required bank financing. He stated that the bank financing the purchase of the site in [redacted] required a debenture over all of the Appellant's assets. He stated that in order to avoid the bank having a debenture over the Site, the Appellant transferred the Site to [redacted].

27. In relation to the [redacted] site, Mr [redacted] stated that the Appellant subsequently applied for and was granted planning permission for a "few hundred" houses on it. He stated that, having been granted planning permission, it had been the Appellant's intention to build the houses however a house builder made an offer to the Appellant to purchase the site. The Appellant then sold the site to the house builder in or around 2018 or 2019.

28. He stated that in the Financial Statements for the year ended 31 August 2007 the Appellant's Balance Sheet contained the outstanding Loan amounts at Notes 10 and 11. Note 10 which was entitled "*Creditors: amounts falling due within one year*" contained an amount of €1,949,026 relating to the Loan. Note 11 which was entitled "*Creditors: amounts falling due after one year*" contained an amount of €5,350,974 relating to the Loan. When asked by the Appellant's Senior Counsel to comment on this, Mr [redacted] stated that he was of the opinion that the total amount of the Loan should more properly have been contained in Note 10 as the entire amount of the Loan was repayable in 2008.

29. He stated that for the year ended 31 August 2007 the Appellant recorded a profit of €1,744,730 and for the year ended 31 August 2008 the Appellant recorded a loss of €3,121,169. He stated that this reflected the state of the business at that time and stated that sales had decreased in addition to the Appellant's stock, that is to say the remaining houses in the [redacted] development and the Site, being revalued downwards. The Appellant, he stated, did not return into a profit making position between 2008 and 2016.

30. Mr [redacted] stated that the Appellant's Balance Sheet in 2015 showed net liabilities of €6,616,076 and in 2016 the Appellant's Balance Sheet showed net liabilities of €600,280 which was a reflection of the debt write off received from the Bank in June 2016.

Appellant's Submissions

31. The Appellant submitted that the forgiveness of the outstanding Loan facility was not taxable income of the Appellant. Rather, the Appellant submitted that the forgiveness of the outstanding loan facility was a transaction on capital account.

32. The Appellant submitted that for the purposes of Case I or II of Schedule D of the TCA1997, the profits and gains of a trade or profession are computed in accordance with the provisions of section 76(1) of the TCA1997 which provides:

> "*Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions of the amounts which are or are not to be taken into account as income or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment.*"

33. The Appellant also submitted that Section 76A(1) of the TCA1997 provides that:

"*For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.*"

34. The Appellant submitted that the effect of section 76A(1) of the TCA1997 is not blindly to follow accounting standards but to subject them to any adjustment required or authorised by law.

35. The Appellant submitted that section 76A of the TCA1997 refers to "*profits or gains of a trade*". Profits in case law, the Appellant submitted, are seen as profits relating to the trade and represent the difference between the amount earned and the amount spent in buying, operating or producing something.

36. The Appellant submitted that in the Supreme Court decision of *Birch v Delaney* [1936] IR 517 at 535 per Fitzgibbon J, it was reiterated that income tax is a tax on income following the decision of the House of Lords in *London County Council v A.G.* [1901] AC26. The Appellant submitted that, as a result, only receipts of an income or revenue nature arising from that trade may be included in computing the taxable profits of that trade and that capital receipts must be excluded from the computation.

37. The Appellant referred to the House of Lords decision in *Gresham Life Assurance v Styles* [1892] AC 309 in which it was held that profits must be ascertained on the ordinary principles of commercial accountancy by setting against income the cost of earning it.

38. The Appellant also referred to *Cronin v Cork & County Property Co* Ltd [1986] IR 559 where the Supreme Court accepted as a correct statement of principle, the following words of Clyde LJ in *Whimster & Co v* IRC (1925 12 TC 813 (Inner House) at 823:

"..the account of profit and loss to be made up for the purpose of ascertaining that difference [between receipts and expenditure] must be found consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Acts."

39. This, the Appellant submitted, echoed what Budd J had said in the Supreme Court in *Dolan v AB* [1969] IR 282 (hereinafter "*Dolan*") at 379:

"*I do consider that due weight should be given to the tests applied in business and there seems no reason why best accountancy practice should not be accepted in arriving at the appropriate figure for profits and gains unless it be shown that the*

deductions taken into account are prohibited or are in some way not allowable for income tax purposes."

40. The Appellant submitted that the effect in section 76A of the TCA1997 of the phrase "*subject to any adjustment required or authorised by law in computing such profits or gains for those purposes*" places the same limitation on the use of accountancy principles as has been enunciated in case law prior to any statutory provision.

41. The Appellant submitted that it is the case that where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then if the whole or any part of that debt is thereafter released, the amount released is treated as a receipt of the trade or profession arising in the period in which the release is effected.

42. The Appellant submitted that section 87(1) of the TCA1997 provides:

"*Where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade or profession arising in the period in which the release is effected.*"

43. The Appellant submitted that this does not apply in this appeal because no tax deduction has ever been claimed or taken, or could have been claimed or taken, by the Appellant.

44. It was submitted that in the income statement for the financial year ended 31 October 2016, the Appellant's gross profit on a turnover of €541,850 was €15,350. In accordance with Financial Reporting Standard 102 the forgiveness of debt was brought into that income statement, and was included as a credit sum below the gross profit line on the basis that the amount of write off did not represent a trading profit. Accordingly, it was not included as taxable income in the Appellant's corporation tax return for the financial year ended 31 October 2016.

45. The Appellant submitted that while section 76A of the TCA1997 requires company profits to be computed for Case I *"in accordance with generally accepted accounting practice*" that principle is qualified in a very important respect namely "*it is subject to any adjustments required or authorised by law in computing such profits or gains for those purposes*".

46. The Appellant submitted that whether a receipt is a capital receipt or a revenue receipt will not necessarily be determined by where the receipt appears in the accounts if the

legal analysis is at variance with this. The Appellant referred to the High Court decision of *Carroll Industries plc v Culacháin* [1988] IR 705 in that regard.

47. The Appellant submitted that the issue of whether the receipt is capital or income has still to be ascertained regardless of where it appears in a company's accounts as only a revenue receipt goes into the computation of income for corporation tax purposes. The Appellant submitted that the fundamental point is that the accounting treatment must be in conformity with tax law. If it is not then it must be adjusted in the tax computation.

48. In drawing the distinction between capital and revenue receipts, the Appellant submitted that there is "*no single infallible test*" as stated by MacDermott CJ in *Harry Ferguson (Motors) Limited v IRC* (1951) 33 TC15. In *Dolan* (albeit about whether a deduction rather than a receipt was capital or income) O Dálaigh CJ said:

> "*There is no statutory definition of "capital" or "revenue" and the problem which faces the Court is therefore one of characterisation or classification. In the absence of parliamentary wisdom and guidance in this field, the most the courts have been able to do has been to commend an analysis of transactions in question and to indicate a number of heads under which the transactions can be usefully examined. These heads are 'essentially descriptive rather than definitive.'"*

49. The Appellant submitted that the Loan remained in place for ten years before it was forgiven by the Bank. The Loan had been taken to finance the acquisition of development sites and would, in the normal course of events, have been refinanced to assist in the development of the property. The Appellant submitted that the Loan was advanced as capital with the Bank taking security including a debenture from the Appellant. The fact that the profit on the development would be trading profit would not have the effect of rendering the Loan as anything other than capital.

50. The Appellant referred to the decision of the Federal Court of Appeal in Canada in *Queenswood Land Associates Ltd v Canada* [2000] DTC 6065 where it was held that where a company borrows money from its bankers to finance the acquisition of assets, the debt is on capital account and where that debt is forgiven by the bank it has no impact on its taxable profit in that year.

51. The Appellant submitted that the enduring benefit of capital is one of its prime features. In the House of Lords decision in *Atherton v British Insulated and Helsby Cables Limited* [1926] AC 205 (HL) at 213-4 (albeit an expenditure case but the principle is the same), Viscount Cave LC observed that:

"*…when expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade I think there is very good reason (in the absence of circumstances leading to an opposite conclusion) for treating such expenditure as properly attributable not to revenue but to capital.*"

52. In that case the company had claimed a deduction, in computing its profits for income tax purposes, for a lump sum which it had contributed irrevocably as the nucleus of a pension fund established by trust deed for the benefit of its clerical and technical staff. The Court held that the sum was not an admissible deduction in arriving at the company's profits for income tax purposes.

53. In *Davies v The Shell Company of China Ltd* (1951) 32 TC 133 agents' deposits against default were left with the taxpayer company which made a foreign exchange gain in respect of them. It was found by the Special Commissioners that the exchange profit was a capital profit and not subject to income tax and this was upheld on appeal to both the High Court and the Court of Appeal. Jenkins LJ said at page 157

"*…I find nothing in the facts of this case to divest those deposits of the character which it seems to me they originally bore, that is to say the character of loans by the agents to the Company with a security but nevertheless loans. As loans it seems to me they must prima facie be loans on capital not revenue account; which perhaps is only another way of saying that they must prima facie be considered as part of the Company's fixed and not its circulating capital.*"

54. In *European Investment Trust Co Ltd v Jackson* (1932) 8 TC 1 (hereinafter "*European Investment Trust Co Ltd*") a company bought motor cars and sold them on hire purchase with capital of £1,000 and £10,000 borrowed from its parent company and then borrowed further large sums from its parent as and when the company purchased motor cars. The advances for the purchase of motor cars were paid out of the hire purchase instalments as and when they were received. The monies advanced were held to be employed as capital in the trade.

55. In *Beauchamp v FW Woolworth plc* [1989] STC 510 (hereinafter "*Beauchamp*") the tax treatment of foreign exchange losses on the repayment of loans was considered and a deduction for the losses was not allowed in computing taxable income because the borrowing was capital. Templeman LJ observed that:

"*in a rough way, it is not a bad criterion of what is a capital borrowing to say that capital borrowing is a thing that is going to be spent once and for all, and income borrowing is a thing that is going to recur every year*."

Respondent's Submissions

56. The Respondent did not adduce any witness evidence to the Commissioner.

Section 76A of the TCA1997

57. The Respondent submitted that the Appellant booked the debt release as income in its 2016 Profit and Loss account as "exceptional income" and therefore, pursuant to section 76A(1) of the TCA1997, should have included it in the calculation of taxable profit for that period.

58. The Respondent submitted that the write off of the loans amounts to a credit which Section 76A requires be treated as a Case I receipt. Section 76A of the TCA1997 sets out the methodology for computing Case I and Case II profits and applies to:

    (i) income which is revenue in nature and arising from carrying on the trade or profession; and
    (ii) expenditure which is revenue in nature and incurred in the carrying on of the trade or profession.

59. The Respondent submitted that the taxable amount under Case I or Case II of Schedule D is the amount of the profit or loss booked for that period in the Profit & Loss Account and this is legislated for in section 76A(1) of the TCA1997. The calculation, the Respondent submitted, can be adjusted if legislated for in the TCA1997, however, the legislation does not legislate for the reversing of the accounting treatment of any bank debt forgiveness in the tax computation.

60. The Respondent submitted that in calculating Case I income, companies are obliged to follow their accounts prepared in accordance with generally accepted accounting practice unless an adjustment is required or allowed / authorised by law.

61. The Respondent submitted that the Courts are slow to accept an argument that accounts prepared in accordance with accepted principles of commercial accounting are not sufficient for tax purposes as a true statement of the profits for the period. This was the conclusion of the courts in *Johnston v Britannia* (1994) 67 TC 99 3 and *Threlfall v Jones* (1994) CH 107. The importance attaching to accounting treatment was underlined in

Revenue and Customs Commissioners v William Grant & Sons Distillers Limited and Small (Inspector of Taxes) v Mars UK Limited [2007] STC 680.

Section 87 of the TCA1997

62. The Respondent submitted that section 87 of the TCA1997 outlines the basis on which the write off of trading balances can give rise to a taxable receipt. The Respondent submitted that section 87 of the TCA1997 provides that where any debt has been allowed in the computation of profits or gains of a trade and where that debt is subsequently released, the amount of the debt released is treated as a receipt arising the period in which the release takes place. A trading receipt will arise where a corporation tax deduction was previously allowed for the expenditure incurred on creating the trading balance.

63. The Respondent submitted that section 87(1) of the TCA1997 applies in this instance and the amount of the debt forgiveness should be included in the calculation of the taxable profits for the period in question. The write off of a trading loan gives rise to a taxable trading receipt for the recipient of the write off and is subject to Corporation Tax.

64. The Respondent submitted that the Corporation Tax treatment of a debt write off depends on the original purpose of the loan. The Respondent submitted that the Loan funds that are the subject of the debt release (€6,043,555) were used by the Appellant to fund the trading activities of the company and, if the assets were not impaired, the cost of the assets purchased would have been allowed as a deduction as a "Cost of Sales".

65. The Respondent submitted that as the assets, which were financed by the Loan, were impaired, a tax deduction was taken when the impairment was booked in the accounts. Therefore, Section 87(1) TCA 1997 applies and the amount of the debt forgiveness should be included in the calculation of the taxable profits for the period in question.

66. The Respondent submitted that the purpose of the bank borrowing at issue in this case was to fund the Appellant's trade (i.e., the purchase of land for development), in effect, to help the Appellant company carry out its trading activities, therefore, the Loan was of a "revenue" nature .

67. The Respondent submitted that loan capital will be employed as capital in a company's trade if it represents an accretion to the capital of the company, borrowed on a permanent footing such that "the capital of the concern is in a commercial sense enlarged thereby and the business extended" as held *Beauchamp*, citing *Scottish North American Trust v Farmer* 5 TC 693 (hereinafter "*Scottish North American Trust*").

68. The Respondent submitted that money borrowed by way of a "temporary accommodation", on the other hand, is not "employed as capital' in the borrower's trade as held in *European Investment Trust Co Ltd* and in *Beauchamp.* In *Scottish North American Trust* Johnston LJ found that an overdraft facility is not regarded in commercial circles as part of the “capital” “employed” in a company's trade.

69. The Respondent submitted that the purpose of the loan concerned is of paramount importance. In the House of Lords decision of *Farmer (Surveyor of Taxes) v Scottish North American Trust Limited* [1912] AC 118, although the House of Lords did refer to the temporary and fluctuating manner in which the moneys concerned were borrowed, the focus was on the fact that the purpose of the loans was centred on revenue (as opposed to capital) purposes.

70. The Respondent submitted that the purpose for which the loans concerned were taken was the focus of the English High Court decision of *Ascot Gas Water Heaters, Ltd v Duff (H Inspector of Taxes)* (1942) 24 TC 171. In the English Court of Appeal decision in *European Investment Trust Co Ltd* Finlay J (at first instance, and whose decision was affirmed on appeal) did refer to the concept of temporary accommodation. However, he also referred at paragraph 12 to the contrasting situation where there is an accretion to the capital structure of the company, in as much as the taxpayer obtains "*sums which are used as capital and nothing else*".

71. The Respondent referred to Maguire, "*The Taxation of Companies*” (2022, Bloomsbury) (hereinafter “*Maguire*”) at page 151 where he says:

> "*Thus, the basis for the capital v revenue distinction in relation to borrowings would be the use to which the borrowings are put in the relevant period.*"

72. The Respondent submitted that, notwithstanding the decision of Templeman LJ in *Beauchamp*, in Ireland the question of whether loans were revenue transactions or accretions to capital is one of fact. The Respondent referred to the judgement of Murphy J in the High Court limb of *Brosnan v Mutual Enterprises Ltd* [1997] 3 IR 257 (hereinafter “*Brosnan*”) that:

> "*Whether accommodation is 'fluctuating' or 'temporary' is to my mind demonstrably a question of fact to be determined by all of the relevant circumstances of the case." This finding was not interfered with in the Supreme Court appeal*.”

73. The facts in *Brosnan* were that in 1979, the respondent obtained a loan of monies in sterling, payable "on demand" from a bank to facilitate the purchase of a business

premises from which it was intended to carry on its trade. The monies were used for the purchase of a premises but the sterling debt was converted from time to time into various European currencies to achieve the best possible rate of interest payable. As a result of these currency dealings, the company incurred substantial losses. Revenue sought to include the losses incurred on the foreign currency transactions in computing the trading profits and allowable losses for corporation tax purposes. The appellant argued that as the monies were borrowed for the purpose of acquiring a capital asset, any losses incurred on foreign currency dealings with the monies were capital losses and were not allowable trading losses. That issue was determined in favour of the respondent by the appeal commissioner. On appeal to the Circuit Court, the Circuit Judge formed the opinion that the losses were not of a capital nature or intended to be employed as capital in the company's trade and that they were connected with the trade and were therefore allowable. The applicant was dissatisfied with the determination and the Circuit Court Judge Stated a Case for the opinion of the High Court as to whether his decision was correct in law.

74. Murphy J in the High Court found that the Circuit Court Judge was correct and that in deciding whether losses were of a revenue or capital nature, all relevant facts must be taken into account. Murphy J found that an important factor to be considered in determining whether a bank loan was of a revenue nature, rather than of a capital nature was whether it was a fluctuating and temporary accommodation, the weight to be attached to these factors was a question of fact to be determined by the appeal commissioners as they thought fit. Murphy J held that it could not be said that "*no reasonable judge of first instance*" could have concluded on the facts as a whole that the loans were a means of fluctuating and temporary accommodation.

75. On appeal to the Supreme Court by Revenue, the appeal was dismissed, with Hamilton CJ finding (approving *Scottish North American Trust*) that where a loan was a capital transaction, any accompanying currency exchange loss was a capital loss and was not deductible from profits; but where the loan was in the nature of a revenue transaction, then the currency exchange loss was deductible in computing the respondent's profits. In determining whether a loan was a revenue transaction the test was whether it constituted a temporary and fluctuating borrowing.

76. The Respondent submitted that the basic principle in regard to loans is that where they are a means of fluctuating and temporary accommodation, they are be to regarded as revenue transactions and not accretions to capital.

77. The Respondent submitted that the nature of loans to the construction industry are between three to six years, as the construction company would have to purchase the land, apply for planning permission and then start construction all of which could take up to five years. A construction company would not be in a position to repay these loans until they start selling units.

78. The Respondent submitted that in *MacAonghusa (Inspector of Taxes) v Ringmahon Company* [2001] 2 IR 507 section 61 of the Income Tax Act 1967 and section 81 of the TCA1997 were under consideration which provide that for the purpose of computing trade profits under Cases I and II of schedule D, deductions will only be allowed in respect of expenditure incurred wholly and exclusively for the purposes of the trade in question. The respondent company had taken out a term loan in 1991, which was applied to redeem preference share capital. The respondent sought to deduct the interest payable in respect of the loan as an expense incurred wholly and exclusively for the purposes of its trade. The appellant was of the opinion that the loan was raised for the purpose of a share restructuring of the respondent, which was capital in nature, rather than for its trade and refused to allow the deduction. On appeal to the Circuit Court, the Circuit Court Judge ruled in favour of the respondent. The appellant appealed by way of Case Stated to the High Court. The High Court dismissed the appeal. The appellant appealed to the Supreme Court. The Supreme Court dismissed the appeal holding that the interest was a deductible expense because it was laid out to retain the benefits of the borrowed money which enabled the respondent to carry on its trade. Thus it could be said to be expenditure incurred wholly and exclusively for the purposes of the respondent's trade.

79. The Respondent submitted that the principle that loans used to acquire trading stock are regarded as revenue in nature is seen in the Australian Federal Court decision of *Federal Commissioner of Taxation v Hunter Douglas Limited* (1983) 83 ATC 4,562. Lockhart J explained as follows (at 4,576):

> "*Borrowing money to carry on business must prima facie be treated as augmenting the capital employed in the business. Borrowings by finance companies to then lend to their customers, and borrowings by trading companies to finance the purchase of trading stock, are exceptions to this general rule. Such borrowings are an integral part of the ordinary conduct of the company's business and are thus revenue, not capital, items... Moneys borrowed by a trading company for the purpose of financing the purchase of trading stock are borrowed with a view to disposal of the stock at a profit. They are in each case part of the company's circulating capital.*"

80. The Respondent submitted that the facts in *Beauchamp* are not only distinguishable from those of the present proceedings, but a close analysis of that case demonstrates that it does not stand for the inflexible and blanket proposition that the purpose of the loan is immaterial when ascertaining whether or not the loan concerned is a revenue or a capital transaction.

81. The facts of *Beauchamp* were that, in 1971 the company had borrowed 50 million in Swiss francs. The loan was for a period of five years with an option for the company to repay at an earlier date on payment of a premium; the loan was converted into sterling. The purpose of the loan was to overcome a short term problem due to the fact that stocks were high and trade depressed. Bank of England exchange control policy was at that time opposed to short term borrowing in foreign currency and this resulted in the five year term.

82. In 1976, the company bought 50 million Swiss francs and repaid the loan. The pound was then worth less against the Swiss franc than in 1971. The company sought to deduct the excess as a loss in computing its profits for tax purposes. For the company to succeed, it had to show that the loss was a revenue loss. If, as the Revenue argued, and the House of Lords held, the loss was of a capital nature it could not be set off against trading income. Moreover, as the capital loss was not incurred on the disposal of a capital asset it could not be set against any capital gains realised by the company. The company's claim was rejected by Templeman LJ when the case came before the House of Lords. The Respondent submitted that the *ratio decidendi* of the judgment appears to be that, as the loan was a capital transaction, this associated loss was a capital loss. The company's case was weakened in that some of the money had been put to capital use and that the company's accountants had treated the loan as being on capital account. Two specific matters were addressed by Templeman LJ.

    i. First, was either the intention of the company as to the uses to which the money was to be put or the actual use made of it relevant? His answer was a clear "no", "in these circumstances" (at p. 7A) but he did not indicate what "these" circumstances were. In the lower court, Hoffman J had said that the uses might be relevant where the loan was not for a fixed term (at p. 259c).

    ii. Secondly, Templeman LJ asked what is the difference between a five-year loan (which is now established to be a capital transaction) and a five-year petrol tie (the expenditure on which had been held to be a revenue transaction in *Regent Oil Co Ltd v Strick* [1966] AC 295)? His answer was that the petrol tie had become an "integral and essential

method of trading in petroleum products" and "an ordinary incident of marketing" (p 11A). By contrast one had to distinguish short term and fluctuating loans to assist in the day to day running of the business from an accretion to capital; this case was the latter. The petrol tie cases, which had appealed to Nourse LJ were thus rejected.

83. The Respondent submitted that the facts in *European Investment Trust Co Ltd* are different to the facts in this appeal as the bank loans in *European Investment Trust Co Ltd* were used by the trust company to purchase cars for their staff to use. These cars allowed staff to carry out their duties and were booked in the balance sheet as an asset (the company was able to claim capital allowances). Unlike the Loan at issue in this appeal, the loan funds in *European Investment Trust Co Ltd* were not used to purchase raw material or stock. In addition, the provision in question was Section 74(f) of the Income and Corporation Taxes Act, 1988 which provided that "*no sum shall be deducted in respect of any capital withdrawn from or any sum employed or intended to be employed as capital in any trade ...*". This provision had rarely been used since capital expenditure is generally thought to be non-deductible as a result of general principle. However, in *European Investment Trust Company Co Ltd* it was used to disallow a claim for interest paid in respect of a capital loan. This decision was reversed by the statutory addition in the final phrase of Section 74(f) - "*but so that this paragraph shall not be treated as disallowing any deduction for interest*". Noting this legislative change, *Maguire* observes, that, in Ireland, in practice the Revenue Commissioners do not seek to disallow interest in circumstances similar to those arising in the *European Investment Trust Co Ltd*.

84. In *Beauchamp*, Counsel for the company persuaded the Court of Appeal that the 1931 decision should be disregarded since it rested on a concession that the status of the loan determined the deductibility of the interest (page 56A). Nourse LJ therefore said that the words "in respect of' should not be construed in their widest sense but rather as meaning "on account of' or "for'. He therefore rejected the Revenue's argument based on Section 74(f). Templeman LJ stated in the course of his speech that expenses incurred in respect of capital transactions could not be deducted (at page 4A) and that the loss was "*in connection with a capital transaction*" (at page 12G). Whether these words refer to general principle or to Section 74(f) is unclear.

85. The Respondent submitted that the decision in *Beauchamp* has been the subject of significant criticism. See, e.g., Tiley, "*Taxation of Profits-Loss of Repayment of Five Year Loan - Capital or Revenue Loss*" (1989) 49(3) Cambridge Law Journal, 378, 380 where the author comments that while the ultimate outcome of the case was acceptable, the reasoning was not sufficiently cogent if the question was one of law rather than fact, with

the author seeming to prefer the question being treated as one of fact, as is the case in this jurisdiction.

86. *Maguire* observes at page 411 that *Brosnan* "*would suggest that the courts in Ireland would not rigidly apply the [Beauchamp] principles*".

87. In all the circumstances, the Appellant submitted that, the question is one of fact and the purpose of the Loan is the relevant consideration. The Respondent's position is that they are revenue in nature and should have been booked as income when the bank released the debt, in view of the facts of this matter and having regard to the accounting treatment given to the loans by the Appellant previously.

Material Facts

88. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

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

89. The following material facts are not at issue between the parties and the Commissioner accepts same as material facts:

    i. The Appellant is an Irish registered private company limited by shares which is involved in the purchase and development of lands for residential housing;

    ii. The Appellant incorporated in [redacted] as a special purpose vehicle for the purpose of buying and developing lands;

    iii. The Appellant's called up share capital of the Appellant in 2006 and 2007 was €2 (two Euro);

    iv. On 5th December 2006 the Appellant received a loan offer for a bridging term loan of €9,500,000 from [redacted] to finance the purchase of a site of [redacted] acres at [redacted]. The Loan was subsequently drawn down by the Appellant on 29 January 2007;

    v. The Loan was approved for a period of 15 months and was to be reduced by way of site fines in the sum of €100,000 per site from the sale of remaining residential units

in a separate development owned by the Appellant known as the [redacted] development, also in [redacted]. The security given for the Loan was as follows:

- Legal charge/mortgage over [redacted] residential units in the [redacted] development;
- Floating debenture over the Appellant's assets and undertakings to incorporate a fixed charge over the Site; and
- Such insurance as required by the Bank;

vi. The Appellant's intention was to develop the Site with residential houses;

vii. Following the purchase, the Appellant did not develop the Site and held it instead as trading stock;

viii. The Loan was serviced by the Appellant and capital repayments in the amount of in or around €3,500,000 were made;

ix. A significant proportion of the Loan remained outstanding before it was forgiven by the Bank in June 2016. An amount of €6,043,555 was forgiven, net of a settlement amount of €250,000 which the Appellant paid to the Bank;

x. In its' income statement for the financial year ended 31 October 2016 the Appellant's gross profit on a turnover of €541,850 was €15,350. The forgiveness of debt was included in the income statement as a credit sum below the gross profit line on the basis that the amount of the debt write off did not represent a trading profit;

xi. The forgiveness of debt of €6,043,555 was not included as taxable income in the Appellant's Corporation Tax return for the financial year ended 31 October 2016. Trade tax losses were carried forward from the year ended 31 October 2015 in the sum of €7,187,270;

xii. A Notice of Determination was issued by the Respondent on 25 May 2021 wherein the Respondent indicated that it had determined that the forgiveness of the Loan amounting to €6,043,555 should be treated as taxable income on the date of the forgiveness, that is to say June 2016;

xiii. The Respondent's determination resulted in the losses carried forward in the amount of €7,187,270 as at 31 October 2016 being reduced by €6,043,555 to €1,143,714;

xiv. On 24 June 2021, a Notice of Appeal was submitted to the Commission by the Appellant.

90. The following material facts are at issue in this appeal:

i. The Loan was incurred for the purposes of trade by the Appellant;

ii. The Loan was of a temporary or fluctuating nature;

iii. A tax deduction was allowed for the Loan.

The Loan was incurred for the purposes of trade by the Appellant:

91. The question which is before the Commissioner is whether the Loan of €9,500,000 which the Appellant drew down on 29 January 2007 was incurred for the purposes of trade.

92. There is no dispute between the Parties as to the objects of the Appellant.

93. Three different versions of the Appellant's Memorandum and Articles of Association have been submitted as part of this appeal. An original version dated September [redacted] an amended version dated August 2002 and a further amended version dated 2009. The relevant version of the Appellant's Memorandum and Articles of Association are those dated August 2002 which were applicable at the time of the drawdown of the Loan and which state that the objects for which the Appellant is established are :

"2(a) *To carry out all or any of the businesses of property developers and dealers in land and buildings; the construction and sale of houses, builders and building contractors, electrical contractors, carpenters, plasterers, civil engineers, contractors for the construction, maintenance, repair, coration, alteration and demolition of buildings of all kinds, site clearance and foundation preparation, builders merchants, proprietors, surveyors, hirers, letters on hire, manufacturers, repairers, merchants and factors of, agents for and dealers in builders and general contractors plant, machinery, implements, equipment and appliances of all kinds, merchants of a dealers in stone, sand, gravel , bricks, tiles, slates, lime, cement, plastic and plastics substances and general building materials, requisites and goods of every description, plumbers, painters and decorators, timber merchants and sawmill proprietors, importers and dealers in joinery, hard and soft woods, veneers, mouldings and buildings woodwork of all kinds carpenter, joiners, tuners, coopers and packing case makers, cabinet case makers, shop and office fitters, French polishers, electrical, gas, hot water, heating, mechanical, motor and general engineers, hardware merchants*

and general ironmongers; to hire , manufacture, buy, sell and deal in all plant, machinery, tools, implements, apparatus, articles and things of all kinds, capable of being used in the foregoing businesses or any of them, or which may be conveniently dealt with or are necessary by any of the customers of or persons having dealings with the company.

(b) To carry on any other business of any description which may be capable of being advantageously carried on in connection with or ancillary to the objects of the Company or any of them.

(c) To purchase, take on lease or in exchange, hire or otherwise acquire and hold for any estate or interest in any lands, buildings, easements, rights, privileges, concessions, patents, patent rights, licences, secret processes, machinery, plant, stock-in-trade, and any real or personal property of any kind necessary for or convenient for the purchase of or in connection with the Company's business or any branch or department thereof.

(d) To apply for purchase or otherwise acquire any patents, licences or concessions which may be capable of being dealt with by the Company, or be deemed to benefit the Company, and to grant rights thereon.

(e) To erect, construct, lay down, enlarge, alter and maintain any shops, stores, factories, buildings, works, plant and machinery necessary or convenient for the Company's business, and to contribute to or subsidise the erection, construction and maintenance of any of the above.

(f) To invest and deal with the moneys of the Company not immediately required in such share or upon such securities and in such manner as may from time to time be determined.

(g) To enter into partnerships or into any arrangement or sharing profits, union of interests, co-operation, reciprocal concessions or otherwise, with any person or company, carrying on business within the objects of this Company.

(h) To sell or otherwise dispose of the whole or any part of the business or property of the Company.

(i) To purchase or otherwise acquire all or any part of the business or assets of any person, firm or company carrying on or formed to carry on any business which this Company is authorised to carry on or possessed of property suitable to the purposes of this Company, and to pay cash or issue any shares, stocks,

debentures or debenture stock of this Company as the consideration or such purchase or acquisition and to undertake any liabilities or obligations relating to the property or business so purchased or acquired.

…

(s) To do all or any of the above things in any part of the world either alone or in conjunction with others and either as principals, agents, contractors, trustees or otherwise and either by or through agents, sub-contractors, trustees or otherwise.

(t) To do all such other things as are incidental or conducive to the above objects or any of them.

…"

94. Mr [redacted], the Appellant's Finance Director and Chartered Accountant, gave direct evidence to the Commissioner and stated that the Appellant incorporated in [redacted] as a special purpose vehicle for the purpose of buying and developing lands.

95. On cross examination, Mr [redacted] agreed that the objects of the Appellant were to carry out all or any of the businesses of property developers and dealers in land and buildings; the construction and sale of houses, builders and building contractors.

96. Mr [redacted] also agreed on cross examination that part of the Appellant's trade is to buy land, to develop land and to sell houses and make a profit.

97. Mr [redacted] was asked about the contents of a letter dated 22 November 2006 which he, on behalf of the Appellant, wrote to the Bank which set out, *inter alia*, that the Appellant had been successful in a tender bid to purchase the Site and that the Appellant proposed to purchase the Site and to develop it in a manner similar to that of the [redacted] Project. He agreed that the purpose of the Loan was to finance the purchase of the Site which would then be developed and houses would be constructed on which would then be sold.

98. Moreover, Mr [redacted] agreed on cross examination that the facility letter from the Bank dated 5 December 2006 described the purpose of the Loan as being "*To finance the purchase of [redacted] acres at [redacted]*".

99. In addition, the facility letter from the Bank dated 5 December 2006 set out as part of the terms of the facility and repayment that the loan "*… has been approved for a period of 15 months and is to be reduced by way of Site Fines in the sum of €100,000 per Site from the sale of remaining Residential Units in the [redacted] at [redacted]*

[redacted]…". The facility letter also set out that the security held was "*Legal Charge / Mortgage over 2 Residential Units in the* [redacted] *at* [redacted] *registered in the name of* [redacted]." Mr [redacted] agreed with all of these matters in direct evidence and also on cross examination.

100. In relation to the capital position of the Appellant, the Balance Sheet of the Appellant for 2007 states that the called up share capital of the Appellant in 2006 and 2007 was €2 (two Euro). Under cross examination, Mr [redacted] agreed that there had never been any equity investment in the Appellant. Mr [redacted] also agreed that the Appellant's trade and activities had been financed by way of facility letters and short term loans.

101. The Commissioner has considered whether the Loan was incurred for the purposes of trade by the Appellant.

102. It is agreed by Mr [redacted] on behalf of the Appellant that the Appellant was incorporated in [redacted] for the purpose of buying and developing lands at [redacted]. The Memorandum of Association of the Appellant sets out at 2(a) that the first object for which the Appellant was formed was to carry out all or any of the businesses of property developers and dealers in land and buildings; the construction and sale of houses. Furthermore, the Memorandum of Association of the Appellant sets out at 2(c) that an object of the Appellant is to purchase, take on lease or in exchange, hire or otherwise acquire and hold for any estate or interest in any lands.

103. The objects of the Appellant point to the Appellant's trade being the purchase and development of land and the sale of houses. In addition, the previous activities of the Appellant at the [redacted] project in purchasing that land, developing that land and selling the houses which were constructed on the land point to the Appellant's trade being the purchase and development of land and the sale of houses. Mr [redacted] has agreed with this in his evidence to the Commissioner. There is no dispute between the Parties in this regard.

104. The Bank's letter to the Appellant of 5 December 2006 sets out that the purpose of the Loan was to finance the purchase of the Site. In addition, a term and condition of the Loan was that the repayment of the Loan was to be made by way of Site Fines on the sale of Sites from the Appellant's [redacted] development.

105. The Commissioner also notes that, as a result of there being no equity investment in the Appellant, the Appellant financed its trade and activities by way of a series of short term loans.

106. The Commissioner has considered whether the acquisition of the Site was an acquisition of an asset for the enduring benefit of the Appellant's trade. The evidence given by Mr [redacted] was that the intention behind the purchase of the Site was to develop the Site by applying for and acquiring planning permission, building housing and selling the housing. No evidence was given to the Commissioner that there was ever an intention by the Appellant to retain the Site.

107. Furthermore, no evidence was given to the Commissioner that the Site was capable of providing an enduring benefit to the Appellant's trade. The Commissioner notes that the Site was transferred by the Appellant to [redacted] in 2017 on the basis that the Appellant required to raise further funding for the acquisition and intended development of a site at [redacted]. Mr [redacted] stated that prior to 2016 and the forgiveness of the Loan, the Appellant would not have been in a position to secure further bank funding. Mr [redacted] also stated that the purpose of transferring the Site to [redacted] was to avoid the Bank have a debenture over it.

108. The Commissioner further notes that the Appellant's Balance Sheet in 2006 recorded Stocks as part of Current Assets of €3,694,271 and in 2007 recorded Stocks of €11,001,406, an increase of €7,307,135. The relevant note in the accounts relating to Stocks (Note 8) describes Stocks as "Work in Progress".

109. There can be no doubt that the Appellant's trade is the purchase of land for the purposes of developing the land, building houses and selling those houses. This is the evidence which Mr [redacted] has given to the Commissioner. This is also reflected in the objects of the Appellant. The activities of the Appellant prior to the drawdown of the Loan are reflective of the Appellant's trade being the purchase of land for the purposes of developing the land, building houses and selling those houses. In addition the activities of the Appellant following the forgiveness of the debt the subject matter of this determination at the [redacted] site are reflective of the Appellant's trade being the purchase of land for the purposes of developing the land, building houses and selling those houses.

110. The letter of Loan offer issued by the Bank on 5 December 2006 described the purpose of the Loan as being "*To finance the purchase of* [redacted] *acres at* [redacted]".

111. Having taken all of the above into account, the Commissioner is satisfied, and finds as a material fact, that the Loan was incurred for the purposes of trade by the Appellant. Therefore this material fact is accepted.

The Loan was of a temporary or fluctuating nature;

112. The evidence adduced to the Commissioner was that the initial period of the Loan was for a period of 15 months as set out in the letter of offer from the Bank dated 5 December 2006. The Loan was drawn down by the Appellant on 29 January 2007 and this is reflected in both the Loan statements submitted and a Debenture dated 30 January 2007 between the Appellant and the Bank. There is no dispute between the Parties in relation to this.

113. Correspondence from the Bank granting a continuation of the Loan facility was submitted during the course of this appeal as follows:

i. 1 May 2009 continuing Loan with balance of €7,100,000 until 31 July 2009 with repayment term stated as "*The Loan is to be repaid from the sale proceeds (Net of VAT) of Residential Units at* [redacted] *and from other sources and is to be repaid in full by 31st July 2009.*" Purpose "*Continuation of existing facility (Account No:* [redacted]*) previously accepted by* [redacted] *until 31st July 2009.*";

ii. 1 December 2009 restructuring Loan with balance of €7,136,000 until 31 March 2010 with repayment term stated as "*The Bridging Term Loan is to be repaid from whatever source and is to be paid in full by 31st March 2010. €25,351.20 representing part payment of Interest (based on the current interest rate) to be provided quarterly, commencing three months from restructure*." Purpose "*To assist with the restructure of existing facility (a/c* [redacted]*).*";

iii. 12 March 2012 restructuring Loan with balance of €7,361,527.18 until an unspecified date in June 2012 with repayment terms stated as "*Monthly repayments from Gross Rental Income from properties at* [redacted] *in the amount of €7,000 minimum to apply for a period from January to June 2012.*

The facility will expire in June 2012 but may be reviewed and renewed thereafter at the total discretion of the Bank and is payable in demand…" Purpose: "*To assist with the restructure of existing facility (acc no.* [redacted]*)…*"

iv. 5 February 2014 restructuring Loan with balance of €7,196,818.26 for 12 months with repayment terms stated as "*The Loan is to be repaid from whatever sources and is to be repaid in full within 12 months of restructure but may be reviewed and renewed thereafter at the total discretion of the Bank. Repayments in the agreed*

amount of €3,800.00 to be provided monthly, commencing one month from restructure with a final bullet payment to clear the loan in full within the repayment term of 12 months…"

v. 7 June 2016 restructuring Loan with balance of €6,293,555.69 for 1 month with repayment terms stated as "*The facility will expire within 1 month of date of restructure but may be reviewed thereafter at the total discretion of the Bank.*

Strictly subject to the Borrower complying in full to the Bank's satisfaction, with all of the conditions contained in this Restated Offer Letter, the sum of €250,000 being lodged in reduction of this facility by 21st June 2016, the Bank will not enforce its rights over the Borrower in respect of the residual balance on this facility, and will release its charge over the property at [redacted] *…*"

114. Mr [redacted] gave evidence that it had been the Appellant's intention that, once planning permission had been granted on the Site, there would have been a refinancing of the Appellant's position to allow for construction of housing on the Site. Mr [redacted] stated that this did not occur due to the financial crisis which emerged in the economy shortly after the purchase of the Site. As a result, Mr [redacted] stated, the term of the Loan was extended from time to time by the Bank until June 2016 as set out in the above correspondence.

115. The Commissioner considers that the Loan was initially a temporary loan in that it was drawn down for a term of 15 months. After the expiry of the initial 15 month term a number of extensions to the term of the Loan was granted to the Appellant. The letters of extension issued by the Bank in relation to the Loan also amended the terms and conditions of repayment as well as changing the basis of the repayment of the Loan from interest only to part interest only on at least one occasion. This is reflected in the letter from the Bank dated 1 December 2009.

116. In addition, the Commissioner notes based on the contents of the correspondence from the Bank, that the balance of the Loan increased from €7,100,000 in May 2009 to €7,361,527.18 in March 2012. The Commissioner further notes that the balance of the Loan had reduced to €7,196,818.26 in February 2014 however, this continued to represent an increase of the balance from that in May 2009.

117. The Commissioner considers that the ongoing restructuring of the Loan and the increase in the Loan balance between May 2009 and at least June 2014 represents a fluctuation in the term and the balance of the Loan which eventually extended to June 2016, some almost 9.5 years after the Loan was first drawn down by the Appellant.

118. As a result of the above, the Commissioner finds as a material fact that the Loan was of both temporary and fluctuating nature.

A deduction was allowed for the debt.

119. The Appellant submitted that no tax deduction was ever claimed by the Appellant in respect of the debt. The Appellant also submitted that no tax deduction could have been claimed by the Appellant.

120. On the other hand, the Respondent submitted that the Appellant did claim a deduction in respect of the debt for the following reasons:

- the Site was financed by the Loan;
- the value of the Site became impaired; and
- tax deductions were taken when the impairment was booked into the Appellant's account.

121. The Appellant's audited accounts for the years ending 2006 to 2016 have been submitted to the Commissioner as part of this appeal.

122. Whilst very little evidence in relation to the Appellant's audited accounts was adduced at the oral hearing, the Commissioner has reviewed the Appellant's accounts for the years 2006 to 2016 in detail and notes the following Closing Stock (Work in Progress) included therein in rounded totals:

2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
€ 000										
3,694	11,001	8,402	8,402	5,857	5,200	1,857	1,646	1,541	726	200

123. The Commissioner notes that the Appellant's accounts reflect the following Cost of Sales for the years 2006 to 2016 in rounded totals:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
€ 000											
Opening Stock	2,719	3,694	11,001	8,402	8,402	5,857	5,200	1,857	1,647	1,541	726

Site costs	0	9,429	0	20	0	0	0	0	0	0	0
Construction costs	3,542	2,161	766	390	99	0	0	0	0	0	0
Planning costs	2	0	0	0	0	0	0	0	0	0	0
Professional fees	43	0	0	0	0	0	0	0	0	0	0
Electricity connection	48	0	0	0	0	0	0	0	0	0	0
Provision for refundable deposit Stock write down	0	0	0	0	0	0	200	0	0	0	0
Stock write down	0	0	0	0	0	0	0	0	0	300	0
Closing stock	3,694	11,001	8,402	8,402	5,857	5,200	1,857	1,647	1,541	726	200
Cost of sales	2,660	4,283	3,365	410	2,644	657	3,543	211	105	515	526

124. The Appellant's accounts reflect the following Profit and Loss for the years 2006 to 2016 in rounded totals:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
€ 000											
Turnover	8,233	7,101	444	0	0	0	0	258	113	599	542
Cost of Sales	2,660	4,283	3,365	410	2,644	657	3,543	211	105	515	526
Gross Profit / (Loss)	5,573	2,818	(2,921)	(410)	(2,644)	(657)	(3,543)	47	8	84	15
Admin Expenses	2,684	556	39	28	22	38	33	47	28	31	20
Other Operating Income	0	0	0	0	9	64	95	134	54	86	49
Write-down of Inventory	0	0	0	0	0	0	0	0	0	300	0

Forgiveness of Debt											6,043
Operating Profit / (Loss)	2,889	2,262	(2,960)	(438)	(2,657)	(632)	(3,414)	133	34	(161)	6,087
Cancellation of Inter group balances	0	0	0	0	0	275	0	0	0	0	0
Interest Payable	51	268	410	300	177	215	204	180	163	141	72
Profit / (Loss) before tax	2,838	1,994	(3,370)	(738)	(2,834)	(572)	(3,618)	(46)	(129)	(302)	6,015
Tax on profit	334	249	249	0	0	0	0	0	0	0	0
Profit	2,503	1,745	(3,121)	(738)	(2,834)	(572)	(3,618)	(46)	(129)	(302)	6,015

125. The Commissioner notes that significant write downs in the value of the Appellant's Stock (Work-in-Progress) were booked to the Appellant's accounts between 2010 and 2016 which impacted on the Cost of Sales amounts which were booked to the Appellant's Profit and Loss accounts for those years. As these accounts were not opened in detail to the Commissioner during the oral hearing, the Commissioner has concentrated on the years 2010, 2011 and 2012 as being years where the Appellant booked €0.00 in turnover and where significant write downs in the Stock (Work-in-Progress) values were booked to the Appellant's accounts which are set out below.

126. The Commissioner notes that in the year ending 31 August 2010 the Appellant had €0.00 in turnover, €99,000 in construction costs, had €8.402m in opening stock and €5.857m in closing stock. This led to Costs of Sale of €2.644m being recorded and being applied to the Appellant's Profit and Loss account which recorded a loss in 2010 of €2.834m. The Appellant's accounts for 2010 state at page 1 that "*The 2010 loss of €2,833,919 has increased significantly from the loss of €737,803 in 2009 as there was a further write-down of stock during 2010 to its current net realisable value.*"

127. Similarly, the Commissioner notes that in the year ending 31 August 2011 the Appellant had €0.00 in turnover, €5.857m in opening stock and €5.200m in closing stock. This lead to Costs of Sale of €657,000 being recorded and being applied to the Appellant's

Profit and Loss account which recorded a loss in 2011 of €572,000. The Appellant's accounts for 2011 state at page 1 that "*The loss for the year ended 31st August 2011 amounted to €571,687 and at the balance sheet date the deficit on shareholders' funds amounted to €2,520,247. The financial statements have been prepared on a going concern basis, the validity of which depends on (i) the availability of future sufficient funds from banks (€7,286,453) and (ii) the ability of the company to realise the current carrying value of its stock amounting to €5,200,000.*"

128. In the year ending 31 August 2012 the Appellant had €0.00 in turnover, had €5.200m in opening stock and €1.857m in closing stock. This led to Costs of Sale of €3.543m being recorded and being applied to the Appellant's Profit and Loss account which recorded a loss in 2012 of €3.618m. The Appellant's accounts for 2012 state at page 1 that "*The loss for the year ended 31st August 2012 amounted to €3,618,416 (31st August 2011 – loss €571,687) and at the balance sheet date the deficit on shareholders' funds amounted to €6,138,663. The financial statements have been prepared on a going concern basis, the validity of which depends on (i) the availability of future sufficient funds from banks (€7,367,083) and (ii) the ability of the company to realise the current carrying value of its stock amounting to €1,857,200.*"

129. The write down in the value of the Appellant's Stock in the years 2010, 2011 and 2012 amounted to €2.545m in 2010, €657,000 in 2011 and €3.343m in 2012 totalling €6.545m.

130. The Commissioner notes that in the years ending 31 August 2010, 2011 and 2012 the Appellant booked €0.00 (zero) in turnover and booked the following amounts in interest payable for those years in its accounts totalling €596,000:

- 2010 €177,000
- 2011 €215,000
- 2012 €204,000

131. The Bank statements in relation to the Loan were not opened to the Commissioner at the oral hearing. However, these statements have been submitted to the Commissioner during the course of this appeal and the Commissioner has considered the contents of same in detail. The Commissioner notes that the following repayments in relation to interest on the Loan were made by the Appellant in the years ending 31 August 2010, 2011 and 2012 totalling €377,313.83:

- 2010 €126,608

- 2011 €125,561.83
- 2012 €125,144

132. The excess amounts between the interest amounts payable booked to the Appellant's accounts in interest payable and the amounts actually paid in interest in relation to the Loan by the Appellant in those years are as follows totalling €218,686.17:

- 2010 €50,392
- 2011 €89,438.17
- 2012 €78,856

133. The Commissioner notes that the written down amounts in the value of the Appellant's Stock in 2010, 2011 and 2012 in addition to the interest amounts payable in relation to the Loan in 2010, 2011 and 2012 were booked to the Appellant's Cost of Sales account which in turn were included in the Appellant's Profit and Loss account for those years. It therefore follows that the Appellant took deductions in relation to both the Stock valuation and the interest payable on the Loan in those years.

134. The Commissioner also notes that similar deductions in relation to Stock value deductions and interest payable in relation to the Loan were booked to the Appellant's accounts in the years 2013, 2014 and 2015.

135. As a result of the foregoing, the Commissioner finds as a material that a deduction was allowed for the debt, that is to say the Loan, in the Appellant's accounts. Therefore this material fact is accepted.

Findings of Material Fact

136. For the avoidance of doubt, the Commissioner finds the following as material facts in this appeal:

i. The Appellant is an Irish registered private company limited by shares which is involved in the purchase and development of lands for residential housing;

ii. The Appellant incorporated in [redacted] as a special purpose vehicle for the purpose of buying and developing lands;

iii. The Appellant's called up share capital of the Appellant in 2006 and 2007 was €2 (two Euro);

iv. On 5th December 2006 the Appellant received a loan offer for a bridging term loan of €9,500,000 from [redacted] to finance the purchase of a site of [redacted] at [redacted]. The Loan was subsequently drawn down by the Appellant on 29 January 2007;

v. The Loan was approved for a period of 15 months and was to be reduced by way of site fines in the sum of €100,000 per site from the sale of remaining residential units in a separate development owned by the Appellant known as the [redacted] development, also in [redacted]. The security given for the Loan was as follows:

- Legal charge/mortgage over [redacted] residential units in the [redacted] development;
- Floating debenture over the Appellant's assets and undertakings to incorporate a fixed charge over the Site; and
- Such insurance as required by the Bank;

vi. The Appellant's intention was to develop the Site with residential houses;

vii. Following the purchase, the Appellant did not develop the Site and held it instead as trading stock;

viii. The Loan was serviced by the Appellant and capital repayments in the amount of in or around €3,500,000 were made;

ix. A significant proportion of the Loan remained outstanding before it was forgiven by the Bank in June 2016. An amount of €6,043,555 was forgiven, net of a settlement amount of €250,000 which the Appellant paid to the Bank;

x. In its' income statement for the financial year ended 31 October 2016 the Appellant's gross profit on a turnover of €541,850 was €15,350. The forgiveness of debt was included in the income statement as a credit sum below the gross profit line on the basis that the amount of the debt write off did not represent a trading profit;

xi. The forgiveness of debt of €6,043,555 was not included as taxable income in the Appellant's Corporation Tax return for the financial year ended 31 October 2016. Trade tax losses were carried forward from the year ended 31 October 2015 in the sum of €7,187,270;

xii. A Notice of Determination was issued by the Respondent on 25 May 2021 wherein the Respondent indicated that it had determined that the forgiveness of the Loan amounting to €6,043,555 should be treated as taxable income on the date of the forgiveness, that is to say June 2016;

xiii. The Respondent's determination resulted in the losses carried forward in the amount of €7,187,270 as at 31 October 2016 being reduced by €6,043,555 to €1,143,714;

xiv. On 24 June 2021, a Notice of Appeal was submitted to the Commission by the Appellant;

xv. The Loan was incurred for the purposes of trade by the Appellant;

xvi. The Loan was of a temporary or fluctuating nature;

xvii. A tax deduction was allowed for the Loan.

Analysis

137. As with all appeals before the Commission the burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable*."

138. For the reasons set out above, the Commissioner has already found, *inter alia*, the following material facts:

i. The Loan was incurred for the purposes of trade by the Appellant;

ii. The Loan was of a temporary or fluctuation nature;

iii. A deduction was allowed for the debt, that is to say the Loan;

iv. An amount of €6,043,555 in relation to the Loan was forgiven.

139. Both the Appellant and the Respondent have made detailed submissions in relation to this appeal however, the Commissioner considers that the question which requires to be decided in this appeal is whether the provisions of section 87 of the TCA1997 apply to the forgiveness of the Loan, the details of which have been set out above.

140. Section 87 of the TCA1997 is entitled "*Debts set off against profits and subsequently released*" and provides at subsection (1) that:

> *"(1) Where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade or profession arising in the period in which the release is effected.*"

141. The Commissioner has already found as a material facts that that the Loan was incurred for the purposes of the Appellant's trade and that a deduction was allowed in the Appellant's accounts for the Loan. The Commissioner has also found as a material fact that an amount of €6,043,555 in relation to the Loan was forgiven.

142. It therefore follows that as a result of the Loan being incurred for the purposes of trade by the Appellant; a deduction being allowed for the debt / Loan and the amount of €6,043,555 in relation to the Loan being forgiven, the provisions of section 87(1) of the TCA1997 must be applied to the amount released under the forgiveness. That is to say the Commissioner finds that the Loan amount forgiven of €6,043,555 in 2016 must be treated as a receipt of the Appellant's trade in 2016.

143. The Commissioner has considered the Appellant's submissions in relation to the computation of profits or gains of a trade or profession as set out in section 76(1) of the TCA1997 and section 76A of the TCA1997 and the case law which was cited in relation to this.

144. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter "*Perrigo*"), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in* Dunnes Stores v. The Revenue Commissioners *[2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in* Bookfinders Ltd v. The Revenue Commissioner *[2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners*, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in* Revenue Commissioners v. Doorley *[1933] I.R. 750 where Kennedy C.J. said at p. 766:*

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence*

in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

145. These principles have been confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43.

146. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner finds that the words contained in sections 76(1), 76A and 87 of the TCA1997 are plain and their meaning is self-evident.

147. Section 76 of the TCA1997 is entitled "*Computation of income: application of income tax principles*" and provides that *"(1)Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment."* (emphasis added)

148. Section 76A of the TCA1997 is entitled "*Computation of profits or gains of a company – accounting standards*" and provides *"(1) For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes*." (emphasis added)

149. The Commissioner finds that the meaning of the wording "*Except where otherwise provided by the Tax Acts…*" in section 76(1) of the TCA1997 and the wording "*subject to any adjustment required or authorised by law in computing such profits or gains for those purposes*" contained in section 76A(1) of the TCA1997 means that those provisions are qualified. The Commissioner finds these sections when taken together mean that where another provision of the TCA1997 provides for an alternative method of the computation

of income for the purposes of corporation tax then the method of calculation prescribed in the other provision of the TCA1997 must be applied.

150. The Commissioner notes that section 87 of the TCA1997 provides for the treatment of forgiven / released debt on which deductions have been allowed as a receipt of the trade or profession arising in the period in which the forgiveness / release is effected.

151. The Commissioner notes that the use of the word "*shall*" as set out in section 87(1) of the TCA1997, indicates an absence of discretion in the application of this provision. The wording of the provision does not provide for extenuating circumstances in which this provision might be mitigated.

Determination

152. The Commissioner determines that the Appellant has not discharged the burden of proof in this appeal and that it has not succeeded in showing that the Respondent's decision of 25 May 2021 was incorrect.

153. The Commissioner further determines that the Loan amount forgiven of €6,043,555 in 2016 must be treated as a receipt of the Appellant's trade in 2016.

154. The Commissioner commends the Parties for the manner in which this appeal was conducted.

155. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular section 949AL thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
24 May 2023

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.