AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

161TACD2023

Between

[redacted]

Appellants

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against a Notice of Amended Assessment to Income Tax issued to the first-named Appellant. That assessment which was issued by the Respondent on 5th December 2018 is in respect of the tax year 2014 and the amount of income tax sought on the assessment is €609,445.

2. This appeal also relates to a Notice of Assessment to Dividend Withholding Tax ("DWT") issued to the second-named Appellant. That assessment in the sum of €353,830 was issued by the Respondent on 13th March 2018 and is in respect of a deemed distribution of €1,769,150 made by the second-named Appellant on 27th March 2014.

3. As both the first and second assessment relate to the same underlying transaction, it was agreed between the Appellants and the Respondent ("the parties") that the two appeals would be heard at the same time by the Commissioner in accordance with the provisions of section 949H TCA 1997.

4. The hearing of the appeal took place with the parties in physical attendance on 15th December 2022. At the request of the parties and to facilitate settlement negotiations, the Commissioner agreed to adjourn that hearing. Following a Case Management Conference ("CMC") on 1st March 2023 at which the Commissioner was informed by the parties that settlement negotiations had been unsuccessful, the hearing resumed and concluded on 28th March 2023.

5. The Appellants were represented by Counsel and their accountant. The Respondent was represented by both Senior and Junior Counsel, its solicitor and three members of its staff. In addition, the Commissioner heard sworn testimony from a number of witnesses including expert witnesses, in additional to legal submissions from the parties' representatives.

Background[1]

6. On 14th February 2014, the first-named Appellant entered into a loan agreement with [redacted] for a loan in the amount of €1,769,150. At the time of acquiring the loan [redacted] was an Irish incorporated and Irish tax resident company but it ceased to be tax resident in Ireland on 30th December 2015.

[1] For ease of reference and to aid comprehension, the Commissioner sets out at **Appendix 2**, a summary of the transactions undertaken by the Appellants.

7. On 13th March 2014, the first-named Appellant subscribed for and paid the sum of €1,769,150 for 176,915 B class redeemable non-voting preference shares ("B Class Shares") in [redacted] an [redacted] incorporated, United Kingdom ("UK") tax resident company, with a nominal value of €0.01 per share and issued at a premium of €9.99 per share. Both [redacted] and [redacted] are related companies through common control (meaning they share common directors and shareholders).

8. Subsequently on 27th March 2014, the first-named Appellant transferred his entire shareholding in [redacted], consisting of the 176,915 B Class Shares to the second-named Appellant for a consideration of €1,769,150. At all material times the first-named Appellant was a director and sole shareholder in the second-named Appellant.

9. Following an enquiry into the taxation affairs of certain companies and individuals under the provisions of sections 956 and 959Z TCA 1997, the Respondent issued its Notice of Amended Assessment to the first-named Appellant and its Notice of Assessment to the second-named Appellant.

10. The first-named Appellant who was not in agreement with the Amended Notice of Assessment to income tax submitted his appeal to the Commission on 21st December 2018, which included the following grounds:

    10.1. The amended assessment wrongly includes an amount of €1,769,150 in respect of Schedule F income and wrongly includes a credit for DWT in the amount of €353,830;

    10.2. The amended assessment wrongly states that the amount of income tax chargeable is €1,814,053 and that the amount of income tax payable is €609,445.30.

    10.3. On 27th March 2014, the first-named Appellant sold certain shares to the second-named Appellant, a company which, at that date, the first-named Appellant was a director and shareholder owning 100% of the share capital. The first-named Appellant received an electronic funds transfer in the amount of €1,769,150 from the second-named Appellant for the shares. The Respondent in their letter dated 31st October 2018 state that, in relation to the sale of shares, an amount of €1,769,150 falls to be treated as a distribution in accordance with the provisions of section 130 (3) (a) TCA 1997. The first-named Appellant is of the view that no distribution in the amount of €1,769,150 arises under the provisions of section 130(3) (a) TCA 1997 based on the relevant facts and related law. This is on the basis that:

10.3.1. Section 130 (3) (a) TCA 1997 does not apply, or in the alternative;

10.3.2. If section 130 (3) (a) TCA 1997 does apply, the Appellant did not receive a benefit of €1,769,150, as contemplated by section 130 (3) (a) TCA 1997, or in the alternative;

10.3.3. If a benefit was received by the first-named Appellant as contemplated by section 130 (3) (a) TCA 1997 the value of such benefit did not exceed the consideration provided by the Appellant by €1,769,150 as stated by the Respondent i.e. the "relevant amount" as defined in section 130 (3) (a) TCA 1997 is not €1,769,150.

10.4. In arriving at their view that section 130 (3) (a) TCA 1997 is applicable, the Respondent in their letter dated 31st October 2018 state that the market value of the shares sold by the first-named Appellant, at the date of sale was negligible. The first-named Appellant is of the view that this opinion of the market value of the shares, at the date of sale, is incorrect based on the relevant facts and related law.

10.5. All transactions between the first and second-named Appellants were made at arm's length terms.

10.6. The sale proceeds by the first-named Appellant to the second-named Appellant did not result in a reduction of the net worth of the second-named Appellant to the advantage of the first-named Appellant.

11. The second-named Appellant who was not in agreement with the Notice of Assessment to DWT also submitted a Notice of Appeal to the Commission on 21st December 2018. Those grounds of appeal included:

11.1. The assessment wrongly includes an amount of €353,830 in respect of DWT and wrongly includes interest in the amount of €165,201.81.

11.2. No distribution in the amount of €1,769,150 arises based on the relevant facts and law on the basis that:

11.2.1. Section 130 (3) (a) TCA 1997 does not apply, or alternatively;

11.2.2. If section 130 (3) (a) TCA 1997 does apply, then the first-named Appellant did not receive a benefit of €1,769,150 as contemplated under that section, or alternatively;

11.2.3. If a benefit was received, the value of the benefit did not exceed the consideration provided by the Appellant for the shares in [redacted].

Documentation presented to the Commission

12. Included within the documentation presented to the Commission by the Respondent was the following:

12.1. Loan agreement dated 14th February 2014 between the first-named Appellant and [redacted] ("the loan parties"). The loan agreement provided:

12.1.1. The loan funds were advanced to enable the first-named Appellant to "*purchase or subscribe for certain share investments*".

12.1.2. The funds to be advanced were in the sum of €1,769,150.

12.1.3. The first-named Appellant was required to "*pay interest on the loan from the date of drawdown on an actual day basis and shall be payable monthly in arrears by standing order*". The loan agreement did not specify the rate of interest to be charged on the loan.

12.1.4. In the event of default of interest payments, the first-named Appellant was required to pay an amount calculated as the lenders' cost of funds plus 1% (provided that the annual interest rate does not exceed 5% per annum). The loan agreement also provided in the event of default, the loan "*shall become payable on a date that is three months after the date of the default termination*".

12.1.5. At any time when the first-named Appellant was required to repay the loan, he could do so by transferring to [redacted] "*title to any shares issued by* [redacted] *or any company which either directly or indirectly controlled by the same person (or persons) as controls (or control)* [redacted]".

12.1.6. Assignment of the loan was prohibited without the "*prior written consent of the loan parties*" save that assignment was permitted if [redacted] wished to transfer the loan to any company which was either directly or indirectly controlled by the same person or persons who control [redacted]

12.1.7. The loan agreement was governed by the laws of the Republic of Ireland and signed by a representative of [redacted] and the first-named Appellant.

12.2. A document titled "*side agreement between the first-named Appellant and* [redacted] dated 14th February 2014, signed by the loan parties. Within that document the loan parties agreed that:

12.2.1. The first-named Appellant would pay [redacted] a loan arrangement fee on the drawdown of the loan in the sum of €11,230.

12.2.2. The loan parties acknowledged that the first-named Appellant *"intends to utilise the loan in subscribing for a new issue of 176,915 redeemable preference shares of €0.01 each to be issued at a premium of €9.99 per share in* [redacted]".

12.2.3. The applicable interest rate was 2% per annum payable monthly in arrears.

12.2.4. The first-named Appellant irrevocably instructed [redacted] to pay the loan amount directly to the issuer in return for the issue of shares.

12.2.5. If the first-named Appellant sought to repay the loan within five years of drawdown, interest was payable on the loan from the date of notification of the early repayment to the fifth anniversary of the loan drawdown.

12.2.6. The interest rate on the loan would remain unaltered except in the event of default, death of the borrower, a change in the law or a material adverse change in the affairs in either of the loan parties which affected the loan.

12.3. A letter from [redacted] to the first-named Appellant dated 14th February 2014. This letter was headed "*Proposed Transactions*", set out the nature of [redacted] business activities, was signed for and on behalf of [redacted] and the terms were accepted and signed by the first-named Appellant. Those activities were stated as being:

"*Our business involves us in entering into transactions as a principal with counterparties like you. These transactions may involve us in providing you with funding or in acquiring assets for you or disposing of assets to you; by so doing, we enable the counterparties we deal with to enter into transactions which they wish to undertake. Whilst our experience in designing transaction structures to achieve intended benefits may equip us to bring ideas for potential transactions to you, we envisage that the expected benefits and risks with any particular transaction will be fully analysed by you with the aid of appropriate professional advice; we will not be regarded as in any sense your advisor or agent in any capacity in regard to a transaction or any aspect of it.* .."

12.4. A letter from [redacted] to the Appellant dated 24th February 2014. This document invited the first-named Appellant to subscribe for 176,915 B Class Shares in [redacted] subject to paying the sum of €1,769,150. The dividend rate attached to those shares was set at €0.50 per share issued (which equated to a 5% per annum capital return) subject to profit availability and to the distribution policy of [redacted]. That letter concluded – "*If you are happy to proceed, please return your payment of €1,769,150 and we will then issue the appropriate share certificate to you*".

12.5. A copy of a new standing order which authorised payment from the first-named Appellant's bank account in the sum of €2,948.58 to [redacted] bank account. The standing order was to commence on 6th April 2014 and on the 6th of every month thereafter until further notice in writing.

12.6. A letter from [redacted] with an address in the [redacted] to [redacted] dated 28th February 2014. This letter offered [redacted] a loan facility in the sum of €1,769,150. The interest payable on that loan was the "*base rate*" which was defined as "*the base rate of the bank from time to time as that rate fluctuates*" and a margin of 0.5% per annum. The loan was unsecured but provided a number of conditions in the event of [redacted] defaulting on repayment. The facility was available "*on or before 7th March 2014*" and an arrangement fee of €9,730 was payable by [redacted] to [redacted]. The term of the loan was from the date of the advance of the loan facility to the repayment date which was defined as "*one month from the date of the advance*". All and any payments under that loan were to be made to a bank account in the name of [redacted]. The facility was signed for and on behalf of [redacted] and [redacted]

12.7. An unsigned "*Form of Drawdown Notice*" addressed to [redacted] from [redacted]

12.8. A "*Form of Resolution*" in the name of [redacted] This document recorded draft minutes of a meeting of the Directors of [redacted] and authorised [redacted] to undertake borrowings. That Form was incomplete, undated and unsigned.

12.9. Minutes of a Directors' meeting of [redacted] dated 28th February 2014. Those signed minutes authorised [redacted] to borrow the sum of €1,769,150 from [redacted] subject to the terms outlined in paragraph 12.6 above.

12.10. A letter from [redacted] to [redacted] dated 3rd March 2014. That letter requested [redacted] to advance the sum of €1,769,150 on or before 6th March 2014 or as soon as practicable thereafter.

12.11. Loan agreement between [redacted] and [redacted] dated 10th March 2014. This document provided an interest-free loan of €1,769,150 between [redacted] and [redacted] and stipulated that the funds were to be provided on or before 13th March 2014.

12.12. A letter from [redacted] to [redacted] dated 12th March 2014. This letter requested that the drawdown date on the proposed loan offer dated 28th February 2014 be amended from "*on or before 7th March 2014*" to "*14th March 2014*". The letter was signed for and on behalf of [redacted] and accepted by [redacted] on the same date.

12.13. A bank statement in the name of [redacted]. This Statement was headed [redacted] *Account*" and showed two lodgements as follows:

10/3/2014	[Second-Named Appellant]	€9,730
13/3/2014	[redacted]	€1,769,150

And one withdrawal as follows:

13/3/2014	[redacted]	€1,769,150

12.14. A document on [redacted] letterhead. This was headed "*Client Statement*" and referred to [redacted] as the client. The following transactions were recorded on that statement:

13/3/2014	Drawdown of loan from [redacted]	€1,769,150 (Credit)
13/3/2014	Advance of loan to [First-Named Appellant]	€1,769,150 (Debit)
13/3/2014	Drawdown of loan from [redacted]	€1,769,150 (Credit)
13/3/2014	Isol loan repayment to [redacted]	€1,769,150 (Debit)

As those transactions were self-cancelling, the closing balance on that statement was nil on 13/3/2014.

12.15. A further document also called "*Client Statement*". This document referred to the first-named Appellant and showed two transactions as follows:

13/3/2014	Drawdown of loan from [redacted]	€1,769,150 (Credit)
13/3/2014	Subscription for preference shares In [redacted]	€1,769,150 (Debit)

12.16. An additional [redacted] client statement in the name of [redacted]. This statement showed the following two transactions:

13/3/2014	Share investment proceeds received from [First-Named Appellant]	€1,769,150 (Credit)
13/3/2014	Advance of loan to [redacted]	€1,769,150 (Debit)

12.17. A letter from [redacted] to the first-named Appellant. This document was dated 24th June 2019 and was called "*statement of interest and confirmation of payment of loan arrangement fee*". This letter stated "*we can confirm that you paid the loan arrangement fee of €11,230 in accordance with the terms of the loan agreement and side agreement entered into by you on 14th February 2014 in two amounts of €1,500 and €9,730 on 4th March 2014*". Attached to that letter was a statement of interest paid dated 24th June 2019 which showed the interest paid by the first-named Appellant for the period 7th April 2014 to 1st June 2019. The loan interest was identical for each month during that duration, in the sum of €2,948.58, and the total amount paid for that duration was €182,911.96. The statement referred to an amount borrowed in the sum of €1,769,150, an interest rate of 2% per annum and the date of the loan drawdown being "*13th March 2014*".

12.18. A letter from the first-named Appellant to [redacted] dated 6th April 2020. This letter referenced the loan agreement entered into between the first-named Appellant and [redacted] and stated:

> "*I refer to the above loan agreement.*
>
> *On 6th April 2020, I acquired 176,915 B Class redeemable non-voting preference shares of €0.01 each in the capital of* [redacted] *("the shares") from [the second-named Appellant]. Please find enclosed the signed stock transfer form transferring the shares to me.*
>
> *In accordance with clause 5.5 of the loan agreement, I am now transferring the shares to* [redacted] *in full repayment of the loan….*
>
> *As a result of the above, I understand that I have now fully discharged all my obligations to* [redacted] *in relation to the loan. You might confirm your agreement by countersigning and returning this letter [signed by the first-named Appellant and countersigned for and on behalf of* [redacted]"

12.19. A copy of [redacted] Memorandum and Articles of Association.

12.20. A copy of a share certificate in [redacted] showing the first-named Appellant as the owner of 176,915 B Class Shares on 13th March 2014.

12.21. A copy of an undated stock transfer form transferring the 176,915 B Class Shares from the first-named Appellant to the second-named Appellant.

12.22. A copy of a share certificate in [redacted] showing the second-named Appellant as the owner of the B Class Shares on 27th March 2014.

12.23. A copy of a stock transfer form dated 6th April 2020. This document transferred the B Class Shares from the second-named Appellant to the first-named Appellant for a consideration of €1.

12.24. A copy of a share certificate in [redacted] showing the first-named Appellant as the owner of the B Class Shares on 6th April 2020.

12.25. A copy of a stock transfer form dated 6th April 2020. This document transferred the B Class Shares from [redacted] to [redacted] on 6th April 2020 for a consideration of €1,769,150.

12.26. A copy of a share certificate in [redacted] showing [redacted] as the owner of the B Class Shares on 6th April 2020.

12.27. A copy of [redacted] unaudited financial statements for the periods 1st January 2012 to 31st December 2014. A summary of those financial statements is as follows:

[redacted]) Limited			
	€	€	€
Profit & Loss Account	31.12 .12	31.12.13	31.12.14
Income	-	-	-
Expenses	-	-	-
Net Profit/ Loss	-	-	-
Balance Sheet	€	€	€
	31.12.12	31.12.13	31.12.14
Current Assets			
Debtors - [redacted]	3,500,000	8,200,000	10,359,500
Cash	1	1	1
	3,500,001	8,200,001	10,359,501
Current liabilities			
Class B Non-Cumulative, non-voting Preference shares	(3,500,000)	(8,200,000)	(10,359,500)
Net Assets	1	1	1
Shareholders' Funds			
Share Capital	1	1	1
Profit & loss	-	-	-
	1	1	1

12.28. Also included within [redacted] financial statements for the year ended 31st December 2014 was a list of shareholders of the company. Included within this list was the second-named Appellant who was recorded as holding 176,950 B Class Shares. The other shareholders held 859,000 B Class Shares and appeared to be independent of the first and second-named Appellants. The principal activity of [redacted] is stated as "*the company issues preference shares, the purpose of which are used for financing*". Note 5 to those accounts states:

> "*Debtors' Balances – The debtors balances consist of loans to* [redacted]*, a related company totalling €10,359,500 which are unsecured, interest-free and repayable on demand. The loans were used by* [redacted] *to make loans to a number of individuals to facilitate their investment in 1,035,950 Class B non-cumulative, non-voting redeemable preference shares*".

12.29. A copy of the second-named Appellant's financial statements for the year ended 30th November 2014. Included within the Balance Sheet of those financial statements was financial assets in the sum of €1,769,150. No explanatory note detailed what those financial assets related to but from the accompanying appeal documentation, it is evident that they related to the 176,915 B Class Shares. The net assets of the company were in the amount of €4,660,305 which included the sum of €3,015,967 in cash at bank as at that date.

12.30. A copy of [redacted] abridged financial statements for the year ended 31st December 2014. These detailed stocks of €1,327,481, debtors of €8,098,437, cash at bank of €13,476 and creditors (falling due within one year) of €9,429,082. The net assets of the company were €10,312. The accompanying note 4 to those financial statements which purported to provide a breakdown of creditors (falling due within one year) did not reconcile to the Balance Sheet figure of €9,429,082.

12.31. The first-named Appellant's statement of Net worth as at 27th March 2014. This is reproduced as follows:

[redacted]

Statement of Net Worth at 31March2014	€
Assets	
Principal Private Residence	1,550,000
Bank & Cash	854,572
Jewelry	100,000
Motor Vehicles	50,000
Pension	90,116
[redacted] Investment	32,605
Shares in [redacted]	4,000,000
	6,677,293
liabilities	
Personal Loan	(1,769,150)
Net assets	4 908,143

12.32. A letter to the first-named Appellant from [redacted] dated 8th April 2019. This letter which is headed "*Valuation of redeemable non-voting preference shares issued by* [redacted]" is considered at paragraph 47 below.

12.33. The Respondent's report prepared by [redacted] dated March 2020. This Report is entitled "*Report for the Revenue Commissioners in respect of the valuation of shares in* [redacted] *at 27th March 2014*". The contents of this report are considered at paragraph 48 below.

Witness Evidence

[redacted]

13. [redacted] explained that he was a director of [redacted] and [redacted] at the end of February/March 2014 as well as a part owner of both of those companies. He stated that there were four main stages in the transactions entered into between the first-named Appellant and [redacted]

14. The first of these transactions was the first-named Appellant acquired a loan of €1,769,150 from [redacted] He stated that the underlying loan agreement, which ran to 14 pages, was a "*fairly standard loan*". He advised that the signatures on the loan agreement were his and that of the first-named Appellant. He explained that while the loan agreement

was dated 14th February 2014, it was not until 13th March 2014 that the loan funds were advanced to the first-named Appellant.

15. The second step in the transaction was that the first-named Appellant subscribed €1,769,150 for shares in [redacted]. He further explained that when [redacted] received the proceeds of the share subscription from the first-named Appellant, the third step was completed whereby [redacted] provided a loan of the same amount to [redacted]. He stated that this loan was formulised in a loan agreement called "*loan agreement 10th March 2014 between* [redacted] *and* [redacted]".

16. [redacted] advised he was not a party to the fourth step in the transactions. However, he stated that he understood the first-named Appellant sold the entirety of his shareholding in [redacted] to the second-named Appellant on 27th March 2014. He stated that he became aware of that transaction when the first-named Appellant, as required under the loan agreement entered into by him, requested approval from [redacted] to transfer the shares from his name to that of the second-named Appellant. He further advised that he was provided with a stock transfer form, transferring the [redacted] shares from the first-named Appellant to the second-named Appellant and the date on that form was 27th March 2014.

17. The witness stated that the rights attaching to the [redacted] shares were set out in the share offer letter to the first-named Appellant and the Articles of Association of [redacted]. He summarised that the shares were non-voting and redeemable on demand (meaning that the owner of the shares could demand [redacted] to repay the issued price of the shares back at any stage). When asked how an [redacted] shareholder could get its money back "*on demand*", the witness explained that, subject to funding [redacted] could transfer the proceeds by bank transfer or such like. Alternatively the witness explained, [redacted] Articles of Association provided, at clause 16.1, that the repayment could be satisfied by transferring an "*asset in specie*". The witness explained that this process would involve transferring, in the second-named Appellant's case (as the owner of the [redacted] shares) the loan asset of €1,769,150 in [redacted] as full satisfaction of the amount due. Put plainly, this would result in the second-named Appellant acquiring the loan of €1,769,150 in exchange for its shareholding in [redacted]. This would result in the first-named Appellant (as the beneficiary of the loan funds) then being obligated to pay the interest and redemption amount of the loan to the second-named Appellant.

18. The witness advised in the event of the second-named Appellant acquiring the loan owed by the first-named Appellant, it could similarly demand repayment of the loan or continue with the term of the loan. The advantage of the latter course of action, the witness

explained, was that as there was interest of 2% chargeable on the loan, the second-named Appellant could have generated a financial return on the transaction in the form of the interest receivable on the loan.

19. Whether the loan was a good or bad investment for the second-named Appellant, in the event of it acquiring the loan, the witness stated, was contingent upon the ability of the first-named Appellant being in a position to repay the loan together with any interest arising. The witness advised that he had been provided with a copy of the first-named Appellant's net worth at the time he acquired the loan and as that revealed he was then worth in the region of four to five million euros, he was of the opinion that the first-named Appellant was more than capable of servicing the loan and repaying the capital balance. The witness explained that the first-named Appellant's net worth was a key consideration in providing the loan on an unsecured basis.

20. The witness further advised that the second-named Appellant never sought repayment of its investment in [redacted] during the term of the loan. He stated that the loan was repaid by the first-named Appellant on 6th April 2020.

21. The witness stated that the process involved in repaying the loan advanced by [redacted] involved two main steps. Firstly, the first-named Appellant purchased the [redacted] shares held by the second-named Appellant. Once the first-named Appellant was in possession of the [redacted] shares, he then transferred those shares to [redacted] in repayment of the loan. The witness stated that when those transactions completed on 6th April 2020, the loan was repaid in full and as such, that was the end of his involvement in the matter.

22. Under cross examination, the witness stated that:

    22.1. When the first-named Appellant repaid the loan on 6th April 2020, [redacted] subsequently called upon [redacted] to redeem the shares and following that transaction, the entire series of transactions was unwound.

    22.1. A third party international fund, [redacted], which he, his companies [redacted]) and both the first and second-named Appellants were unconnected with, provided a monetary loan to [redacted] initially. Rather than the funds being transferred from [redacted] directly to [redacted], the witness explained that the advanced funds were transferred to a trustee company, [redacted]. The witness explained that the advanced monies were lodged into a client account and subsequently advanced to the first-named Appellant so that he could purchase the shares in [redacted]. In turn the funds received by [redacted] from the first-named Appellant in respect of the purchase of the shares were lent to [redacted]. Upon receipt of these funds by [redacted] it

subsequently used those funds to repay [redacted] in full which had the effect of terminating both [redacted] and [redacted] from any further involvement. The witness stated that all of the aforementioned sequence of transactions occurred on the same day, which was 13th March 2014.

22.2. In response to the following question the witness answered "yes" –

"*So basically, in terms of actual physical transfer of funds here, there isn't any, in the sense of the money goes from* [redacted] *to* [redacted]*, it just sits in some kind of* [redacted] *account momentarily by the looks of it and ultimately, as a result of the on transfer to* [redacted]*, the transfer on to* [redacted]*, the transfer back to* [redacted]?"

22.3. In addition to the arrangement fee of €11,230, the first-named Appellant paid the sum of "€3,000 odd" per month to [redacted] in the form of interest payments for the duration of the loan.

22.4. [redacted] was a [redacted] based company possibly resident in [redacted] and received payment of a fee in the sum of €9,730 from the second-named Appellant.

22.5. [redacted] was a trust company based in [redacted]

The First-Named Appellant – [redacted]

23. [redacted] explained that he had been renting his residence for a period of time and following his marriage, he and his partner found their ideal family home in 2014 which was within their "*network*" and in close proximity to where their children attended school.

24. The witness reminded the Commissioner that 2014 was the time of sub-prime mortgage lending issues which resulted in a tightening around the world in terms of lending. He stated, while aware of this situation, he approached his bank and they informed him that the maximum they would be willing to lend him was around the €200,000 "*mark*". As this was insufficient funding to acquire the proposed residence, the witness stated that he was anxious to find a solution to fund the purchase as he was aware that there were a number of potential bidders on the property, and as such, he needed to move quickly to secure the property.

25. The witness stated that he approached his taxation advisors and requested their assistance to secure the property. They advised as it was not the most "*cost-effective thing*" to take the required funds from his company (the second-named Appellant) and as taking a large amount of cash reserves from the company could adversely affect its

continued operation and success, an alternative strategy was required. In order to implement this strategy, the witness advised that he was introduced to [redacted] who he was informed were "*a company that can lend you the money over a short-term period at a competitive rate of interest*".

26. The witness advised that he considered this option an attractive short-term solution as he had hoped that the Global lending crisis would ease in around two years' time, at which stage he proposed to re-approach his bank and get a mortgage through the "*traditional route*". He stated that as the Respondent began an investigation into his taxation affairs in 2016, he decided to "*sit and wait to see how everything was going to play out because he didn't know the ultimate end result of the investigation*".

27. The witness confirmed that his signature was affixed to the loan agreement and the share transfer form which effected the transfer of the shares from his name to that of the second-named Appellant. He further confirmed that he sold his [redacted] shares to the second-named Appellant and received the sum of €1,769,150 from it for the sale.

28. Turning to his provided statement of net worth, the witness confirmed that it was a true reflection of his financial position at that time and that he personally held the sum of €854,000 in available cash. He stated that he needed that cash to pay the interest on the loan, which was effectively €3,000 per month and over the course of the loan from drawdown date to the date he paid it off, he personally paid some €212,000 in the form of loan interest.

29. The witness advised that he repaid the loan in 2020 because *"it had gotten to a stage, you know, because the investigation had been dragging on for so long that my health had actually taken a big hit and I was advised to basically bring it to an end*". He further stated that while he redeemed the loan for that purpose and as his business was being affected, he never believed the loan was not *bona fide*. In his own words, he stated "*it just got to a stage in 2020 where I just thought, yeah, I just needed closure of it*". He stated that he was always of the view that the loan was short-term in nature as such, he was required to repay the full balance personally.

30. Under cross examination, the witness confirmed that:

    30.1. The balance of €1,769,150 owed by him to the second-named Appellant, as per his provided statement of net worth, had arisen from the sale of his shareholding in [redacted] which had occurred before the statement of net worth was prepared.

30.2. The second-named Appellant was involved in the sale of structured products to [redacted] globally. He advised that those structured products were products like [redacted] and the providers of those products were [redacted]

30.3. The second-named Appellant's provided Balance Sheet as at 30th November 2014 had the sum of €3 million in cash within it and this was after payments of €1,420,840 and €174,880 were transferred to him earlier in that year. He further confirmed from the provided Financial Statements for 2014 that his salary was €34,000 in 2013 and €42,000 in 2014. The witness accepted that the relatively low salary (in proportion to the cash reserves of the second-named Appellant) was a decisive factor in the bank only offering him a mortgage of circa €200,000.

30.4. When it was put to him that he had €854,000 in personal cash at the stage he was considering acquiring the property and could have gone to his bank and advised them of that position and requested they finance the 50% balance of funds necessary to acquire the property with his shares in the second-named Appellant as security, he said that he needed the cash for personal reasons and could not afford to sink it into the property and hence that proposition was not available.

30.5. Despite the Respondent putting it to the first-named Appellant that he entered into the transaction to avoid a significant tax liability, he stated that was not his motivation but rather to secure the funds necessary to purchase his home in a tax effective manner.

[redacted] – *The Appellants' accountant*

31. The Appellants' accountant stated he acted in that capacity for both the first and second-named Appellant since in or around mid-2020. He stated that he had recently become aware that the financial statements prepared in respect of the second-named Appellant for the financial years 2020 and 2021 were required to be adjusted and resubmitted to the Companies Registration Office owing to an error. The error, he explained, was that the prepared accounts showed the second-named Appellant still owning the €1.7m investment in [redacted] when it had in fact disposed of that investment to the first-named Appellant in April 2020.

32. From an accountancy perspective, the witness advised that he was required to remove the investment from the Balance Sheet and transfer it into the first-named Appellant's director's current account. In order to clear the director's current account which would be

overdrawn as a result of the transaction, he stated he was then required to declare a dividend to the first-named Appellant and the effect of this transaction was to clear the overdrawn director's current account. The overall effect of this transaction, he explained, was that the second-named Appellant was restored to the position as if it had never entered into any investment-related transaction and in place had declared a dividend of €1.7m to the first-named Appellant.

33. The witness explained that he was also required to adjust the first-named Appellant's 2020 Income Tax Return to reflect the position that he received a dividend of €1.7m from the second-named Appellant in 2020. He stated that the Respondent's on-line filing system ("ROS") required an explanation as to why the return was being amended to which he stated he was going to state "*owing to an omission on my part*".

34. Under cross examination, the witness stated that:

    34.1. The "*self correction period*" for the error to have been corrected had lapsed but he was still free to adjust the 2020 Income Tax Return to reflect the true position. "*Self-correction*" is a facility which allows the taxpayer to correct an error in his or her tax return and provided it is done within a certain timeframe (which is contingent on the tax head, quantum of the liability and certain other conditions) it enables the taxpayer to avail of a nil or reduced penalty. In the first-named Appellant's case self-correction was not available as the Respondent had initiated an investigation into his taxation affairs and he had not paid the under-declared income tax within two years following the end of the chargeable period in which the error occurred.

    34.2. As the second-named Appellant had paid a dividend in 2020 to the first-named Appellant, he was further required to adjust the first-named Appellant's Corporation Tax Return ("Form CT1") and pay DWT for the financial year 2020.

Commissioner Intervention and Adjournment

35. Following the conclusion of the Appellants' factual witnesses' evidence, the Commissioner spoke initially to the Appellants' accountant to clarify certain matters tendered in his evidence and subsequently to both of the parties.

36. The Commissioner stated that his jurisdiction in the Appellants' appeal was confined to those provided under section 949AK (1) TCA 1997. That section provides in the case of appeals against assessments, the Commissioner is confined to increasing the assessment, decreasing the assessment or leaving the assessment stand.

37. The Commissioner stated that the effect of the Appellants' accountant's evidence was tax neutral. He explained that as the effect of the unwinding of the transaction in 2020 amounted to sums comparable to those on the disputed Notices of Assessment and as he did not have jurisdiction to deal with the quantum of penalty or interest, then he was unsure if he could assist the parties any further in concluding the appeal.

38. In coming to the finding that the transaction was tax neutral the Commissioner considered the 2014 transactions and the Notices of Assessment issued by the Respondent. In calculating the quantum of those assessments, the Respondent took the position that no investment took place (in 2014) by the second-named Appellant and in place, the first-named Appellant received a distribution or advance from the second-named Appellant in the amount of €1,769,150. This resulted in the second-named Appellant being required to pay DWT on the deemed distribution and the first-named Appellant being required to pay income tax on the deemed distribution (with a credit for the DWT paid by the Second-Named Appellant).

39. In his evidence, the Appellants' accountant stated that as the first-named Appellant unwound the transaction in 2020, he was required to adjust the financial statements and tax returns of both Appellants and pay the resultant liability on both Appellants' behalf. As the investment/loan amount remained static between 2014 and 2020, and as tax rates remained materially the same, this resulted in the same tax on the transactions becoming payable in 2020 as would have been payable in 2014.

40. Put plainly, the Commissioner stated that the Respondent's view of the 2014 transactions was that they resulted in a distribution being made to the first-named Appellant. The effect of such a distribution was that the second-named Appellant was liable to DWT on the amount of the deemed distribution, €1,769,150 and the first-named Appellant was liable to income tax on the amount of the deemed distribution (with a credit for the DWT charged to the second-named Appellant).

41. Turning to the "reversal" of the transaction in 2020, for the first-named Appellant to repay the loan to [redacted], he was firstly required to re-acquire the shares from the second-named Appellant, which he did. Upon completion, this resulted in the first-named Appellant owing the second-named Appellant the deemed value of those shares, €1,769,150. The Appellants' accountant initially "parked" this amount owed into the first-named Appellant's director's current account. The effect of this adjustment was that the first-named Appellant owed the second-named Appellant the sum of €1,769,150 in respect of the acquisition of those shares. As the first-named Appellant was required to clear this overdrawn director's

current account in order to avoid an initial and ongoing charge to taxation for both himself and the second-named Appellant[2], he was required to declare a dividend in the amount of the loan, €1,769,150. Rather than receive the amount of the dividend, the first-named Appellant "offset" it against his director's loan account which resulted in that balance being reduced to nil.

42. The effect of the first-named Appellant paying a dividend to himself from the second-named Appellant in 2020 was that the second-named Appellant was, as with the 2014 transaction, deemed to make a distribution in the amount of €1,769,150 and the first-named Appellant was deemed to receive this amount. As tax rates and the amount of the deemed distribution in 2014 and 2020 remained materially identical, it therefore follows that the tax calculated by the Respondent in its issued assessments mirrored the tax arising on the 2020 transaction.

43. Following the Commissioner's intervention, the parties requested some time in which to discuss the position between themselves and the Commissioner acceded to this request by granting a break in the proceedings.

44. The hearing resumed shortly thereafter and the Commissioner was informed by the Respondent's Counsel that an accommodation had been reached but that accommodation was subject to further approval. It was agreed that the matter would be adjourned to establish if an agreement could be finalised between the parties and a CMC would be held at a later date in order for the Commission to establish if the appeal was concluded.

45. The CMC took place on 1st March 2023 during which the Commissioner was informed that the settlement discussions had fallen through and the Commissioner was requested to fix another hearing date for the appeal to conclude. The appeal proceeded on 28th March 2023 with the parties' expert witnesses tendering their evidence in advance of the parties' legal submissions. That evidence is considered below at paragraphs 47 and 48.

[2] As the second-named Appellant is a "close company", a special tax regime is applied where such a company makes a loan to certain persons called "participators" which includes a director/shareholder. A close company is a "company which is controlled by five or fewer participators". Section 239 TCA 1997 requires where such a loan is provided to a participator, the paying company is ordinarily required to pay income tax, at the standard rate for the year of assessment in which the loan or advance is made on the grossed-up equivalent of the loan amount. In addition, if the person receiving the loan does not pay interest on the loan amount, they are subject to tax under section 122 TCA 1997, on the deemed interest benefit (calculated at 4% of the loan amount if the loan is in respect of a private residence or 13.5% of the loan amount on non-residence loans).

Expert Witness Valuation Reports

46. In addition to the foregoing referenced documentation, in advance of the appeal hearing, the Commission were provided with valuation reports from the parties. These are considered below.

Appellants' Report

47. The Appellants' Report was entitled "*valuation of redeemable non-preference shares issued by* [redacted]", was set out in letter format addressed to the first-named Appellant and was five pages long. Included within the report was the following:

    47.1. A "*limitation in scope*" which stated "*We did not access the financial systems of the Companies and the information was provided by email and phone*."

    47.2. The background to the valuation which detailed the sequence of the transactions entered into by the first and second-named Appellant.

    47.3. The terms of the loan provided by [redacted] to the first-named Appellant. This stated that the interest on the loan was 2% per annum, that the loan was unsecured, that the loan could be assigned by [redacted] without the consent of the borrower and that the borrower could assign the loan with the consent of [redacted]

    47.4. The terms of the B Class Shares issued by [redacted] This noted that those shares were eligible for a 5% per annum dividend (if declared) but if unpaid that the dividend was not cumulative.

    47.5. A review of the terms of the loan provided by [redacted] to [redacted]. This noted that the loan was unsecured, interest free and repayable on demand.

    47.6. The first-named Appellant - this referenced the Appellant's provided statement of net worth as at 31st March 2014 and discussed his credit score.

    47.7. Valuation of shares. This noted that it was necessary "*to look through* [redacted] *and* [redacted] *to the resources/solvency of the [first-named Appellant]*" in order to determine the value of the B Class Shares. It further noted that the owner of the B Class Shares would have recovered the full value of those shares from the first-named Appellant and hence the appropriate market valuation of the B Class Shares was €1,769,150 as at 27th March 2014.

Respondent's Report

48. The Respondent's Report was labelled "*Report for the Respondent in respect of the valuation of shares in ICP at 27th March 2014*". The report was 12 pages long and included the following:

    48.1. An introductory paragraph which referred to a "*goodwill valuation report*".

    48.2. Our work. This set out a brief background to the transactions undertaken. It stated "*we value shares at open market rate in line with section 548 TCA 1997 – 'The general rule is that market value means the price which an asset might reasonably be expected to fetch on a sale in the open market*". Some lines down, the author stated – "*the key question in this case is whether it is possible for the [first-named Appellant] to sell the shares in* [redacted] *to an unconnected third-party at the valuation date and what would a third party have paid for those shares?*"

    48.3. The background to the transactions undertaken.

    48.4. The investment in the [redacted] Class B Class Shares. This detailed the transactions undertaken by the Appellants with [redacted] and [redacted] which were described as "*circular transactions*".

    48.5. Details of the fund transfers.

    48.6. [redacted] accounts. This provided a summary of [redacted] Balance Sheet for the years 2012 to 2014 and concluded that the value of the net assets of [redacted] for those years was €1. Included within the analysis was - "*what was the motivation for the investment?*" with the provided answer "*The coupon for the shares was 5% but* [redacted] *had no activity which it could derive income. The company was incorporated on the* [redacted] *in the* [redacted] *By 31st December 2014 it had no revenue reserves and no activity on the Profit and Loss Account for the three years since incorporation*".

    48.7. [redacted] accounts. These detailed the ownership of the company and stated "*generally, the company received money from* [redacted] *and loaned it to other parties who invested it in the* [redacted] *shares*". A summary of [redacted] Financial Statements for the years 2012 to 2015 was provided where it was noted that the "*other debtors*" figure is closely related to the "*due to connected parties*" figure.

    48.8. Sale of the [redacted] shares by the first-named Appellant to the second-named Appellant. This detailed the sequence of the transactions and concluded as follows:

"*The benefit of the transaction to [the first-named Appellant] is obvious – it has enabled him to withdraw funds from his company without paying significant taxes. The shares were valued by* [redacted] *at €1,769,150 [sic] therefore there would have been no capital gains tax payable by [the first-named Appellant] when he sold the shares to his company.*"

48.9. Share valuation methods. This detailed the various valuation methods ordinarily used when valuing shares in companies and concluded that the appropriate valuation method to be used was that of market value. Underneath that heading it stated*:*

48.9.1. "Given the circular nature of this transaction and the fact the [the first-named Appellant] disposed of the shares to a company wholly owned by himself the disposal is not evidence of the market value of the shares. We recognise that in the event of the liquidation of [the second-named Appellant], [the first-named Appellant] would have to repay his loan from [redacted] *and unwind the transaction, therefore on the face of it the shares are worth €1.76m, the value to him/[the second-named Appellant] is €1.76m but that is not the market value of the shares.*

The question for a valuer is would there have been a willing third-party purchaser for the shares and what would they have paid for the shares in 2014?

What would the attractiveness of [the first-named Appellant's] shares in [redacted] *be to a third party?*

As already noted, the shares are non-voting preference shares with a 5% coupon that was not paid in the period under review. [redacted] *was not generating any profits, therefore the shares were not attractive from an income or capital growth perspective.*

The shares are effectively backed by a loan to [redacted] *which would have needed to redeem the loan to [the first-named Appellant] to pay back* [redacted] *which in turn could have redeemed the shares. Therefore, in effect any purchaser of the shares was in effect buying a loan to [the first-named Appellant] – what benefit would have accrued to a third-party purchaser from the shares. They would have got their money back if the transaction was successfully unwound, but there would have been no reward for risk and no income return.*

While [the first-named Appellant], based on [redacted] valuation report, may have been a person of high net worth (€4.9m at 31st March 2014..), but there was no guarantee that he would continue to be so or that he would have been willing to unwind the transaction at the behest of the new shareholder.

…

Would an investor have purchased the shares at a discount? An investor may have been willing to do so but [the first-named Appellant] would not have been willing to sell at a discount. If the shares were disposed of at a discount to an independent third party and the loan to [the first-named Appellant] was not similarly discounted then the investor would have moved to have the shares redeemed for their issue value, thereby gaining the difference between the discounted share price and the issue value. This would not be in [the first-named Appellant's] interest as [the second-named Appellant] would incur a loss on its investment and he would be required to pay the original value of the loan to the investor."

48.10. Conclusion. This stated:

"*While the stated motivation for the transaction was to diversify [the second-named Appellant's] assets in 2014, as it had large cash reserves and there were strong fears around the solvency of [redacted] where the funds were held. There are many options open to the [second-named Appellant] which would not have involved an investment effectively backed by a loan to [the first-named Appellant], and which would not [sic] resulted in him personally receiving €1.769m from the company, therefore this strategy did not effectively diversify the assets of the company.*

While the shares are worth €1.769m to [the first-named Appellant], their market value was €Nil, it was not in [the first-named Appellant's] interest to dispose of them to a third party, nor was it in the interest of a third party to acquire them – there was no market for the shares.

For the reasons outlined in our view the market value of the [redacted] shares on 27th March 2014 was €Nil."

The Expert Witnesses' Evidence

[redacted] – *The Appellants' Expert Witness*

49. [redacted] advised that he was a Director with [redacted]. He stated that he had over 30 years' experience in corporate finance and was requested by the Appellants to prepare a report and tender expert evidence on their behalf.

50. The witness stated that he does a significant amount of share valuation work and has also acted as a valuer on the Respondent's behalf. He advised that he was specifically requested by the Appellants to value the shares in [redacted] as at 27th March 2014.

51. The witness stated that he considered a number of different valuation methodologies in preparing his Report but decided that the best approach in the Appellants' case was to value the [redacted] shares based on the underlying assets of [redacted]. As the underlying assets in [redacted] was the provided loan, the witness stated that he concentrated his valuation on the value of the loan agreement entered into by the first-named Appellant on the open market.

52. In determining the market value, the witness stated that he considered the ability to recover the advanced loan from the first-named Appellant. Having regard to the first-named Appellant's provided statement of affairs, he stated he was of the opinion and it was uncontroversial to state that the loan was recoverable in full from the first-named Appellant. As the [redacted] shares were effectively underwritten by the value of the loan and as the loan was recoverable in full, he concluded that the value of the [redacted] shares was identical to the value of the loan if sold on the open market.

53. When asked by the Appellants' Counsel if there was a market for the [redacted] shares the witness stated "*there's an open market for everything but you ultimately can only tell whether there's an open market when you go to it*[3]". He stated it was very important for the Commissioner to note that there are a number of statutory hypotheses that a valuer is required to abide by with the central one being that a valuer is required as part of his work to assume that there is a deemed open market and as such, a willing seller and buyer.

54. The witness stated that he cannot conduct a valuation with the benefit of hindsight and is required to value a particular asset on the facts and circumstances prevailing at the date of the valuation. In conducting this approach, he stated that he looked at the situation as at 27th March 2014 and noted that if a person had surplus cash "*there wasn't any place*

[3] Transcript, Day 2, page 8 at lines 17-19.

to put it[4]". He explained that as the European Central Bank ("ECB") rate was 0% at the time there was concerns about the viability of the banking system if an individual or entity wanted to put money to work then there was very few "*safe havens*" around at the time. He stated "*so perhaps a loan backed ultimately by an individual with wealth would have been seen as an attractive proposition. So in my view there was a market for such loan notes at the time*[5]. "

55. In terms of the first-named Appellant's financial stability in 2014, he stated:

> "[redacted] *had a strong personal balance sheet at that time in excess of what the loan was. He was solvent even allowing for that loan. Like, he had significant personal property. He'd significant cash reserves. He'd investments in a successful business. He was a man of means. So he was, like he'd a good credit rating, for want of a better way of putting it. He was a safe mark, for want of a better way of putting it*.[6]"

56. The witness explained that in conducting a "FICO" assessment on the first-named Appellant's credit rating he achieved a high score to the extent that his likelihood of defaulting on the loan was calculated to be 1%. "FICO" is an anagram for the Fair Isaac Corporation and is seen in the marketplace as a pioneer in developing a method for calculating credit scores based on information collected by credit reporting agencies[7].

57. When asked by the Appellants' Counsel if he would recommend such an investment to his clients, the witness replied by stating "*Well, I don't have a business investment licence from the accountancy body but nonetheless, if I had, I would certainly consider it strongly*[8]*.*"

58. Under cross-examination the witness stated that:

    58.1. He agreed that net book valuation of [redacted] according to its provided 31st December 2014 Balance Sheet was €1.

    58.2. He was unable to value [redacted] on a "market value basis" as he was not provided with any information to do so nor was he requested to value that company.

    58.3. His report was based upon provided documentation and he did not conduct any audit work in preparing the Report.

[4] *Ibid.* page 9 at lines 9-10
[5] Transcript, Day 2, page 9 at lines 22-24.
[6] *Ibid.* page 10 at lines 1-8.
[7] https://www.fico.com/
[8] Transcript, Day 2, page 11 at lines 6-8.

58.4. He agreed as the first-named Appellant purchased a family home, it might be difficult in the event of a loan default to realise security from a family home.

[redacted] – *The Respondent's Expert Witness*

59. [redacted] advised that he is a partner in [redacted] having previously trained with [redacted] in the 1990s where he was first exposed to valuation work. He further advised that he worked in a multi-national in [redacted] doing corporate finance work and in other large firms after that before sitting up his own practice in 2005. He stated that since 2005 he had continuously been involved in the area of valuation and was requested by the Respondent to value the Appellants' shares in [redacted]

60. He stated that he received a file from the Respondent which included information on the various entities associated with the loans, the structure, how the structure was set up, etc. He confirmed that the provided financial statements of [redacted] had debtor balances of €10.3m and note 4 to those accounts stated:

> "*The debtor balance consists of loans to* [redacted] *and related companies totalling €10,359,000 unsecured interest being repayable on demand. They were used by* [redacted] *to make loans to a number of individuals...in Class B Shares.*"

61. The witness stated that the key consideration for him in valuing the [redacted] shares was whether it was possible for the second-named Appellant to sell the [redacted] shares to an unconnected third-party at the valuation date, 27th March 2014, and what the third-party would have paid for those shares.

62. The witness acknowledged that there was a value on the [redacted] shares but he disputed that full value would be obtained on the open market for those shares. He explained that nobody in their "*right mind*" would invest in the [redacted] shares once they started to look at the structure of those shares. He stated that as the [redacted] shares were essentially underwritten by the first-named Appellant in the event of him defaulting on the underlying loan, it would be a costly exercise to pursue him. He also noted that the underlying loan documents did not contain any security within them.

63. Furthermore, the witness stated based upon the first-named Appellant's financial position, he would have been required to access funds from the second-named Appellant and being a potentially time consuming and expensive process, this would have been unattractive to any unconnected purchaser of the [redacted] shares.

64. The witness further acknowledged that the Global Market was in disarray at the time of the valuation but was of the view that a prudent investor would rather invest in an

investment firms' fund where they would have had a minimum of a small return on their investment and if required, capital guarantees.

65. Under cross examination by the Appellants' Counsel, the witness stated that:

65.1. Section one of his Report contained an error as it referred to a "*goodwill valuation Report*" rather than an "*open-market valuation Report*".

65.2. It was not a contradiction for his report to state that "*the key question in this case is whether it was possible for* [redacted] *to sell the shares in* [redacted] *to an unconnected third party at the valuation date*" despite being required to conduct his valuation on the assumption that a willing buyer and seller exist.

65.3. That his Report contained the statement "*the benefit of the transaction to* [redacted] *is obvious. It has enabled him to withdraw funds from his company without paying significant taxes*[9]". When asked by the Appellants' Counsel if it was necessary for him to have considered that matter in preparing his valuation report and whether he was biased by that knowledge, the witness stated "*Well, I think it has been acknowledged by everybody here that the structure*[10] *–"before* being interrupted by Counsel who stated that was an issue for the Commissioner.

65.4. His view was that the [redacted] shares were worth nothing because they were not marketable. He reiterated that as the [redacted] share value was contingent on payment of the loan value by the first-named Appellant and as this was unsecured then that was formative in his conclusion that an investor would not acquire the [redacted] shares but in place would choose to invest in an investment fund or such like. When asked whether that was not an extreme view, the witness stated "*No*."

65.5. The "*personalised structure*" of the transactions aided his belief that the shares were not marketable. When asked about the personalised structure, he stated :

"You can't avoid [redacted] *in this, if you're asking me to avoid mentioning him. The reason for the structure was because of his personal need and clearly he's underpinning the structure, okay*[11]*."*

65.6. Based upon the first-named Appellant's provided statement of affairs, the first-named Appellant had sufficient reserves to repay the loan, albeit that he would

[9] Transcript, Day 2, page 87 at lines 1-3.
[10] *Ibid*. page 87 at lines 11-12.
[11] *Ibid*. page 96 at lines 3-7.

have been required to have received funds from the second-named Appellant to so do.

Submissions

Appellants

66. The Appellants' Counsel submitted it was erroneous for the Respondent to have arrived at a nil or negligible value of the B Class Shares as at 27th March 2014. The Appellants' Counsel noted in coming to that valuation, the Respondent's valuer had based his findings on two main premises – (1) It would not have been in the first-named Appellant's interest to sell the B Class Shares and (2) No open market existed for those shares.

67. The Appellants' Counsel submitted that established case law determined in valuing an asset, it is necessary for a valuer to assume that (a) a sale happens and (b) the sale is made by a hypothetical seller, not the actual seller. The Appellants' Counsel submitted given those underlying principles, it is not permissible in arriving at the market value, to determine the valuation based on the personal circumstances or preferences of the actual seller. Counsel further submitted that it is also not permissible to argue that the actual seller would not have accepted a certain price or any price based on such actual seller's personal circumstances. Counsel submitted that as the Respondent's valuer incorrectly took those factors into consideration in arriving at the nil or negligible valuation, then the Commission should place no reliance on that valuation.

68. In support of those submissions, the Appellants' Counsel opened the case of *AG v Jameson* [1905] 2 IR 218. Counsel stated by way of background that a valuation was required for estate duty purposes of a holding of 750 £100 shares out of 4,500 shares in issue. Under the articles of association if a member wished to dispose of their shares the other members had a right of pre-emption at a fair value fixed at £100 per share. The executor in the Jameson estate claimed that the "open market value" under the Finance Act was limited to that figure. Mr Justice Fitzgibbon held at page 230:

> "*In my opinion section 7(5) (Finance Act 1894) turns value into price for the purpose of estimating its amount; that price is to be ascertained on a sale assumed to take place in the open market and that means the price which would be obtainable upon a sale where it is open to everyone who had the will and the money to offer the price which the property of Henry Jameson in the shares was worth as he held them. The price was to be that which a purchaser would pay for the right 'to stand in Henry Jameson's shoes' with good title to get into them and to remain in them and to receive all the profits subject to all the liabilities, of the position. The price was what the shares were*

worth to Henry Jameson at his death, in other words it was what a man of means would be willing to pay for the transmigration to himself of the property which passed from H. Jameson when he died."

69. Turning to the issue that the hypothetical seller is required to be anonymous and the accepted valuation principles to be applied, the Appellants' Counsel opened the case of *Re: Crossman [House of Lords]* [1937] AC 26 ("*Crossman*"). Lord Blanesburgh stated:

"*If the duty of the Commissioners is, as I think, to estimate the price which the "property" as at the time of the deceased's death would fetch in the open market, if it were to be offered for sale, it is unnecessary to inquire by whom the property would hypothetically have to be offered*."

In coming to the valuation principles to be adapted, Lord Blanesburgh continued that the following underlying assumptions were required:

"*a) a sale of the shares is possible;*

b) the shares must be valued on the basis of hypothetical sale in a hypothetical open market;

c) the participants are a hypothetical purchaser and a hypothetical seller not the actual purchaser or seller;

d) the parties are willing – the hypothetical buyer is not being forced to buy and the hypothetical seller is not being forced to sell;

e) the incoming hypothetical purchaser will stand in the shoes of the hypothetical seller and will be subject to the restrictions, degree of influence and risk that the seller is bound by in the real world;

f) there is available to any prospective purchaser all information in relation to the shares which a prudent purchaser might reasonably request; and

g) the market value is the highest price achievable based on the above."

70. The Appellants' Counsel submitted, it followed that in arriving at a valuation of the B Class Shares, it needs to be determined at what price a hypothetical seller would seek to sell those shares. Counsel submitted that the Appellants' opinion was that such a seller would seek a price of €1,769,150 given that the hypothetical seller would itself be in a position to call for redemption of the B Class Shares at the point in time of the sale. Counsel continued that on seeking redemption of the shares, such a seller would receive an

assignment of the [redacted] loan, giving such a seller the right to demand immediate repayment of the [redacted] loan by the first-named Appellant. Counsel stated that on repayment of the [redacted]l loan, the hypothetical seller would receive the full €1,769,150 and hence that was correct valuation for the B Class Shares.

71. The Appellants' Counsel further submitted that it was incorrect for the Respondent's valuer to state that that a hypothetical purchaser would not have an interest in acquiring the B Class Shares. Counsel stated that as such a hypothetical purchaser of those shares would be in a position to immediately call for redemption of the shares, it would be entitled to receive the full €1,769,150 from the first-named Appellant.

72. Furthermore, the Appellants' Counsel submitted that rather than call for immediate redemption of the loan from the first-named Appellant, the hypothetical purchaser could elect to earn interest at 2% per annum in the form of interest on the loan for the duration of the loan and then ultimately receive the full value of the loan on redemption. The Appellants' Counsel submitted given the strong personal financial status of the first-named Appellant, it was unfathomable to consider that the loan could not or would not be paid back.

73. In conclusion, the Appellants' Counsel submitted that there is no commercial reality to suggest that a hypothetical seller would accept a price of nil for the B Class Shares or a price anywhere near nil. Counsel submitted in so doing, such a hypothetical seller would essentially be providing a gift of €1,769,150 to a hypothetical purchaser. Counsel stated, given this position, from a commercial and logical point of view, suggesting that the B Class Shares had a nil value at 27th March 2014 made no sense. Given the structure of the transaction and in noting the low level of risk associated with the loan and the potential return on same, Counsel submitted that the correct valuation of the B Class Shares was the full value of the loan, €1,769,150. Thus, as the first-named Appellant sold the B Class Shares to the second-named Appellant for full value, Counsel submitted that the Respondent's assessments should be reduced to nil and the Appellants' appeal allowed.

Respondent

74. The Respondent's Counsel opened section 548 TCA 1997 which legislates for the valuation of assets. In noting that subsection (1) defines "*market value*" as "*the price which those assets might reasonably be expected to fetch in the open market*", Counsel submitted that market value was the required basis for the valuation of the B Class Shares.

75. The Respondent's Counsel submitted that the amount paid by the second-named Appellant, in the sum of €1,769,150, to the first-named Appellant cannot represent the open market value of the B Class Shares. As such, Counsel submitted that the difference between the open market value of the B Class shares and the value paid to the first-named Appellant in respect of those shares ought to be treated as a distribution and taxed accordingly.

76. The Respondent's Counsel submitted that the transactions entered into by the first and second-named Appellant were to enable the first-named Appellant to extract tax-free funds from the second-named Appellant. Given, the degree of connectivity between the first and second-named Appellant and the underlying purpose of the transaction, the Respondent submitted that the underlying value of the B Class Shares was nil or negligible.

77. The Respondent's Counsel further submitted that the value of the B Class Shares was negligible as a third party could not reasonably obtain any value for those shares as they were not marketable on the open market. Counsel stated that he was of the belief that the B Class Shares were not marketable as no reasonable third-party would buy those shares as essentially the shares only purpose was to enable the first-named Appellant to extract tax-free sums from the second-named Appellant.

78. Counsel submitted that the valuation was required to be based upon what a "reasonable" third-party would pay for the B Class Shares. In support of this submission, the Respondent's Counsel opened *IRC -v- Gray* [1994] STC 360 which states at pages 371 and 372:

> *"…one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real*

life have been the best price reasonably obtainable. The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus on what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened. It is often said that the hypothetical vendor and purchaser must be assumed to have been 'willing: but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or disappointed with the result: for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant."

79. The Respondent's Counsel submitted as no reasonable person, armed with full knowledge of the B Class Shares, would have acquired those shares, then there was no open market for those shares. Given this position, Counsel submitted that as the value of the B Class Shares was nil or negligible, the entire sum of €1,769,150 paid by the second-named Appellant to the first-named Appellant was a distribution and as such, the provisions of section 130 (3) (a) TCA 1997 and section 172B TCA 1997 applied.

80. The Respondent's Counsel submitted that section 130(3) TCA 1997 generally provides that where a transfer of assets or liabilities takes place by either - (a) a company to its members, or (b) a company by its members, and the amount or value of the benefit received by the member (taken accordingly to its market value) exceeds the amount or value (so taken), the company is to be treated as making a distribution to the member of an amount equal to the difference.

81. The Respondent's Counsel submitted that as the B Class Shares had no value and as the second-named Appellant paid the first-named Respondent the sum of €1,769,150 for those shares, then a distribution of that amount had been paid by the second-named

Appellant to the first-named Appellant. Furthermore, as section 130 (3) (a) TCA 1997 requires the first-named Appellant to pay income tax on the amount of the deemed distribution (with a credit for the amount of DWT paid by the second–named Appellant), the Respondent submitted that it had correctly taxed the first-named Appellant in its issuance of the Notice of Assessment to him.

82. In addition, as section 172B TCA 1997 requires DWT to be paid on any such distribution, the Respondent's Counsel submitted that the Respondent had correctly calculated DWT on the transaction in the sum of €353,830.

83. In conclusion, the Respondent's Counsel submitted that as the first-named Appellant had received the sum of €1,769,150 from the second-named Appellant and as the first-named Appellant had not provided any valuable consideration for same, then it was incumbent on the Commission to uphold the Respondent's Notices of Assessment and refuse the Appellants' appeal.

Material Facts

84. The Commissioner finds the following material facts:

    84.1. On 14th February 2014, the first-named Appellant entered into a loan agreement with [redacted] for the provision of a loan in the sum of €1,769,150. The first-named Appellant received the loan funds under that agreement on 13th March 2014.

    84.2. The loan was unsecured but repayable on demand.

    84.3. That loan agreement required the first-named Appellant to make "interest only payments" on the loan at the rate of 2% per annum. The first-named Appellant paid the sum of €182,911.96 in the form of interest payments for the period 7th March 2014 to 1st June 2019 which equated to the monthly sum of €2,948.58.

    84.4. Assignment of the loan was permitted with the prior written consent of both the first-named Appellant and [redacted]. The loan documentation provided that a penalty, which equated to the unpaid interest over a five-year term, was payable in the event that the first-named Appellant wished to discharge the loan amount within the first five years.

    84.5. The loan documentation provided a clause which permitted repayment by offset of the B Class Shares.

    84.6. At all material times, the first-named Appellant was unconnected with [redacted]

84.7. On 13th March 2014, the first-named Appellant acquired 176,915 B Class Shares in [redacted] for the sum of €1,769,150. Those shares were eligible for an annual dividend of 5% subject to certain conditions being fulfilled. As they were not, no dividend was payable on those shares for the periods under appeal.

84.8. The B Class shares were assignable subject to certain conditions being fulfilled.

84.9. The first-named Appellant fulfilled the conditions necessary for the B Class Shares to be assigned on 27th March 2014 and on the same date sold the B Class shares to the second-named Appellant for an amount of €1,769,150.

84.10. At all material times, the first-named Appellant was a director and sole shareholder in the second-named Appellant.

84.11. On 6th April 2020, the first-named Appellant reacquired the B Class shares from the second-named Appellant for the sum of €1,769,150. The provided stock transfer form shows that transaction as occurring for a consideration of €1.

84.12. As the first-named Appellant did not pay the second-named Appellant for the B Class shares on 6th April 2020, the first-named Appellant owed the second-named Appellant the sum of €1,769,150 on that date.

84.13. No evidence was provided to the Commission to demonstrate that, to date, the first-named Appellant had discharged the amount owing to the second-named Appellant.

84.14. On 6th April 2020, the first-named Appellant surrendered his B Class Shares to [redacted] in discharge of the loan owed to it.

84.15. The first-named Appellant's statement of net worth disclosed that his net worth on 31st March 2014 was €4,908,143.

84.1. On 30th November 2014, the second-named Appellant's net assets amounted to €4,660,305 which included cash balances of €3,015,967.

Analysis

85. The appropriate starting point for analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in *Menolly Homes v The Appeal Commissioners and Anor* [2010] IEHC 49 where Charleton J held at paragraph 22:-

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

86. This burden of proof was reiterated in the recent High Court case of *O'Sullivan v Revenue Commissioners* [2021] IEHC 118, where Sanfey J. held at paragraph 90:

"*…The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer's position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position...*"

87. The Commissioner has considered section 10 TCA 1997 which provides for connected persons and section 549 TCA 1997 which provides for transactions between connected persons. In addition, the Commissioner has considered the provisions of section 547 and 548 TCA 1997 which provides for disposals and acquisitions to be treated as made at market value and the valuation of assets.

88. Following those considerations, and in line with the Appellants' and the Respondent's submissions, it follows that the central issue to be considered by the Commissioner is whether the first-named Appellant transferred the B Class Shares to the second-named Appellant for a value of €1,769,150 or whether a lower or nil valuation ought to be applied to that transfer. It is the Appellants' position that the transfer, which occurred on 27th March 2014, was for value, being a sale made at arm's length on the open market. The Respondent does not accept this position and in place submits that a nil or nominal value ought to be applied to the transfer.

89. Central to the Commissioner's findings is a requirement to consider the contents of the Appellants' and the Respondent's expert reports and a consideration of the expert evidence tendered by those experts.

90. Turning to the duties of expert witnesses, in the recent High Court case of *Thomas McNamara and the Revenue Commissioners* [2023] IEHC 15 ("*McNamara*") Barr J states at paragraph 47:

"*… the statement of such duties as set out by Cresswell J. in the High Court decision in the Ikarian Reefer case, has been adopted with approval in many cases in this jurisdiction, most recently in Duffy v. McGee, where Noonan J. delivering the majority judgment in the Court of Appeal, described the statement of principles set out in that*

case as being the "classic statement of the duties of experts" when he stated as follows at para. 89:

> "*The classic statement of the duties of experts, widely recognised in the common law world, is to be found in the judgment of Cresswell J. in National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd (The Ikarian Reefer) [1993] 2 Lloyds Rep. 68 at 81- 82:*
>
> > *"The duties and responsibilities of expert witnesses in civil cases include the following:*
> >
> > *1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (per Lord Wilberforce, Whitehouse v. Jordans [1981] 1 WLR 246 at p.256).*
> >
> > *2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. (See Polivitte Limited v. Commercial Union Assurance Company [1987] 1 Lloyds Rep. 379 at 386 per Mr. Justice Garland and Re J, [1990] FCR193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
> >
> > *3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J Sup.).*
> >
> > *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
> >
> > *5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J Sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. & Ors. v. Weldon & Ors., The Times, November 9, 1990 per Lord Justice Staughton).*
> >
> > *6. If after exchange of reports, an expert witness changes his view on a material matter having read the other side's experts report or for any*

other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be proved to the opposite parties at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).”

91. Barr J. continued at paragraph 48:

“*Order 39, r.57 (1) of the RSC, provides that it is the duty of an expert to assist the court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert. The decision in the Duffy case establishes that where it can be shown that the expert witness has departed from the standard of independence and impartiality that is expected of the expert, his or her evidence can be excluded in its entirety: see, in particular, the concurring judgment of Collins J. The general duties of expert witnesses were also considered by the Irish courts in Payne v. Shovlin [2004] IEHC 430; Donegal Investment Group PLC v. Danbywiske & Anor [2016] IECA 193 and in O’Leary v. Mercy University Hospital [2019] IESC 48.”*

92. The Commissioner has considered the decisions in *IRC v Gray* [1994] STC 360 (see paragraph 78 above) and *Crossman* which examine the parameters which expert valuers are required to abide by in determining the “market value” of an asset. While not binding in this jurisdiction, *Crossman* sets out those principles which are reproduced below for ease of reference:

    92.1. It must be assumed that a sale of the shares is possible;

    92.2. the shares must be valued on the basis of hypothetical sale in a hypothetical open market;

    92.3. the participants are a hypothetical purchaser and a hypothetical seller not the actual purchaser or seller;

    92.4. the parties are willing – the hypothetical buyer is not being forced to buy and the hypothetical seller is not being forced to sell;

92.5. the incoming hypothetical purchaser will stand in the shoes of the hypothetical seller and will be subject to the restrictions, degree of influence and risk that the seller is bound by in the real world;

92.6. there is available to any prospective purchaser all information in relation to the shares which a prudent purchaser might reasonably request; and

92.7. the market value is the highest price achievable based on the above.

93. Having regard to the foregoing jurisprudence, it follows for the valuation reports to be considered by the Commission, they should be prepared with regard to the principles set out in *Crossman* and on an independent and impartial basis.

94. Turning to the Respondent's expert witness's report entitled "*Report for the Respondent in respect of the valuation of shares in* [redacted] *at 27th March 2014*". The title of this report is unfortunate in referring to the Respondent as it negates against the impression of independence and impartiality.

95. Further unfortunate comments are included in the Respondent's Expert's Report which include the statement, "*The benefit of the transaction to [the first-named Appellant] is obvious – it has enabled him to withdraw funds from his company without paying significant taxes."* The Commissioner notes that the effect of the loan and the payment of taxes are outside the scope of an independent valuation expert. Again, the impression of deficit in independence and impartiality is unfortunate. It is not the role of an independent expert to step into the shoes of the instructing party and references to tax implications are not helpful.

96. Furthermore, the Respondent's expert witness did not comply with the established valuation methods to be applied in determining market value as set out in *Crossman,* in considering the following comments included within his Report:

96.1. *The key question in this case is whether it was possible for* [redacted] *to sell the shares in* [redacted] *to an unconnected third party at the valuation date.*

96.2. *While [the first-named Appellant], based on* [redacted] *valuation report, may have been a person of high net worth (€4.9m at 31st March 2014..), but there was no guarantee that he would continue to be so or that he would have been willing to unwind the transaction at the behest of the new shareholder.*

96.3. *While the shares are worth €1.769m to [the first-named Appellant], their market value was €Nil, it was not in [the first-named Appellant's] interest to dispose of*

them to a third party, nor was it in the interest of a third party to acquire them – there was no market for the shares.

97. It is evident that the above extracts in paragraph 96 are not in compliance with the requirements for the Respondent's valuer to assume that both a willing seller and buyer exist and the additional requirement that hindsight should not be used in establishing market value.

98. In addition, the Commissioner noted during the witness's' evidence that he was heavily focused on the structure of the transaction in his evidence which included – "*You can't avoid* [redacted] *in this, if you're asking me to avoid mentioning him. The reason for the structure was because of his personal need and clearly he's underpinning the structure, okay*[12]*."*

99. The Commissioner further noted during the witness's cross examination, when propositions were put to him regarding the B Class Shares having "some value", he appeared unwilling to consider such propositions and in place, held firm that the B Class Shares had **no value**.

100. Owing to this position, and in line with *McNamara*, as the Respondent's expert witness has departed from the standard of independence and impartiality that is required of him, it follows that the Commissioner is required to exclude the Respondent's expert's findings that the B Class Shares are worthless in its entirety.

101. In considering the Appellants' expert witness, the Commissioner notes that this Report was based on the accepted valuation principles as set out in *Crossman* and the valuation was conducted with reference to the facts pertaining on the valuation date, 27th March 2014.

102. Having established that the Appellant's expert report is admissible, the Commissioner is required to establish what weight, if any, is to be attached to that report.

103. The Commissioner is assisted in this regard by the dicta of Clarke J (as he was then) in the Supreme Court decision of *Donegal Investment Group plc v Danbywiske and others* [2017] IESC 14 ("*Donegal Investment*"). At paragraph 60, Clarke J set out the role of a trial judge in considering expert evidence as follows:

"*5.1 A starting point has to be to identify the proper role of a trial judge in assessing expert evidence. Charleton J. explained that role in James Elliott Construction Limited*

[12] Transcript, Day 2, page 96 at lines 3-7.

v. Irish Asphalt Limited [2011] IEHC 269, (para. 12 of the judgment) in the following terms:-

> *Every expert witness has to be evaluated on the basis of sound reasoning. An expert witness is, however, no different to any other witness simply because he or she is entitled to express technical opinions; all of us are subject to human frailty: exaggerated respect based solely on a witness having apparent mastery of arcane knowledge is not an appropriate approach by any court to the assessment of expert testimony. Every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability.*

…

5.5 However, as Charleton J. also pointed out in Elliott, an important part in the assessment of any evidence is the application by the trial judge of logic and common sense to the testimony heard. That approach is particularly relevant in the context of expert evidence. Where experts differ the position adopted by the other side will be put to each of the experts in cross-examination. Their reasons for maintaining their view can be examined in some detail. The trial judge can, therefore, assess whether the reasons given by one expert or the other stand up better to scrutiny."

104. Having regard to those findings, the Commissioner is required to consider whether "sound reasoning" was applied by the Appellants' expert witness in reaching his valuation. In line with *Donegal Investment*, this requires the Commissioner to consider whether in applying "common sense and logic", a shrewd assessment can be placed on the valuation being "reliable".

105. In considering this position, the Commissioner notes the Appellants' witness's reliance on the prevailing circumstances which persisted in 2014 and the first-named Appellant's net worth at that time in establishing that the B Class Shares were worth €1,769,150 on 27th March 2014.

106. Whilst on cursory examination of the transactions, it may appear an unsavoury investment for an investor, closer examination of market conditions which persisted at the time reveals that may not have been the position. The Commissioner notes from the Appellants' expert's evidence that the ECB rate in 2014 was 0%, whereas a potential purchaser of the B Class Shares could have achieved a return of 2% on their purchase of the loan, for its duration. Furthermore, as there were concerns with the financial stability

of financial institutions at that time[13], the Commissioner further notes given the first-named Appellant's net worth in March 2014, that the B Class Shares would have offered a degree of financial security to a potential investor in those shares. While, the loan was unsecured, the Commissioner notes that it was repayable on demand and given the Appellant's profession, it was unlikely that he would have defaulted in repayment, if so demanded.

107. For those reasons, the Commissioner finds that the value of the B Class Shares as at 27th March 2014 was not nil but rather the valuation provided by the Appellants' expert, €1,769,150. As section 130 (3) (a) TCA 1997 seeks to tax assets transferred at undervalue and as the Commissioner finds that this does not occur, it follows that the Notice of Amended Assessment which issued to the first-named Appellant and the Notice of Assessment which issued to the second-named Appellant should be vacated.

108. As stated at paragraph 36 above, the Commissioner's jurisdiction is confined to those set out under section 949 AK (1) TCA 1997. As such, in this appeal, the Commissioner is restricted to increasing the assessments, decreasing the assessments or leaving the assessments stand.

109. In addition, the Commissioner can only adjudicate upon matters pleaded before him. The Commissioner notes that the Appellants engaged in a series of circular transactions which, as previously noted, are summarised at **Appendix 2** to this Determination.

110. For reasons unknown, the Respondent placed reliance on those transactions being transfers of an asset at undervalue and as such being within the charge under section 130 TCA 1997 rather than within the anti-avoidance provisions of the TCA 1997, such as section 811 TCA 1997 and section 817 TCA 1997.

111. In the event that the Respondent had made such submissions to the Commission, the Commissioner having regard to the inconsistencies in the first-named Appellant's evidence and his accountant's evidence, may have come to a different finding. Those inconsistencies included the first-named Appellant stating that he intended on the loan being a short-term solution despite incurring a significant penalty if he discharged the loan within five years of drawdown and the Appellants' accountant stating in evidence that he had only recently been appointed in that position despite the provided financial

[13] The Deposit Guarantee Scheme was introduced by the Government on 30th September 2008 to ensure the best interests of consumers of financial services are protected. It provided protection to an individual or entity who had monies in a financial institution. However, the protection only accommodated an amount up to €100,000 per person/entity and per institution.

statements for the second-named Appellant listing him as the acting accountant as at 14th August 2015.

112. The Commissioner notes from the evidence produced by the Appellants and their representative at paragraphs 32-34 above, in relation to the unwinding of the transactions in 2020, that the effect of the unwinding of the transaction results in similar, if not identical taxation charges arising to those sought by the Respondent.

Determination

113. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded in showing that the tax is not payable. Therefore, the Notice of Amended Assessment to Income Tax dated 5th December 2018 to the first-named Appellant and the Notice of Assessment to DWT dated 13th March 2018 to the second-named Appellant in the sums of €609,445 and €353,830 respectively, shall both be reduced to nil.

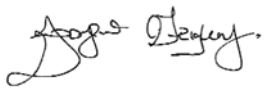
114. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) of the TCA 1997.

Notification

115. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ (5) and section 949AJ (6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ (6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

116. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Andrew Feighery

Appeal Commissioner

4th October 2023

Appendix 1 – Legislation

Taxes Consolidation Act 1997

Section 10 – Connected Persons

(1) In this section—

"close company" has the meaning assigned to it by sections 430 and 431;

"company" has the same meaning as in section 4(1);

"control" shall be construed in accordance with section 432;

…

(2) For the purposes of the Tax Acts and the Capital Gains Tax Acts, except where the context otherwise requires, any question whether a person is connected with another person shall be determined in accordance with subsections (3) to (8) (any provision that one person is connected with another person being taken to mean that they are connected with one another).

…

(6) A company shall be connected with another company—

(a) if the same person has control of both companies, or a person (in this paragraph referred to as "the first-mentioned person") has control of one company and persons connected with the first-mentioned person, or the first-mentioned person and persons connected with the first-mentioned person, have control of the other company, or

(b)if a group of 2 or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person with whom such member is connected.

(7) A company shall be connected with another person if that person has control of the company or if that person and persons connected with that person together have control of the company.

…

Section 130 – Matters to be treated as distributions.

(1) The following provisions of this Chapter, together with sections 436, 436A and 437, and subsection (2) (b) of section 816, shall, subject to any express exceptions, apply with respect to the meaning in the Corporation Tax Acts of "distribution" and for determining the persons to whom certain distributions are to be treated as made; but references in the Corporation Tax Acts to distributions of a company shall not apply to distributions made in respect of share capital in a winding up.

(2) In relation to any company, "distribution" means—

(a) any dividend paid by the company, including a capital dividend;

(b) any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except, subject to section 132, so much of the distribution, if any, as represents a repayment of capital on the shares or is, when it is made, equal in amount or value to any new consideration received by the company for the distribution;

(c) any amount met out of assets of the company (whether in cash or otherwise) in respect of the redemption of any security issued by the company in respect of shares in, or securities of, the company otherwise than wholly for new consideration, or in the redemption of such part of any such security so issued as is not properly referable to new consideration;

…

(3) (a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount").

Section 172B – Dividend withholding tax on relevant distributions.

(1) Except where otherwise provided by this Chapter, where, on or after the 6th day of April, 1999, a company resident in the State makes a relevant distribution to a specified person—

(a) the company shall deduct out of the amount of the relevant distribution dividend withholding tax in relation to the relevant distribution,

(b) the specified person shall allow such deduction on the receipt of the residue of the relevant distribution, and

(c) the company shall be acquitted and discharged of so much money as is represented by the deduction as if that amount of money had actually been paid to the specified person.

(2) Except where otherwise provided by this Chapter, where, at any time on or after the 6th day of April, 1999, a company resident in the State makes a relevant distribution to a specified person and the relevant distribution consists of an amount referred to in paragraph (b) or (c) of section 172A(2) (being an amount equal to the amount which the specified person would have received if that person had received the relevant distribution in cash instead of in the form of additional share capital of the company), subsection (1) shall not apply, but—

(a) the company shall reduce the amount of the additional share capital to be issued to the specified person by such amount as will secure that the value at that time of the additional share capital issued to the specified person does not exceed an amount equal to the amount which the person would have received, after deduction of dividend withholding tax, if the person had received the relevant distribution in cash instead of in the form of additional share capital of the company,

(b) the specified person shall allow such reduction on the receipt of the residue of the additional share capital,

(c) the company shall be acquitted and discharged of so much money as is represented by the reduction in the value of the additional share capital as if that amount of money had actually been paid to the specified person,

(d) the company shall be liable to pay to the Collector-General an amount (which shall be treated for the purposes of this Chapter as if it were a deduction of dividend withholding tax in relation to the relevant distribution) equal to the dividend withholding tax which, but for this subsection, would have been required to be deducted from the relevant distribution, and

(e) the company shall be liable to pay that amount in the same manner in all respects as if it were the dividend withholding tax which, but for this subsection, would have been required to be deducted from the relevant distribution.

(3) Except where otherwise provided by this Chapter, where, on or after the 6th day of April, 1999, a company resident in the State makes a relevant distribution to a specified person and the relevant distribution consists of a non-cash distribution, not being a relevant distribution to which subsection (2) applies, subsection (1) shall not apply, but the company—

(a) shall be liable to pay to the Collector-General an amount (which shall be treated for the purposes of this Chapter as if it were a deduction of dividend withholding tax in relation to the relevant distribution) equal to the dividend withholding tax which, but for this subsection, would have been required to be deducted from the amount of the relevant distribution,

(b) shall be liable to pay that amount in the same manner in all respects as if it were the dividend withholding tax which, but for this subsection, would have been required to be deducted from the relevant distribution, and

(c) shall be entitled to recover a sum equal to that amount from the specified person as a simple contract debt in any court of competent jurisdiction.

(4) A company resident in the State shall treat every relevant distribution to be made by it on or after the 6th day of April, 1999, to a specified person as a distribution to which this section applies, but, where the company has satisfied itself that a relevant distribution to be made by it to a specified person is not, by virtue of the following provisions of this Chapter, a distribution to which this section applies, the company shall, subject to those provisions, be entitled to so treat relevant distributions to be made by it to the specified person until such time as it is in possession of information which can reasonably be taken to indicate that a relevant distribution to be made to the specified person is or may be a relevant distribution to which this section applies.

…

(5) The provisions of the Tax Acts relating to the computation of profits or gains shall not be affected by the deduction of dividend withholding tax in relation to relevant distributions in accordance with this section and, accordingly, the amount of such relevant distributions shall, subject to section 129, be taken into account in computing for tax purposes the profits or gains of persons beneficially entitled to such distributions.

(6) This section shall not apply to a relevant distribution where section 831(5) applies in relation to that distribution.

…

<u>Section 547 – Disposals and acquisitions treated as made at market value</u>.

(1) Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—

(a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift),

(b) the person acquires the asset by means of a distribution from a company in respect of shares in the company, or

(c) the person acquires the asset wholly or partly—

(i) for a consideration that cannot be valued,

(ii) In connection with the person's own or another person's loss of office or employment or diminution of emoluments, or

(iii) otherwise in consideration for or in recognition of the person's or another person's services or past services in any office or employment or of any other service rendered or to be rendered by the person or another person.

(1A) (a) Notwithstanding subsection (1), where, by virtue of section 31 of the State Property Act, 1954, the Minister for Finance waives, in favour of a person, the right of the State to property, the person's acquisition of the property shall for the purposes of the Capital Gains Tax Acts be deemed to be for a consideration equal to the amount (including a nil amount) of the payment of money made by the person as one of the terms of that waiver.

(2) (a)In this subsection, "shares" includes stock, debentures and any interests to which section 587(3) applies and any option in relation to such shares, and references in this subsection to an allotment of shares shall be construed accordingly.

(b)Notwithstanding subsection (1) and section 584(3), where a company, otherwise than by means of a bargain made at arm's length, allots shares in the company (in this subsection referred to as "the new shares") to a person connected with the company, the consideration which the person gives or becomes liable to give for the new shares shall for the purposes of the Capital Gains Tax Acts be deemed to be an amount (including a nil amount) equal to the lesser of—

(i) the amount or value of the consideration given by the person for the new shares, and;

(ii) the amount by which the market value of the shares in the company which the person held immediately after the allotment of the new shares exceeds the market value of the shares in the company which the person held immediately

before the allotment or, if the person held no such shares immediately before the allotment, the market value of the new shares immediately after the allotment.

(3) Subsection (1) shall not apply to the acquisition of an asset where—

(a) there is no corresponding disposal of the asset, and

(b) there is no consideration in money or money's worth for the asset, or

(ii) the consideration for the asset is of an amount or value which is lower than the market value of the asset.

(4) (a)Subject to the Capital Gains Tax Acts, a person's disposal of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where—

(i) the person disposes of the asset otherwise than by means of a bargain made at arm's length (including in particular where the person disposes of it by means of a gift), or

(ii) the person disposes of the asset wholly or partly for a consideration that cannot be valued.

(b)Paragraph (a) shall not apply to a disposal by means of a gift made before the 20th day of December, 1974, and any loss incurred on a disposal by means of a gift made before that date shall not be an allowable loss.

Section 548 – Valuation of Assets.

(1) Subject to this section, in the Capital Gains Tax Acts, "market value", in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market.

(2) In estimating the market value of any assets, no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at the same time.

(3) …

(4) Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length.

(5) *In the Capital Gains Tax Acts, "market value", in relation to any rights of unit holders in any unit trust (including any unit trust legally established outside the State) the buying and selling prices of which are published regularly by the managers of the trust, means an amount equal to the buying price (that is, the lower price) so published on the relevant date or, if none was published on that date, on the latest date before that date.*

Section 549 – Transactions between connected persons.

(1) *This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.*

(2) *Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.*

Section 949AK (1) – Determinations in relation to assessments.

(1) *In relation to an appeal against an assessment, the Appeal Commissioners shall, if they consider that—*

(a) *an appellant has, by reason of the assessment, been overcharged, determine that the assessment be reduced accordingly,*

(b) *an appellant has, by reason of the assessment, been undercharged, determine that the assessment be increased accordingly, or*

(c) *Neither paragraph (a) nor (b) applies, determine that the assessment stand.*

,,,

Section 956 – Inspector's right to make enquiries and amend assessments.

(1) (a) *For the purpose of making an assessment on a chargeable person for a chargeable period or for the purpose of amending such an assessment, the inspector—*

(i) *may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and*

(ii) *may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains, or allow any deduction, allowance or relief by reference to such statement or particular.*

(b)The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a) (i) shall not preclude the inspector—

(i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and

(ii) subject to section 955 (2), from amending or further amending an assessment in such manner as he or she considers appropriate.

(c) Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 6 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.

(2) (a) A chargeable person who is aggrieved by any enquiry made or action taken by an inspector for a chargeable period, after the expiry of the period referred to in subsection (1) (c) in respect of that chargeable period, on the grounds that the chargeable person considers that the inspector is precluded from making that enquiry or taking that action by reason of subsection (1)(c) may, by notice in writing given to the inspector within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners, and the Appeal Commissioners shall hear the appeal in all respects as if it were an appeal against an assessment.

(b) Any action required to be taken by the chargeable person and any further action proposed to be taken by the inspector pursuant to the inspector's enquiry or action shall be suspended pending the determination of the appeal.

(c) Where on the hearing of the appeal the Appeal Commissioners—

(i) determine that the inspector was precluded from making the enquiry or taking the action by reason of subsection (1)(c), the chargeable person shall not be required to take any action pursuant to the inspector's enquiry or action and the inspector shall be prohibited from pursuing his enquiry or action, or

(ii) decide that the inspector was not so precluded, it shall be lawful for the inspector to continue with his or her enquiry or action.

Section 959Z – Right of Revenue officer to make enquiries.

(1) A Revenue officer may, subject to this section, make such enquiries or take such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to—

(a) whether a person is chargeable to tax for a chargeable period,

(b) whether a person is a chargeable person as respects a chargeable period,

(c) the amount of income, profit or gains or, as the case may be, chargeable gains in relation to which a person is chargeable to tax for a chargeable period, or

(d) the entitlement of a person to any allowance, deduction, relief or tax credit for a chargeable period.

(2) The making of an assessment or the amendment of an assessment in accordance with subsection (2) of section 959Y by reference to any statement or particular referred to in paragraph (a) of that subsection does not preclude a Revenue officer from, subject to this section, making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular.

(3) Subject to subsection (4), any enquiries or actions to which either subsection (1) or (2) applies shall not be made in the case of a chargeable person for a chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period.

(4) Enquiries and actions to which either subsection (1) or (2) applies may be made at any time in relation to a person or a return for a chargeable period where—

(a) any of the circumstances referred to in paragraph (a), (b) or (c) of section 959AC(2) apply, or

(b) a Revenue officer has reasonable grounds for believing, in accordance with section 959AD(3), that any form of fraud or neglect has been committed by or on behalf of the person in connection with or in relation to tax due for the chargeable period.

Appendix 2