AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

48TACD2024

Between

[redacted]

First-Named Appellant

and

[redacted]

Second-Named Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against an Amended Notice of Assessment to Corporation Tax which issued to the First-Named Appellant on [redacted] in respect of the accounting year ended [redacted] in the sum of €2,165,870. The appeal also relates to a Notice of Assessment which issued to the Second-Named Appellant in respect of the same accounting year and for the same quantum on [redacted].

2. The Appellants make their appeal in accordance with the provisions of section 933 Taxes Consolidation Act 1997, as amended ("TCA 1997").

Background

3. The First-Named Appellant [redacted] is a [redacted] company and an investment company pursuant to section 83 TCA 1997. [redacted]

4. [redacted]

5. The principal activities of [redacted]

6. The Second-Named Appellant ([redacted]) is a wholly owned indirect subsidiary of [redacted] and is part of [redacted] Irish tax purposes.

7. [redacted]

[redacted]

8. It was against this backdrop that [redacted] with an unsolicited proposal to acquire the [redacted].

9. [redacted] incurred costs in the accounting period ended [redacted], in what it stated was, obtaining advice from third-party advisors in order to assess the commercial merits of the [redacted] to identify and assess the strategic alternatives available to the [redacted] and to determine the most suitable means to conduct [redacted] business during this period.

10. [redacted] treated these costs as tax deductible expenses of management under section 83(2) TCA 1997 in its corporation tax return, and surrendered resultant losses arising utilising group relief to [redacted]

11. Both [redacted] and [redacted] ("the Appellants") filed their corporation tax returns for the accounting year ended [redacted], in which they offset and claimed the respective loss which had arisen. Also included in those returns was an "Expression of Doubt[3]" under section 959P TCA 1997. [redacted] Expression of Doubt concerned the deductibility of costs amounting to [redacted] incurred as "expenses of management" whereas [redacted] Expression of Doubt concerned the same amount which it had claimed on its corporation tax return under available group relief loss provisions.

12. By way of correspondence dated [redacted], the Respondent informed the Appellants that a review of the Expression of Doubts was continuing and it requested [redacted] to furnish to it a full listing of expenses by supplier and a copy of each engagement letter relating to the expenditure incurred as "expenses of management".

13. Following a reminder letter to the Appellants on [redacted], the Appellants furnished the Respondent, by way of letter dated [redacted], a listing of expenses by supplier and a copy of each relevant engagement letter.

[3] Where a taxpayer has a genuine doubt as to the application of the law in relation to any matter in an income tax, capital gains tax or corporation tax return, they may make an Expression of Doubt. The purpose of an Expression of Doubt is to indicate to the Respondent a genuine doubt about the application of law or the treatment for tax purposes of any matter contained in the return. https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-41a/41A-03-00.pdf

14. By way of letter dated [redacted], the Respondent issued its findings which included the reasons why it believed the "expenditure of management" expenses were not allowable for corporation tax purposes. Given this finding, the Respondent stated that the deduction claimed by [redacted] of [redacted] in its financial period ending [redacted] was not allowable under section 83(2) TCA 1997.

15. In a separate letter, owing to those findings, the Respondent informed [redacted] that its claim to corporation tax loss relief was to be reduced by the same amount, [redacted], which it had claimed under group relief loss provisions when it submitted its corporation tax return.

16. Furthermore, within those letters the Respondent rejected the Appellants' Expression of Doubts. It stated:

> "*I have reviewed your submission and wish to inform you that Revenue is of the opinion, having regard to guidelines published and to any supporting documentation provided, that the matter is sufficiently free from doubt and the Expression of Doubt has not been accepted as genuine. However, I am happy to clarify the issue you raised in your Expression of Doubt. Where an investment company incurs expenditure on resisting a change in the ownership of its own share capital, then, just as in the case of a trading company, such expenditure is not allowable.*"

17. Subsequently on [redacted], the Respondent issued its Amended Notices of Assessment to corporation tax to both [redacted] and [redacted]

18. The Appellants who were not in agreement with those Notices of Assessment and the determination in respect of the Expression of Doubt submitted Notices of Appeal to the Commission on [redacted].

19. Thereafter, the Respondent withdrew its determination that the Expressions of Doubt submitted by the Appellants were not "genuine". This leaves the net issue to be determined by the Commissioner in the Appellants' appeal, is as to whether the costs of [redacted] incurred by [redacted] are deductible expenses of management under section 83 TCA 1997. Furthermore, the Commissioner is required to determine whether the loss surrendered from [redacted] to [redacted] is eligible for deduction against the assessable income of [redacted] As the Expressions of Doubt submitted by [redacted] and [redacted] are considered "genuine", the Commissioner does not need to consider the Appellants' grounds of appeal and submissions on that matter.

20. As such, the Appellants' relevant grounds of appeal are as follows:

[redacted]

20.1. The Respondent's determination to reduce the loss claimed to be surrendered by [redacted] to [redacted] to nil, which reduces [redacted] claim for group relief by [redacted] is excessive and has no basis in fact or in law.

20.2. The expenses of management of [redacted] incurred by [redacted] are expenses of management within the meaning of section 83(2) TCA 1997 as interpreted in relevant case law.

20.3. The Respondent's interpretation of "expenses of management" under section 83(2) TCA 1997 which denies a deduction for certain expenses incurred of [redacted], is incorrect when the relevant legal principles of interpretation are applied and has no basis in fact or law.

20.4. The Respondent's assertion that the costs of [redacted] related to "*engaging outside advisers in relation to a matter concerning the ownership of the shares of the company itself, rather than in the management of the business of the company*" and are therefore not "expenses of management" under section 83(2) TCA 1997 is incorrect and has no basis in fact or law. The costs incurred by [redacted] were incurred in performance of its role of assessing strategy for the group and managing its investments in its operating subsidiaries and had to be incurred to comply with its duties under the [redacted] and Company Law.

20.5. The Respondent has misunderstood the facts of this case including, but not limited to, the nature of the expenses of management of [redacted] incurred by [redacted] and therefore, the Respondent's determination is incorrect and has no basis in fact or law.

[redacted]

20.6. The Respondent's determination to withdraw [redacted] claim for group relief under section 420 TCA 1997 of [redacted] surrendered to [redacted] by [redacted] and reduce it to nil is excessive and has no basis in fact or in law.

20.7. The additional corporation tax of €2,165,870 in respect of the year ended [redacted] assessed on [redacted] by way of the Respondent's Notice of Amended Assessment dated [redacted] is excessive and has no basis in fact or in law.

20.8. The expenses of management of [redacted] incurred by [redacted] (which were claimed by [redacted] as a deduction by virtue of section 420 TCA 1997) are expenses of management within the meaning of section 83(2) TCA 1997 as interpreted in relevant case law.

20.9. The Respondent's interpretation of "expenses of management" under section 83(2) TCA 1997 which denies a deduction for certain expenses incurred of [redacted] by [redacted] and therefore denies a claim for group relief surrendered by [redacted] to [redacted] is incorrect when the relevant legal principles of interpretation are applied and has no basis in fact or law.

20.10. The Respondent has misunderstood the facts of this case including, but not limited to, the nature of the expenses of management of [redacted] incurred by [redacted] and therefore, the Respondent's determination and Notice of Amended Assessment is incorrect and has no basis in fact or law.

21. As the Appellants' appeals are intertwined, the Commission issued a direction to the Appellants and the Respondent ("the parties") on [redacted]. This direction advised the parties that as the Appellants' appeals were related, the appeal in relation to [redacted] under the Commission's reference number [redacted] and the appeal in relation to [redacted] under the Commission's reference number [redacted] would be consolidated and that a determination under the reference number [redacted] would issue to both Appellants in respect of all matters under appeal.

22. The matter proceeded to hearing over two days on [redacted]. The Appellants were represented by Senior Counsel, four members of their accountants' staff and two members of their own staff. The Respondent was represented by Senior and Junior Counsel, its solicitor and two members of its staff. In addition, the Commissioner heard sworn testimony from the Appellants' [redacted] and their expert witness, in addition to legal submissions from the parties' representatives.

Documentation presented to the Commission

23. The Commission were presented with booklets of documentation from the Appellants and the Respondent in advance of the appeal hearing. For convenience, the Commissioner summarises that documentation below under grouped category headings:

Financial and Managerial Documents

23.1. Copies of the corporation tax returns for both [redacted] and [redacted] for the accounting period ending [redacted].

23.2. Copy of [redacted] corporation tax computation for the year ended [redacted]

23.3. Included within that computation was a breakdown of "management expenses" as follows:

Wages & Salaries	[redacted]
Foreign Exchange	[redacted]
Other Costs	[redacted]
Bank Charges	[redacted]
Audit Fee	[redacted]
Communications	[redacted]
Consultancy Fees – Reporting Requirement	[redacted]
Consultancy Fees	[redacted]
	[redacted]

23.4. A letter from [redacted] to the Respondent dated [redacted]. Included within that letter was the following:

"*…As requested a full listing of expenses by supplier is set out in the table below.*

Supplier	***Amount €M***
[redacted] *– Investment Bank*	[redacted]
[redacted] *– Stockbrokers*	[redacted]
[redacted] *– Solicitors*	[redacted]
[redacted] *– Professional Services*	[redacted]
[redacted] *– Solicitors*	[redacted]
[redacted] *– Business Advisory Services*	[redacted]
[redacted] *– Solicitors*	[redacted]
Other	[redacted]
Total	[redacted]

The Companies Act 2014 and the [redacted]. *We attach the engagement letters appointing* [redacted]. [redacted] *are the company's legal advisors and there is no specific engagement letter. There are no other specific engagement letters.*"

23.5. Included within the list of "associated companies" in [redacted]

23.6. Copies of [redacted] corporation tax computation for the year ended [redacted] Under the section "Group relief claims", the computation showed that an amount of [redacted] for that year. Under the heading "Associated Companies", [redacted] was [redacted] as an associated company of [redacted]

23.7. A copy of the Appellants' [redacted] dated [redacted] in the format of a Microsoft PowerPoint presentation. This detailed:

23.7.1. An introduction by the [redacted] of [redacted]

23.7.2. Financial and operating performance measures.

23.7.3. [redacted] and;

23.7.4. A[redacted].

Proposal Documents

23.8. A letter from [redacted] to [redacted] dated [redacted]. Included within that letter was the following:

23.8.1. [redacted]

Thank you for agreeing to meet with me and allowing me to explain in person [redacted] *strong interest in acquiring* [redacted] *and combining our two companies. Given the importance of this matter and with due regard to the appropriate protocol, I also wanted to provide you and your Board with a written proposal. Accordingly, I am writing on behalf of the Board of* [redacted] *to confirm our strong interest in making an offer to acquire the entire issued share capital of* [redacted] *and I set out herein the*

terms of a non-binding indicative proposal (the "Proposal"). Please note that this Proposal has been discussed with [redacted] Board of Directors who are strongly supportive and have approved its submission to you.

Rationale for the Proposal

[redacted]

23.8.2. Details of the proposal. This proposal offered an amount of cash and shares in [redacted] for each [redacted].

23.8.3. The “Principal Assumptions” used in reaching the proposal.

23.8.4. Details of the proposal funding.

23.8.5. The proposed treatment of shareholders, management and employees if the proposal succeeded.

23.8.6. Due diligence matters and timetable.

23.8.7. Regulatory matters.

23.8.8. Under the heading “Pre-conditions to the making of a formal offer”, it detailed numerous procedures and confirmations that would be necessary to be completed in advance of a formal offer being made by [redacted]

23.8.9. Details of the “next steps”

23.9. Details of the [redacted]. This letter detailed an enhanced offer for shares in [redacted] The letter concluded as follows:

“*For the avoidance of doubt, this letter is intended only to convey [redacted] in [redacted]. It does not constitute an offer or*

impose any obligation to make an offer, and nothing in this letter is intended to create a legally binding agreement..."

23.10. Documentation from [redacted] dated [redacted] which outlined the proposed transaction with [redacted] as a "proposal" or "possible offer".

[redacted]

23.11 [redacted]

[redacted]

23.12 [redacted]

[redacted]

23.13. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

23.14 [redacted]

23.15. [redacted]

23.16. [redacted]

23.17. [redacted]

23.18 [redacted]

23.19. [redacted]

Letters of Engagements from Professional Service Providers

23.20. A letter of engagement from [redacted] to [redacted] dated [redacted]. Included within the "Scope of engagement" was the following:

> "(*a*) [redacted] *will familiarize itself to the extent it deems appropriate and feasible with the business, operations, properties, financial condition and prospects of the Company (provided that the Company shall remain responsible for conducting appropriate due diligence with respect to any Transaction);*
>
> *(b)* [redacted] *will assist the Company in evaluating the extent to which it might be subject to an unsolicited change of control and in considering possible defensive measures that may be available to the Company;*
>
> *(c) if the Company or any shareholder receives any oral or written offer or proposal relating to an acquisition of or similar business* [redacted] *involving the Company, or relating to the acquisition of more than 30% of the Company's voting securities from the Company and/or its shareholders (any such offer or proposal being hereinafter called a "*[redacted] *Proposal" and any such acquisition or* [redacted] *whether resulting from a* [redacted] *Proposal or otherwise, being hereinafter called a "*[redacted] *Transaction"),* [redacted] *will advise and assist the management and Board of Directors of the company in their evaluation of the* [redacted] *Proposal and provide such financial advisory and investment banking services in connection with the* [redacted] *Proposal as management or the Board of Directors may reasonably request;*
>
> *(d) If the Board of Directors of the Company determines that a* [redacted] *Proposal is in the best interests of the Company and its shareholders,* [redacted] *will advise on the strategy and mechanics of implementing any offer or other arrangements with the objective of successfully consummating the* [redacted] *Transaction, including …*
>
> *(e) If the Board of Directors of the Company determines that a* [redacted] *Proposal is not in the best interests of the Company and its shareholders,* [redacted] *will advise and assist the Board of Directors in seeking to promote the best interests of the Company and its shareholders, as determined by the Board of Directors of the Company;…*"

23.21. Under the heading "Fees and Expenses" was the following:

"*For our services hereunder, the Company will pay to* [redacted] *the following cash fees (plus any applicable value added tax):*

(a) a base fee of [redacted]*, payable either (i) promptly following* [redacted] *or (ii) promptly following the cessation of discussions* [redacted] *in relation to a* [redacted] *Proposal between the Company and the bidder that tabled a* [redacted] *Proposal on* [redacted]*…*"

23.22. A letter of engagement from [redacted] dated [redacted] addressed to [redacted] This letter stated:

"*We refer to the bid defence of* [redacted]*") following the approach from* [redacted] *and certain assistance that you have requested* [redacted] *to provide in that respect ("the Assignment").*

1. Scope of Work

The purpose of the Services will be to seek to identify potential financial themes and issues that may be used in the [redacted] *defence process as follows:*

• Independent commentary on the three year financial record of [redacted] *together with the latest balance sheet, including consideration of accounting policies and practices. We have set out the areas we aim to cover in greater detail in Appendix 2 to this letter:*

• Critical appraisal of the last five years acquisition history of [redacted] *commenting, to the extent possible based on* [redacted] *available information, on synergies achieved and integration; and*

• Comparison of financial performance (as set out in Appendix 2 to this letter) of [redacted] *against the* [redacted]

• Comparison of financial performance of [redacted] *and/or the* [redacted] *in greater detail with wider peer groups as may be requested; and*

• Assistance in developing lines of attack against [redacted] *identified in Phase 1, to be directed by the* [redacted] *and the Banks…*

4. Our charges

Our charges will be set out under separate cover..."

23.23. A letter from [redacted] to [redacted] dated [redacted]. Under the heading "Role" it stated:

"*Our role is to serve your - and only your - interests throughout this process. We will actively participate as part of your core advisor team to ensure that the messages that are delivered to [redacted] and [redacted] (and other stakeholders) are credible and coherent; and, protect your corporate reputation and value. We will act as a credible, proven voice in the market delivering consistency of message for [redacted] Specifically, our role will include:*

• Advising the [redacted] team on all aspects of [redacted] related to the process;

• Managing global financial [redacted] - drawing on [redacted] as required;

• Playing a lead role in the drafting of all materials including shareholder documentation, [redacted] and presentation material;

• Building on our understanding of the [redacted] history, culture and prospects, [redacted]

• [redacted]

• Advising on engagement with shareholders and proxy advisors in relation to ensuring that any recommendation by the Board is supported by shareholders;

• Co-ordinating proxy solicitation efforts to maximise the voting outcome and support at any EGM; and,

• Co-ordinating logistical and other arrangements around [redacted] and shareholder meetings relevant to any possible offer."

23.24. Under the section entitled "Fee" in that letter it stated:

"*Specifically, our fee proposal (excluding VAT) is:*

- *Retainer of* [redacted] *per month for a minimum period of six months; and,*
- *A success fee of a minimum of* [redacted] *in the event that independence is retained;*
- *Or, In the event a transaction completes, a fee of* [redacted] *basis points of the equity value of the transaction.*"

23.25. An engagement letter from [redacted] dated [redacted] addressed to [redacted] Under the heading "Services to be rendered", it stated:

"*We will assist you in analysing, structuring, negotiating and effecting the proposed Transaction on the basis set out in this letter and will provide agency services on behalf of the Company in relation to the transfer of securities from the company to the purchaser. In this regard, we propose to undertake certain activities on your behalf, in conjunction with your other advisors, including if any the following:*

(a) Assisting you in evaluating the approach by [redacted] *and advising you as to the strategy and tactics to be adopted in relation to the* [redacted] *approach and any other approach.*

(b) Exploring with you the appropriate strategies for maintaining the Company's independence;

(c) *…"*

23.26. Under the heading Fees and expenses, it stated:

"*You agree to pay* [redacted] *the following fees (plus, where applicable VAT) to us in cash for the above services:*

(a) A base fee of [redacted]*, payable either (i) promptly following the* [redacted] *by a bidder of a firm intention to make an offer to the* [redacted]*, or (ii) promptly following the cessation of discussions in* [redacted] *in relation to a* [redacted] *proposal between the Company and* [redacted] *the bidder that tabled a* [redacted] *proposal on* [redacted]*, plus;*

(b) *An additional fee of* [redacted] *in the event of a protracted* [redacted] *involving the Company and one or more bidders following the* [redacted] *for the Company…*"

Respondent Document

23.27. An extract from the Respondent's "Tax and Duty Manual". This was entitled "*Whether certain disbursements constitute management expenses, summary of Supreme Court decision – Part 04-06-15*". Included within that documentation was the following narrative:

"*The following is an extract from Tax Briefing Issue 40 of June 2000 that referred to a then-recent Supreme Court Decision which considered whether certain disbursements constituted "management expenses":*

Whether certain disbursements constitute management expenses

Case: Hibernian Insurance Company Ltd - Appellant v MacUlmis (Inspector of Taxes) – Respondent

Decision made by: The Supreme Court Decision Date: 20 January 2000

Relevant Legislation: Section 83 Taxes Consolidation Act 1997 (previously Section 15 Corporation Tax Act 1976)

Summary:

Hibernian Group Plc. (the Group) was incorporated on 7 April 1986 with the object of facilitating the expansion of life and general insurance business carried on through subsidiary companies. The business of the Group consisted wholly or mainly in the making of investments and the principal part of its income was derived from the making of such investments. That business required the maintenance and evaluation of the existing investments of the Group and the evaluation of potential investment opportunities.

In the accounting period to 31 December 1990 the Group claimed a deduction for expenditure incurred in exploring and evaluating the possible acquisition of certain insurance companies. The expenditure was largely in respect of advice from investment bankers and leading accountants as well as legal advice. In the event only one of the companies concerned was ultimately acquired by the Group.

The Supreme Court decided that the expenditure incurred in procuring the expert and specific evaluation of all the investment opportunities did not constitute management expenses.

This summary is for reference only and readers are recommended to read the full text of the judgment.

N.B. In the case of Camas plc v Atkinson (IOT) [2004] STC 860 it was held that expenses incurred in an abortive take-over were deductible management expenses. However, it should be noted that the outcome in that UK case is no more than persuasive as against the binding nature of the Supreme Court judgment above in relation to this issue."

Her Majesty's Revenue and Customs Document

23.28. An extract from the "Gov.UK" website which contained an extract from the then Her Majesty's Revenue & Customs ("HMRC") Business Income Manual. Under the heading "*Distinction between expenses of managing a business and expenses incurred in determining ownership of that business*" it stated:

"*An investment company (as defined in S1218 CTA 2009) will seek relief under S1219 CIA 2009 so neither the wholly and exclusively test In S54 (1) (a) CTA 2009, nor the capital expenditure test in S53 CIA 2009, are relevant.*

The question is whether expenditure incurred in resisting a takeover bid can be said to be 'expenses of management'. That is to say, expenses of managing the business of making investments, see CTMO8O5O.

In the case of Sun Life Assurance Society v Davidson [1937] 37 TC 330 Viscount Simonds approved the view that the words 'expenses of management' were words of qualification or limitation and indicated it was not all 'of the expenses incurred by an investment company which would be deductible. It is well established that the purchase price of investments and those incidental expenses, which are not severable from acquisition or sale, are not management expenses'. At page 360, Lord Reid remarked:

> *'I do not think that it is possible to define precisely what is meant by expenses of management. It has not been argued that these words have any technical or special meaning in this context. They are ordinary words of the English language, and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters.... It is not enough to show negatively that a particular sum does not fall into any other class; it must be shown positively that it ought to be regarded as an expense of management....*

It appears to me that the phrase has a fairly wide meaning, so that, for example, expenses of investigation and consideration whether to pay out money either in settlement of the claim or in acquisition of an investment must be held to be expenses of management'

By reference to these words of Lord Reid, the cost of considering or resisting a bid for the purchase of one of a company's investments would be an expense of managing its business. However, in the takeover situation, the bidder is trying to acquire all the shares held by the investment company or more commonly, the share capital of the investment company itself. There is a clear distinction between expenses of managing a business of holding Investments and expenses incurred in determining ownership of that business or in determining ownership of the investment company itself.

Where an investment company incurs expenditure on resisting a change in the ownership of its own share capital, then, just as in the case of a trading company, such expenditure is not allowable.

The contention is likely to be put, however, that the investment company was resisting a change in the ownership of its shares because it thought that the new shareholders would radically change the way the company carried on its investment business.

For example, a parent holding company might argue that the operations of the subsidiary companies whose shares were held as investments might be changed so radically as to affect the income and business of the parent company. The argument would then be that the defence expenses were expenses of managing the company's investments.

As the above conclusion demonstrates, the crux of the matter for investment companies is not very different from that for trading companies even though the legal route is different, it follows that the practical guidance given above about the analysis of expenditure, the nature of evidence to be sought, and the Interpretation of that evidence holds good for examining management expenses computations as well."

Witness Statement

23.29. A witness statement from the Appellants' [redacted], [redacted]. Included within that statement was the following:

23.29.1. [redacted] personal background in which he detailed his professional background and stated he was appointed to the Board of Directors of [redacted] on [redacted].

23.29.2. The background of [redacted]

23.29.3. Details of [redacted] management team and [redacted]

23.29.4. The Approach by [redacted] and [redacted] proposal.

23.29.5. Details of the independent professional advice sought (in connection with the approach from [redacted]

23.29.6. [redacted]

23.29.7. Details of the [redacted].

23.29.8. [redacted]

23.29.9. Evaluation of [redacted] possible interest.

23.30. This witness statement was signed by [redacted] on [redacted] and is considered further at paragraphs 24 to 25 below.

Expert's Report

23.31. The Report of [redacted], the Appellants' expert witness, dated [redacted] and entitled "Expert Report of [redacted] on issues of Irish Law". Included within that Report was the following, which are discussed more fully at paragraphs 26 to 27 below:

23.31.1. An introductory section which set out the background to the [redacted] approach.

23.31.2. Details of the Appellants' expert witness's professional experience which included a detailed Curriculum Vitae.

23.31.3. Details of the Appellants' expert witness's instructions. This included the following narrative:

> "*I would note at the outset that my expertise is in corporate law. I am not an expert in Irish tax law and I have not been asked to consider tax matters.*
>
> *I understand that it is my duty to assist the Appeal Commissioner of the Tax Appeals Commission as to the matters within my field of expertise*

and that this duty overrides any obligation to any party discharging my fee as expert."

23.31.4. The Report which included the following considerations:

- Overview of the [redacted].
- The legislative and regulatory framework for [redacted] on the [redacted] and [redacted].
- The Companies Act 2014 (Fiduciary duties of company directors).
- [redacted].
- The Corporate Governance Code.
- [redacted].
- Obligations on the target and its directors on an approach (split between those obligations under the Companies Act 2014, [redacted] and the Corporate Governance Code).
- Market practice on receipt of an approach.
- [redacted]
- [redacted] approach and [redacted] response.
- A timeline of [redacted] Proposals.
- [redacted] Response – engaging third-party advisors and considering the [redacted] proposal and the [redacted].
- Conclusions

[redacted]

Witness Evidence

[redacted]

24. [redacted] gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given:-

    24.1. [redacted] stated that he joined [redacted] in [redacted] and during his time with the [redacted] which included [redacted]. He explained that he was appointed to the [redacted] in [redacted], to the Board of Directors in [redacted] and that his [redacted]

    24.2. The witness stated that he was the first person that the [redacted] called after he received the initial approach from [redacted] He recalled the backdrop to [redacted] approach was that the [redacted] was coming out of the [redacted] and in his opinion was undervalued at the time. He stated that the [redacted] was the first step in getting the [redacted] back on track and that he and other senior members of the [redacted] were travelling around to various stakeholders promoting the [redacted]

    24.3. The witness stated that the initial [redacted] approach was in the form of a telephone message which was not received until the day following as he and the [redacted] were "out on the road" promoting the [redacted] he was aware that [redacted] while primarily based in the [redacted] had been running a "loss making forever" [redacted] business and that it had closed a couple of its loss making facilities in [redacted] and [redacted]. As such, the witness stated he did not feel that [redacted] were a good fit for the [redacted] from the inception of its approach to the [redacted]

    24.4. The witness advised that following a return phone call to [redacted] that a sit down meeting took place between the [redacted] and [redacted] At the end of that meeting, the [redacted] proposal was "passed across the table" by [redacted]

    24.5. Upon receipt of that proposal, the witness stated that he knew based on his experience that the [redacted] were required to "put players on the pitch in terms of how we would need to line up" so that it could assess the [redacted] proposal received. He explained he was aware that the [redacted] required

the [redacted] to [redacted], as he and the Board were not independent to conduct such review.

24.6. The witness explained that the [redacted] sought assistance from [redacted] in conducting the review. Turning to the provided engagement letters, he stated the usual practice is that firms will provide an initial engagement letter which sets out the terms of their engagement and if those terms alter, then they are replaced by a supplementary or replacement engagement letter.

24.7. The witness stated while engagement letters are generally "boilerplate" that the terms of the provided engagement letters were essentially to assist the [redacted] in assessing [redacted] proposal and a "big fee" was only payable to the firms in the event that the [redacted] was sold.

24.8. The witness stated despite a subsequent proposal being received from [redacted] which required further analysis by [redacted] engaged professionals, that no formal offer was ever received from [redacted] He explained that the information and assistance received from the [redacted] engaged professionals was absolutely necessary for the Board to consider the [redacted] proposals and in order for the Board to comply with its statutory responsibilities.

24.9. The witness explained in addition to the provided letters of engagement, the Board also required legal advice from its solicitors and as the rate of charge for that service was on an hourly basis there were no specific engagement letters provided for that work. The witness further explained as some of the Board members, which comprises Irish and international individuals, are not up to date with Irish law or the [redacted], that they would have needed a lot of advice around their roles, duties and responsibilities and that is what the majority of the legal advice received concerned.

24.10. The witness stated that as [redacted], the duties of the Board are first to the company, which is [redacted] as the position in the United Kingdom ("UK") is different.

24.11. The witness explained following a review of the [redacted] proposal in line with the [redacted] and in noting that trading results had improved significantly during the course of the year, [redacted] Within his provided witness statement, the witness summarised the rationale as to why the decision was made to reject [redacted] proposal:

[redacted]

24.12. The witness further stated he and the rest of the Board were of the view that they would "not be around" if [redacted] proceeded to acquire the [redacted] and as such were not in favour of negotiations proceeding or as he put it in his own words, "turkeys don't vote for Christmas[6]". As such, in discharging their duties to the [redacted] the witness stated it was crucially important that the Board obtained independent advice from independent professionals and acted on that advice rather than their own negative views on the proposed acquisition succeeding. The witness stated at all times the Board relied heavily on that professional advice in discharging their responsibility to the [redacted].

24.13. In addition to that need, the witness stated under [redacted], the Board were mandated to get such independent advice on the [redacted] approach and that is what they had done.

24.14. The witness stated following the second [redacted] approach, which was similarly evaluated and rejected, he approached the [redacted] and asked them to give their [redacted]. The witness explained that a [redacted]. The witness explained that as [redacted] approach was a [redacted] and as it was hampering the implementation of the [redacted], then it needed to conclude matters so that the Board could refocus their full attention to the [redacted] trading and development activities which were being neglected and frustrated as a result of [redacted] approach. The witness further explained that professional advice was required from the [redacted].

24.15. The witness stated that the approach to the [redacted] was successful and this cumulated in [redacted] formally withdrawing its interest in acquiring the [redacted] on [redacted]. The witness noted that [redacted] withdrew its proposal

[5] Transcript, day 1, page 70 at lines 20-28.
[6] *Ibid.* page 73 at line 18.

as it had stated since the inception of negotiations that it would not proceed to make an offer to the [redacted] unless it was recommended by the Board. As such, the witness stated it was paramount that the Board obtained the professional advice it did in order to ensure that any acceptance or [redacted] of the proposals were properly reasoned by the Board.

24.16. The witness stated he summed up his evaluation of the Board's position within his provided witness statement and that he stood over that position. That statement was as follows[7]:

"*The Board fulfilled its duties to act in good faith...by thoroughly evaluating the commercial merits of* [redacted] *proposals, and* [redacted]

24.17. Finally within paragraph 43 of his provided witness statement, the witness stated:

"*The Board at all times understood that the company needed the expertise of the professional advisers (*[redacted]*) to obtain advice in making the assessment and arriving at their decision, and therefore that the Board had to incur these expenses irrespective of whether the possible interest ultimately progressed to an offer.*"

24.18. In explaining why the Board had to incur those expenses "irrespective", the witness reiterated that as the Board were not independent, as they had their own concerns on the proposal advancing, it was important not just from a company regulatory position but also for each Board member to ensure that any acceptance or [redacted] of [redacted] proposals was done in accordance with the relevant legal framework and in the interest of those parties to whom the Board owed a fiduciary duty.

25. Under cross examination, the witness stated:

25.1. The initial [redacted] approach was received on [redacted] but within his provided witness statement, he stated:

[7] Transcript, day 1, pages 79-80 at lines 24 to1.

"*…On the* [redacted], *responded to* [redacted] *indicating that* [redacted] *was not interested in discussing an opportunity to combine the two companies at that time…*"

25.2. When asked why a proposed opportunity was dismissed so quickly, given the Board's alleged fiduciary duties, the witness stated as [redacted], the [redacted], although at that stage the [redacted] was of the view that it was [redacted] given that it felt it was undervalued. The witness further stated both he and the [redacted] were not interested in any conversation with [redacted] and were unsure of what the substance of the proposed conversation entailed.

25.3. Within his provided witness statement, he had stated[8]:

"*The approach came somewhat as a surprise to myself and to my colleagues on the Board. I believe that the* [redacted] *was likely a contributing factor in* [redacted] *decision to approach* [redacted] *as they clearly understood that our execution of the* [redacted] *would put us out of their reach financially as the value creation envisaged by the* [redacted] *once implemented, would significantly increase the value of the* [redacted] *business*."

25.4. When asked how he was stating in evidence that he did not know what the conversation would entail given the foregoing, the witness stated[9]:

"*We had no idea who they were. I mean, in reality, they had never made any interest or approach. We didn't know them very well. They had a* [redacted] *business that was non-performing or underperforming so their expertise at running* [redacted] *companies was non-existent. Their expertise of running a* [redacted] *business was failing and they has since exited. So they didn't, you know, seem to be a company in an inquisitive manner. In fact, I remember about a week before we had a meeting with some of our advisers and sat down and talked about okay, as we enter* [redacted] *what's out there in terms of opportunity, what's out there in terms of threat and we actually all agreed that* [redacted] *wasn't probably a threat to us. So that's why I say it came as a surprise*."

[8] Transcript, day 1, page 85 at lines 21-28.
[9] *Ibid.* page 86 at lines 5-19

25.5. When asked whether the approach was being cut off before it was made, the witness stated that "*but it wasn't for sale. I mean, I think it goes back to a fundamental point that* [redacted] *was not for sale*".

25.6. When asked whether any minutes of meetings were kept of the subsequent discussions regarding [redacted] proposals, the witness stated[10] "*No, you don't keep minutes of those meetings*".

25.7. When further asked why the Commission were not provided with any detailed correspondence from the [redacted] advisors discussing the merits or otherwise of [redacted] proposal nor any minutes of Board meetings which discussed the proposals, the witness stated that he believed the information provided in his witness statement was sufficient for the purpose of the Appellants' appeal.

25.8. Turning to the provided engagement letters from the professionals engaged by the [redacted], the witness stated he agreed that they were defensive rather than open in tone.

25.9. When asked whether [redacted] approach was something not going to be entertained by the [redacted] from the "get-go", the witness stated:

"*You can't say that. But it sort of goes back to, as a* [redacted] *. That's acknowledged fact. But what you don't have to do is sell for less than the value of your future returns and cashflows. Like, that's not the game in town*."

[redacted]

26. [redacted] gave expert evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given:-

26.1. [redacted], having being sworn in by the Commissioner stated that he was [redacted] at [redacted] based in [redacted] The witness stated he was a qualified solicitor in England and Wales for eighteen years and that he previously worked in [redacted] firms of solicitors. The witness stated that he specialised in Merger and Acquisition work and had a long history of advising boards of [redacted]

[10] Transcript, Day 1, page 98 at line 3.

[redacted] The witness advised that he prepared the provided Report to the Commission.

26.2. Turning to that Report, the witness stated that he was an expert in corporate law but not in the field of taxation. In considering company law considerations on what directors are required to do upon receipt of a proposal to acquire their business, the witness stated that the Companies Act 2014 ("CA 2014") was the applicable legislation that directors were required to act in accordance with.

26.3. The witness explained that unlike the position in the UK, directors of Irish companies were required to act primarily in the interests of the company. The witness referred to section 228 (1) (a) Companies Act 2014 which provides:

"*A director of a company shall:*

(a) act in good faith in what the director considers to be the interests of the company;

(b) Act honestly and responsibly in relation to the conduct of the affairs of the company."

26.4. Following an objection from the Respondent's Counsel in which he submitted that matters of Irish Law were for the Commissioner to determine, the witness turned to the provisions of the [redacted] In explaining the purpose of that [redacted] the witness stated the following[11]:

[redacted]

[11] Transcript, day 1, page 142 at lines 7-19.
[12] The Financial Conduct Authority ("FCA") regulate financial service firms and financial markets in the United Kingdom.

26.5. The witness explained that [redacted] sets out the procedure directors are required to adhere to upon receipt of an offer for their business. It states:

[redacted]

26.6. The witness further advised that the [redacted]

26.7. When asked what the typical approach of a company was upon receipt of an offer or proposal for its business, the witness stated[13]:

"*So, on an approach, which would typically - it's typically made to a senior member of the Board, usually the Chairman, and it's usually a phone call - so, on that, most large companies will have some kind of contingency policy or document, at this stage a plan kicks into action and so a number of people will be informed, but one of the very first things that they will do within the first day or so is speak to their financial advisors and to their lawyers,* [redacted] *. You also need, as we have looked at, you need to understand or be reminded of your fiduciary duties under the Companies Act and you'll also need to understand what's going on under the* [redacted]

26.8. Turning to the Corporate Governance Code, the witness stated that the Board was required to be supplied in a timely manner with information in a form of a quality appropriate to enable them to discharge their duties and that directors have access to independent professional advice at the company's expense where they judge it necessary to discharge their responsibilities as directors.

26.9. In considering the various phases involved when a proposal is received the witness advised that there are two distinct phases. Turning to the first of these, the witness stated it required an evaluation of the proposal that is advanced to the entity. The witness explained that this phase was required as [redacted]

[13] Transcript, day 1, pages 146 and 147 at lines 17-2.

the directors simply cannot say “no, there’s a proposal – not even going to evaluate it” as to do so would not only be in [redacted] but also the fiduciary duty owed to the company and its shareholders.

26.10. The witness explained that the next step was, “*in the case of a rejection, upon the receipt of a subsequent offer made without the support of the board (known as a* [redacted] *and which may or not come), the board would then proceed to a second phase and implement a defence strategy*."

26.11. The witness submitted that the use of the word “defence” must be taken in context. He explained that a “true defence” doesn't kick in until there is what is [redacted]. He further explained that a [redacted]

26.12. The witness further explained that a [redacted]

26.13. The witness stated that as no offer was made to the [redacted] from [redacted], that it approached the [redacted]

26.14. The witness stated that he endorsed the conclusion contained within his Report where he stated:

> “*The decision of the board to engage third party advisors was not only sensible and in line with market practice but also mandated by both the* [redacted] *and the CG Code*."

26.15. Furthermore, the witness explained as part of his work into his Report, he reviewed the provided engagement letters furnished by the [redacted] relevant professional advisors. He stated following this review he opined that they were "fairly standard form documents", that they contained a lot of "boilerplate language" and that they were consistent with the documentation he would expect to see under the circumstances.

27. Under cross examination, the witness stated:

27.1. He did not know as an Expert Witness that he was required to list the documentation which he had sight of when preparing his Report.

27.2. That he had not acted as an Expert Witness previously.

27.3. That he recalled in preparing his Report that he relied on the [redacted] the [redacted] and the available engagement letters.

27.4. Beyond that documentation, he did not see any other documentation such as board minutes or letters of advice from the engaged professionals.

27.5. Given that lack of documentation, when asked whether it was possible to have adequately considered the following narrative contained in his Report -

"*Consideration of the approach taken by* [redacted] *in response to the* [redacted] *from the* [redacted] *considered whether such approach was aligned with the relevant duties and obligations of the directors in the company in the context of responding to such approach.*".

- the witness stated that he made some assumptions based upon his knowledge in advising on the matter.

27.6. That the conclusions reached in his Report took account of some of those assumptions.

Submissions

Appellants

28. Counsel for [redacted] and [redacted] ("the Appellants") stated that the [redacted] Board ("the Board") had a duty under [redacted] The Appellants submitted in line with this requirement, which they stated applied equally to

any proposal received by the [redacted], this required the Board to obtain such advice in discharge of these requirements.

29. In addition, the Appellants submitted that it was further required to obtain independent advice so that the [redacted] and its individual board directors who numbered [redacted] in total during the periods under appeal, could properly evaluate the proposals and comply with their statutory duties under the Companies Acts.

30. The Appellants submitted it was not disputed by the Respondent that [redacted] was an investment company nor that section 420 TCA 1997, which permits the surrender of group losses, applied to the Appellants.

31. The Appellants submitted [redacted] never made any formal offer and that the approaches received from that company amounted to no more than an expression of interest to make an offer. As no offer was received, the Appellants submitted that the disputed expenditure related to "*obtaining advice from its third party advisers in order to assess the commercial merits of an* [redacted] *from* [redacted] *to identify and assess the strategic alternatives available to the* [redacted] *and to determine the most suitable means to conduct the* [redacted] *business during this very disruptive period whilst meeting all its obligations under Irish company law and the* [redacted]".

32. The Appellants stated that [redacted] treated these costs as tax deductible expenses of management under section 83(2) TCA 1997 in its tax return, and surrendered the resultant loss, utilising available group loss relief provisions, to [redacted] The Appellants submitted as those expenses were incurred in the performance of [redacted] role as the ultimate holding company of the [redacted], with responsibility for setting strategic direction and policy as well as managing its investments, then it had properly claimed and was entitled to offset those losses to [redacted]

33. The Appellants submitted it is evident that the Respondent misunderstood the facts of this appeal, as it had failed to engage with the [redacted] in order to clarify any of the facts before it proceeded to issue its Notices of Amended Assessment. The Appellants further submitted that this misunderstanding was obvious when considering the Respondent's comments contained within its statement of case in which it stated that the [redacted] was subject to a [redacted]. The Appellants reiterated its position which was at no point did [redacted] engage in a [redacted] bid in respect of the [redacted] nor did its expression of interest in acquiring the shares ever become a formal offer for those shares.

34. The Appellants submitted that the disputed costs incurred by [redacted] were "expenses of management of investment companies" and the applicable legislative provision dealing with those costs was section 83 TCA 1997. The Appellants opened subsection (2) of that provision which states:

> "*In computing for the purposes of corporation tax the total profits for any accounting period of an investment company resident in the State—*
>
> *(a) there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing income for the purposes of Case V of Schedule D; but*
>
> (b) *there shall be deducted from the amount treated as expenses of management the amount of any income derived from sources not charged to tax, other than franked investment income*."

35. The Appellants stated that the term "expenses of management" **is not defined in section 83 TCA 1997 or anywhere else in tax legislation**. Given this position, the Appellants submitted that reliance on case law, Revenue guidance and other tax commentary is necessary in order to form a view as to whether an expense should be so classified. The Appellants submitted as there is no adequate guidance available from the Respondent which provides commentary on whether the disputed expenditure incurred by [redacted] is an expense of management, then it follows that regard must be had to relevant case law and the principles of statutory interpretation in ascertaining whether [redacted] properly deducted the disputed expenditure of [redacted] as an expense of management in its accounting period ending on [redacted].

36. The Appellants submitted that the words "expenses of management" should be taken in context and this line of reasoning was consistent with *Inspector of Taxes v Kiernan* [1981] IR 117 ("*Kiernan"*) in which Henchy J held:

> "*A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole…"*

37. Furthermore, the Appellants submitted in *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60, which cited and approved *Kiernan,* it was clear that the principles of statutory interpretation should be applied to relevant taxing statutes and if

those principles are applied and it cannot be said that the taxing statute applies in clear and unambiguous terms, then the tax liability is not imposed on the person.

38. In establishing the position under case law, the Appellants opened the United Kingdom ("UK") Court of Appeal case of *Capital and National Trust Ltd v Golder* [1949] 31 TC 265 ("*National Trust*"). In *National Trust*, the point at issue was whether an investment company could claim relief for brokerage and stamp duties as management expenses. In interpreting the phrase "expenses of management" the Court held that they included those expenses linked to the taking of managerial decisions, but excluding expenses involved in carrying them out. The Appellants submitted this case established the important principle that expenses of management were '*mainly concerned with matters up to the time when the actual purchase or sale of an investment is effected*'.

39. In addition, the Appellants submitted that a number of cases deal with the transitioning of expenses of management from managing investments to the other side of the line of implementing a decision already made concerning an acquisition or disposal. The Appellants further submitted that case law has determined that the former will be expenses of management and the latter will not be expenses of management. In support of that submission, the Appellants opened the case of *Camas plc v Atkinson* [2003] 76 TC 641 ("*Camas*"), in which the UK Court of Appeal held that "*Once the decision to acquire has been made then the expenditure is likely to fall into the category of 'costs of implementation of a purchase already decided upon' and will therefore not be an expense of management.*" The Appellants submitted in line with this decision, it was clear from the Appellants' case that [redacted] at all times incurred costs in relation to the management of its business and underlying investments and there was never a transitioning point of implementing a decision already made. As such, the Appellants submitted that the management expenses claimed by it ought to be allowed by the Commission.

40. The Appellants opened the case of *Sun Life Assurance Society v Davidson* [1958] 37 TC 330 ("*Sun Life*") which it submitted is the leading UK case on the meaning of "expenses of management" and had been endorsed in the Irish Courts as such. In *Sun Life,* the company itself was a life assurance company and the case concerned the taxation of life assurance companies. The question to be decided was whether Sun Life was entitled to relief as expenses of management for stamp duty and brokerage fees on the purchase and sale of investments. The House of Lords held that these sums were not allowable as management expenses and concluded that the brokerage and stamp duties were not general expenses of conducting the Society's business, but expenses of the purchase of investments. Lord Reid commented;

"*....looking to the purpose and content of the section it appears to me that the phrase has a fairly wide meaning so that, for example, expenses of investigation and consideration whether to pay out money either in settlement of a claim or in acquisition of an investment must be held to be expenses of management … It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition, on the one hand or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management.*"

41. The Appellants submitted the general principles that have been derived from the decision of Lord Reid in *Sun Life* as to whether expenditure constitutes expenses of management are as follows;

    - the expression "expenses of management" has no special meaning in that they are ordinary words of the English language;

    - the phrase should be given a wide or fairly wide meaning and includes the cost of investigating and considering whether to buy an investment;

    - an important question is whether the expense is severable from the cost of acquisition of an asset.

42. The Appellants submitted the principle that the term 'expenses of management' is to be given a broad interpretation was reiterated in the UK case of *Holdings Limited v HMRC* [1994] STC (SCD) 144 ("*Holdings*") which came before the Special Commissioners in February 1994. The Commissioner in the course of his judgement confirmed the following:

    "*Prima facie, expenses incurred in managing the investment business, not being expenditure incurred in raising foreign currency working capital or expenditure connected with the buying and selling of investments, would qualify as management expenses. Judicial recognition of the fairly wide meaning of the expression "expenses of management" reinforced the point that, so long as the expenses were incurred in the course of the investment business and were not spent on raising foreign currency working capital or connected with buying and selling investments, they would tend to be expenses of management*".

43. Turning to Irish jurisprudence, the Appellants opened the case of *Stephen Court Ltd v JA Browne* (Inspector of Taxes) [1983] III ITR 95 ("*Stephen Court*") which reviewed some of the older Irish case law in relation to expenses of management, in which McWilliam J

cited the *Sun Life* case with approval. He noted that "*I am of opinion that the view of Lord Reid is correct when he indicated that, if expenses incurred for work performed by a member of the staff of a business would be classed as management expenses, such expenses would not cease to be management expenses because independent qualified persons were employed for the same work*".

44. The Appellants submitted based on the foregoing, it is clear that it is accepted by the courts that the term 'expenses of management' is to be given a broad interpretation. The application of this principle in the Irish courts, the Appellants submitted, is highly significant in the context of multinational groups where certain management functions are assisted by third-party advisors and consultants.

45. The Appellants further submitted it important to note that there is no requirement in Section 83 TCA 1997 that expenses of management be incurred 'wholly and exclusively' for the purposes of the investment business. The Appellants stated, in this regard, the UK case of *Howden Joinery Limited v HMRC* [2014] UKFTT 257 (TC) ("*Howden Joinery*") upheld the principle that there is no "wholly and exclusively" test for expenses of management, and advice which has a duality of purpose can still qualify for a deduction. In this regard, the following was noted;

> "*To attempt to apply an exclusivity rule to an investment company would be to remove the possibility of allowing almost all expenses, since, as we have said, it is in the nature of a holding company that its business is the maintenance of the value of its subsidiaries. We do not think it is correct to approach the statutory language or the authorities to end up with a set of management expenses which is empty by definition.*"

46. The Appellants submitted in light of the above, merely because an expense may benefit a subsidiary or arguably have an indirect benefit to shareholders, it remains an "expense of management" if it is incurred by an investment company in the course of its investment business. What an investment company undertakes as its investment activities and what might be treated as managing those activities was also considered in *Howden Joinery* and in this regard the Appellants noted that the Court stated:

> "*We take [management] to mean some sort of active involvement with the assets which are being managed, including taking strategic decisions, not just about their acquisition and sale, but also about how they are best looked at after, and their return best*

maximised, on a day to day 'business as usual' basis. There is support for this in cases such as Jennings v. Barfield[14] and, to an extent, Dawson and Holdings."

47. In the similar UK Upper Tribunal ("UT") case of *Dawson Group PLC v HM Revenue and Customs* [2010] EWCH 1061("*Dawson Group*"), the UT determined there is a requirement that the expenses incurred by a specific company must be connected in some way with the company's investment business in order for that company to deduct the expenses from its profits in holding:

"*If the expenditure has nothing at all to do with the investment business, it cannot be an expense of management of that business*".

48. Although the Appellants denied that any of the expenditure incurred by [redacted] was "bid defence costs", it submitted in the event that the Commission held this type of expenditure was incurred, there was relevant case law which that held that such type of expenditure was allowable for tax purposes.

49. Turning to that case law, the Appellants opened the UK case of *Morgan v Tate & Lyle* [1954] 35 TC 366 ("*Morgan*"). In *Morgan*, expenses were incurred to protect the business from significant adverse changes likely to result due to the new owners and, in those circumstances, the costs were considered deductible. The Appellants submitted while the House of Lords examined expense deductions for a trading company, those principles equally applied to an investment company as they established a precedent for a company to be eligible to obtain a tax deduction for costs incurred in resisting a change in the ownership of a company where it is considered, as in the Appellants' case, that the new shareholders would adversely affect the company's business or investment activities.

50. Within *Morgan*, Lord Reid noted:

"*The proposal which the directors were opposing was the transfer to public ownership of their sugar refining concern. If that proposal became law, the Company would lose its business and assets. I think that it is reasonably clear that the dominant purpose of the directors was to prevent the Company from losing its business and to preserve its assets intact. People often have more than one reason for forming a purpose, and I think that the facts found in the case indicate that the directors had two main reasons. They believe that nationalisation would be disastrous to the industry and that it would cause loss to the shareholders. Whether their beliefs were right or wrong is quite immaterial. The question whether their purpose can be held to come within the terms*

[14] *Jennings (H.M. Inspector of Taxes) v Barfield* 1962 40 TC 365

of Rule 3(a) does not depend on whether or not their purpose was misconceived. The shareholders' purpose and reasons are set out in the resolution of 15th of September, and there is nothing in the Case to indicate that its terms do not reflect their real purpose and reasons. Their purpose was to prevent the assets of the Company being seized and their reasons were that such seizure would harm workers, consumers and themselves alike. Again it does not matter whether those reasons were good or bad."

51. The Appellants further submitted that this approach has been adopted in the more recent UK case of *Centrica Overseas Holdings Limited v HMRC* (2021) UKUT 0200 TTC ("*Centrica*"). In *Centrica*, the UT reversed the decision of the First Tier Tribunal ("FTT") and found that expenditure incurred by an investment company in connection with a sale of the businesses of a subsidiary was deductible as expenses of management under the UK equivalent of section 83 TCA 1997.

52. The Appellants opened the facts of that case which noted that Centrica Overseas Holdings Limited (COHL), is a company in the Centrica PLC group. It claimed a corporation tax deduction for expenditure relating to fees paid to professional firms in connection with the disposal of certain companies owning gas and power businesses. The fees were paid by the top company in the group but recharged by book entry to COHL for the relief.

53. The FTT had previously held that COHL did not itself carry out the management activities in relation to which the disputed expenditure was incurred, and these were not deductible expenses of management for COHL on the basis that the management decision to make the disposal was taken by its parent entity Centrica plc. The UT held that the FTT was wrong to conclude that COHL was not managing its investment business as the findings of fact by the FTT showed that the directors of COHL had participated in the decision-making. Although the strategic decision had been made by the parent entity, Centrica plc, several individuals involved were directors of both companies. The UT recognised that whereas it may well be desirable for decision-making and any delegations of authority to be recorded in board minutes or correspondence, no such formality is necessary in terms of delegation of authority for the purposes of the UK equivalent of section 83 TCA 1997.

54. The UT agreed with the FTT's conclusion, that the expenses incurred prior to the date the final offer to acquire the assets was approved in principle by the board of Centrica plc, were expenses of management.

55. Following a consideration of the judgements in *Sun Life* and *Camas*, the UT noted the following:

"*It is clear therefore that there is a distinction between expenses incurred in deciding whether to acquire or dispose of an asset, and expenses incurred on the "mechanics of implementation" once that decision has been taken. The former will be expenses of management and the latter will not be expenses of management. The categorisation of particular expenses will be a fact-sensitive enquiry. Further, in our view expenditure incurred in assessing how to make an acquisition or a disposal may fall on either side of the line. It may be part of the decision whether to proceed or part of the implementation of a decision. The answer will be part of the factual enquiry and may involve a value judgement*."

56. The UT also addressed and endorsed the approach taken in respect of construing the term 'management' in the context of expenses of management in *Howden Joinery* and stated:

"*Taking the approach of the court in Sun Life and applying the ordinary English meaning to the concept of management, we take this to mean some sort of active involvement with the assets which are being managed, including taking strategic decisions, not just about their acquisition and sale, but also about how they are best looked at after, and their return best maximised, on a day to day "business as usual" basis.*"

57. In their consideration of the sale process timeline, the UT concluded that the cut off period occurred much later in the disposal timeline, i.e. after identifying a possible target but before actual implementation of any course of action. In the judgement, the UT identified clearly that costs incurred that were required to 'appraise' a course of action were unquestionable expenses of management:

"*We accept that Centrica decided that it wanted to sell the Oxxio business, publicised that fact and drew up its accounts on the basis that the Oxxio group would be treated as discontinued businesses held for sale. However, the way in which it was going to achieve a sale and whether it was willing to proceed with a sale depended on what was possible and on the advice it received. The FTT found that the business would not be sold at any price and that it may be necessary to close down the business. Centrica or COHL needed to appraise the business, understand what was going wrong and identify how a beneficial sale could take place. We view the decision in June 2009 as a decision in principle, where many issues still remained to be decided upon. The FTT found that the purpose of PwC's Deep Dive report in July 2010 was to enable Centrica to understand the extent of the problems in Oxxio and inform Centrica as to the options*

available. In our view the FTT was entitled to conclude that the Deutsche Bank fees and the PwC fees prior to 22 February 2011 were expenses of management."

58. As part of their consideration of the grounds of appeal, the UT assessed each of the different fee expenses claimed as follows:

"*The advisors' fees in the present case will be expenses of management if the work carried out by the advisors was directed at helping COHL to evaluate the Oxxio businesses and/or make decisions, not just about whether to divest itself of the Oxxio group, but also about how best to realise value from it. That is, whether they were expenses of "investigation and consideration".*

The services provided by Deutsche Bank were to identify possible buyers and to determine the level of interest they may have. Deutsche Bank costs were held to be management expenses as the "advice informed Centrica as to the options available to them and assisted the company in deciding how best to divest Oxxio and whether to enter into that particular transaction with Eneco."

PwC's services included preparing a vendor due diligence report. It was held that this report 'was capable of serving a dual purpose: helping the management of Centrica make decisions about a sale as well as being used in the sale itself". Further, there is no requirement that the expenses have to be wholly and exclusively incurred in respect of management expenses, therefore "advice which has a duality of purpose can still qualify for deduction

The services provided by De Brauw was to advise Centrica on matters of Dutch Law which included advice on how to produce and negotiate the documents needed to implement the transaction. The FTT held that these were not deductible as management expenses as they were capital in nature however the UT held "to the extent that the DeBrauw fees were expenses of management because they informed decision-making in relation to the disposal of the Oxxio business it seems to us that they were revenue in nature and the FTT was wrong to hold otherwise."

59. The Appellants submitted that *Centrica* sets out important principles of application in support of [redacted] position that the expenses incurred as a result of engaging third parties in assessing the [redacted] by [redacted] are deductible as expenses of management. The Appellants further submitted that it is clear from *Centrica* that there is no requirement that the expenses be incurred "wholly and exclusively" on management, and advice that serves more than one purpose can qualify for a deduction.

60. The Appellants submitted that the guidance which contains the Respondent's position on the meaning of the term "expenses of management" is set out in its Tax and Duty Manual Part 04-06-11. As that guidance is unhelpful in the Appellants' appeal the Appellants submitted that the guidance provided by HMRC is persuasive given the commonalities between the jurisdictions of Ireland and the UK and as such, this guidance can be instructive and be of assistance in considering the Irish tax position in respect of the matter under appeal.

61. Turning to that UK guidance, the Appellants submitted that HMRC's view is that expenditure on appraising and investigating investments will in general be revenue in nature, and they have indicated that they generally consider that the decision to dispose of an asset is the point at which the decision is taken to market it. Once that decision has been made, the costs will be capital and therefore not allowable as management expenses.

62. The Appellants further submitted that HMRC's views on the severability of expenditure in connection with the acquisition of an investment can be found under section CTM08260 of their Company Taxation Manual entitled "Management expenses: capital exclusion-acquisitions and disposals". The Appellants submitted the guidance states that expenditure on appraising and investigating investments (such as obtaining preliminary reports and profit forecasts for a number of investment options) will in general be revenue in nature and that it is necessary to look at the immediate commercial effects of the expenditure, rather than its more distant purpose.

63. In reiterating its position that no formal offer was made by [redacted] to acquire [redacted] the Appellants opened HMRC's guidance on whether takeover bid defence costs can qualify as management expenses under section CTM08200 of their Company Taxation Manual entitled "Management expenses: take-over bid defence costs" and under section BIM38297 of their Business Income Manual entitled "Wholly and exclusively: companies: take-over bids: investments companies". The Appellants submitted that both of these guidance documents provide that such expenses could qualify for a tax deduction where:

> "*… the investment company was resisting a change in the ownership of its shares because it thought the new shareholders would radically change the way the company carried on its investment business… A parent company may claim that, if the take-over goes ahead, the operations of the subsidiary companies, whose shares are held as investments, would be changed radically. This radical change would affect the income*

and business of the parent company. It may then contend that take-over bid defence costs were an expense of managing its investments."

64. In conclusion, the Appellants submitted it is clear that [redacted] never made an offer to acquire [redacted] As such, the Appellants submitted that the expenses incurred by [redacted] were expenses of management within the meaning of relevant Irish and UK case law. Given this position the Appellants submitted that the Commission ought to allow the portion of the loss incurred by [redacted] in defraying such expenditure and that this loss be available under available group loss relief provisions as an offset against [redacted] assessable profits.

Respondent

65. The Respondent submitted that the term "expenses of management" includes actual day to day expenditure incurred in the management of a business but does not extend to expenditure incurred in relation to the **ownership or control of the business**. The Respondent further submitted that the disputed expenditure was incurred in the context of a take-over bid and as such, relates to the ownership of the company itself rather than the conduct of the investment business of the company.

66. In support of that position, the Respondent opened the UK case of *Southwell v Savill Brothers Ltd* [1901] 2 KB 349 in which a brewing company was in the habit of making applications to licensing Justices for new licenses in respect of premises owned by it. As the licensing Justices sometimes required the applicant to surrender an existing licence, the brewers made a practice of paying annual sums to the holders of certain existing licenses in return for the right to call for a surrender of such licenses in case they were required by the Justices. The brewery accepted that where an application for a new licence was successful no part of the annual payments were deductible. In that event the payments were treated as capital. They contended, however, that where the licence was refused they should be allowed to deduct from their profits the annual expenditure. Kennedy J in delivering his judgment disallowing the deduction said (at page 353):

"'*The fact that the expenditure does not turn out to be a profitable investment cannot alter the nature of the expenditure, or make it any less an investment of capital.*"

67. In further support of its submission, the Respondent also opened the case of *National Trust.* Tucker LJ in the Court of Appeal stated at page 958:

"*When the matter came before the learned judge, he dealt with it in this way. I read the language he used because I find myself in complete agreement with it and quite unable to express myself in any better language. He said (ante p 133):*

'... it seems to me that it is impossible for the company here to say, on the facts as proved, not only that as a matter of law these payments are expenses of management, but that the commissioners ought to have been satisfied that they were. I do not think they are expenses of management, although, no doubt, it was judicious for the company to do what was done. If they are not expenses of management, then the sub-section is not satisfied and the company is not entitled to relief under it. I cannot see how, giving the expression 'management' its ordinary everyday meaning, it can possibly be said, with regard to an investment company, that the cost of stamps on transfers and contract notes and brokers' remuneration can be said to be expenses of the management of the company. It is, no doubt, incidental to the business of an investment company, but I do not think it is within the expression which is used, giving it, as I must give it, its ordinary meaning. The only other point left in the case is that the section refers to 'commissions.' I think that that reference is not apt to cover a stockbroker's remuneration, which is calculated as a commission, in making bargains on behalf of the company. The section is aimed at something quite different-managing a concern where somebody gets, as part of his remuneration, perhaps, a commission on income, or something of that sort.'

Those last words are merely indicating the kind of case which the learned judge was envisaging. They are not purporting to be an exhaustive definition. As I have said, I find myself in complete agreement with that statement of the case.

I would only add that the argument of counsel for the company, as it seems to me, is really that these expenses were 'expenses of management', because they were expenses incurred by the management in carrying out the business of the company. That seems to me a totally different thing. <u>What we are concerned with here is the expenses of management, not expenses incurred by the management in carrying out the proper business of the company</u> <u>[emphasis added]</u>. The word 'commissions,' in my view, in no way extends the meaning of 'expenses of management.' Before these deductions can be made by the company, they must, first of all, be expenses of management, but it is made clear that those expenses can properly include expenses which have been paid by way of commission. For these reasons, I agree with the decision of the learned judge, and I think this appeal fails."

68. The Respondent submitted that the significance of *National Trust* is that it establishes the principle that an expense is not necessarily deductible for tax purposes merely because it was incurred by the company.

69. The Respondent further opened *Sun Life* in which the plaintiff was a life assurance company which claimed relief from tax in respect of two categories of disbursements: first, brokerage charges and secondly stamp duties, arguing that those disbursements constituted expenses of management within the meaning of section 33 of the Income Tax Act, 1918. Harman J in the UK High Court and all of the Judges of the Court of Appeal decided, relying on the decision of *National Trust,* that neither category of disbursement constituted expenses of management. Singleton LJ in the Court of Appeal explained his views (at page 346) in the following terms:-

> "*If the purchase is part of the ordinary day to day business of the Society it is difficult at first sight to see why something which the Society has to pay in order to carry out the purchase is not an expense of the ordinary running of the Society's business. It is argued that the expenses of management end when a decision is made to buy, and thus that the cost of stamp or brokerage which takes place later is not an expense of management. That cannot be right, for someone on behalf of the Society has to receive and to check the securities and the broker is under the duty of seeing to the transfers and forwarding the securities. That is a part of his work in return for the remuneration he receives by way of brokerage or commission. It seems to me to be impossible to split the transaction in this way; to do so is to depart from common sense.*"

70. The House of Lords upheld the unanimous conclusion of that Court of Appeal judgment. In particular, Viscount Simonds in the House of Lords, having quoted the passage already cited from the judgment of Singleton LJ, went on to say (at page 357):

> "*The case is thus put by the learned Lord Justice as cogently as it can be put. But it is, I think, vitiated by the initial mistake that he regards 'management' as equivalent to running the company's business in a wide and almost colloquial sense. If it had this meaning, it would cover the price of the investment equally with the brokerage and the stamp duties. But ex concessis it does not, and I would say with the greatest respect that it would be to depart from common sense to treat the three constituents of the cost of purchase differently.*"

71. The Respondent submitted that the following passage cited from the judgment of Lord Reid, and relied on regularly in subsequent cases, was expressed (at page 360) in the following terms:

> "*I do not think that it is possible to define precisely what is meant by 'expenses of management'. It has not been argued that these words have any technical or special meaning in this context. They are ordinary words of the English language, and, like*

most such words, their application in a particular case can only be determined on a broad view of all relevant matters. I cannot accept the argument for the Appellants that every sum spent by the company is an expense of management unless it can be brought within certain limited classes of expenditure which are admittedly not expenses of management, such as payments to policy holders and the purchase price of investments acquired by the company. It is not enough to show negatively that a particular sum does not fall into any other class; it must be shown positively that it ought to be regarded as an expense of management. But looking to the purpose and content of the Section it appears to me that the phrase has a fairly wide meaning, so that, for example, expenses of investigation and consideration whether to pay out money either in settlement of a claim or in acquisition of an investment must be held to be expense of management. The collocation of the words 'including commissions' shows that a sum can be an expenses of management whether the work in question is done by the company's staff or done by someone else on a commission basis, and it must follow that if work of an appropriate kind is done for a fixed fee that fee may also be an expense of management.

Admittedly the price paid for an investment is not an expense of management, and Counsel for the Appellants did not and could not reasonably withhold the admission that a sum spent on enhancing the value of a trading asset is not an expense of management. I do not think that it is practicable or reasonable to draw a rigid line between payments which enhance the value of an asset and payments which do not… It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition on the one hand or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management."

72. The Respondent submitted on the foregoing criteria, a particular disbursement would fail to qualify for deduction either because it could not be severed from the cost of acquisition of an asset or, if it could be so severed, it could not properly be regarded as an expense of management.

73. The Respondent stated in the Irish Supreme Court case of *Hibernian Insurance Company Ltd v MacUimis* [2000] 2 IR 263 ("*Hibernian Insurance*") Murphy J commented on that passage of Lord Reid as follows:

"*It is in fact very clear that an expression like 'expenses of management' is insusceptible of precise definition and that there must be a borderline or twilight area*

in which a conclusion one way or the other could easily be reached. That does not mean that there is not on either side of it an area of sunshine and of darkness."

74. The Respondent noted that the Appellants relied on *Morgan* in support of their argument that the legal and professional expenses qualify as "expenses of management" for the purposes of section 83 TCA 1997. However, the Respondent submitted that this case should be distinguished on the basis that it is factually dissimilar to the case at hand. The Respondent further submitted that *Morgan* was concerned with the takeover of the assets of the trade rather than the shares of the company that carried on the trade. The Respondent noted that the company in question was a trading company and not an investment company and that it concerned the nationalisation of the company following the end of the Second World War. The Respondent submitted that the House of Lords found that there was no reason in law which prevented the Special Commissioners finding as they did. As Lord Reid explained at paragraph 44:

"*In the Case Stated the Commissioners set out fully the evidence which was before them and which they accepted, and then they state that they 'found that the sum in question was money wholly and exclusively laid out for the purposes of the Company's trade', but they do not state specifically what the purposes were. The purpose of a person or of a board of directors in spending money is a pure matter of fact. It may be that it can only be ascertained by drawing an inference from other facts, but the Commissioners are entitled to draw inferences.*"

75. Importantly for present purposes, the Respondent stated that Lord Reid held at paragraph 68:

"*It is convenient to deal now with another argument for the Appellant. In most industries where nationalisation had been effected before 1949 the assets of those engaged in the industry had been compulsorily acquired from them and vested in statutory bodies which used those assets to carry on the industry. But in two cases, the Bank of England and Cable and Wireless, Limited, nationalisation had been effected by compulsory transfer of all the stock or shares to Government nominees. It was admitted for the Respondent that expenditure to resist the latter form of nationalisation would not be expenditure for the purposes of the trade; and it was argued for the Appellant that, as there is no substantial difference between these forms of nationalisation in the result, it would be anomalous if expenditure to resist one form were deductible while expenditure to resist the other form were not. But in law there is an essential difference: the company is held in law to be a person entirely different from the shareholders, and*

the company is the trader, not the shareholders. By the first form of nationalisation the company, the trader, is deprived of its assets. But by the latter form the company's position is unchanged; it retains its assets and continues to carry on its business. All that happens is that the new shareholders can alter its policy; but a change of shareholders does not interest the company as a trader, and expenditure to prevent a change of shareholders can hardly be expenditure for the purposes of the trade [emphasis added). It was argued that in the case of sugar refining nationalisation might have taken either form and, therefore, the expenditure being directed against both forms was not wholly and exclusively laid out for the purposes of the trade. But I think that the facts stated in the Case shew that neither the Directors nor the shareholders had in mind the latter form of nationalisation and, if this be relevant, there is nothing in the Case to show that they ought to have had it in mind. What they had in mind was that the company would remain in existence but would have its assets taken away (no doubt on payment of compensation) and would no longer be able to carry on the trade of sugar refining, and the question is whether expenditure to resist that is deductible as a trading expense."

76. The Respondent further opened *Sargent (HM Inspector of Taxes) v Eayrs* [1972] 48 TC 573 in which Goff J held that a taxpayer who carried on a farming business in England and incurred costs in travelling to Australia with a view to buying a farm was not entitled to deduct the costs in computing his taxable income. The costs constituted capital expenses even though no farm was ever bought. The judgment of Goff J was summarised (at page 578) in the following terms:-

"*In the result the business was not extended, because he found prices in Australia prohibitive, and therefore the expenditure was abortive. But Lothian Chemical Company Ltd. Rogers (1926) 11 TC 508 shows, as one would expect, that that is an irrelevant consideration. The expenditure does not change its nature according to whether it be successful or unsuccessful.* "

77. The Respondent further submitted that the decision in *Hoechst Finance Ltd v Gumbrell (Inspector of Taxes)* [1981] STC 127 also examined the phrase "expenses of management". In that case the taxpayer company was incorporated to raise and provide finance for its fellow subsidiary companies. It raised a substantial loan on the Stock Exchange but only on terms that the parent company guaranteed repayment thereof. For so doing the parent company charged a commission of .25% per annum on the amount of the loan outstanding for the time being. The taxpayer contended that the commission so payable was deductible "as an expense of management". Mr Justice Nourse allowed

that claim but his decision was unanimously overruled by the Court of Appeal[15]. A passage from the judgment of Dillon LJ (at page 155) is as follows:

> "*In the present case, it seems to me that the guarantee had to be obtained by the company from its parent in order to raise the money to invest by advances to the other United Kingdom subsidiaries and the company had to agree to pay the parent the continuing commission in order to obtain the guarantee and therefore realistically as part of the price of raising the money. The commission cannot be severed from the cost of acquisition and so equally the annual payments of the commission cannot be severed from the cost of acquisition. It is unreal to regard each annual payment as merely a payment for the current year or the current six months to keep the guarantee on foot as part of the continuing management of the company's business, because the whole obligation in respect of the loan stock and the obligation of the guarantee was undertaken once and for all when the stock was raised and the guarantee was entered into, and, as shown by the letter from the parent company, the commission was charged by the parent company for giving the guarantee. It all relates back to the giving of the guarantee.*"

78. The Respondent submitted that the Appellants' reliance on *Stephen Court* was ill conceived as that case concerned the consideration of the concept of "management", but only in the context of section 81(5)(d) of the Income Tax Act, 1967 which provided for the deduction from rents of certain payments including:-

> "*(d) the cost of maintenance, repairs, insurance and management of the premises borne by the person chargeable and relating to and constituting an expense of the transaction or transactions under which the rents or receipts were received, not being an expense of a capital nature*."

79. The Respondent further noted that the use of the word "management" used in section 81 of the 1967 Act is used in a very different context from that in which it appears in section 83 TCA 1997. The Respondent submitted this was evident in noting that it appears in the context with the words "maintenance repairs and insurance" and, secondly, that it is expressly concerned with "management of the premises".

80. The Respondent advised that the Irish Supreme Court commented on *Stephen Court* in *Hibernian Insurance* as follows:

[15] [1983] STC 150

"*In the circumstances I think there is little assistance to be derived from that judgment in determining the issues which arise in the present case. I would, however, note that Mc William J approved, in my view correctly, the observation of Lord Reid that if expenses incurred for work performed by a member of the staff of a business would be classed as management expenses, such expenses would not cease to be management expenses because independent qualified persons were employed for the same work.*"

81. The Respondent submitted that *Hibernian Insurance* made a number of key findings as follows:

(1) if expenses incurred for work performed by a member of staff of a business would be classed as management expenses, such expenses would not cease to be management expenses because independent qualified persons were employed for the same work;

(2) an expenditure incurred in purchasing a capital asset would not qualify as expenses of management (*National Trust Ltd*)

(3) a decision by the plaintiff whether or not to purchase an asset could not change the nature of the service provided;

(4) a close relationship between a proposed acquisition and expenditure incurred in respect thereof would necessarily deprive that expenditure of the characteristics of a management disbursement;

(5) the relationship between the disputed expenses in this case and the potential purchases of shares was such as to deprive the expenditure of the character of expenses of management.

82. Furthermore, within *Hibernian Insurance* Murphy J stated at paragraph 51:

"*In my view the very substantial costs incurred by the Group in procuring the expert and specific evaluation of the three investment opportunities referred to in the Case Stated did not constitute management expenses. It is not necessary to make a positive finding as to the category into which the expenditure does fall. I am satisfied, however, that, from the date on which the Group focused its attention on the acquisition of the prospective investments, the expenditure incurred in respect of them would properly have been considered to be costs of acquisition of an investment in the event of the purchase being completed and that it would not have a different characterisation simply because the plans to purchase were frustrated or aborted. In my view Judge Devally*

was entitled to conclude that the disbursements in question did not constitute management expenses and the learned High Court Judge was correct in deciding that there was ample evidence to justify that conclusion. Accordingly I would dismiss the appeal and affirm the order of the High Court."

83. Before adding:

"*In [National Trust] it was conceded that the cost of purchasing an investment which formed part of the current or circulating capital of the tax payer company was not and could not be an expense of management. If that concession was correctly made - and I believe that it was a fortiori expenditure incurred in purchasing a capital asset would not qualify as expenses of management. In the present case the Appellant did not in the High Court, nor does he in this Court, contend otherwise*."

84. The Respondent noted that Barron J stated at paragraphs 66 to 67 of that judgment:

"*What we are dealing with is a privilege granted to an investment company not available to other taxpayers. Tax is paid on the income generated regardless of the cost of administration whether of the fund or of the income generated by the fund. Such costs are the real costs of management. In the instant case, the proposed investments were never made, but that did not change the nature of what was being done. The decision which it is submitted creates the dividing line between costs of management and costs of acquisition was in fact taken before any other disputed expenditure was incurred. It may be part of day to day management to appraise the possibility of acquisitions or disposals, but it ceases to be such when a specific situation is pursued.*

The costs of management come to an end when a decision is taken to acquire or dispose of an investment as the case may be. This does not relate to the entering into of a binding commitment. Once steps are taken which may lead to a binding commitment and which are necessary for management to make a full and informed decision then management ceases and acquisition or disposal as the case may be commences."

85. Following on from the *Hibernian Insurance* judgment, the Respondent noted that it's Tax and Duty Manual (Part 04-06-15) on the subject of whether certain disbursements constitute management expenses is in line with the findings contained within that judgment. In section 3 (d), it states:

"*The costs of changing investments (brokerages, commissions and stamp duties) are not admissible as expenses of management (Capital and National Trust Ltd v Golder ... and Sun Life Assurance Society v Davidson ...)*"

86. The Respondent advised its Manual further states in section 4(i) that:

"*Expenses incurred by an investment company in evaluating an investment opportunity are not allowable as management expenses. Such expenses are regarded as capital in nature -refer to the decision in Hibernian Insurance Company Ltd v MacUimis ITC 1997 and Tax Instruction 4.6.15.*"

87. The Respondent further noted that the Appellants relied on the judgment of *Camas* where it was held that expenses incurred in an abortive takeover were deductible management expenses. However, the Respondent submitted that it should be noted within that case the UK Court of Appeal disagreed with the decision of the Irish Supreme Court in *Hibernian Insurance*. As such the Respondent submitted that the binding precedent in this jurisdiction for the purposes of construing section 83 of the Irish TCA 1997 is *Hibernian Insurance*.

88. Given this position, the Respondent submitted that the Appellants further reliance on *Holdings* and *Centrica* were moot given the subsequent Irish Supreme Court decision in *Hibernian Insurance* which is the binding precedent in Ireland for the purposes of interpreting the application of domestic tax law.

89. Furthermore, the Respondent opened the case of *Dawson Group* which held that as the expenditure was for the benefit of the company's shareholders and while the expenditure did benefit the company, there was not a sufficiently close link between this and the management of its investment business. Mann J, in dismissing the appeal, set out the findings of Judge Bishopp in the court below on expenses of management as follows:

"*There must, I think, be a connection, or identifiable relationship, between the expenditure and the investment business of which it is, supposedly, an expense. Here, the expenditure had nothing to do with investment (or trading for that matter). I do not doubt that the regulatory burden was significant, that it impeded the Board's freedom to make strategic decisions and that it adversely affected the Group's growth and profitability. The question, however, is not whether the expenditure was reasonably incurred, or whether the company (ultimately the shareholders) derived a benefit from what was done in return for the expenditure, but whether it is an expense of management, that is the conduct of the (investment) business. The business undertaken by Dawson Group, whether correctly viewed as trade or investment, was*

wholly unaffected by what was done - it was, and always would have been, carried on in exactly the same way; no investment decisions (such as the acquisition of a new subsidiary) depended on it; and Dawson Group's relationship with its subsidiaries, which represent its only investments, was, and was intended to be, unchanged. Indeed, as Mr Gear's evidence makes clear, it was the Board's perception of the effect of its listed status on the Group's trading activities (that is, the need to earn short-term profits at the expense of growth) and on the value, or perhaps more accurately the price, of its shares which led to the incurring of the expenditure. At best it could be said to have made it possible for Dawson Group to exploit its subsidiaries better in the future, but it could not be said to be expenditure incurred in the course of managing investments."

90. The Respondent noted within the *Howden Joinery* case relied upon by the Appellants, that *Dawson Group* was referred to as follows:

"*Mr Peacock's response to this approach was to take a different perspective on the Dawson decision, namely that in order for a management expense to be deductible, it has to be clearly connected with the investment business of the company. In the Dawson case the expenditure was for the benefit of the company's shareholders and while the expenditure did benefit the company, there was not a sufficiently close link between this and the management of its investment business. The same could not be said of HJ's payments under its guarantee obligations, which was for the direct benefit of HJ's investment business.*"

91. The Respondent submitted that even allowing for some divergence between UK and Irish authorities, in the context of the Appellants' appeal, HMRC have provided guidance by way of its business note (HMRC BIM 38297) which makes it clear that in the UK, HMRC would take issue with management expenses of the type under appeal being deducted against trade income. The Respondent referred to that note which states:

"*there is a clear distinction between expenses of managing a business of holding investments and expenses incurred in determining the ownership of that business or in determining ownership of the investment company itself. Where an investment company incurs expenditure on resisting a change in the ownership of its own share capital, then, just as in the case of a trading company, such expenditure is not allowable.*"

92. In conclusion, the Respondent submitted that its decision to refuse [redacted] entitlement to claim the disputed portion of management expenses as an expense of its trade and to

refuse [redacted] deductibility in respect of that loss was correct as the professional expenses claimed were not expenses of management within the meaning of section 83 TCA 1997.

Material Facts

Material facts not in dispute.

93. The Commissioner finds the following material facts which are not in dispute between the parties:

93.1. [redacted] claimed a deduction of [redacted] as expenses in computing its assessable Schedule D, Case I income for the year of assessment ended [redacted]

93.2. Of those expenses the sum of [redacted] relates to specific expenses of management which arose owing to [redacted] from [redacted]

93.3. As a result of the [redacted], [redacted] engaged third-party advisors and incurred the sum of [redacted] in costs. [redacted] claimed these costs under the provisions of section 83 (2) TCA 1997 as an "expense of management".

93.4. The Respondent does not accept that this expenditure which was incurred by [redacted] in its financial year ended [redacted], is tax deductible by [redacted] in assessing its Schedule D, Case I profits or losses.

93.5. The effect of the denial of this expenditure results in the amount of a group claim in the sum of [redacted] for an associated company, [redacted] being denied and the resultant sum of €2,165,870 being chargeable to [redacted] in corporation tax for its year of assessment ended [redacted].

93.6. [redacted] is a wholly owned subsidiary of [redacted] and is part of [redacted] corporation tax group for Irish taxation purposes.

93.7. The Respondent does not dispute that [redacted] is an investment company within the meaning of section 83 TCA 1997.

93.8. The principal activities of [redacted]

93.9. In the period [redacted], [redacted] developed a new investment and business strategy following changes to the leadership in [redacted].

This was [redacted] as its [redacted]. It addressed plans to invest [redacted] in capital expenditure, as well as to how it would innovate its product offering and capitalise on its sustainability credentials. It also included plans to reduce its leverage range and to improve return on capital employed up to [redacted].

93.10. [redacted] on the [redacted], approached [redacted] on [redacted] with a view to seeking its interest in having discussions with [redacted]

93.11. Following a meeting on [redacted] received from [redacted] by way of letter dated [redacted], an initial non-binding indicative proposal to acquire the [redacted].

93.12. On [redacted], having assessed the merits of [redacted], the Board of [redacted] unanimously determined not to recommend [redacted] proposal to [redacted] shareholders.

93.13. On [redacted] submitted a [redacted]. [redacted] wanted the support of the Board within the [redacted].

93.14. On [redacted], the [redacted] Board [redacted] that they unanimously rejected [redacted]

93.15. On [redacted], the [redacted] ruled that [redacted] was required to either [redacted] for [redacted] or [redacted] that it [redacted] for [redacted] by [redacted]

93.16. On [redacted], [redacted] announced that it would not make an offer to acquire the [redacted]. The day following, [redacted] issued a [redacted] acknowledging this announcement by [redacted]

93.17. In addition, the Respondent does not dispute that [redacted] and [redacted] are entitled to apply the provisions of section 420 TCA 1997, in the event that a valid loss is in existence between those companies.

93.18. Originally, the Appellants' appeal concerned Expressions of Doubt made under the provisions of section 959P TCA 1997, which the Respondent held were "not genuine".

93.19. Subsequently, the Respondent accepted that the Expressions of Doubt made by the Appellants are genuine Expressions of Doubt and comply with the provisions of section 959P TCA 1997.

Material facts from evidence presented at the hearing.

94. In reaching these material findings, the Commissioner took cognisance of the documents presented as listed above. The Commissioner notes that some documents were not available. The Commissioner further notes that [redacted] is a [redacted] as confirmed in their submissions. As such, it can ensure it retains professional advisors and maintains all documents relating to its business. The Commissioner would have expected all invoices relating to the expenses at issue would have been presented at the hearing. But they were not. It would have been helpful to the Commissioner if minutes of Board meetings or emails relating to these matters had been presented. But they were not.

    The Commissioner also noted the pertinent letters of engagement and the absence of such letters for four of the eight service providers. While an explanation was provided to the Commissioner which explained why no engagement letter was available from the Appellants' legal advisors, the Commissioner would have expected a detailed invoice with an itemised narrative detailing work done in relation to **the proposal.** With respect to the other service providers for whom no letters of engagement or invoices were presented, no credible explanation was provided to the Commissioner as to why this documentation was not made available. The Commissioner has examined the wording of the provided letters of engagement and notes that all four of those letters are defensive in tone (see paragraph 105 below for further).

    Following consideration of the documents, the documentation which is not presented, and the witness evidence, the Commissioner makes the following additional material findings of fact:

    94.1. The Commission were presented with a list of payments made to third-party professional firms but were not provided with a list of invoices which detailed the work undertaken by those firms.

    94.2. No documentary evidence in the form of Directors' meetings or third-party advices from the engaged professionals was provided to the Commission.

    94.3. Of the eight professional firms engaged by [redacted] the Commission were only provided with engagement letters for four of those firms.

    94.4. The tone of those provided engagement letters was "defensive" in nature owing to the wording contained within them.

94.5. No supplementary engagement letters from the retained professional firms were provided to the Commission.

94.6. The provided engagement letter from [redacted] stated that the firm were to be paid an amount of [redacted] for services to be provided up to the point a formal offer was to be made by [redacted] for [redacted] From the list of payments provided the sum of [redacted] was paid to [redacted] for its services. No information was provided to the Commission on why that firm received twice the amount it had provided in its engagement letter.

94.7. In a similar vein, [redacted] quoted the sum of [redacted] for services to be provided. From the provided list of payments, the sum of [redacted] was paid to that entity. No information was provided to the Commission as to why that entity received payment exceeding the amount quoted.

94.8. No formal offer was ever made by [redacted] for [redacted]

94.9. From the outset of [redacted] making its expression of interest, the [redacted] did not consider [redacted] a "good fit".

94.10. The duties of the Board of Directors of an Irish company are set out in section 228 (1) Companies Act 2014. Those duties are owed to the company itself.

94.11. In the UK, the position is different as section 172 (1) (a) of the (UK) Companies Act 2006 provides that those duties are "t*o promote the success of the company for the benefit of its members as a whole".*

94.12. The Board of Directors of an [redacted] are required to [redacted]

94.13. [redacted]

94.14. [redacted], [redacted] acquired a [redacted] in the [redacted] for [redacted].

94.15. The duration of [redacted] approach to [redacted] commenced on [redacted] and ceased on [redacted]. As such, [redacted] interest in acquiring [redacted] was short-term in nature

94.16. [redacted] claimed all of its expenses, which consisted of Management expenses in the sum of [redacted] which included "other costs" of [redacted], without any disallowable element in its provided tax computations for the year ended [redacted].

Analysis

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

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

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

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

97. For the Appellants' appeal to succeed, it therefore follows that it must prove, on the balance of probabilities, that the sum of [redacted] which [redacted] incurred in connection with the [redacted] approach is properly classified as "expenses of management" and as such qualifies for a deduction against its Schedule D, Case I income. It also follows for [redacted] appeal to succeed, it must be proved that it was eligible to deduct the amount of the loss surrendered by [redacted] in computing its taxable income.

98. As cases such as *Morgan* have held that the term "expenses of management" is incapable of detailed definition, the Commissioner is required to establish if he can discern the meaning of those words in accordance with the rules for statutory interpretation in considering the Appellants' appeal.

99. Those rules for statutory interpretation are eloquently set out in the judgment of McDonald J in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners*

and ors. [2020] IEHC 552 ("*Perrigo*") where he 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."

100. As noted from the material facts, the parties agree that [redacted] is an "investment company" which is defined under section 83 (1) TCA 1997 as:

> "…*any company whose business consists wholly or mainly of the making of investments, and the principal part of whose income is derived from the making of investments, but includes any savings bank or other bank for savings*."

101. Section 83(2) TCA 1997 defines the deductions which an investment company may make in computing the amount of its profits for a chargeable period. Those expenses are:

> "*Any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing income for the purposes of Case V of Schedule D; but there shall be deducted from the amount treated as expenses of management the amount of any income derived from sources not charged to tax, other than franked investment income…*"

102. As [redacted] is not claiming Schedule D, Case V expenses and as all of its sources of income are chargeable to taxation, it follows that it is seeking to claim a number of deductions in calculating its allowable loss for the accounting year ended [redacted]. While the Respondent does not query [redacted] entitlement to claim a number of those deductions, it contends that the payments of [redacted] paid to third-party advisors ("the disputed costs") are not expenses of management and as such do not qualify as an allowable deduction in computing [redacted] allowable loss.

103. In contrast, [redacted] submit that those disputed costs were *"incurred in the performance of its role of assessing strategy for* [redacted] *and managing its investments in its operating subsidiaries and had to be incurred to comply with its duties under the* [redacted] *and Company Law*" and as such are allowable expenses of management which are properly available in computing the amount of its allowable loss.

104. For the Commissioner to determine whether the disputed costs are allowable as expenses of management, it is important that the nature of those expenses are fully defined. In noting that *Hibernian Insurance* permits the payment of monies to third-party advisors to be included as expenses of management, it follows that such expenses are capable of being "expenses of management". However, the Commissioner does not agree with the [redacted] classification of the disputed costs as he finds that an element of the disputed costs were incurred **in defending the approach from** [redacted] from its provided narrative.

105. In coming to that finding the Commissioner considered the wording contained within the provided Engagement Letters[16] which include the following:

105.1. [redacted] - "*…in considering possible defensive measures that may be available to the [Appellants*]"

105.2. [redacted] - "*We refer to the bid defence of* [redacted] …"

105.3. [redacted] – "*A success fee o* [redacted] *in the event that Independence is retained"*

105.4. [redacted] – "*Exploring with you the strategies for maintaining the company's independence…"* [emphasis added]

106. Furthermore, the Commissioner notes from the Appellants' [redacted] evidence that the [redacted] was "not for sale" (see sub-paragraph 25.5 above) which further endorses the Commissioner's findings. In addition, the Commissioner notes that the Appellants did not provide the Commission with any documentation to explain why such large costs, even relative to its turnover, were expended in what it claims was evaluating [redacted] approach nor were any details provided to the Commission as to why the payments to [redacted] and [redacted] were multiples of those provided for in the Engagement Letters which is in direct conflict with the Appellant [redacted] evidence in which he stated the "*big fee was only payable in the event the* [redacted] *was sold*" (sub-paragraph 24.7 above refers).

[16] See respectively subparagraphs 23.20, 23.22, 23.24 and 23.25 above.

107. It is evident from the Appellants' submissions that an element of the disputed costs was incurred by [redacted] in reviewing and assessing the [redacted] proposal which the Commissioner notes [redacted] were mandated to so do, in discharging its duties under the Companies Acts and the [redacted]. Owing to those imposed obligations, the Commissioner would deem it appropriate, in keeping with *Camas plc v Atkinson (IOT)* [2004] STC 860 (see paragraph 23.28 above), that this element of the costs incurred by the Appellants, being compliance in nature, would be part of the duties of the [redacted] Board in managing its investments and hence would qualify as "expenses of management".

108. However, as the Commissioner was not provided with any invoices or similar documentation which detailed the nature and scope of the works undertaken by its engaged third-party professionals, he is unable to split the expenditure between the compliance costs and those incurred in defending the [redacted] approach. Hence, the Commissioner, having regard to the quantum of third-party fees paid, the deviation in the fees paid to [redacted] and [redacted] (from those contained within the provided engagement letters[17]), the unavailability of invoices and in noting that no documentation whatsoever was provided to him in respect of four of the entities who were paid some of the disputed costs, finds that the disputed costs were incurred by [redacted] in defending the [redacted] approach and that any compliance costs contained within the disputed costs, being unquantifiable, were incidental to the overall costs incurred.

109. Furthermore, absent documentary evidence explaining the nature of the disputed costs, this could lead to the Commissioner erring in his Determination in coming to his findings in allowing some of the costs, such as those incurred [redacted] in the [redacted] or other disallowable capital expenditure, which may or may not have been included in the disputed cost. As an aside, the Commissioner notes that the acquisition of this [redacted] was in the middle of the [redacted] approach which was at a time [redacted] claimed the Board was neglecting its development opportunities as they were being frustrated by the [redacted] approach. The Commissioner further notes that any "interference" to the Appellants' business activities was of limited duration given [redacted] tenure of its expression of interest (commencing on [redacted] and ceasing on [redacted]).

110. As such, the Commissioner finds the primary central issue to be resolved in the Appellants' appeal is whether the disputed defensive costs incurred by [redacted] are properly considered "expenses of management" and as such are an allowable component of its calculated loss.

[17] See paragraphs 23.21 and 23.26 above.

111. As noted, the term “expenses of management” is not defined in section 83 TCA 1997 or anywhere else in tax legislation. The words “expense” and “management” and hence the phrase “expenses of management” are ordinary words. However, as also noted, their meaning is not self-evident. But as stated in *Perrigo,* context is critical, both immediate and proximate.

112. The Courts in both the UK and Ireland have, as confirmed in *Sun Life,* given a wide meaning to “expenses of management”. As Lord Reid commented in *Sun life* at page 360 of that judgment - “*It appears to me that the phrase has a fairly wide meaning…”*

113. The Commissioner must take cognisance of *Perrigo* and consider each word or phrase should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use a word or words without meaning.

114. There is no suggestion that the term “expenses of management” is unclear. The matter to be considered is the extent and breadth of what expenses can be said to be “expenses of management”. Whilst the Courts have decreed that the phrase is to be given a fairly wide meaning, there is a limit to that “width”.

115. The limit to the width of the meaning of the phrase “expenses of management” has been considered by the Courts with respect to resisting a change on ownership. Those expenses do not fall within the width or wide meaning of the phrase “expenses of management”.

116. The term “expenses of management” and its application to a business depends on the particular business and trading activities and the expense in each case. It involves an analysis of the particular facts in each circumstance and case. As noted by Lord Reid in *Sun Life* (at page 360):

> “*They are ordinary words of the English language, and like most such words, their application in a particular case can only be determined on a broad view of all relevant matters.*”

117. The Commissioner has considered the Respondent’s submissions with respect to the key findings of *Hibernian Insurance* (paragraph 81 above refers) and agrees with those key findings.

118. While both parties’ Counsel submit that much of the provided UK jurisprudence is of relevance in determining the matter under appeal, the Commissioner finds that caution must be exercised in placing reliance on such jurisprudence owing to the divergence of

duties owed by a director under the respective Irish and UK Companies Acts (that is to the company and to the shareholders respectively).

119. The activities of an investment company are defined in paragraph 100 above and in line with that definition the Commissioner is required to find whether the disputed defence costs were incurred in the "actual management of the investment company". In noting that [redacted] activities are [redacted], and that the disputed defence costs were not incurred by [redacted] in **managing its investments** but in place were incurred in **resisting a change of ownership of its own share capital**, the Commissioner finds, based upon the evidence and facts in this case, that in this particular case, the disputed defence costs cannot be considered an expense of management for the purpose of section 83 (2) TCA 1997.

120. In coming to that finding, the Commissioner notes the Supreme Court decision in *Hibernian Insurance*, which is the binding authority in this jurisdiction, held that expenditure incurred in relation to a proposed investment acquisition are not considered "expenses of management". In line with this reasoning, as **the disputed defence costs were incurred in resisting a potential change in the ownership of** [redacted] the Commissioner considers that the expenditure was not incurred in assisting [redacted] trading activities but in place were incurred to ensure that the value of the [redacted] shares would appreciate over time i.e. if shares in [redacted] were sold at a future time that the [redacted] shareholders would achieve a superior return than that proposed by [redacted]

121. As such payments are not considered expenses relating to [redacted] underlying trading activities, the Commissioner therefore considers that the payments made, akin to goodwill payments, are capital in nature and hence not allowable in [redacted] computation of its allowable corporation tax losses. Furthermore, despite the divergences between Irish and UK law, the Commissioner notes in *Morgan*, Lord Reid held at paragraph 68 of that judgment (which is detailed at paragraph 23.28 above but is repeated here for ease of reference):

> "…*but a change of shareholders does not interest the company as a trader, and expenditure to prevent a change of shareholders can hardly be expenditure for the purposes of the trade…"*

122. While *Morgan* considered the interpretation of "expenses of management" in a trading company context, the Commissioner considers although [redacted] is an investment company that the same principle applies given the disputed defence costs were incurred in

protecting [redacted] shareholders' interests rather than incurred in the management of [redacted] underlying investment activities. The Commissioner notes that this view is supported by the provided HMRC guidance note (see also paragraph 23.28 above) which provides "*where an investment company incurs expenditure on resisting a change in the ownership of its own share capital, then such expenditure is not allowable*."

123. As noted, the burden of proof lies with the Appellant. As confirmed in *Menolly Homes*, "*the burden of proof …is on the taxpayer"*. As confirmed in that case by Charleton J at paragraph 22:-

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

124. The burden of proof has not been discharged to satisfy the Commissioner that the taxation liabilities sought by the Respondent are not due. However, as [redacted] sustained (overall) losses in the year ended [redacted], the Commissioner finds that the Respondent's Amended Notice of Assessment to corporation tax dated [redacted], which it issued to [redacted] in the sum of €2,165,870, should be reduced to nil.

125. As the Commissioner has determined that [redacted] incurred a capital loss and as it incorrectly transferred a disallowable trading loss of [redacted] to [redacted] under group loss relief provisions, it follows that the Amended Notice of Assessment which issued to [redacted] on [redacted], in the sum of €2,165,870, which is referable to the Corporation Tax due on the amount of the incorrect loss transferred, must stand.

126. As there is no taxation payable by [redacted] the Commissioner finds that he is not required to consider the Expression of Doubt submitted for [redacted] However, as [redacted] has an additional corporation tax liability and in noting that the Respondent considers the [redacted] Expression of Doubt "genuine", the Commissioner finds that he is required to consider the provisions of sections 959P and 959AU TCA 1997.

127. Those provisions provide, in the event of an Expression of Doubt being considered genuine, that any taxation payable, arising from the matter contained within the Expression of Doubt, is due for payment on a date which is one month following the issuance of the Respondent's Amended Notice of Assessment. As the Respondent issued its Notice of Amended Assessment to [redacted] on [redacted], it follows that the due date for payment of the additional corporation tax, €2,165,870 by [redacted] is [redacted] for the purpose of the Respondent's calculation of its statutory interest charge.

Determination

128. As such and for the reasons set out above, the Commissioner determines that the Appellants have not succeeded in their appeal.

129. Therefore, the Notice of Assessment dated [redacted], in the sum of €2,165,870 which issued to [redacted] for the year of assessment [redacted] must stand, with the variation that the due date of payment of that liability is [redacted]. The Commissioner finds that the Notice of Amended Assessment which issued to [redacted] on [redacted] in the sum of €2,165,870 shall be reduced to nil.

130. The Commissioner appreciates that the Appellants will be disappointed with this Determination but they were correct to seek legal clarity on their appeals. The Commissioner wishes the Appellants every success in their future business activities.

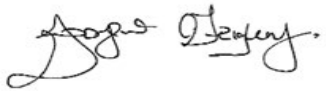
131. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) TCA 1997.

Notification

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

Appeal

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



Andrew Feighery

Appeal Commissioner

22nd December 2023

Appendix 1 – Legislation

Taxes Consolidation Act 1997.

Section 83 - Expenses of management of investment companies.

(1) For the purposes of this section and of the other provisions of the Corporation Tax Acts relating to expenses of management, "investment company" means any company whose business consists wholly or mainly of the making of investments, and the principal part of whose income is derived from the making of investments, but includes any savings bank or other bank for savings.

(2) In computing for the purposes of corporation tax the total profits for any accounting period of an investment company resident in the State –

(a) there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing income for the purposes of Case V of Schedule D; but

(b) there shall be deducted from the amount treated as expenses of management the amount of any income derived from sources not charged to tax, other than franked investment income.

(3) Where in any accounting period of an investment company the expenses of management deductible under subsection (2), together with any charges on income paid in the accounting period wholly and exclusively for the purposes of the company's business, exceed the amount of the profits from which they are deductible, the excess shall be carried forward to the succeeding accounting period, and the amount so carried forward shall be treated for the purposes of this section, including any further application of this subsection, as if it had been disbursed as expenses of management for that accounting period.

(4) For the purposes of subsections (2) and (3), there shall be added to a company's expenses of management in any accounting period the amount of any allowances to be made to the company for that period by virtue of section 109 or 774.

(5) [deleted]

(6) [deleted]

Section 420 – Losses, etc. which may be surrendered by means of group relief.

(1) Where in any accounting period the surrendering company has incurred a loss, computed as for the purposes of section 396(2), in carrying on a trade in respect of which the company is within the charge to corporation tax, the amount of the loss may be set off for the purposes of corporation tax against the total profits of the claimant company for its corresponding accounting period; but this subsection shall not apply –

(a) to so much of a loss as is excluded from section 396(2) by section 396(4) or 663, or

(b) so as to reduce the profits of a claimant company which carries on life business (within the meaning of section 706) by an amount greater than the amount of such profits (before a set off under this subsection) computed in accordance with Case I of Schedule D and section 710(1).

(2) Where for any accounting period any capital allowances are to be made to the surrendering company which are to be given by discharge or repayment of tax or in charging its income under Case V of Schedule D and are to be available primarily against a specified class of income, so much of the amount of those capital allowances (exclusive of any carried forward from an earlier period) as exceeds its

income of the relevant class arising in that accounting period (before deduction of any losses of any other period or of any capital allowances) may be set off for the purposes of corporation tax against the total profits of the claimant company for its corresponding accounting period.

(3) Where for any accounting period the surrendering company (being an investment company) may under section 83(2) deduct any amount as expenses of management disbursed for that accounting period, so much of that amount (exclusive of any amount deductible only by virtue of section 83(3)) as exceeds the company's profits of that accounting period may be set off for the purposes of corporation tax against the total profits of the claimant company (whether an investment company or not) for its corresponding accounting period.

(4) The surrendering company's profits of the period shall be determined for the purposes of subsection (3) without any deduction under section 83 and without regard to any deduction to be made in respect of losses or allowances of any other period.

(5) References in subsections (3) and (4) to section 83 shall not include references to that section as applied by section 707 to companies carrying on life business.

(6) Where in any accounting period the surrendering company has paid any amount by means of charges on income, so much of that amount as exceeds its profits of the period may be set off for the purposes of corporation tax against the total profits of the claimant company for its corresponding accounting period.

(7) The surrendering company's profits of the period shall be determined for the purposes of subsection (6) without regard to any deduction to be made in respect of losses or allowances of any other period or to expenses of management deductible only by virtue of section 83(3).

(8) In applying any of the preceding subsections in the case of a claim made by a company as a member of a consortium, only a fraction of the loss referred to in subsection (1), or of the excess referred to in subsection (2), (3) or (6), as the case may be, may be set off under the subsection in question, and that fraction shall be equal to that member's share in the consortium, subject to any further reduction under section 422(2).

…

Section 933 – Appeals against assessment.

(1) (a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.

…

Section 959P – Expression of doubt.

(1) In this section - 'law' means one or more provisions of the Acts; 'letter of expression of doubt', in relation to a matter, means a communication by written or electronic means, as appropriate, which –

(a) sets out full details of the facts and circumstances of the matter,

(b) specifies the doubt, the basis for the doubt and the law giving rise to the doubt,

(c) identifies the amount of tax in doubt in respect of the chargeable period to which the expression of doubt relates,

(d) lists or identifies the supporting documentation that is being submitted to the appropriate inspector in relation to the matter, and

(e) is clearly identified as a letter of expression of doubt for the purposes of this section,

and reference to 'an expression of doubt' shall be construed accordingly.

(2) Where a chargeable person is in doubt as to the correct application of the law to any matter to be contained in a return required for a chargeable period by this Chapter, which could –

(a) give rise to a liability to tax by that person, or

(b) affect that person's liability to tax or entitlement to an allowance, deduction, relief or tax credit,

then the chargeable person may –

(i) prepare the return for the chargeable period to the best of that person's belief as to the correct application of the law to the matter, and deliver the return to the Collector-General,

(ii) include a letter of expression of doubt with the return, and

(iii) submit supporting documentation to the appropriate inspector in relation to the matter.

(3) This section only applies if –

(a) the return referred to in subsection (2) is delivered to the Collector-General,

(b) and the documentation referred to in paragraph (iii) of that subsection is delivered to the appropriate inspector,

on or before the specified return date for the chargeable period involved.

(3A)(a) The documentation referred to in subsection (3)

(b) shall be delivered by electronic means where the return referred to in subsection (2) is delivered by electronic means (b) The electronic means by which the documentation referred to in subsection (3)(b) shall be delivered shall be such electronic means as may be specified by the Revenue Commissioners for that purpose.

(4) Where a return is delivered in accordance with subsection (2), a self assessment shall, where required under section 959R, be included in the return by reference to the particulars included in the return.

(5) Subject to subsection (6), where a letter of expression of doubt is included with a return delivered by a chargeable person to the Collector-General for a chargeable period –

(a) that person shall be treated as making a full and true disclosure with regard to the matter involved, and

(b) any additional tax arising from the amendment of an assessment for the chargeable period by a Revenue officer to give effect to the correct application of the law to that matter shall be due and payable in accordance with section 959AU(2).

(6) Subsection (5) does not apply where a Revenue officer does not accept as genuine an expression of doubt in respect of the application of the law to a matter, and an expression of doubt shall not be accepted as genuine in particular where –

(a) [deleted]

(b) the officer is of the opinion, having regard to any guidelines published by the Revenue Commissioners on the application of the law in similar circumstances and to any relevant supporting documentation delivered to the appropriate inspector in relation to the matter in accordance with subsections (2) and (3), that the matter is sufficiently free from doubt as not to warrant an expression of doubt, or

(c) the officer is of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax.

(7) Where a Revenue officer does not accept an expression of doubt as genuine, he or she shall notify the chargeable person accordingly and any additional tax arising from the amendment of an assessment for the chargeable period by a Revenue officer to give effect to the correct application of the law to the matter involved shall be due and payable in accordance with section 959AU (1).

(8) A person aggrieved by a Revenue officer's decision that the person's expression of doubt is not genuine may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that decision.

Section 959AU – Date for payment of tax: amended assessments.

(1) Subject to subsection (2) and section 959AV, any additional tax due by reason of the amendment of an assessment for a chargeable period shall be deemed to be due and payable on the same day as the tax due under the assessment, before its amendment, was due and payable.

(2) Where –

(a) the assessment was made after the chargeable person had delivered a return containing a full and true disclosure of all material facts necessary for the making of the assessment, or

(b) the assessment had previously been amended following the delivery of the return containing such disclosure,

any additional tax due by reason of the amendment of the assessment shall be deemed to have been due and payable not later than one month from the date of the amendment.

Section 959AV – Due Date for payment of tax: determination of an appeal.

(1) Where, on the determination of an appeal against an assessment made on a chargeable person for a chargeable period, the amount of tax payable by the person for the period is in excess of the amount of the tax which the chargeable person had paid before the making of the appeal, the excess shall be deemed to be due and payable on the same date as the tax charged by the assessment is due and payable.

(2) Notwithstanding subsection (1), where –

(a) the amount of tax which the chargeable person had paid before the making of the appeal is not less than 90 per cent of the amount of tax found to be payable on the determination of the appeal, and

(b) the tax charged by the assessment was due and payable in accordance with section 959AO(2), section 959AQ, section 959AR(3) or section 959AS(3), as the case may be,

the excess referred to in subsection (1) shall be deemed to be due and payable not later than one month from the date of the determination of the appeal.

Companies Act 2014.

Section 228 -Statement of principal Fiduciary duties of directors

(1) A director of a company shall –
(a) act in good faith in what the director considers to be the interests of the company;
(b) act honestly and responsibly in relation to the conduct of the affairs of the company;
(c) …

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]