



42TACD2024

Between:

██████████

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Table of Contents

Introduction	3
Background	3
Legislation and Guidelines	6
Evidence and Submissions	11
<i>Appellant's Witness Evidence – [REDACTED]</i>	11
<i>Appellant's Submissions</i>	12
<i>Respondent's Witness Evidence – [REDACTED]</i>	21
<i>Respondent's Submissions</i>	33
Admissibility of Expert Evidence	36
Material Facts	40
<i>A secondary market existed for investments in the Fund in June 2007:</i>	44
<i>At the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner:</i>	47
<i>The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares:</i>	53
<i>The NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund:</i>	59
<i>Final findings of material fact:</i>	64
Analysis	68
Determination	70
Notification	70
Appeal	71

Introduction

1. This appeal comes before the Tax Appeals Commission (hereinafter the “Commission”) against Notices of Amended Assessment to income tax for the years 2017 and 2019 raised by the Revenue Commissioners (hereinafter the “Respondent”) on 9 December 2022.
2. The Appellant lodged a Notice of Appeal with the Commission in relation to the Notices of Amended Assessment on 7 January 2023.
3. The amount of tax in dispute is €200,537.13.

Background

4. [REDACTED] (hereinafter the “Appellant”) is a businessman and taxpayer who, in or around May / June 2007, made an investment in the [REDACTED] (hereinafter the “Fund”).
5. The Fund was incorporated [REDACTED] on [REDACTED] April 2007 and was not tax resident in Ireland. The Fund was promoted by [REDACTED] (hereinafter the “Bank”) and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.
6. The Appellant’s investment in the Fund took the form of a Capital Commitment Agreement which he entered into. The Capital Commitment Agreement required the following from investors in the Fund:
 - i. 10% of the Capital Commitment in the form of Participating Shares; and
 - ii. 90% of the Capital Commitment in the form of an interest free, non-recourse, subordinated loan evidenced by way of Loan Notes.
7. It is agreed between the Appellant and the Respondent (hereinafter the “Parties”) that the Capital Commitment Agreement entered into by the Appellant was for a total of €[REDACTED]. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant but has been furnished with a copy of a Capital Commitment Agreement which was entered into by a third party. The Parties agree that the contents of the third party Capital Commitment Agreement are the same in all respects as the Capital Commitment Agreement entered into by the Appellant.
8. It is agreed between the Parties that, as a result of the Capital Commitment Agreement entered into by the Appellant, [REDACTED]
[REDACTED]
[REDACTED]. The Commissioner has not been furnished with

documentary evidence of share certificates issued to the Appellant as a result of entering into the Capital Commitment Agreement.

9. It is further agreed between the Parties that, further to the provisions of the Capital Commitment Agreement, the Appellant advanced a total of € [REDACTED] to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
10. It is agreed between the Parties that the Fund made repayments totalling € [REDACTED] of the Loan Notes to the Appellant between [REDACTED] May 2014 and [REDACTED] June 2017.
11. The Commissioner has been furnished with copies of the following Distribution Notices issued by the Fund to the Appellant in relation to the repayment of Loan Notes:

Date	Distribution Notice No.	Description	Amount
[REDACTED] May 2014	1	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] October 2014	2	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] May 2015	3	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] December 2015	4	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
	5	Not submitted to the Commissioner	
[REDACTED] December 2016	6	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] June 2017	7	Distribution by way of repayments of the residual Loan Notes held by the Investor	€ [REDACTED]

12. The Fund was wound up voluntarily by resolution on [REDACTED] July 2015 with [REDACTED] (hereinafter the "Liquidator") being appointed as Liquidator.

13. It is agreed between the Parties that in 2017 and 2019, the Appellant received distributions totalling € [REDACTED] in respect of "Distributions by way of a liquidation distribution" on foot of the liquidation of the Fund (hereinafter the "liquidation distribution"). The Appellant received [REDACTED] by way of liquidation distribution in 2017 and received € [REDACTED] by way of liquidation distribution in 2019 as follows:

Date	Distribution Notice No.	Description	Amount
[REDACTED] June 2017	7	Distribution by way of a liquidation distribution	€ [REDACTED]
[REDACTED] October 2017	8	Distribution by way of a liquidation distribution	€ [REDACTED]
[REDACTED] April 2019	9	Distribution by way of a liquidation distribution	€ [REDACTED]
[REDACTED] September 2019	10	Final Distribution	€ [REDACTED]

14. The Appellant submitted Form 11 tax returns to the Respondent in relation to the tax years 2017 and 2019. No reference was made to the liquidation distributions received by the Appellant in the Form 11 returns made by the Appellant.

15. The Appellant did not submit any Capital Gains Tax (hereinafter "CGT") returns to the Respondent in relation to the liquidation distributions.

16. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D – Offshore Income Gain in the amount of € [REDACTED]. The balance of tax payable in the Notice of Amended Assessment to income tax for 2017 is €190,080.98.

17. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D – Offshore Income Gain in the amount

of € [REDACTED]. The balance of tax payable in the Notice of Amended Assessment to income tax for 2019 is €10,456.15.

18. The total additional Schedule D – Offshore Income Gain amount for 2017 and 2019 included in the Notices of Amended Assessment was € [REDACTED].

19. The Appellant, through his tax agent, submitted a Notice of Appeal to the Commission on 7 January 2023 appealing the Notices of Amended Assessment to income tax for 2017 and 2019 issued by the Respondent on 9 December 2022.

20. The grounds of appeal identified in the Notice of Appeal are as follows:

“Revenue have raised assessments to income tax in respect of liquidation proceeds received from [REDACTED], a [REDACTED] incorporated and tax resident company. The shareholders in the company included a majority of Irish Tax resident shareholders including both Irish individuals and corporate entities. The shareholders subscribed for shares in the company as well as providing interest free loans to the company. The directors of the company resolved to place the company in liquidation on [REDACTED] July 2015.

As stated above, Revenue have raised assessments to income tax in respect of the liquidation proceeds received. We are of the opinion that any distribution made by the company to the Irish shareholders following the date of appointment of the liquidator should be considered a liquidation distribution and therefore a disposal (or part disposal in the case of several liquidation distributions) of the Irish Shareholders' shares in the company for CGT purposes. We therefore lodge this appeal against the assessments dated 9 December 2022 in relation to the tax years 2017 and 2019.”

21. The oral hearing of this appeal took place on 18 and 19 September 2023.

Legislation and Guidelines

22. The legislation relevant to the within appeal is as follows:

Section 740 of the Taxes Consolidation Act 1997 (hereinafter the “TCA1997)

“740 Interpretation (Chapter 2 and Schedules 19 and 20).

In this Chapter and in Schedules 19 and 20—

“account period” shall be construed in accordance with subsections (8) to (10) of section 744;

“disposal” shall be construed in accordance with section 741(2);

“distributing fund” shall be construed in accordance with subsections (2) and (3) of section 744;

“the equalisation account” has the meaning assigned to it by section 742(1);

“Irish equivalent profits” has the meaning assigned to it by paragraph 5 of Schedule 19;

“material interest” shall be construed in accordance with section 743(2);

“non-qualifying fund” has the meaning assigned to it by section 744(1);

“offshore fund” has the meaning assigned to it by section 743(1);

“offshore income gain” shall be construed in accordance with paragraphs 5 and 6(1) of Schedule 20.”

Section 743 of the TCA1997 (as in force from 30 November 1997 to 14 March 2021)

“743. Material interest in offshore funds.

(1)In this Chapter, references to a material interest in an offshore fund shall be construed as references to such an interest in any of the following -

(a)a company resident outside the State,

(b)a unit trust scheme the trustees of which are not resident in the State, and

(c)any arrangements not within paragraph (a) or (b) which take effect by virtue of the law of a territory outside the State and which under that law create rights in the nature of co-ownership (without restricting that expression to its meaning in the law of the State),

and any reference in this Chapter to an offshore fund shall be construed as a reference to any such company, unit trust scheme or arrangements in which any person has an interest which is a material interest.

(2)Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7

years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).

(3)For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.

(4)For the purposes of subsections (2) and (3) -

(a)a person shall be deemed to be able to realise a particular amount if the person is able to obtain that amount either in money or in the form of assets to the value of that amount, and

(b) if at any time an interest in an offshore fund has a market value which is substantially greater than the portion which the interest represents, as mentioned in subsection (3), of the market value at that time of the assets concerned, the ability to realise such a market value of the interest shall not be regarded as an ability to realise such an amount as is referred to in that subsection.

(5)An interest in a company, scheme or arrangements shall be deemed not to be a material interest if it is either -

(a)an interest in respect of any loan capital or debt issued or incurred for money which in the ordinary course of business of banking is loaned by a person carrying on that business, or

(b)a right arising under a policy of insurance.

(6)Shares in a company within subsection (1)(a) (in this section referred to as "the overseas company") shall not constitute a material interest if -

(a)the shares are held by a company and the holding of them is necessary or desirable for the maintenance and development of a trade carried on by the company or a company associated with it,

(b)the shares confer at least 10 per cent of the total voting rights in the overseas company and a right in the event of a winding up to at least 10 per cent of the assets of that company remaining after the discharge of all liabilities having priority over the shares,

(c)not more than 10 persons hold shares in the overseas company and all the shares in that company confer both voting rights and a right to participate in the assets on a winding up, and

(d)at the time of its acquisition of the shares the company had such a reasonable expectation as is referred to in subsection (2) by reason only of the existence of either or both -

(i)an arrangement under which, at some time within the period of 7 years beginning at the time of acquisition, that company may require the other participators to purchase its shares, and

(ii)provisions of either an agreement between the participators or the constitution of the overseas company under which the company will be wound up within a period which is or is reasonably expected to be shorter than the period referred to in subsection (2),

and in this paragraph "participators" means the persons holding shares which are within paragraph (c).

(7)For the purposes of subsection (6)(a), a company shall be associated with another company if one company has control (within the meaning of section 432) of the other company or both companies are under the control (within the meaning of that section) of the same person or persons.

(8)An interest in a company within subsection (1)(a) shall be deemed not to be a material interest at any time when the following conditions are satisfied -

(a)that the holder of the interest has the right to have the company wound up, and

(b)that in the event of a winding up the holder is, by virtue of the interest and any other interest which the holder then holds in the same capacity, entitled to more than 50 per cent of the assets remaining after the discharge of all liabilities having priority over the interest or interests concerned.

(9)The market value of any asset for the purposes of this Chapter shall be determined in the like manner as it would be determined for the purposes of the Capital Gains Tax Acts except that, in the case of an interest in an offshore fund for which there are separate published buying and selling prices, section

548(5) shall apply with any necessary modifications for determining the market value of the interest for the purposes of this Chapter.”

Section 745 of the TCA1997 (as in force from 30 November 1997 onwards)

“Charge to income tax or corporation tax of offshore income gain.

(1)Where a disposal to which this Chapter applies gives rise, in accordance with Schedule 20, to an offshore income gain, then, subject to this section, the amount of that gain shall be treated for the purposes of the Tax Acts as -

(a)income arising at the time of the disposal to the person making the disposal, and

(b)constituting profits or gains chargeable to tax under Case IV of Schedule D for the chargeable period (within the meaning of section 321 (2)) in which the disposal is made.

(2)Subject to subsection (3), sections 25(2)(b), 29 and 30 shall apply in relation to income tax or corporation tax in respect of offshore income gains as they apply in relation to capital gains tax or corporation tax in respect of chargeable gains.

(3)In the application of sections 29 and 30 in accordance with subsection (2), section 29(3)(c) shall apply with the deletion of "situated in the State".

(4)In the case of individuals resident or ordinarily resident but not domiciled in the State, subsections (4) and (5) of section 29 shall apply in relation to income tax chargeable by virtue of subsection (1) on an offshore income gain as they apply in relation to capital gains tax in respect of gains accruing to such individuals from the disposal of assets situated outside the State.

(5)(a)In this subsection, "charity" has the same meaning as in section 208, and "market value" shall be construed in accordance with section 548.

(b)A charity shall be exempt from tax in respect of an offshore income gain if the gain is applicable and applied for charitable purposes; but, if the property held on charitable trusts ceases to be subject to charitable trusts and that property represents directly or indirectly an offshore income gain, the trustees shall be treated as if they had disposed of and immediately reacquired that property for a consideration equal to its market value, any gain (calculated in accordance with Schedule 20) accruing being treated as an offshore income gain not accruing to a charity.

(6)In any case where -

(a) a disposal to which this Chapter applies is a disposal of settled property within the meaning of the Capital Gains Tax Acts, and

(b) for the purposes of the Capital Gains Tax Acts, the general administration of the trusts is ordinarily carried on outside the State and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the State,

then, subsection (1) shall not apply in relation to any offshore income gain to which the disposal gives rise.”

Evidence and Submissions

23. The following is a summary of the evidence adduced and the submissions made by both Parties.

Appellant’s Witness Evidence – [REDACTED]

24. The following is a summary of the direct evidence adduced to the Commissioner by the Appellant.

25. The Appellant stated that at the time of investing in the Fund he was concerned with the potential impact of inflation on the assets in the form of property and land which he, at that time, held. He stated that, by investing in the Fund, he was trying to diversify his investments [REDACTED]

[REDACTED].”¹

26. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

27. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

28. He stated that the Fund documentation was sent to him and that he had referred it to his in-house accountant who had advised him that the Fund was “alright” and who also

¹ Hearing transcript, day 1, page 21 lines 10 to 11.

advised him that he would not get his money back for a long time. He stated that his accountant advised him that the documentation did not say when there would be a return on the investment but that it could be 10 years before he received anything. It was on that basis, he stated, that he decided to make the investment in the Fund.

29. [REDACTED]

Appellant's Submissions

30. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

31. The Appellant submitted that the question before the Commissioner is whether the Appellant held a material interest in the Fund pursuant to the provisions of section 743 of the TCA1997.

32. The Appellant submitted that his investment in the Fund was not a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA1997. Counsel on behalf of the Appellant outlined the history of the equivalent provision in the United Kingdom which, he stated, was introduced in 1990. No expert evidence in that regard was adduced to the Commissioner.

33. The Appellant referred the Commissioner to a document which was published by the Respondent in February 2003 which was entitled "*Taxes Consolidation Act 1997, Part 27 Unit trusts and offshore funds*" and in particular Appendix B(2) thereof which is entitled "*Background to the introduction of the Offshore Funds Legislation*". It was submitted that, in the Respondent's own words, section 743 of the TCA1997 was introduced as an anti-avoidance legislation to prevent Irish residents using funds overseas to convert income into capital gains "by rolling them up"²

34. The Appellant submitted that, at the time of making the investment in the Fund in 2007, it could not have been reasonably expected that at some time during the period of 7 years

² Transcript of hearing, day 1, page 133

beginning at the time of the investment, he would have been able to realise the value of his interest in the Fund whether by transfer, surrender or in any other manner.

35. The Commissioner was pointed to a document entitled "[REDACTED] [REDACTED] [REDACTED]" (hereinafter the "Memorandum") and in particular paragraph 2 of page 1 which states:

"Prospective investors must rely upon their own examination of the Company and consider the risks involved before making a Capital Commitment to the Company. The capital of the Company will not be quoted on any recognised or designated investment exchange and, accordingly there will not be an established or ready market in them. Capital Commitments to the Company will therefore not be easily realisable and the ability to transfer Shares is restricted by the Company's Articles."

36. The Commissioner was also pointed to paragraph 6 of page 1 of the Memorandum which states:

"The attention of prospective investors is drawn to the fact that the Company would be committing its funds to investments in property over the long term and that these investments may be illiquid in nature. Prospective investors should be able to bear the financial risk of making the Capital Commitment to the Company for an indefinite period and should be able to withstand a total loss of the full amount of the Capital Commitment."

37. The Commissioner was further pointed to page 10 of the Memorandum and also page 25 of the Memorandum where it states:

"Term: Investors should not expect to realise their investment for at least 7 years.

The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of the investments."

38. The Appellant submitted that paragraph 8.3.7.3 of the Memorandum which is entitled "Redemption" states:

"The Participating Shares do not carry a right to redemption by Shareholders. Redemption of Participating Shares in the repayment of Loan Notes are at the absolute discretion of the Directors."

39. The Commissioner was pointed by the Appellant to paragraph 8.3.8 of the Memorandum which states:

“Subject to the laws of ██████, the Board may issue shares, and Loan Notes as certificated or uncertificated shares in its absolute discretion. Subject to any restrictions on transfers described below:

8.3.8.1

Any Shareholder may transfer all or any of his certificated shares by an instrument of transfer in any usual form, or in any other form which the Board may approve, signed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee.

The Directors may, subject to the Articles, refuse to register a transfer of funds unless: it is approved for registration to the registered office of the Company or such other place as the Board may decide, accompanied by such evidence as the Board may reasonably require.

The Directors may also refuse in their absolute discretion and without providing any reason therefore [sic], to register a transfer, including without limitation if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating Shares or Loan Notes or minimum amount in value of the holding of Participating Shares or Loan Notes specified by the Directors from time to time or if it appears to the Directors that the transferee is not qualified to hold Participating Shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an “investment company” under the United States Investment Company Act of 1940 or if the transferee fails or refuses to furnish the Directors with such informational declarations as they may require.”

40. Paragraph 13.11 of the Memorandum is entitled “*Lack of Liquidity*” and states:

“By its nature, real estate is an illiquid form of investment. It is unlikely that there will be a public market for any of the investments held by the Company. Generally the types of investment held by the Company may require substantial periods of time to liquidate. In particular, no assurances can be given that all or any of the Company’s investments will be liquidated prior to the scheduled termination of ██████.”

41. Paragraph 13.16 of the Memorandum is entitled “*Restriction on Transferability*” and states:

“The Investors interests in Participating Shares may not be transferred. There is currently no public market in the Participating Shares, and it is highly unlikely that one will develop. Investors should not expect to realise their investment for at least 8 years.”

42. The Appellant also referred the Commissioner to the Fund’s Articles of Association which were registered on [REDACTED] 2007 (as amended by a special resolution dated [REDACTED] 2007).

43. Article 1 defines “Participating Share” as “A participating redeemable preference share in the capital of the Company of one Euro cent issued subject to and in accordance with the provisions of the Law and these Articles and having the rights provided for under these Articles with respect to such shares.”

44. Article 8 is entitled “Issue and Redemption of Shares” which states:

“8.1 Subject as hereinafter provided on receipt by the Company or its authorised agent of:-

8.1.1 an application in writing (unless the Directors shall otherwise agree) in such form as the Directors from time to time determine; and

8.1.2 such information and declarations as the Directors from time to time may require;

the Company may, on such day or days as the Directors may determine, allot and issue Participating Shares and Loan Notes for cash at a Subscription Price therefor determined at the absolute discretion of the Directors.”

8.2 The allotment of initial Participating Shares should be conditional on the set application (and such information and declarations as the Directors may from time to time require) and the subscription monies having been received by such time as the Directors may from time to time specify either generally or in any specific case.

8.3 The names and addresses of all Members and the amounts, which shall be denominated in Euros and shall represent Euro obligations, representing the total capital and Loans subscribed by each Member in respect of the Participating Shares and Loan Notes subscribed for by such Members (referred to herein as such Members’ “**Capital Commitments**”) shall be set forth in the Register which shall be filed with the records of the Company and which may be amended from time to time by the Directors in accordance with these Articles. It is understood and agreed that, of the total amount of each Member’s Capital Commitment, 90% will be required to be made by such member to the

Company in the form of interest-free, non-recourse, subordinated loans to the Company evidenced by Loan Notes as more fully described in Article 4.6 above, and the remaining 10% will be such Member's subscription for the Participating Shares. The proportions of Loan Notes and Participating Shares may be varied in the sole discretion of the Directors. For the avoidance of doubt, once issued neither Loan Notes nor Participating Shares may be converted into any other instrument. The liability of the Members with respect to the Participating Shares and the Loan Notes is limited to the amount (if any) for the time being remaining unpaid on their Capital Commitment.

The price per unit at which Participating Shares shall be offered to subscribers at the first Closing Date shall be €1,000 per Participating Share or such other sum as may be fixed (whether or not actually determined) by the Directors before the Participating Shares and Loan Notes are offered for subscription and disclosed in the capital commitment document.

- 8.4 *A separate loan account shall be established and maintained for each Member during the term of the Company reflecting Loans outstanding to such Member. Each such loan account, and all credits and debits thereto shall be stated in Euros. Each Member's loan account (i) shall be increased by the amount of the Loans actually made and advanced to the Company by such Member and (ii) shall be decreased by the amount of any cash payments made by the Company to such Member to repay such Loans. The loan accounts of the Members shall be determined as of the end of each fiscal year. In addition, the loan accounts of the Members may, at the election of the Directors, be determined as of any other date.*
- 8.5 *As the first instalment of its Capital Commitment, each Member hereby agrees to pay in cash to the Company on such date as the Directors shall at their discretion determine such amount, which shall represent the same percentage of its Capital Commitment as the first instalment of each other Member represents of its Capital Commitment. The proportion of the Capital Commitment which relates to Participating Shares shall be determined at the discretion of the Directors. Each Member further agrees to pay in cash to the Company, in additional instalments, as determined by the Directors upon 10 Business Days' prior written notice, the balance of its total Capital Commitment, together with interest on any overdue amount until paid in full at an interest rate of four percent (4%) above the one-month Euribor at such times as may be*

required in the judgment of the Directors to make investments, provided, however, that no member shall have any obligation to pay any portion of its Capital Commitment to the Company after the third anniversary of the Closing Date except to the extent that the Manager may need capital for certain purposes after such anniversary.

...

8.14 *Subject to the provision of the Laws the redemption of Participating Shares shall be at the sole discretion of the Directors and redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine.”*

45. Article 17 is entitled “*Transfer and Transmission of Shares*” and states:

“17.1 *All transfers of shares and Loan Notes shall be effected by transfer in writing in any usual or common form in use in [REDACTED] or in any other form approved by the Directors but need not be under seal, and every form of transfer shall state the full name and address of the transferor and transferee and be signed by or on behalf of the transferor. The transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register in respect thereof.*

17.2 *The Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-*

17.2.1 *if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating Shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;*

17.2.2 *if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an “**investment company**” under the United States Investment Company Act of 1940;*

17.2.3 if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.

17.3 The Directors shall decline to recognise any transfer of shares unless:-

17.3.1 the instrument of transfer is deposited at the Office or such other place as the Directors may reasonably require, accompanied by such evidence as the Directors may reasonably require to show the right of the transferor to make the transfer; and

17.3.2 the instrument of transfer relates to shares of one class only.

17.4 If the Directors decline to register a transfer of any share they shall, within one month after the date on which the transfer was lodged with the Company, send to the transferee notice of the refusal.”

46. The Appellant submitted that the effect of the Memorandum and the Articles of Association was that the Participating Shares and the Loan Notes which he held in the Fund were restricted in terms of their transferability and redemption. The Appellant also submitted that he did not have a right to request the company to redeem his shares and that there was no ability to transfer his shares or loan notes without the consent of the Directors of the Fund. The Appellant submitted that in order for someone to be able to do something, they have to have the power to do it. The Appellant further submitted that if the consent of a third party is required, then a person does not have the power to carry out that act.

47. In relation to the question of a secondary market for his investment in the Fund, the Appellant submitted that a secondary market did not exist for the Participating Shares and Loan Notes in the Fund. However, the Appellant submitted that, even if a secondary market for the Participating Shares and the Loan Notes did exist, the transfer of the Participating Shares and Loan Notes was restricted and was not possible without the consent of the Directors. The Appellant submitted that in those circumstances, it could not have been reasonably expected that he would have been able to realise the value of his interest in the Fund at some time during the period of 7 years beginning at the time that he acquired his interest in the Fund.

48. Counsel on behalf of the Appellant submitted that the Appellant definitely had sight of the Memorandum prior to entering into the Capital Commitment. However, Counsel on behalf of the Appellant submitted that it cannot be certain that the Appellant would have seen the Articles of Association prior to doing so. Counsel on behalf of the Appellant stated that even in circumstances where the Appellant may not have seen or read, or understood, the Articles of Association, the pertinent provisions of the Articles of Association were

contained in the Memorandum which the Appellant had sight of prior to entering into the Capital Commitment.

49. Counsel further submitted that in circumstances where the Memorandum stated that *“Investors should not expect to realise their investment for at least 7 years”*, the Appellant could not have had a reasonable expectation that he would have been able to realise the value of his interest in the Fund at some time during the period of 7 years beginning at the time that he acquired his interest in the Fund.

50. The Appellant submitted section 743(3) of the TCA1997 gives guidance on the meaning of *“value of the interest”* contained in section 743(2) of the TCA1997. Section 743(3) of the TCA1997 provides:

“For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

51. The Appellant submitted that the effect of section 743(3) of the TCA1997 is that, in order to establish the market value of the assets of the Fund, the Net Asset Value (hereinafter “NAV”) of the Fund could only have been realised by the Appellant if he had the right to approach the Fund and ask it to pay out on his Participating Shares at a value proportionate to the NAV of the Fund.

52. It was submitted that even if there was a secondary market, it would be impossible to determine whether or not the Appellant could have realised a value proportionate to the NAV on the secondary market. The Appellant submitted that in circumstances where he could not realise a value proportionate to the NAV on the secondary market it follows that his investment in the Fund could not be a material interest in an offshore fund as set out in section 743 of the TCA1997.

53. The Appellant submitted that section 743(4) of the TCA1997 provides:

“(4)For the purposes of subsections (2) and (3) -

(a)a person shall be deemed to be able to realise a particular amount if the person is able to obtain that amount either in money or in the form of assets to the value of that amount, and

(b)if at any time an interest in an offshore fund has a market value which is substantially greater than the portion which the interest represents, as mentioned in subsection (3), of the market value at that time of the assets concerned, the ability to realise such a market value of the interest shall not be regarded as an ability to realise such an amount as is referred to in that subsection.”

54. The Appellant submitted that the effect of section 743(4)(b) of the TCA1997 is that if at any time the market value of the Fund was substantially greater than the NAV then the Appellant would not be deemed as having an ability to realise a value proportionate to the market value of his interest in the Fund, even if he had been able to realise a value proportionate to the NAV of the Fund on a secondary market.

55. The Appellant raised an issue with the second question posed to Professor [REDACTED] by the Respondent and which the Professor [REDACTED] addressed in his Report. The Appellant submitted that the question which [REDACTED] had been asked to consider was:

“Secondly, should an investor open such a position, would it be reasonable to assume that on the date of investment, there was a fair expectation that they would realise the value of their initial investment within 7 years?”

56. The Appellant submitted that the question posed to Professor [REDACTED] by the Respondent does not reflect the test contained in section 743(2) of the TCA1997. As a result, the Appellant submitted, the opinions given by the Expert in relation to that question are not admissible as they are based on an incorrect statement of the legal position contained in the question.

57. Counsel for the Appellant summarised the Appellant’s submissions as being that:

- i. he did not hold a material interest in the Fund as defined in section 743(2) of the TCA1997;
- ii. it could not have been reasonably expected that the Appellant would be able to realise the value of the interest within 7 years of the date of acquisition;
- iii. there was no public market for the Fund;
- iv. there were restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Company’s permission for the transfer and or redemption of same;

- v. even if there was a secondary market, there was no guarantee of a reasonable expectation that the Appellant would have been able to realise the NAV of the Fund on the secondary market.

Respondent's Witness Evidence – Professor [REDACTED]

58. The Commissioner heard evidence from Professor [REDACTED] (hereinafter the “Expert”) who is a full Professor of Finance at [REDACTED]. Prior to taking up an academic position in [REDACTED] the Expert had undertaken a Masters degree in International Finance and a PhD in Finance, had worked as a commodities trader and had also worked as an Economist with [REDACTED] in the area of financial stability.

59. The Expert was engaged by the Respondent to act as an independent expert witness in this appeal. The Respondent sought the Expert’s opinion on the following questions:

“First, in June 2007, would it be reasonable to consider that there was a secondary market in Ireland for unquoted securities, comprising;

*(a) shares in [REDACTED] that ultimately derive their value from [REDACTED] property;
and*

*(b) shares in [REDACTED] that ultimately derive their value from [REDACTED] property
and a loan note issued by [REDACTED]*

Secondly, should an investor open such a position, would it be reasonable to assume that on the date of investment, there was a fair expectation that they would realise the value of their initial investment within seven years?”

60. The Expert submitted a written report dated 23 June 2023 (hereinafter the “Report”) to the Commissioner and the evidence which he gave was based on that Report. The Report undertook specific analysis for the period 30 April 2007 to 30 June 2007 which was within the period in which the Appellant invested in the Fund. The Commissioner has also reviewed the Report in considering this appeal.

Question 1: Expert opinion as to whether there was a secondary market for the Fund in Ireland in May / June 2007:

61. In relation to the first question, as to whether there was a secondary market for shares in the Fund in June 2007, the Expert stated that a primary dealership market is, for example, a stock exchange. He stated that a stock exchange has a liquid active market that can be sold into and where most likely active buyers can be found. He stated that a secondary

market is more opaque, where people deal with experience, with contacts and with other people who work in institutions such as investment banks or brokerages. He stated that selling assets which have been acquired through a fund, such as the Fund in this appeal, is more difficult than selling assets through a stock exchange.

62. The Expert stated that as part of the research which he undertook prior to writing his Report, he had undertaken analysis to test whether it is reasonable to believe that a liquid secondary market existed in Ireland for investors to resell their holdings in the Fund. This analysis consisted of:

- i. investigating whether the Fund was oversubscribed;
- ii. investigating whether signals of escalating international liquidity risks that were evident at the time of investing in the Fund in June 2007 existed; and
- iii. investigating whether documentation relating to the Fund made direct reference to the expected process to follow when transferring ownership.

(i) Oversubscription of Fund

63. In relation to whether the Fund was oversubscribed, the Expert stated that he has no doubt that the Fund was oversubscribed. He stated that a number of online sources verified that the Fund was heavily subscribed. In particular, the Expert referred to an article published on [REDACTED] 2007 in the [REDACTED] which is entitled [REDACTED] [REDACTED] and which is contained in Figure 1 of his Report. He stated that this article had stated that the initial target of the Fund was to raise between €100 million and €150 million and that this target had been exceeded quite substantially such that the Fund's value was €200 million.

64. He stated that, given the success of the [REDACTED] fund and given that the Bank was in control of the Fund, there would have been significant external demand to subscribe to the Fund. In addition, he stated that from 30 April 2007 to 30 June 2007 the [REDACTED] property market was seen as an alternative investment to the Irish property market given obvious headwinds which existed in the [REDACTED] property and rental markets at the time and which are set out in his Report. The Expert also pointed the Commissioner to [REDACTED] rental performance along with Polish property price appreciation in the years prior to the establishment of the Fund as indicators, as contained in his Report, in support of his position that the Fund was oversubscribed.

65. The Expert stated the following in his Report at section 2.1 in conclusion to the question as to whether the Fund was oversubscribed:

“Therefore, the article presented in Figure 1 provides substantial evidence that the [REDACTED] fund was heavily oversubscribed; therefore I am happy to infer that there was an active secondary market available for the resale and transfer of ownership of the investment.”

(ii) Signals of International Liquidity Risks

66. The Expert stated that, when considering whether the Fund had been oversubscribed, he had also investigated whether signals of escalating international liquidity risks were evident in the period 30 April 2007 to 30 June 2007. He stated that a substantial amount of his academic research surrounds financial market interactions and the use of data. He stated that, as an instrument, the Fund was quite opaque and as a result it was prudent for him, as an academic, to use secondary data as part of his research and to use interlinked markets data such as [REDACTED] property market prices, [REDACTED] rental prices, [REDACTED] stock exchanges along with the volume of sales which were entering the market at that time.

67. He stated that if, in the period 30 April 2007 to 30 June 2007, a problem could have been anticipated in the market, spikes or deteriorations in the volume of liquidity traded would have been evident. He stated that there was no evidence of such market spikes or deteriorations in 2007. In that regard, the Expert referred to the following figures which were contained in his Report:

- i. Figure 2 which is entitled “*EURO STOXX price indices January 2000 through December 2022*”. He stated that Figure 2 shows that prior to 2007 markets had grown quite substantially in both value and liquidity and that conditions had maintained up to that point. He stated that Figure 2(i) represents the top 50 largest companies in Europe which he stated was quite consistent throughout the period January 2000 through December 2022. He stated that Figure 2(ii) relates to the 600 largest companies in Europe, Figure 2(iii) and (iv) relate to the banking stocks in Europe through that period as a comparison to the broad STOXX index. He stated that all of the figures provided show that there was no deterioration in those values between 30 April 2007 and 30 June 2007.
- ii. Figure 3 which is entitled “*Selected EURO STOXX price indices (January 2007 through December 2007)*”. He stated that the price indices peaked in Quarter 3 of 2007 and that during Quarter 3 and Quarter 4 of 2007 the beginning of the market crash which subsequently occurred started to come to light.
- iii. Figure 4 which is entitled “*Selected EURO STOXX liquidity conditions (January 2006 through December 2022)*”. This, he stated, represents the EURO STOXX main

contract liquidity conditions during that period. He stated that of interest in this figure is the fact that liquidity conditions remained consistent the whole way through the period from 2006 to 2022, aside from 2011 where a fall in liquidity conditions occurred.

- iv. Figure 5 which is entitled “*Liquidity conditions in the [REDACTED] banking and construction sectors (January 2000 through December 2022)*”. The Expert stated that this shows a very, very sharp appreciation in trading volume in [REDACTED] between 2002 and 2008 which, he stated, was abnormal.
- v. Figure 6 which is entitled “*Liquidity conditions in the European banking and construction sectors (January 2000 through December 2022)*”. The Expert stated that this figure provides context of the sharp growth in liquidity conditions in the European banking and construction sectors, not just in the Irish context. He stated that this figure demonstrates the Bank’s context of investing in [REDACTED] property as a diversification tool for Irish investors.
- vi. Figure 7 which is entitled “*Liquidity conditions in European property related funds (January 2000 through December 2022)*”. The Expert stated that this figure looks specifically at Real Estate Investment Trusts (hereinafter “REITs”) and property related Exchange Traded Funds (hereinafter “ETFs”). He stated that sharp growth can be seen from 2000 until 2008 and that it is impossible to state that there was a dip or a collapse in European liquidity conditions in the period prior to 30 April 2007 to 30 June 2007.

68. The Expert stated the following in his Report at section 2.2 in conclusion to the question of whether signals of escalating international liquidity risks that were evident at the time of investing in the Fund in June 2007 existed:

“Overall, such results indicate that irrespective of whether we consider [REDACTED] and European construction sectors, or European property-based ETFs and REITs, market liquidity conditions remain robust, in advance of the beginning of the international financial crisis that followed in the United States subprime collapse in 2008. [REDACTED] property, in particular, benefited from elevated international interest due to significant price appreciation and positive rental yields. Based on such evidence, it would be reasonable to consider that a strong, secondary market for Irish unquoted securities such as [REDACTED] existed throughout 2007, including the specific date 29 June 2007.”

(iii) Fund Documentation in relation to Transfer Process

69. The Expert stated that he had also investigated whether the Fund documentation made direct reference to the expected process which would occur when transferring ownership.

He stated that the Capital Commitment Agreement makes direct reference to the expected process underlying the sale of such funds by an investor, therefore presenting an expectation that such a process would be both possible and necessary in some cases.

70. The Expert specifically stated that at no point in the documentation did it say that investors could not transfer their investments or that they were “locked in” to the investment. The Expert stated that neither the Memorandum nor the Articles of Association contain any prohibitive terms which would lockdown an investor’s ability to transfer, such as the term “cannot”.

71. The Expert stated that his research had led him to conclude that there would have been an active secondary market in investments in the Fund. The Expert pointed the Commissioner to his conclusion in his Report at section 2.3 which states:

“When considering that the ██████████ Capital Commitment Agreement makes direct reference to the expected process to follow when transferring ownership, we can establish that there was a reasonable expectation by the company themselves, that a secondary market in Ireland existed for such unquoted securities, to which direction was provided describing a pathway to resale for ██████████ investors.”

Question 2: Expert opinion on whether it be reasonable to assume that on the date of investment, there was a fair expectation that investors would realise the value of their initial investment within seven years?

72. The Expert referred the Commissioner to section 3 of his Report which deals with the second question posed to him by the Respondent which the Expert referenced in his Report as a question as: “On 29 June 2007, would an investor in the ██████████ fund have reasonably considered the realisation of at least the value of their initial investment within seven years?”

73. In his Report, the Expert undertook analysis in the following areas prior to forming his opinion:

- i. The performance of ██████████ property prices in advance of the beginning of the Fund;
- ii. Whether there were negative US and European financial market signals on the VIX and VSTOXX indices in advance of the beginning of the Fund;
- iii. Whether there were elevated signals in the Irish media that would influence an investor’s expectation of realising at least the value of their initial investment within seven years.

The performance of [REDACTED] property prices in advance of the beginning of the Fund:

74. The Expert stated that in researching this question he had considered how [REDACTED] property prices performed in advance of the beginning of the Fund investments in June 2007. In that regard the Expert pointed the Commissioner to the following figures in his Report:

- i. Figure 8 which is entitled “[REDACTED] property price performance, quarterly (2005-2022)”. This figure refers to nominal house prices and to house costs in [REDACTED] from 2005 to 2022. He stated that Figure 8 makes it very obvious that, in the period from 2005 through to 2007, there was substantial growth in the [REDACTED] property market. He stated that Figure 8 shows that in 2007, [REDACTED] property had obtained international attention because of the level of growth in the market, which he stated was extraordinary. He stated that housing prices in [REDACTED] almost doubled from 2005 to 2007 which he stated made the [REDACTED] property market deeply attractive from an investment standpoint.
- ii. Figure 9 which is entitled “[REDACTED] national rental price performance, quarterly (2005-2022)”. He stated that this shows that rental yield in [REDACTED] was consistently growing from 2005 to 2009 during which time the rental yield index rose from approximately 73 in 2005 to approximately 97 in 2007. He stated that this represents an approximate 20% increase in rental yield during that period and that this represented a sharply appreciating base price accompanied by a sharply growing year-on-year rental increase. This, he stated, was a deeply attractive investment at that time of June 2007.
- iii. Figure 10 which is entitled “[REDACTED] property ratio performance, quarterly (2005-2022).” The Expert stated that this figure shows a sharp appreciation in terms of the price-to-income ratio and the price-to-rent ratio in the [REDACTED] market. He stated that price-to-income measures the relative price growth of property with respect to the relative income growth of the average citizen. He stated that the price-to-income index value was 100 in early 2006 and that midway through 2007 it had risen as high as 180.

75. Having considered all of the information as set out in Figures 8 to 10 of his Report, the Expert stated in his Report at the conclusion of section 3.1 that:

“Such price performance in the [REDACTED] property market would have been impossible to ignore. Through [REDACTED], investors would have been leveraging their position substantially through the use of debt, therefore taking what would be considered extremely high levels of risk in a market that was presenting many substantial signs of sharp price appreciation. Any investor that would have considered the [REDACTED] property market to be in a state of overheating would not have invested in [REDACTED]. Failure to

acknowledge such risks would present direct evidence of a catastrophic failure of due diligence and portfolio management. Further, if an investor could state in the period thereafter that they could not have reasonably anticipated the return of at least their initial investment within seven years, it would present substantial evidence of a failure of duty of care and reasonable risk management. Through the use of ██████████, investors would have undoubtedly understood the sophistication and risk contained within this detailed investment product, and specifically the exact nature of the risks to which they had been exposed at the point of investment. It is beyond doubt that when considering ██████████ property performance in the years before 29 June 2007, ██████████ investors were attracted by the exceptional price performance that had been experienced.”

Whether there were negative US and European financial market signals on the VIX and VSTOXX indices in advance of the beginning of the Fund:

76. The Expert also, in considering the Respondent’s second question, investigated whether negative United States and European financial market signals were available when observing the VIX and VSTOXX indices.

77. He stated that the VIX and the VSTOXX are known as the “*fear gauges*” of the United States and European financial markets respectively. The CBOE Volatility Index (the VIX) is a real-time index reflecting the US market’s expectations for the relative strength of short-term price changes in the S&P 500 Index. The VIX is derived from the S&P 500 Index options with near-term expiration dates, enabling a 30 day forward projection of volatility. Volatility, he stated in his Report, indicates the speed of price changes, and serves as a metric to assess market sentiment and the level of fear among participants.

78. The EURO STOXX 50 VOLATILITY INDEX (the VSTOXX) is designed to gauge the anticipated volatility of the EURO STOXX 50 Index within a future timeframe based on the available option contracts on the Eurex Exchange for that particular index. He stated that the VSTOXX methodology leverages the entire spectrum of open strikes to provide an accurate estimate of implied volatility. He stated that this approach differs from other models that predominantly rely on (near) At-The-Money strikes. He stated that the EURO STOXX 50 options are among the most heavily traded products on the Eurex Exchange and the VSTOXX indices reflect the skewed or “*smiling*” profile observed in the volatility surface.

79. The Expert pointed the Commissioner to Figures 11 and 12 contained in his Report as follows:

- i. Figure 11 which is entitled “*The VIX Index*”. He stated that this figure clearly shows that there was no escalation or significant escalation in the VIX from 2000 until August 2007. This, he stated, coincided with the collapse of BNC Bank and funds relating to Bear Stearns. He stated that at the point of time of the making of the investment in the Fund in June 2007, an investor would have expected continued growth and performance. He stated that the best way to draw expectation relating to tomorrow’s price performance is to incorporate the information relating to recent past performance. He stated that the VIX Index would not have given any cause for concern of immediate 30 day future problems at the point in time from 30 April 2007 through to 30 June 2007.
- ii. Figure 12 which is entitled “*The VSTOXX Index*”. He stated that this reflected the same position as the VIX Index and that it would not have given any cause for concern of immediate 30 day future problems at the point in time from 30 April 2007 through to 30 June 2007.

80. In his conclusion to section 3.2 of his Report, the Expert states:

“Such evidence indicates that the United States and European markets, on 29 June 2007, nor in the months immediately before this date, did not present evidence of elevated fear about future market conditions. Therefore, [REDACTED] investors could reasonably expect the current financial market conditions would persist and realise at least the value of their initial investment within seven years, even with short-term and medium-term headwinds. [REDACTED], and the leveraged investment contained therein, was undoubtedly targeted at sophisticated investors who understood the investment type and the inherent risks they were taking.”

Whether there were elevated signals in the Irish media that would influence an investor’s expectation of realising at least the value of their initial investment within seven years:

81. The Expert also researched as to whether there were elevated signs in the Irish media that would influence an investor’s expectation of realising at least the value of their initial investment within seven years. In that regard the Expert stated that he used broadsheet newspapers [REDACTED] [REDACTED] as a broad representation of what the average Irish person would consider in terms of their investment decisions. He stated that, having downloaded all of the articles from those sources, [REDACTED] [REDACTED] through which it was established that, in the entire period during 2007, only 27% of the articles of the sample were negative in tone. He further stated that less than a total of 10 articles in the entire period before Quarter 3 of 2007 were

negative in tone. The Expert stated that this analysis is based on his own research which has been published in top ranking economics and finance journals.

- i. Figure 13 which is entitled "*Mainstream Irish media coverage using the term 'recession' during 2007*". He stated that there were mentions of the word "recession" in Q1 and Q2 of 2007 but that, just before September 2007, an elevation occurred which, he stated, was the Irish media drawing attention to the term "recession". He stated that this coincides with the collapse of BNC Bank and the Lehman Brothers and Bear Stearns issues that began in late July / August 2007.
- ii. Figure 14 which is entitled "*Mainstream Irish media coverage using the term 'bubble' during 2007*". This, he stated, was consistent the whole way throughout 2007 and there was no elevation in the use of the word "bubble" during that period.
- iii. Figure 15 which is entitled "*Mainstream Irish media coverage using the term 'subprime' during 2007*". He stated that the use of the term "subprime" was first seen in March 2007. He stated that a sharp escalation in the usage of that term was not seen until after July 2007 and that the use of the term "subprime" was not prevalent in the Irish media until after June 2007.
- iv. Figure 16 which is entitled "*Mainstream Irish media coverage using the term 'property price' during 2007*" which, he stated was consistent throughout 2007.
- v. Figure 17 which is entitled "*Mainstream Irish media coverage using the term 'financial crisis' during 2007*". The Expert pointed to an article in the Irish Examiner on 15 November 2007 which is entitled "*Global financial crisis no real danger to Ireland, says Central Bank*". He stated that the relevance of this article is that during a period of almost 6 months after the investment period in the Fund, the Central Bank of Ireland were stating to the population that the country was sheltered economically.

82. The Expert came to the following conclusion in section 3 of his Report:

"Overall, the frequency of publication of terms such as "recession", "bubble", "subprime", "property prices", and "financial crisis" increased only after mid-Q3 2007, beyond the period were investments in ██████████ were made. Moreover, the relative scarcity of the term "financial crisis" in the media during this period indicated the presence of financial stability in Ireland and Europe. Hence, in such a climate, investors in ██████████ could reasonably expect to recover at least their initial investment within seven years. The overall optimism about the Irish economy's resilience was further underscored in a November 2007 print media coverage based on the Central Bank of Ireland's 2007 Financial Stability Report. Therefore, it would

be particularly challenging for a ██████ investor to assert that they did not invest with the expectation of recouping their initial investment within seven years.”

83. The Expert gave his opinion in section 4 of his Report as to the inherent risks associated with an investment in the Fund considering the information contained in his Report. In coming to this opinion the Expert noted that the Memorandum contained the following statements:

“The minimum amount of Capital Commitment is ██████ for private investors and ██████ for pension funds. The Company may waive these minimum investment amounts in its sole discretion, provided always that it will not waive such minimum investment amounts to the extent that it would be necessary to prepare a prospectus in accordance with the requirements of the Prospectus Directive (or any relevant Member State’s legislation implementing the Prospectus Directors).”

“In respect of the Capital Commitment made by an Investor, 90 per cent will be required to be made to the Company in the form of interest free, non-recourse, subordinated loans to the Company evidenced by Loan Notes and the remaining 10 percent will be an Investor’s subscription for Participating Shares, although these proportions may be varied in the sole discretion of the Company. Holders of Loan Notes and Participating Shares are unable to call for the redemption or repayment thereof.”

84. The Expert stated the following in conclusion to section 4 of his Report:

“Considering the sharp appreciation of ██████ property prices and rental yields in advance of the establishment of ██████, as presented in Section 2.2, it is without a doubt that the use of leverage would have been considered to create an extremely high-risk investment. Such acceptance of this level of risk would have been robustly indicated to each investor in ██████ at the time at which the position was opened through the multiple Memoranda and Prospectuses that existed, along with the substantiative [sic] media coverage that ██████ received in comparison to other similar funds. There would have been, without any doubt, a reasonable assumption that the investor was utilising such leveraged when creating their position so as to maximise their potential profit.

This Expert would have little doubt that such investment in ██████ was no more than an opportunistic attempt to obtain continued high-risk exposure to property markets that had presented some of the largest price appreciation in the world prior to the establishment of ██████. Such investment would have been particularly prudent so as to generate portfolio diversification in the face of some gentle headwinds that were

evident through the first half of 2007 due to growing uncertainty surrounding the United States subprime market. However, the fund's blend, comprising substantial leverage through 10% equity and 90% debt, presented substantial evidence of the risk that each investor had accepted so as to maximise their potential future profits."

85. The Expert summarised his conclusions in section 5 of his Report stating:

"Is it reasonable to consider that there was a secondary market for Irish unquoted securities such as that of ██████████ ?

- *The ██████████ fund was reported to have been oversubscribed by the Irish media; therefore, beyond any reasonable doubt, it can be immediately implied there existed a natural, active secondary market for the resale and transfer of ownership of ██████████ Participating Shares.*
- *Irrespective of whether we consider ██████████ and European construction sectors or related investment funds as represented by property-related ETFs and REITs, we observe that market liquidity conditions elevated throughout the period before 2007. This increased market liquidity was further experienced throughout the period, including early 2008, in advance of the beginning of the international financial crisis that followed the United States subprime collapse. ██████████ property, in particular, benefited from elevated international interest due to significant price appreciation and positive rental yields. Based on such evidence, it would be reasonable to consider that a strong, secondary market for Irish unquoted securities such as ██████████ existed throughout 2007, including the specific date 29 June 2007.*
- *The ██████████ Capital Commitment Agreement directly refers to the expected process when transferring ownership. We can therefore established that there was a reasonable expectation that such transfers would have been sought.*

On 29 June 2007, would an investor in the ██████████ fund have reasonably considered the realisation of at least the value of their initial investment within seven years?

- *The strong price performance in the ██████████ property market would have been impossible to ignore. Through ██████████, investors would have been leveraging their positions substantially through the use of 90% debt, therefore taking what would be considered extremely high levels of risk in a market that was presenting many substantial signs of continuing sharp price appreciation. Any investor that*

would have considered the [REDACTED] property market to be overheating would not have invested in [REDACTED]. Failure to acknowledge such risks would present direct evidence of a catastrophic failure of due diligence and portfolio management. Further, if an investor could state in the period thereafter that they could not have reasonably anticipated the return of at least their initial investment within seven years, it would present substantial evidence of a failure of reasonable risk management, therefore raising substantial doubts about their ability to manage their investment portfolio.

- Through the use of [REDACTED], investors would have undoubtedly understood the sophistication and risk contained within this detailed investment product, and specifically the exact nature of the risks to which they had been exposed at the point of investment. It is beyond doubt that when considering [REDACTED] property performance in the years before 29 June 2007, [REDACTED] investors were attracted by the exceptional price performance that had been experienced.
- Investigating the performance of the VIX and VSTOXX indices indicates that the United States and European markets, on 29 June 2007, nor in the months immediately surrounding this date, did not present evidence of elevated fear about future market conditions. Therefore, [REDACTED] investors could reasonably expect that current financial market conditions would persist and realise at least the value of their initial investment within seven years, even with short-term and medium-term headwinds.
- Further, it is clear there were indications in the Irish media that could impact on investor's anticipation of recovering their initial investment within seven years. The frequency of publication of terms such as 'recession', 'bubble', 'subprime', 'property prices' and, 'financial crisis' increased only after mid-Q3 2007, beyond the period where investments in [REDACTED] were made. Moreover, the relative scarcity of the term 'financial crisis' in the media during this period indicated the presence of financial stability in Ireland and Europe. Hence, in such a climate, investors in [REDACTED] could reasonably expect to recover at least their initial investment within seven years. The overall optimism about the Irish economy's resilience was further underscored in a November 2007 print media coverage based on the Central Bank of Ireland's 2007 Financial Stability Report. Therefore, it would be particularly challenging for a [REDACTED] investor to assert that they did not invest with the expectation of recouping their initial investment within seven years.

Therefore, to summarise the key findings of this Expert Witness Report

- *The investment in ██████████ is perceived as an opportunistic approach to maintaining a high risk exposure to property markets that had shown substantial price appreciation prior to ██████████ establishment.*
- *Through the use of ██████████ investors would have undoubtedly understood the sophistication and risk contained within this detailed investment product.*
- *The investment strategy seemed prudent for portfolio diversification given the subtle headwinds due to increasing uncertainty surrounding the United States subprime market.*
- *The leverage ratio is considered to be quite high, suggesting that ██████████ investors accepted considerable risk for the sole purpose of maximising potential future profits.*
- *The clear, unhindered growth in primary market liquidity conditions serves as an appropriate proxy to represent and indicate that there existed a strong secondary market for unquoted, property-based funds in Ireland in June 2007.*
- *The fact that ██████████ was initially oversubscribed further validates the view that there existed a strong, liquid secondary market to which ██████████ investors could have sold their respective assets.*
- *On 29 June 2007, it would have been reasonable for an investor to expect the realisation of their initial investment's value within seven years."*

Respondent's Submissions

86. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

87. The Respondent submitted that the interest which the Appellant held in the Fund was a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA1997.

88. In that regard, the Respondent submitted that section 743(2) of the TCA1997 provides that:

“(2) Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).”

89. The Respondent submitted the Expert's Report and evidence in support of its contention that at the time of the Appellant's investment in the Fund it could reasonably have been expected that at some time during the period of 7 years beginning at the time of the acquisition the Appellant would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).

90. The Respondent submitted that the Memorandum does not form part of the contract documentation relating to the investment which the Appellant made in the Fund. Rather, the Respondent submitted that the contract documentation which applies to the investment which the Appellant made in the Fund is the Capital Commitment Agreement and the Articles of Association.

91. The Respondent submitted that the Appellant has not submitted the Capital Commitment Agreement or the Articles of Association which he executed as part of his investment in the Fund. However, the Respondent does not dispute that the copies of those documents which have been submitted to the Commissioner are the versions which the Appellant would have had access to on making the investment.

92. The Respondent submitted that the Memorandum was so heavily caveated that it could never be something that any individual could rely upon if they were alleging, for example, that there was a breach of contract or misrepresentation.

93. The Respondent submitted that the Memorandum does not state that the transfer of Participating Shares or Loan Notes was prohibited. It was submitted that at page 1 of the Memorandum it states:

“Prospective investors must rely upon their own examination of the Company and consider the risks involved before making a Capital Commitment to the Company. The capital of the Company will not be quoted on any recognised or designated investment exchange and, accordingly there will not be an established or ready market in them.

Capital Commitments to the Company will therefore not be easily realisable and the ability to transfer Shares is restricted by the Company's Articles."

94. The Respondent also pointed the Commissioner to another paragraph on page 1 of the Memorandum which states:

"Investors should be aware that investing in the Company carries with it a level of risk significantly higher than that associated with investing in securities of companies listed on major securities markets in developed economies. These risks include political, economic, legal, currency and regulatory considerations. The Company is suitable only for institutional and sophisticated investors. Set out in part 13 (Risk Factors) of this Document are certain risk factors which should be considered by prospective investors in connection with Capital Commitments. However, prospective investors must rely upon their own examination of [REDACTED] and consider the risk involved before making the Capital Commitments. Prospective investors are advised to consult a professional advisor before making any investment decision."

95. The Respondent submitted that the contents of the Memorandum and in particular Parts 2, 3 and 4 thereof make it apparent that there was a significant demand for [REDACTED] property at the time of the offering.

96. The Respondent referred the Commissioner to the Capital Commitment Agreement and in particular to the part which states:

"By agreeing to subscribe for Participating Shares and by agreeing to apply for Loan Notes we agreed to make the Capital Commitment to the Company and the terms and conditions of the articles of association of the Company (the "Articles"), the loan note instrument attached as Appendix 3 of this Agreement (including the general conditions and in particular clause 2 which provides details of the Company's rights in an event of default attached hereto as Appendix 1 (the "General Conditions")) and agree to be bound by the Articles and to pay the amount of any call in respect of our Capital Commitment.

It is understood and agreed that, of the total amount of our Capital Commitment, 90% will be required to be made by us to the Company in the form of interest-free, non-recourse, subordinated loans to the Company evidenced by Loan Notes, and the remaining 10% will be our subscription for Participating Shares, although these proportions may be varied in the sole discretion of the Company. By signing this agreement, we confirm that we have read and understood the information memorandum dated [REDACTED] (the "Information Memorandum") subject to which

our subscription for Participating Shares in the Company and application for Loan Notes in the company is made. It is also understood that holders of Loan Notes and Participating Shares are unable to call for the redemption or repayment thereof. Redemptions of Participating Shares and the repayment of Loan Notes are at the absolute discretion of the directors.”

97. The Respondent submitted that it was a pre-requisite that an investor confirm that they had read the Memorandum before entering into an investment in the Fund. However, it is the Respondent’s submission that the confirmation by an investor that they had read the Memorandum before entering into an investment in the Fund did not form part of the contractual terms and conditions of the investment.

98. The Respondent submitted that, whilst the Memorandum and Articles of Association do contain an absolute prohibition on an investor’s right to call for redemptions of Participating Shares and the repayment of Loan Notes, there is no such prohibition on the transfer of Participating Shares in the Fund. The Respondent submitted that, whilst certain restrictions on the transfer of Participating Shares in the Fund are contained in the Articles of Association, these do not amount to a prohibition. In that regard the Respondent submitted that Article 6 makes it clear that the Participating Shares were transferable in accordance with Article 17 of the Articles of Association, at the discretion of the Directors of the Fund.

Admissibility of Expert Evidence

99. The Commissioner notes the role of an expert witness in civil proceedings has been considered by the Court of Appeal in Duffy v McGee [2022] IECA 254 (hereinafter “McGee”). In McGee, Collins J stated the following:

“17. The position in this jurisdiction as regards the issue of reliability would therefore appear to be as follows. There is no general requirement that expert evidence must meet any specific threshold of reliability as a condition of admissibility nor do the Irish courts have the “gatekeeping” function contemplated by Daubert. However, in any given case the admissibility of expert evidence may be challenged on the basis that it lacks a reliable scientific or methodological foundation. At what stage of the proceedings, and in what manner, such a challenge should be determined is a matter for case-by-case assessment. Finally, even where admissible, issues of reliability may properly affect the weight to be given to expert evidence.

18. The point made by the Law Reform Commission about the importance of the trier of fact reaching (and being in a position to reach) their own independent conclusion on

the weight, if any, to be given to expert evidence highlights another significant issue. In civil proceedings, the weight to be given to evidence, including expert evidence, is always a matter for the court. Even if uncontradicted, a court is not obliged to accept the evidence of an expert witness, any more than it is obliged to accept the uncontradicted evidence of a witness of fact... There is no principle that greater weight is to be given to expert evidence than to ordinary evidence of fact. Ultimately it is always a matter for the court to resolve disputed issues of fact and, while that process may be assisted by expert evidence, the court must not surrender its judgement to experts, however well-qualified they may appear to be.

19. To properly perform its function, the court must be able to understand and engage with the evidence, which in turn requires that experts should sufficiently explain their opinions and the basis for them. Their entitlement to express such opinions “is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which their long study and experience has furnished to them whereby they have formed that opinion so that, in those circumstances, the court may be enabled to take a different view: Flynn v Bus Eireann [sic] [2012] IEHC 398, per Charleton J at para 9. It follows that the expert witness must “provide material on which a court can form its own conclusions on relevant issues” (Pora v The Queen [2016] 1 Cr App R 3, at para 24). Mere assertion or “bare ipse dixit” on the part of the expert witness is, accordingly, “worthless”: Kennedy v Cordia (Services) LLP [2016] UKSC 6, [2016] 1 WLR 597, at para 48.”

100. No challenge to the admissibility of the Expert’s evidence on the basis that it lacks a reliable scientific or methodological foundation has been made. The challenge to the admissibility of the Expert’s evidence is based on the phrasing of the second question by the Respondent.

101. The Commissioner notes that the Appellant has expressly stated that he does not raise any issue in relation to the first question posed by the Respondent to the Expert, that being:

“First, in July 2007, would it be reasonable to consider that there was a secondary market in Ireland for unquoted securities, comprising;

*(a) shares in ██████ that ultimately derive their value from ██████ property;
and*

*(b) shares in ██████ that ultimately derive their value from ██████ property
and a loan note issued by ██████.”*

102. Counsel on behalf of the Appellant has, however, raised an issue with the second question posed to the Expert by the Respondent and which the Expert addressed in his Report. The Appellant submitted that the question which the Expert had been asked to consider was:

“Secondly, should an investor open such a position, would it be reasonable to assume that on the date of investment, there was a fair expectation that they would realise the value of their initial investment within 7 years?”

103. The Appellant submitted that the question posed to the Expert by the Respondent does not reflect the test contained in section 743(2) of the TCA1997 which states that:

“(2)Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).”

104. As a result, the Appellant submitted, the opinions given and the conclusions reached by the Expert in relation to the second question posed to him by the Respondent are not admissible as they are based on an incorrect statement of the legal position contained in the question.

105. The Commissioner does not agree.

106. A question was posed to the Expert by the Respondent which asked whether it would be reasonable to assume that on the date of investment, there was a fair expectation that they would realise the value of their initial investment within 7 years. The wording of the question does not mirror the wording contained in section 743(2) of the TCA1997. The Expert is not a legal expert and his Report and oral evidence was not adduced for the purpose of adducing expert legal evidence to the Commissioner.

107. The role of the Commissioner in considering expert evidence has been set out by Collins J in *McGee*:

“19. To properly perform its function, the court must be able to understand and engage with the evidence, which in turn requires that experts should sufficiently explain their opinions and the basis for them. Their entitlement to express such opinions “is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which their long study and

experience has furnished to them whereby they have formed that opinion so that, in those circumstances, the court may be enabled to take a different view”...”

108. The Commissioner has considered the Expert's evidence and Report. The Expert is a Professor of Finance [REDACTED] and during the course of his evidence he described the methodologies which he applied in researching the findings which he reached in his Report. The Expert also stated that he has also used these methodologies in academic papers which he has published. The Commissioner found the Expert's evidence to be logical, detailed and the basis of the research which the Expert carried out in writing his Report was sound.

109. The fact that the second question posed by the Respondent does not replicate the wording of section 743(2) of the TCA1997 does not reduce the validity of the Expert's opinions and evidence to the Commissioner. The Expert explained in detail the methodologies applied by him in forming his opinions and the basis on which his opinions were formed. The Expert is not a legal expert, that is the role of the counsel who appeared in front of the Commissioner at the oral hearing and it is for Counsel to make submissions to the Commissioner. The purpose of the Expert's evidence is to assist the Commissioner in coming to her determination.

110. The Commissioner considers that the Expert has set out in clear terms his opinions on the questions posed to him by the Respondent and finds that there is no basis, based on the wording of the second question posed by the Respondent to the Expert, for the Expert's evidence in that regard to be treated as inadmissible or to be excluded.

111. The Commissioner also notes that at the commencement of the hearing, Counsel on behalf of the Appellant made the following applications to the Commissioner:

- i. That the Expert be required to wait outside the hearing room until such time as he was called to give evidence. This was on the basis that Counsel for the Appellant would be making submissions about the Expert's testimony. In that regard, Counsel on behalf of the Appellant referred the Commissioner to the judgment in *McGee*.
- ii. That the Expert be required to give his evidence first in time to the Commissioner on the basis that it would be more efficient that the Commissioner could evaluate whether the expert evidence adduced was necessary and also that by hearing the Expert's evidence first in time any requirement to re-call the Appellant after he had concluded his evidence and cross-examination would be obviated. In addition, Counsel on behalf of the Appellant submitted that it was relevant that he had only become aware of the fact of the Expert's testimony the week before the oral hearing.

112. The Commissioner did not accede to these applications. In the first instance, the Commissioner noted that the Appellant and his legal team had been put on notice of the fact of the Expert's evidence in the Respondent's Outline of Arguments. In addition, the hearing of this appeal had been adjourned from June 2023 until September 2023 to allow for the Respondent to gather expert evidence.

113. The Commissioner was of the view that the Expert's testimony was being adduced for the purpose of assisting the Commissioner in coming to her determination. The Commissioner was also of the view that the Expert's Report had been submitted by the Respondent in advance of the oral hearing and that any changes from the Report could be challenged under cross examination. The Commissioner considered that hearing the Appellant's evidence may assist the Expert, whose role is to assist the Commissioner.

114. The Commissioner was also of the view that this is the Appellant's appeal and that the burden of proof rests with the Appellant. It is normal course that when bringing an appeal in front of an Appeal Commissioner, the taxpayer bringing the appeal bears the burden of proof and therefore the taxpayer presents his or her case first, after which the Respondent presents its case. The Commissioner was not persuaded by the argument put forward by the Appellant that it would be more efficient to have the Expert give evidence before the Appellant.

115. The oral hearing therefore proceeded as is normal course in tax appeals with the Appellant giving his evidence first. The Expert was not excluded from hearing the Appellant's evidence.

Material Facts

116. The following material facts are not at issue in the within appeal and the Commissioner accepts these as material facts:

- i. The Appellant is a businessman and taxpayer who, in or around May / June 2007, made an investment in the Fund.
- ii. The Fund was incorporated [REDACTED] 2007 and was not tax resident in Ireland.
- iii. The Fund was promoted by the Bank and was incorporated for the purpose of raising funds for investment, mainly in [REDACTED] investment properties.
- iv. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which the Appellant entered into.

- v. The Capital Commitment Agreement required the following from investors in the Fund:
 - a. 10% of the Capital Commitment in the form of Participating Shares; and
 - b. 90% of the Capital Commitment in the form of an interest free, non-recourse, subordinated loan evidenced by way of Loan Notes.
- vi. The Capital Commitment Agreement entered into by the Appellant was for a total of € [REDACTED].
- vii. The Appellant invested a total of € [REDACTED] in the Fund pursuant to the Capital Commitment Agreement as follows:
 - a. [REDACTED] Participating Shares at a value of € [REDACTED] per share, representing a value of € [REDACTED]; and
 - b. € [REDACTED] in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued.
- viii. The Fund made repayments totalling € [REDACTED] of the Loan Notes to the Appellant between [REDACTED] May 2014 and [REDACTED] June 2017 and the following Distribution Notices were issued to the Appellant:

Date	Distribution Notice No.	Description	Amount
[REDACTED] May 2014	1	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] October 2014	2	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] May 2015	3	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] December 2015	4	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
	5	Not submitted to the Commissioner	

■ December 2016	6	Distribution by way of a repayment of Loan Notes	€ ■■■■■
■ June 2017	7	Distribution by way of repayments of the residual Loan Notes held by the Investor	€ ■■■■■

- ix. The Fund was wound up voluntarily by resolution on ■■■■■ 2015 with the Liquidator appointed as liquidator.
- x. The Appellant received distributions totalling € ■■■■■ in respect of “Distribution by way of a liquidation distribution” on foot of the liquidation of the Fund (hereinafter the “liquidation distribution”). The Appellant received € ■■■■■ by way of liquidation distribution in 2017 and received € ■■■■■ by way of liquidation distribution in 2019 as follows

Date	Distribution Notice No.	Description	Amount
■ June 2017	7	Distribution by way of a liquidation distribution	€ ■■■■■
■ October 2017	8	Distribution by way of a liquidation distribution	€ ■■■■■
■ April 2019	9	Distribution by way of a liquidation distribution	€ ■■■■■
■ September 2019	10	Final Distribution	€ ■■■■■

- xi. The Appellant submitted Form 11 tax returns to the Respondent in relation to the tax years 2017 and 2019.
- xii. No reference was made to the liquidation distributions received by the Appellant in the Form 11 returns made by the Appellant for 2017 and 2019.

- xiii. The Appellant did not submit any CGT returns to the Respondent in relation to the liquidation distributions.
- xiv. On 9 December 2022 the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D – Offshore Income Gain in the amount of €[REDACTED]. The balance of tax payable in the Notice of Amended Assessment to income tax for 2017 is €190,080.98.
- xv. On 9 December 2022 the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D – Offshore Income Gain in the amount of [REDACTED]. The balance of tax payable in the Notice of Amended Assessment to income tax for 2019 is €10,456.15.
- xvi. The total additional Schedule D – Offshore Income Gain amount for 2017 and 2019 included in the Notices of Amended Assessment was €[REDACTED].
- xvii. The Appellant, through his tax agent, submitted a Notice of Appeal to the Commission on 7 January 2023 appealing the Notices of Amended Assessment to income tax for 2017 and 2019 issued by the Respondent on 9 December 2022.
- xviii. The grounds of appeal identified in the Notice of Appeal are as follows:

“Revenue have raised assessments to income tax in respect of liquidation proceeds received from [REDACTED], a [REDACTED] incorporated and tax resident company. The shareholders in the company included a majority of Irish Tax resident shareholders including both Irish individuals and corporate entities. The shareholders subscribed for shares in the company as well as providing interest free loans to the company. The directors of the company resolved to place the company in liquidation on [REDACTED] July 2015.

As stated above, Revenue have raised assessments to income tax in respect of the liquidation proceeds received. We are of the opinion that any distribution made by the company to the Irish shareholders following the date of appointment of the liquidator should be considered a liquidation distribution and therefore a disposal (or part disposal in the case of several liquidation distributions) of the Irish Shareholders' shares in the company for CGT purposes. We therefore lodge this appeal against the assessments dated 9 December 2022 in relation to the tax years 2017 and 2019.”

xix. The Fund was an offshore fund pursuant to the provisions of section 743 of the TCA1997.

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

- i. A secondary market existed for investments in the Fund in June 2007;
- ii. At the time of the acquisition of the Appellant's interest in the Fund in May / June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest whether by transfer, surrender or in any other manner.
- iii. The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares.
- iv. The NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.

118. The appropriate starting point for the 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 the High Court case of Menolly Homes Ltd v Appeal Commissioners and another, [2010] IEHC 49 (hereinafter "Menolly Homes"), at paragraph 22, Charleton J. stated:

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

119. The Commissioner has considered the material facts at issue.

A secondary market existed for investments in the Fund in June 2007:

120. The Commissioner heard evidence from the Expert that, in his opinion, a secondary market existed for investment in the Fund in June 2007. The basis for the Expert's opinion is that:

- i. the Fund was oversubscribed;
- ii. there was no evidence of escalating international liquidity risks in June 2007; and

[REDACTED]

124. The Expert stated that the article had led him to form an opinion that the Fund was oversubscribed, based on the fact that Fund had raised €200m in circumstances where it had originally been intended to raise between €100m and €150m. It was put to the Expert that he could not be certain that the raising of an addition €50m to €100m meant that the fund was oversubscribed.
125. The Appellant did not contest the Expert's evidence that that there was no evidence of escalating international liquidity risks in June 2007. It is not contested by the Parties that the Fund documentation made direct reference to the expected process to follow when transferring ownership of Participating Shares or Loan Notes in the Fund.
126. The Appellant did not adduce any evidence in relation to whether a secondary market for Participating Shares and Loan Notes in the Fund existed. In addition, the Appellant did not adduce any evidence as to whether the Fund was oversubscribed.
127. The Appellant submitted at section 6.6 of his Outline of Arguments that, the Loan Notes and Participating Shares had no active market for transactions. No evidence in support of this claim was adduced by or on behalf of the Appellant.
128. Having considered the evidence adduced and the submissions made by the Parties, the Commissioner finds that, on the balance of probabilities, a secondary market for the Participating Shares and Loan Notes in the Fund did exist. This is on the basis of the Expert's evidence which the Commissioner accepts and on the basis that the Appellant, on whom the burden of proof rests, did not adduce any evidence to the Commissioner in relation to this material fact. The Commissioner notes that it was open to the Appellant to call evidence from the Bank or from the Directors of the Fund in relation to this material fact but that he did not do so.
129. **As a result of the above the Commissioner finds as a material fact that a secondary market existed for investments in the Fund in June 2007.**

At the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner:

130. The Appellant argues that, at the time of the Appellant's investment in the Fund in June 2007, it could not have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

131. In considering this material fact, the Commissioner must first consider the meaning of "reasonably expected" in section 743(2) of the TCA1997.

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

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

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

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

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

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

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

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

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

“Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.”

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

134. The Commissioner notes that the word “*reasonably*” is defined in the Oxford English Dictionary as meaning “*fairly or pretty well; sufficiently, suitably; moderately, fairly*”. The Commissioner further notes that the word “*reasonably*” is defined in the Cambridge Dictionary as meaning “*using good judgment*”.
135. The Commissioner notes that the word “*expected*” is defined in the Oxford English Dictionary as meaning “*to regard as probable or imminent; to envisage; to anticipate*”. The Commissioner further notes that the word “*expected*” is defined in the Cambridge Dictionary as meaning “*believed to be going to happen or arrive*”.
136. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in *Heather Hill*, the Commissioner finds that the ordinary, basic and natural meaning of the words “*reasonably expected*” in section 743(2) of the TCA1997 is: **something which is regarded as probable, or could have been envisaged, when good judgment is used.**
137. The Commissioner notes that the Appellant has urged her, when considering the meaning of “*reasonably expected*”, to apply the “*reasonable man*” test, that is to say to consider what a reasonable person of ordinary prudence would have done or in this instance, regarded as probable or would have envisaged. The Commissioner considers that there is no substantive dichotomy between the basic and natural meaning of the words “*reasonably expected*” in section 743(2) of the TCA1997 which she has found and the “*reasonable man*” test urged on her by the Appellant.
138. The question which the Commissioner must therefore consider is whether, in June 2007, using good judgment, it was probable, or could have been envisaged, that at some time during the 7 years following the investment, a person investing in the Fund would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.
139. No expert evidence was adduced on behalf of the Appellant.
140. The Commissioner heard evidence from the Expert which is summarised at paragraphs 58 to 85 of this Determination to the effect that:
- i. In the period between 30 April 2007 and 30 June 2007, the [REDACTED] economy and property markets were performing very well;
 - ii. In the period between 30 April 2007 and 30 June 2007, media in Ireland were not widely reporting on an economic and/or property market downturn or crash;

iii. In the period between 30 April 2007 and 30 June 2007 there were no negative United States or European financial signals available when observing the VIX and VSTOXX indices, the so called “*fear gauges*” of the United States and European financial markets.

141. The Expert was cross examined by Counsel for the Appellant during the course of the hearing and was asked about the following substantive matters in relation to the second question which he was asked by the Respondent to consider in his Report as follows:

i. The Expert was asked whether all of the information which the Expert used in compiling his Report was readily available to investors in May / June 2007 at the time of their investments. The Expert stated that all of the information which he had used in compiling his Report was readily available to investors in May / June 2007. He stated that he had taken the view when compiling his Report, that the sources he would use should be those which could have been obtained by a rational investor sitting in April through June 2007.³

ii. The Appellant was asked in relation to the key term at Part 2 of the Memorandum which provides that “*Investors should not expect to realise their investment for at least 7 years. The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of the investments.*” The Appellant stated that, in his opinion, there is a material difference in the use of the word “should” and the use of the word “could” in this section of the Memorandum. He stated that the use of the word “should” indicates that there was a possibility that the life of the Fund might be shorter or longer than 7 years and that the word “should” is not absolute. He stated that the Directors of the Fund could have made a decision to “kill” the fund prior to the expiry of 7 years.⁴ The Expert agreed with Counsel for the Appellant that the terms of the Memorandum are clear in that it provides that an investor was not permitted to call for the redemption of the Participating Shares or a repayment of the Loan Notes, however, he stated, the Memorandum does not state that transfers of Participating Shares or Loan Notes were not permitted.

142. The Commissioner notes that the Memorandum contained economic information relating to the [REDACTED] economy and to the [REDACTED] property market. This information was set out over two Parts in the Memorandum as follows:

i. Part 3 entitled “*Economic Profile of [REDACTED]*” which is sub-divided as follows:

³ Transcript Day 1, page 95, question 179

⁴ Transcript Day 1, page 103, question 208

- “3.1 Summary
- 3.2 Political and Economic Transformation from the early 1990s
- 3.3 Industry Transformation
- 3.4 European Union Accession
- 3.5 Overview of the Economy in 2006
 - 3.5.1 Summary
 - 3.5.2 Summary
 - 3.5.3 Foreign Direct Investment
- 3.6 Prospects for 2007 and 2008”

ii. Part 4 entitled “An Overview of the [REDACTED] Property Sector” which is sub-divided as follows:

- “4.1 Overview
- 4.2 Investment Market Overview
- 4.3 Residential Market Overview
- 4.4 [REDACTED]
 - 4.4.1 Office Market
 - 4.4.2 Retail Market
 - 4.4.3 Warehouse Market
- 4.5 [REDACTED]
 - 4.5.1 Office Market
 - 4.5.2 Retail Market
- 4.6 [REDACTED]
 - 4.6.1 Office Market
 - 4.6.2 Retail Market
 - 4.6.3 Warehouse Market
- 4.7 [REDACTED] Market
 - 4.7.1 Office Market
 - 4.7.2 Retail Market
 - 4.7.3 Industrial Market
- 4.8 [REDACTED] Market
 - 4.8.1 Office Market
 - 4.8.2 Retail Market”

143. Having considered the market information available in June 2007, the Memorandum and the Expert's Report, the Commissioner finds as a material fact, on the balance of probabilities, that in June 2007, using good judgment, it was probable, or could have been envisaged, that at some time during the 7 years following the investment, a person investing in the Fund would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

144. This finding of material fact is on the basis that:

- i. The economic information available in May / June 2007 suggested that the growth of the [REDACTED] economy and in particular the growth of the [REDACTED] property market would continue as it had been growing in the years prior to the investment. This was set out in the Memorandum and was also set out by the Expert.
- ii. [REDACTED] national rental price performance had increased by approximately 20% during the period 2005 to 2007.
- iii. The [REDACTED] property price-to-income index value had increase from 100 in early 2006 to 180 mid-way through 2007.
- iv. No negative United States or European financial market signals were evident when observing the VIX and VSTOXX indices in May / June 2007.
- v. There was no evidence of an elevation of the use of negative language relating to the economy generally or to the property market in the Irish media in the period ending in June 2007.

145. No evidence contesting or contradicting the economic analysis carried out by the Expert has been adduced to the Commissioner. The Commissioner found the Expert's evidence to be credible and well researched.

146. The Commissioner finds as a material fact that in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares:

147. The Appellant has submitted that there were restrictions on the transfer and redemption of the Participating Shares and Loan Notes in the Fund which required the Fund's permission for the transfer and/or redemption of same such that these restrictions amounted to an effective prohibition on the transfer of the Participating Shares.

148. It is not disputed between the Parties that the Articles of Association and Memorandum contained restrictions on the transfer and redemption of Participating Shares in the Fund. What the Commissioner must consider is whether the restrictions on the transfer and redemption of Participating Shares in the Fund amounted to an effective prohibition on the transfer of the Participating shares.

149. Article 6 of the Articles of Association as amended on [REDACTED] is entitled "*The Shares*" and provides that:

"6.1 Participating Shares shall:

...

6.1.5 be transferable in accordance with Article 17;

..."

150. Article 8 of the Articles of Association as amended on [REDACTED] is entitled "*Issue and Redemption of Shares*" and provides as follows:

"...

8.13 The Directors shall have the power (but shall not be under any duty) to impose such restrictions as they may think necessary for the purpose of ensuring that no shares or Loan Notes of the Company are acquired or held by or transferred to any person in breach of the law or requirements of any country or governmental or regulatory authority or in circumstances which in the opinion of the Directors might result in the Company incurring any liability to taxation or suffering any other pecuniary or other disadvantage which the Company might not otherwise have incurred or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940.

8.14 *Subject to the provision of the Laws the redemption of Participating Shares shall be at the sole discretion of the Directors and redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine.*

...

151. Article 17 of the Articles of Association as amended on [REDACTED] is entitled "Transfer and Transmission of Shares" and provides as follows:

"17.1 *All transfers of shares and Loan Notes shall be effected by transfer in writing in any usual or common form in use in [REDACTED] or in any form approved by the Directors but need not be under seal, and every form of transfer shall state the full name and address of the transferor and transferee and be signed by our on behalf of the transferor. The transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register in respect thereof.*

17.2 *The Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-*

17.2.1 *if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;*

17.2.2 *if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940;*

17.2.3 *if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.*

17.3 *The Directors shall decline to recognise any transfer of shares unless:-*

- 17.3.1 the instrument of transfer is deposited at the Office or such other place as the Directors may reasonably require, accompanied by such evidence as the Directors may reasonably require to show the right of the transferor to make the transfer; and*
- 17.3.2 the instrument of transfer relates to shares of one class only.*
- 17.4 If the Directors declined to register a transfer of any share they shall, within one month after the date on which the transfer was lodged with the Company sent to the transferee notice of the refusal.*
- 17.5 The registration of transfers may be suspended at such times and for such periods as the Directors may from time to time determine, PROVIDED ALWAYS that such registration of transfers shall not be suspended for more than 30 days in any year.*
- 17.6 The Directors may, by notice to a Member, at any time request a Member to furnish a declaration, in a form satisfactory to the Directors, as to his place of residence, citizenship or domicile and any such information as may be reasonably required by the Directors to satisfy themselves that such person is qualified to hold shares in the Company.*
- 17.7 All instruments of transfer which shall be registered shall be retained by the Company, but any instrument of transfer which the Directors may decline to register shall (except in any case of fraud) be returned to the person depositing the same.*
- 17.8 In case of the death of a member, the survivors or survivor where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole or only surviving holder, shall be the only persons recognised by the company as having title to his interest in the shares, but nothing in this Article shall release the estate of the deceased holder whether sole or joint from any liability in respect of any share solely or jointly held by him.*
- 17.9 Any Guardian of an infant Member and any Guardian or other legal representative of a Member under a legal disability and any person entitled to a share in consequence of the death or insolvency of a Member shall, upon producing such evidence of his title as the Directors may require, have the right either to be registered himself as the holder of the share or to make such a transfer thereof as the infant, deceased or insolvent Member could have made.*

17.10 *A person becoming entitled to a share in consequence of the insolvency of a member shall have the right to receive and may give a discharge for all moneys payable or other advantages due on or in respect of the share, but he shall not be entitled to receive notice of or to attend or vote at meetings of the Company, nor save as aforesaid, to any of the rights or privileges of a Member unless and until he shall be registered as a Member in respect of the share PROVIDED ALWAYS that the Directors may at any given time give notice requiring any such person to elect either to be registered himself or to transfer the share and if the notice is not complied with within ninety days the Directors may thereafter withhold all moneys payable or other advantages due in respect of the share until the requirements of the notice have been complied with.*

152. The Commissioner has also considered the contents of the Memorandum as it relates to transfers of Participating Shares and Loan Notes.

153. At Part 2 of the Memorandum it states that *“Investors should not expect to realise their investment for at least 7 years. The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of the investments.”*

154. Section 3.7 of the Memorandum is entitled *“Rights attaching to the Participating Shares”* and section 3.7.3 of the Memorandum entitled *“Redemption”* provides that *“The Participating Shares do not carry a right to redemption by Shareholders. Redemption of Participating Shares and the repayment of Loan Notes are at the absolute discretion of the Directors.”*

155. Section 8.3.8 of the Memorandum is entitled *“Form and transfer of shares”* and provides that:

“Subject to the laws of [REDACTED], the Board may issue shares, and Loan Notes as certificated or uncertificated shares in its absolute discretion.

Subject to any restrictions on transfers described below:

8.3.8.1 Any Shareholder may transfer all or any of his certificated shares by an instrument of transfer in any usual form, or in any other form which the Board may approve, signed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee.

The Directors may, subject to the Articles, refuse to register a transfer of shares unless: it is delivered for registration to the registered office

of the Company or such other place as the Board may decide, accompanied by such evidence as the Board may reasonably require.

The Director's [sic] may also refuse in their absolute discretion and without providing any reason therefore, to register a transfer, including without limitation if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating Shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors from time to time or if it appears to the Directors that the transferee is not qualified to hold Participating Shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940 or if the transferee fails or refuses to furnish the directors with such information or declarations as they may require."

156. It is not disputed by the Parties, and the Commissioner notes, that Article 8.14 of the Fund's Articles of Association provides that the redemption of Participating Shares shall be at the sole discretion of the Directors and that redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine. Therefore, the Commissioner finds that there was a restriction on investors' ability to call for a redemption of their investment in the Fund.

157. The Commissioner also notes that Article 17 of the Fund's Articles of Association is entitled "*Transfer and Transmission of Shares*" and sets out the process which must be followed when transferring shares in the Fund.

158. Under cross examination the Expert was asked about the restriction on investors' ability to call for the redemption of Participating Shares and Loan Notes. The Expert agreed that such a restriction was contained in the Fund documentation.

159. The Expert stated that, in his expert opinion, the Fund documentation did not restrict the transfer of Participating Shares and Loan Notes such that a secondary market did not exist.

160. The Commissioner notes that the Appellant did not adduce any evidence in support of his claim that the Fund documentation contained restrictions on the transfer of funds such that the restrictions amounted to an effective prohibition on the transfer of Participating Shares. The Commissioner notes that it was open to the Appellant to call evidence from the Bank or from the Directors of the Fund or from other investors in relation to this material fact but that he did not do so.

161. The Commissioner, having considered the evidence adduced, the submissions received and the Fund documentation notes that Article 17 of the Articles of Association sets out the process which must be followed when transferring shares and Loan Notes in the Fund. The Commissioner considers that transfer process contained in Article 17 does not establish that an effective prohibition on the transfer of Participating Shares and Loan Notes existed. This is on the basis that:

- i. Article 17 does not state that the transfer of Participating Shares is prohibited;
- ii. Article 17 states the format and mechanism for the making and registration of transfers;
- iii. Article 17.2 sets out that the Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-

17.2.1 if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;

17.2.2 if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940; and

17.2.3 if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.

- iv. No evidence was adduced by the Appellant which tends to establish that the restrictions contained in the Fund Documentation on the transfer of Participating Shares and Loan Notes amounted to an effective prohibition on the transfer of Participating Shares and Loan Notes.

162. **The Commissioner therefore finds as a material fact that the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund’s permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.**

The NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund:

163. The Appellant has submitted that section 743(3) of the TCA1997 gives guidance on the meaning of “*value of the interest*” contained in section 743(2) of the TCA1997. Section 743(3) of the TCA1997 provides:

“For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

164. The Appellant submitted that the effect of section 743(3) of the TCA1997 is that, in order to establish the market value of the assets of the Fund, the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.

165. It was submitted that even if there was a secondary market, it would be impossible to determine whether or not an investor could have realised a value proportionate to the NAV on the secondary market. The Appellant submitted that, in circumstances where he could not realise a value proportionate to the NAV on the secondary market, it follows that his investment in the Fund could not be a material interest in an offshore fund as set out in section 743 of the TCA1997.

166. In considering this material fact, the Commissioner notes that the Expert gave evidence under cross examination at the oral hearing that the NAV of a primary market product, such as a publicly quoted share is easy to establish in that all of the information pertaining to the asset and the market will be built in to the share price by the primary market. The Expert stated under cross examination that the calculation of the NAV of construction property, a portfolio of property or portfolios of rental income is more difficult. He stated that in order to establish the NAV of such a portfolio a valuation for each property would need to be established.

167. The Commissioner notes that Article 11 of the Articles of Association of the Fund is entitled “*Determination of Net Asset Value*” and provides as follows:

“11.1 The Net Asset Value shall be determined by the Directors as at the Accounting Date and/or on such other occasions as the Directors may direct from time to time, and shall be determined in accordance with the provisions of this Article. The Gross Asset Value shall also be calculated by adding to the Net Asset Value the amount of any debt drawn down by the Company.

11.2 The assets of the Company shall be deemed to include:-

11.2.1 all cash in hand, on loan or on deposit, or on-call including any interest accrued thereon;

11.2.2 all bills, demand notes, promissory notes, certificates of deposit and accounts receivable;

11.2.3 all bonds, time notes, shares, stock, debentures, debenture stock, subscription rights, warrants, options, futures and all other investments in securities owned or contracted for by the Company, other than rights and securities issued by it;

11.2.4 all stock and cash dividends and cash distributions to be received by the Company and not yet received by it but declared payable to stockholders of record on a date on or before the relevant determination of the Net Asset Value;

11.2.5 all interest accrued on any interest-bearing securities owned by the Company except to the extent that the same is included or reflected in the principal value of such security;

11.2.6 all other Investments of the Company;

11.2.7 the preliminary expenses of the Company in so far as the same have not been written off; and

11.2.8 all other assets of the Company of every kind and nature including prepaid expenses as valued and defined from time to time by the Directors.

11.3 The assets of the Company shall be valued as follows:-

11.3.1 the value of any collective investment scheme shall be the price as notified to the Directors by the Directors or administrator thereof;

- 11.3.2 *the value of any investment which is quoted, listed or normally dealt in on a securities market will normally be based on the middle market price (if calculable, being the mean price between the bid and offer prices) for such security last available to the Directors on the calculation date. Where such investment is listed or dealt in on more than one securities market, the Directors may select any one of such markets for the foregoing purposes, which shall be the market which, in the opinion of the Directors, constitutes the main market in relation to such investment or the market, which in relation to such investment, the Directors in its absolute discretion considers most accurately reflects the true value of such investment. Notwithstanding the generality of the foregoing, the Directors may adjust the value of any such investment if, having regard to currency exchange costs, marketability and/or such other considerations as it may deem relevant, it considers that such adjustment is required to reflect the probable realisation value thereof;*
- 11.3.3 *the value of any investment which is not listed or dealt in on a securities market or which is normally listed or dealt in on a market but in respect of which no price is currently available will be the market value of such investment;*
- 11.3.4 *the value of any cash in hand or on deposit, prepaid expenses, cash dividends and interest declared or accrued as aforesaid and not yet received shall be deemed to be the face value thereof unless, in any case, the Directors is of the opinion that the same is unlikely to be paid or received in full, in which case the value thereof will be arrived at after making such adjustment as the Directors considers appropriate in such case to reflect the true value thereof;*
- 11.3.5 *the value of any demand notes, promissory notes and accounts receivable will be deemed to be the face value or full amount thereof after making such adjustment as the Directors considers appropriate to reflect the true current value thereof;*
- 11.3.6 *certificates of deposit, Treasury bills, bank acceptances, trade bills and other negotiable instruments shall each be marked to market as at the calculation date;*
- 11.3.7 *if extraordinary circumstances render a valuation pursuant to the above principles impracticable or inadequate, the Directors will determine*

whether alternative methodologies should be adopted and, if so, decide what these alternative methodologies should be. The relevant assets would then be valued accordingly. Notices of the Net Asset Value sent to the Members will describe any such alternative methodology used which is material in the circumstances;

11.3.8 if in any case a particular value is not ascertainable in accordance with the above principles or if the Directors consider that some other method of valuation better reflects the fair value of the relevant investment, then in such circumstances the method of valuation of the relevant investment will be such as the Directors, in its absolute discretion, determines; and

11.3.9 notwithstanding the foregoing, where at the time of any valuation any asset has been realised or contracted to be realised, there will be included in the assets in place of such asset the net amount receivable by the Company in respect thereof provided that, if such amount is not then known exactly, its value will be the net amount estimated by the Directors to be receivable by the Company provided that if the net amount receivable is not payable until some future time after the time of any valuation the Directors will make such adjustment as it considers appropriate to reflect the true current value thereof.

11.4 The liabilities of the company shall be deemed to include:-

11.4.1 all bills, notes and accounts payable;

11.4.2 all administrative expenses payable and/or accrued (the latter on a day-to-day basis);

11.4.3 all known liabilities present and future including the amount of any unpaid dividends declared upon the Participating Shares, contractual obligations for the acquisition of investments or other property or for the payment of money and outstanding payments on any Participating Shares previously redeemed;

11.4.4 an appropriate provision for taxes as determined from time to time by the Directors;

11.4.5 all other liabilities of the Company of whatsoever kind and nature except liabilities represented by shares in the Company and reserves (other than reserves authorised or approved by the Directors); and

11.4.6 such allowance as the directors consider appropriate for contingent liabilities.

In determining the amount of such liabilities, the Directors may calculate administrative and other expenses of a regular or recurring nature on an estimated figure for yearly or other periods in advance and accrue the same in equal proportions over any such period.

11.5 The Net Asset Value shall be calculated by deducting the total of the Company's liabilities from the gross value of the Company's assets.

11.6 Any valuations made pursuant to this article shall be binding on all persons."

168. As previously set out, the burden of proof rests on the Appellant in this appeal. The Appellant has not called any expert evidence in support of this material fact and has not submitted any documentary evidence in support of this claim. Pursuant to the provisions of Article 11 of the Articles of Association of the Fund, the NAV of the Fund was required to be determined by the Directors of the Fund on the Accounting Date, that being 31 December annually commencing on 31 December 2007.

169. The Commissioner notes that the Appellant has not submitted any of the annual reports of the Fund or any other Fund information which he was in receipt of from June 2007 until September 2019 when the final distribution of the Fund was made. The Appellant has, in addition, not given any evidence to the Commissioner whether oral or documentary as to whether he was in receipt of the determined NAV of the Fund on an annual basis or whether he at any time requested or received the NAV from the Fund. The Commissioner notes that the Appellant is an experienced businessman and investor and that, as such, he is aware of the importance of retaining paperwork in relation to investments.

170. The Commissioner does not accept that the Appellant has discharged the burden of proof to establish that the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund. In particular, the Commissioner notes that, pursuant to Article 11 of the Fund's Articles of Association, the NAV of the Fund was to have been determined at minimum on an annual basis. It therefore follows that, even if the NAV was not automatically provided to an investor by

the Fund on an annual basis, an investor would have been in a position to approach the Fund to request and receive the NAV of the Fund on at least an annual basis.

171. The Commissioner has already found as a fact that a secondary market existed for investments in the Fund. In addition, an investor was, pursuant to the provisions of Article 11 of the Articles of Association, in a position to receive the NAV of the Fund on at least an annual basis.

172. As a result of the foregoing, the Commissioner finds as a material fact that **an investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund on the secondary market by way of the acquiring the NAV which the Fund determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.**

Final findings of material fact:

173. For the avoidance of doubt the Commissioner accepts the following as material facts in this appeal:

- i. The Appellant is a businessman and taxpayer who, in or around May / June 2007, made an investment in the Fund.
- ii. The Fund was incorporated in [REDACTED] on [REDACTED] April 2007 and was not tax resident in Ireland.
- iii. The Fund was promoted by [REDACTED] and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.
- iv. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which the Appellant entered into. The Capital Commitment Agreement required the following from investors in the Fund:
 - a. 10% of the Capital Commitment in the form of Participating Shares; and
 - b. 90% of the Capital Commitment in the form of an interest free, non-recourse, subordinated loan evidenced by way of Loan Notes.
- v. The Capital Commitment Agreement entered into by the Appellant was for a total of € [REDACTED].
- vi. The Appellant was issued with [REDACTED] Participating Shares at a value of € [REDACTED] per share, representing a value of € [REDACTED].

vii. The Appellant advanced a total of € [REDACTED] to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued.

viii. The Fund made repayments totalling € [REDACTED] of the Loan Notes to the Appellant between [REDACTED] May 2014 and [REDACTED] June 2017 and the following Distribution Notices were issued to the Appellant:

Date	Distribution Notice No.	Description	Amount
[REDACTED] May 2014	1	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] October 2014	2	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] May 2015	3	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] December 2015	4	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
	5	Not submitted to the Commissioner	
[REDACTED] December 2016	6	Distribution by way of a repayment of Loan Notes	€ [REDACTED]
[REDACTED] June 2017	7	Distribution by way of repayments of the residual Loan Notes held by the Investor	€ [REDACTED]

ix. The Fund was wound up voluntarily by resolution on [REDACTED] July 2015 with the Liquidator appointed as liquidator.

x. The Appellant received distributions totalling € [REDACTED] in respect of the liquidation distribution, receiving € [REDACTED] by way of liquidation distribution in 2017 and receiving € [REDACTED] by way of liquidation distribution in 2019 as follows:

Date	Distribution Notice No.	Description	Amount
■ June 2017	7	Distribution by way of a liquidation distribution	€ ■■■■■■
■ October 2017	8	Distribution by way of a liquidation distribution	€ ■■■■■■
■ April 2019	9	Distribution by way of a liquidation distribution	€ ■■■■■■
■ September 2019	10	Final Distribution	€ ■■■■■■

- xi. The Appellant submitted Form 11 tax returns to the Respondent in relation to the tax years 2017 and 2019. No reference was made to the liquidation distributions received by the Appellant in the Form 11 returns made by the Appellant.
- xii. The Appellant did not submit any CGT returns to the Respondent in relation to the liquidation distributions.
- xiii. On 9 December 2022 the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D – Offshore Income Gain in the amount of €■■■■■■. The balance of tax payable in the Notice of Amended Assessment to income tax for 2017 is €190,080.98.
- xiv. On 9 December 2022 the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D – Offshore Income Gain in the amount of €■■■■■■. The balance of tax payable in the Notice of Amended Assessment to income tax for 2019 is €10,456.15.
- xv. The total additional Schedule D – Offshore Income Gain amount for 2017 and 2019 included in the Notices of Amended Assessment was €■■■■■■.

xvi. The Appellant, through his tax agent, submitted a Notice of Appeal to the Commission on 7 January 2023 appealing the Notices of Amended Assessment to income tax for 2017 and 2019 issued by the Respondent on 9 December 2022.

xvii. The grounds of appeal identified in the Notice of Appeal are as follows:

“Revenue have raised assessments to income tax in respect of liquidation proceeds received from ██████████, ██████████ incorporated and tax resident company. The shareholders in the company included a majority of Irish Tax resident shareholders including both Irish individuals and corporate entities. The shareholders subscribed for shares in the company as well as providing interest free loans to the company. The directors of the company resolved to place the company in liquidation on █████ July 2015.

As stated above, Revenue have raised assessments to income tax in respect of the liquidation proceeds received. We are of the opinion that any distribution made by the company to the Irish shareholders following the date of appointment of the liquidator should be considered a liquidation distribution and therefore a disposal (or part disposal in the case of several liquidation distributions) of the Irish Shareholders' shares in the company for CGT purposes. We therefore lodge this appeal against the assessments dated 9 December 2022 in relation to the tax years 2017 and 2019.”

xviii. The Fund was an offshore fund pursuant to the provisions of section 743 of the TCA1997.

xix. A secondary market existed for investments in the Fund in June 2007.

xx. At the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

xxi. The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.

xxii. An investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund on the secondary market by way of the acquiring the NAV which the Fund

determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.

Analysis

174. Section 745 of the TCA1997 is entitled "*Charge to income tax or corporation tax of offshore income gain*" and provides that:

(1)Where a disposal to which this Chapter applies gives rise, in accordance with Schedule 20, to an offshore income gain, then, subject to this section, the amount of that gain shall be treated for the purposes of the Tax Acts as -

(a)income arising at the time of the disposal to the person making the disposal, and

(b)constituting profits or gains chargeable to tax under Case IV of Schedule D for the chargeable period (within the meaning of section 321 (2)) in which the disposal is made.

...

175. The issue which the Commissioner must consider is whether the investment which the Appellant made in the Fund was a material interest in an offshore fund as set out in section 743 of the TCA1997.

176. It is agreed between the Parties, and the Commissioner has found as a material fact, that the Fund was an offshore fund for the purposes of section 743(1) of the TCA1997.

177. Section 743(2) of the TCA1997 provides that:

"(2)Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner)."

178. The Commissioner has already found as a material fact that at the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

179. It therefore follows that the Appellant's interest in the Fund was a material interest subject to the provisions of sections 743(3) to 743(9) of the TCA1997.

180. Section 743(3) of the TCA1997 provides that:

“(3)For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

181. Section 743(3) of the TCA1997 is a deeming provision and sets out one circumstance in which a person shall be deemed to be able to realise the value of an interest in an offshore fund. The Commissioner considers that the provisions of section 743(3) do not provide that if an investor does not fall within the provisions of section 743(3) then their interest in a fund or company cannot or will not be a material interest pursuant to the provisions of section 743(2) of the TCA1997.

182. The Commissioner has already found that the Appellant has not established on the balance of probabilities that the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.

183. The NAV was, pursuant to Article 11 of the Articles of Association of the Fund, available to investors and to the Appellant on an annual basis from 31 December 2007.

184. The Appellant has therefore not discharged the burden of proof to establish that an investor could not realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund as provided for in section 743(3) of the TCA1997.

185. Section 743(4) of the TCA1997 provides that:

“(4)For the purposes of subsections (2) and (3) -

(a)a person shall be deemed to be able to realise a particular amount if the person is able to obtain that amount either in money or in the form of assets to the value of that amount, and

(b) if at any time an interest in an offshore fund has a market value which is substantially greater than the portion which the interest represents, as mentioned in subsection (3), of the market value at that time of the assets

concerned, the ability to realise such a market value of the interest shall not be regarded as an ability to realise such an amount as is referred to in that subsection.”

186. No submissions have been made to the Commissioner such that if a transfer of the Participating Shares and Loan Notes were to occur an investor would realise anything other than money or assets to the value of that amount as set out in section 743(4)(a) of the TCA1997.

187. In addition, the Parties are in agreement that the provisions of sections 743(4)(b) to section 743(9) of the TCA1997 do not apply to the circumstances of this appeal.

188. As a result of the foregoing, the Commissioner finds that the Appellant’s interest in the Fund was a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA1997.

189. Having made that finding, it follows that the Commissioner must find that the gains of €[REDACTED] in 2017 and €[REDACTED] in 2019 relating to the Fund were offshore income gains and are therefore subject to income tax pursuant to the provisions of section 745(1) of the TCA1997.

Determination

190. As such and for the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the Respondent was incorrect to issue the Notices of Amended Assessment to income tax for the tax years 2017 and 2019. The Notices of Amended Assessment to Income Tax raised by the Respondent for the tax years 2017 and 2019 therefore stand.

191. This appeal is determined in accordance with Part 40A of the TCA1997 and in particular section 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA1997.

Notification

192. This determination complies with the notification requirements set out in section 949AJ of the TCA1997, in particular section 949AJ(5) of the TCA1997 and section 949AJ(6) of the TCA1997. For the avoidance of doubt, the Parties are hereby notified of the determination under section 949AJ of the TCA1997 and in particular the matters as required in section 949AJ(6) of the TCA1997. This notification under section 949AJ of the TCA1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The Parties

shall not receive any other notification of this determination by any other methods of communication.

Appeal

193. Any party dissatisfied with the determination has a right of appeal on a point or points of law only to the High Court within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Clare O'Driscoll
Appeal Commissioner
20 December 2023

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