AC Ref: 14TACD2016

NAME REDACTED COMPANY A

NAME REDACTED COMPANY B

NAME REDACTED COMPANY C

Appellants

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. On [DATE REDACTED] 2009 the first and second Appellants were placed under the protection of the High Court and on [DATE REDACTED] 2010 the High Court approved an examinership process which resulted in the settlement of certain unsecured and preferential liabilities owed by the Appellants. The first and second named Appellants were each the subject of separate but identical schemes of arrangement. The third named Appellant is a company claiming group relief from the second Appellant and the claim of the third Appellant is dependent upon the treatment of the issues arising in relation to the first and second Appellants. By agreement of the parties, all three cases are dealt with in this Appeal.

2. Pursuant to the scheme of arrangement, the Respondent received 24% in full and final settlement of the preferential creditor claims in relation to outstanding VAT and PAYE liabilities. The outstanding liabilities were written down accordingly and payment was made to the Respondent in the reduced amounts as per the terms of the scheme.

3. In the 18 month accounting period ending 30 June 2010 (which covered the pre and post examinership period) the first and second Appellants treated as non-taxable, certain receipts attributable to the release of revenue debts in respect of PAYE and VAT written down as a result of the examinership process. These amounts had been included in the profit and loss account as credits under 'exceptional items' in accordance with the established accounting practice. The Respondent's position was that the profit per the accounts figure upon which a

corporation tax charge arises, includes the written down amounts of VAT and PAYE while the Appellants contended that these amounts should be excluded from the charge to corporation tax. Corporation tax assessments raised in respect of the periods 30/6/2010 and 31/12/2010 were duly appealed.

Submission of the parties in brief

Examinership and the Taxes Consolidation Act, 1997 ('TCA 1997').

4. The Appellants' position was that the debts had been written off in the examinership process and that recovery was thus precluded by law based on section 24(6) of the Companies (Amendment) Act, 1990.

Accounting treatment

5. The Respondent relied on section 76A of the Taxes Consolidation Act which provides that the profits of a trade are to be computed in accordance with the established accounting practice. The Appellants submitted that the correct accounting practice was applied but contended that they came within the exception to section 76A on the basis that there was *"…. an adjustment required or authorised by law…"* on the grounds of either section 24(6) CAA 1990 or on the grounds that debts written down were capital in nature.

Capital v Revenue

6. The Appellants contended that the debts written down were capital in nature while the Respondent contended that they were revenue in nature.

Legislation

Section 24 of the Companies (Amendment) Act, 1990 ('CAA 1990') - Confirmation of proposals

> *The report of the examiner under section 18 shall be set down for consideration by the court as soon as may be after receipt of the report by the court.*
>
> *…. ….*
>
> *…*

(6) Where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any statute, enactment, rule of law or otherwise, is liable for all or any part of the debts of the company.

(7) ….

Etc …

….

Section 21 TCA 1997 - The charge to corporation tax and exclusion of income tax and capital gains tax

Corporation tax shall be charged on the profits of companies at the rate of –

….

…..

Section 65 TCA 1997 - Cases I and II: basis of assessment

Subject to this Chapter, income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment.

…

…

Section 76A TCA 1997 - Computation of profits or gains of a company – accounting standards

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

Schedule 17A shall apply to a company as respects any matter related to the computation of income of the company where as respects that matter] –

for an accounting period profits or gains of a trade or profession carried on by the company are computed in accordance with relevant accounting standards (within the meaning of that Schedule), and

for preceding accounting periods profits or gains of a trade or profession carried on by the company are computed in accordance with standards other than relevant accounting standards (within the meaning of that Schedule).]

Section 87 TCA 1997 - Debts set off against profits and subsequently released

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

.....

ANALYSIS

Examinership and the Taxes Consolidation Act 1997

7. Examinership is a procedure under the Companies Acts to aid the return to health of a viable but ailing company. This principle is reflected well in the facts of this case where the company continued to trade throughout the period of examinership and subsequently continued as a going concern after exiting the process. The examinership scheme binds the company and binds the creditors to that company to accept a scheme of arrangement at the fixed date i.e. [DATE REDACTED] 2010 when the company entered examinership. This date represents the cut off point in relation to the prepetition position. The proposals were confirmed by Order of the Court on [DATE REDACTED] 2010 and that Order provides *inter alia* as follows;

- Clause 5.12.1. – *'The preferential creditors shall be paid the sum of €*[AMOUNT REDACTED] *sixty days after the Effective Date in full satisfaction of any and all liabilities (including contingent or prospective liabilities) which the Company had to it and any and all claims which it had against the Company arising out of or connected with any contract, engagement, circumstance, event, act, obligation or omission of the Company prior to the Fixed Date. Based on the value of the Company's liabilities to the Preferential Creditors accepted by the Company at the date of these Proposals each of the Preferential Creditors would receive a dividend of 24.39%.'*

- Clause 5.12.2 – '*The Preferential Creditors shall waive any and all rights and claims of any description whatsoever, subrogated or otherwise, they may have against the Company howsoever arising including without limitation arising out of any agreements entered into with the Company or otherwise howsoever arising, save as provided in these Proposals.'*

- Clause 5.12.3 – '*No interest, penalty or other charge, shall be payable by the Company to the Preferential Creditors in respect of the Preferential Debt.*'

- Clause 10 – titled '*Extinguishment of Balances'* provides *'Any balances which would or might become due to any of the Creditors or any other party apart from those for which provision is made in the Proposals shall be written off and extinguished as claims or debt as at the Effective Date. The payments to the Creditors provided for herein shall be in full and final settlement of all liabilities and obligations of the Company to the Creditors.'*

8. The Appellants contended that the scheme of arrangement approved by the High Court precluded the Respondent from levying corporation tax in respect of that portion of company profits relating to the PAYE and VAT credits contained in the profit and loss account, written down in the examinership. The Appellants contended that it is a feature of examinership that any debts which have been written down, cannot be resurrected at a later date. The Appellants submitted that if the Respondent were entitled to recover in the manner sought (via corporation tax) it would defeat the scheme of examinership, in effect, allowing the Respondent to recover as creditor post implementation of the examinership scheme, contrary to the provisions of the scheme.

9. The Appellants contended that, in taxing the written down amounts in this way, the Respondent was gaining an advantage over other creditors in the examinership process and that the Respondent could not be permitted to put themselves in a better position than any other creditor whose debt was compromised under the Companies (Amendment) Act, 1990. The Appellants argued that if the assessments were confirmed then the Respondent would avail itself of better and more favourable treatment compared with other classes of creditor in the examinership. The Appellants argued that this would be contrary to the Companies Acts which do not provide for such exceptional beneficial treatment in the context of examinership. The Appellants claimed that in taxing the PAYE and VAT written down amounts credited to the profit and loss account, the Respondent was seeking to resurrect and recover debts lawfully written off.

10. The Respondent strenuously opposed the Appellant's submission that raising the corporation tax assessments adversely impacted the principle of equal treatment of creditors of the same class in the examinership process. The Respondent submitted that the Appellants were conflating the position of the Respondent as a creditor of the company (bound in that capacity under the scheme of arrangement) and the Respondent in its capacity as the statutory authority to assess, levy and collect tax.

11. The Respondent submitted that the Revenue Commissioners, in raising assessments was not acting *qua creditor* in the examinership (i.e. it was not relying on any of the rights it would have had as a creditor of the Appellants in the examinership scheme) nor was it resurrecting

its rights as a creditor in respect of the liabilities compromised under the Scheme. The Respondent submitted that the process of examinership is one which relates to the company and to its creditors and contended that the fact that one of those creditors was the Respondent is not a matter which can affect the tax code. The Respondent submitted that in raising assessments it was simply operating pursuant to the TCA 1997 provisions in accordance with its statutory duties and obligations.

12. The Respondent was anxious to point out that that they were not seeking actual payment of the VAT and PAYE but rather, were seeking to include the amounts written down in the examinership process, in the computation of profits pursuant to section 76A TCA 1997, for the purposes of calculating corporation tax.

13. I accept that the Respondent's capacity in the examinership process is that of creditor of the company whereas the Respondent's capacity in assessing taxes pursuant to the Taxes Acts is imposed by statute and must be carried out in accordance with the provisions of the Taxes Acts. I accept the Respondent's submission that these are separate and distinct capacities.

14. The company ceased to be under the protection of the Court on the date on which the proposals became binding on the creditors and the members, namely [DATE REDACTED] 2010.

15. The profits of the accounting period ended 30 June 2010 could not be specifically computed in accordance with the Taxes Acts until that accounting period had ended. Thus the earliest date upon which profits could be computed (and corporation tax assessed) would have been a date subsequent to both the fixed date ([DATE REDACTED] 2009) and to Court sanction of the examinership proposals on [DATE REDACTED] 2010.

16. The order itself (clause 5.12.1.) provides – *'The preferential creditors shall be paid the sum of €*[AMOUNT REDACTED] *sixty days after the Effective Date in full satisfaction of any and all liabilities (including contingent or prospective liabilities) which the Company had to it and any and all claims which it had against the Company arising out of or connected with any contract, engagement, circumstance, event, act, obligation or omission of the Company prior to the Fixed Date. Based on the value of the Company's liabilities to the Preferential Creditors accepted by the Company at the date of these Proposals each of the Preferential Creditors would receive a dividend of 24.39%.'*

17. The Respondent submits that the Revenue Commissioners cannot be bound in examinership any further than the claims it had against the Appellant companies at the fixed point in time in relation to the pre-petition debts and I accept this submission on behalf of the Respondent.

Statutory wording

18. The Appellants submit that the Respondent, having had their debt written down pursuant to the examinership process, are prohibited by the Companies Acts from recovering on foot of the same debts by way of treating those written down amounts as profits which can be subjected to corporation tax. In this regard the Appellants relied on section 24 of the Companies (Amendment) Act, 1990 and in particular the stipulation contained at section 24(6) that the proposals shall be binding '*notwithstanding any other enactment*.' That provision provides;

    'Where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any statute, enactment, rule of law or otherwise, is liable for all or any part of the debts of the company.' [emphasis added].

19. The Appellants submit that if there is a conflict between the CAA 1990 and the Taxes Act, the CAA 1990 should prevail based on the wording of section 24(6) in particular the words "*notwithstanding any other enactment".*

20. Section 24(6) provides '*..the proposals shall, notwithstanding any other enactment, be binding on all the creditors …. affected by the proposals in respect of any claim or claims against the company*….' Therefore, the proposals are binding on the creditors of the company in accordance with the examinership legislation. In order to invoke the words '*notwithstanding any other enactment…,*' there must be some suggestion that the proposals have become compromised or in some way, less than binding by reason of that other enactment. In this case the written down amounts of debt were agreed and adhered to by the creditors including the Respondent, who accepted lesser sums as a result. In what sense were the proposals not binding? The Appellants contend that it is by virtue of the fact that the Respondent raised assessments to corporation tax in respect of a set of accounts which included in the profit figure, the amounts written off. That does not make the examinership proposals any less binding in my view. The Respondent is a statutory body authorised and obliged to assess and collect taxes pursuant to the provisions of the Taxes Consolidation Act 1997. The exercise of this statutory function does not render the examinership proposals non-binding. It simply means that for as long as the Appellants continue to carry on their trades, tax liabilities will arise, which will have to be met by the Appellant companies.

21. The creditor and collector of these taxes happens to be a body (the Respondent) which was a creditor in the examinership in relation to debts which were written down. The raising by the

Respondent of other taxes on continuing profits does not compromise the binding nature of the proposals referred to per section 24(6) CAA 1990. The legislation states that the proposals shall be binding on the creditors and indeed the proposals were binding on the Respondent as, in observance of the binding nature of the proposals, the write down of debt was implemented and the taxes were written off. I do not accept that the assessment to corporation tax on the profits of the company for the period ended 30 June 2010 compromises the binding nature of the examinership proposals. There is no competing enactment which challenges the binding nature of the examinership proposals and therefore the stipulation that "*the proposals ….shall be binding on all the creditors …. affected by the proposals in respect of any claim or claims against the company*….' is answered by stating that the proposals are binding. The words *"..notwithstanding any other enactment.."* do not present a contrary position because there is no competing enactment here which could render the proposals anything other than binding. For this and the additional reasons set out below, I determine that section 24(6) CAA 1990 does not override the provisions of the TCA 1997, in particular, section 76A TCA 1997.

22. The trade carried on by the Appellants continued in the course of examinership and when the Appellants emerged from examinership the companies continued trading and did so profitably. There are no special provisions in the Taxes Acts for the treatment of a company in or following examinership. The Respondent submits that the scheme of arrangement does not affect the continuing application of the provisions of the Taxes Acts and does not preclude the raising of corporation tax assessments in respect of the period ended 30 June 2010 and I accept this submission on behalf of the Respondent.

23. If the Appellants' position is that the scheme of arrangement, particularly s.24(6) CAA 1990 precludes the taxation of write offs that occur in examinership then potentially, that would consistently apply to all elements of the write off. The Respondent submitted that such a position would apply to the write down of management expenses and not just the Revenue debts. The position in relation to the management expenses is that these debts were also subject to a write down however the Appellant accepted that pursuant to section s.87 TCA 1997 the amount was to be "*treated as a receipt of the trade*" and thus added back and included in the profit figure subsequently assessed to corporation tax. Thus the Appellants accepted the taxability of the management charges and have treated part of the write down in the examinership as a taxable item in the profit and loss account. In my view, the Appellants' treatment of the management expenses presents credible opposition to the submission that section 24(6) overrides the TCA 1997 as a result of the inclusion of the words "*notwithstanding any other enactment*" because in adding back the management charges per s.87 the Appellants appear to accept that section 24(6) CAA 1990 does not override section 87 TCA 1997.

24. For the reasons set out above I find there is no conflict between section 76A TCA 1997 and section 24(6) CAA 1990 and thus I determine that the raising of corporation tax assessments in is not precluded by s.24(6) CAA 1990.

Accounting treatment

25. The parties submitted that no original deduction against profits had been taken in relation to the VAT and PAYE amounts written down in the examinership. As a result, both parties accepted that section 87 TCA 1997 did not apply to these amounts.

26. The VAT and PAYE written down amounts were added back as credits to the profit and loss account (as exceptional items) in the Appellants' accounts. Note 4 to the accounts ended 30 June 2010 provided as follows;

27. Re the first Appellant; '*On* [DATE REDACTED] *2009, the Company along with a related company, [the second Appellant] was placed under the protection of the High Court. On* [DATE REDACTED] *2010, the High Court approved a scheme of arrangement which resulted in the settlement of certain unsecured and preferential liabilities at less than the full amount. This settlement resulted in a benefit to the company of €*[AMOUNT REDACTED]

28. Re the second Appellant; as above and also; *'This settlement resulted in a benefit to the company of €*[AMOUNT REDACTED]. *In addition, receivable balances from a related company, [the first Appellant] and other related companies, were settled at less than their full amounts resulting in [the second Appellant] incurring a bad debt of €*[AMOUNT REDACTED]*.'*

29. The Respondent placed substantial emphasis on the relevance and weight to be attributed to accounting principles in the computation of profits and submitted that the practice of accountancy had become more evolved and more advanced in recent years and now reflects form and substance of transactions in addition to a consideration of their commercial context. The Respondent submitted that as a result of the statutory imperative per section 76A TCA 1997, the weight to be attributed to the accounting treatment was extremely significant. The Respondent relied upon *inter alia*, the cases of *AB Limited v MacGiolla Riogh 1 ITR 419* and *Threfall v Jones (HM Inspector of Taxes) and Gallagher v Jones (HM Inspector of Taxes) [1994] 66 TC 77* in support of its submission. The Respondent also relied on the Irish Supreme Court case of *Dolan (Inspector of Taxes) v AB Co Ltd. II ITR 515*, and in particular the dicta of Budd J. where he stated; *"In my view, the uncontradicted evidence of what is proper to be done from the point of view of business accountancy is a factor weighing heavily in favour of the Appellants unless and until it is shown that the deductions may fall under some prohibition contained in the income tax code*."

30. The Appellants accepted that the PAYE and VAT sums had been credited to the profit and loss account in accordance with the correct accounting treatment and that the basic rule was that the profits shall be computed in accordance with generally accepted accounting principles and practice as per section 76A(1) TCA 1997. The Respondent submitted that the profit figure should be accepted as the appropriate figure for corporation tax purposes unless the Appellants could assert an exception in their favour to the basic rule. The Respondent submitted that the Appellants would bear the burden of proof in contending for any such exception. The outcome turned on whether the Appellants could bring themselves within the exception contained in section 76A TCA 1997 namely, that the basic rule applied "*subject to any adjustment required or authorised by law in computing such profits or gains for those purposes".*

31. As I have determined above that section 24(6) CAA 1990 is not in conflict with nor does it override the provisions of the Taxes Acts, in particular, section 76A, it follows that section 24(6) CAA 1990 does not comprise an "*adjustment required or authorised by law*" for the purposes of section 76A TCA 1997 and thus the profits for tax purposes fall to be computed in accordance with established accounting principles as per section 76A(1) TCA 1997.

32. The second basis contended for by the Appellants was that the PAYE and VAT sums written down in the examinership and credited to the profit and loss account were capital in nature and thus should not be included in the computation of profits for the purposes of corporation tax. The Respondent agreed that if the sums were capital in nature, it would be incorrect to include them in the computation of profits for corporation tax purposes however the Respondent contended that the sums were not capital in nature.

33. In order to ascertain whether the PAYE and VAT credits are to be included in the profit figure for the purposes of corporation tax, an analysis is required as to whether these sums are capital or revenue in nature and that analysis is set out below.

Capital v Revenue

Examinership and the enduring benefit test

34. The Appellants highlighted the fact that there was no physical receipt and no cash received in respect of the PAYE and VAT written down amounts credited to the profits and loss account. They submitted that the benefit to the company was in the debts written off in the examinership process. The Appellants submitted that the benefit did not form part of the profits of the company but comprised a benefit which allowed the company to trade and to exist and therefore, was of an enduring benefit within the meaning of the legal test set out in of *Atherton (H M Inspector of Taxes) v British Insulated and Helsby Cables Limited, 10 TC 155..*

The Appellant did not assert that a capital asset came into being as a result of the examinership but instead contended that there was a capital advantage in the nature of an enduring benefit to the businesses of the Appellants.

35. The Respondent agreed that the objective of examinership is to assist an ailing company during a period of financial instability and to return it to a viable financial position. The Respondent's view was that the emphasis in examinership was one of working capital and solvency while the Appellants opposing this strenuously, contended that the examinership was central to the underlying structure of the company as without it, the company would not have survived. The Respondent accepted that continuation as a going concern as a result of the examinership provided a benefit to the company but contended that the benefit obtained on foot of the examinership was not sufficiently enduring to satisfy the *Atherton* test.

Applicable legal test

36. The Appellants submitted that the correct legal test was the *enduring benefit* test set out in the case of *Atherton (H M Inspector of Taxes) v British Insulated and Helsby Cables Limited, 10 TC 155* and relied on the dicta of Viscount Cave where he stated:

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

37. The Appellants submitted that the test was not altered by cases which followed.

38. The Respondent relied on the later cases of *Anglo-Persion* and *Dolan* as having clarified the scope of the Atherton *enduring benefit* test and submitted that the Appellants could not rely on the *Atherton* test to the exclusion of these later authorities.

39. In the subsequent case of *Anglo-Persian Oil Company Limited v Dale (H M Inspector of Taxes) 16 TC 253*, the taxpayer company made substantial commission payments to a firm appointed to manage their business interests in Persia. On termination of the agency agreement the sum of £300,000 was paid to the agents and the question which arose was whether this sum was a deductible revenue expense in the hands of the paying company, the taxpayer.

40. The Special Commissioners had concluded that the payment was capital in nature on the basis that it secured an enduring benefit to the Company's trade by freeing the company from an onerous contract. This finding was overturned in the Court of Appeal and the Court addressed the *Atherton* case and the meaning of the enduring benefit test. Rowlatt J. stated as follows;

'But to say that it is a capital expenditure because it secured an enduring benefit by getting rid of an onerous contract is not to state the material thing, and it is completely inconclusive.

I think I know where that phrase comes from, and that is from the speech of Lord Cave in the case of Atherton v British Insulated Helsby Cables, Ltd., which is reported in 10 TC on page 192, where he said this: "when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade", then it is capital. But the fallacy is in the use of the word "enduring". What Lord Cave is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures; not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment. It means a thing which endures in the way that fixed capital endures. It is not always an actual asset, but it endures in the way that getting rid of a lease or getting rid of onerous capital assets or something of that sort as we have had in the cases, endures. I think that the Commissioners, with great respect, have been misled by the way in which they have taken "enduring" to mean merely something that extends over a number of years.'

41. The Respondent also relied on the Irish Supreme Court authority of *Dolan (Inspector of Taxes) v AB Co. Ltd. II ITR 515* which involved the issue of whether lump sum payments made by wholesalers of petrol and oil regarding the sale of petrol, were capital or revenue in nature.

42. In Dolan, Budd J. addressed the *Atherton* test and stated as follows;

"Lord Cave's words have, however, been considered and analysed in Anglo Persion Oil Co Ltd v Dale [1931] 16 TC 253. *Rowlatt J pointed out that there was a fallacy in the way it was sought to use the word "enduring" in that case. He says (page 262):*

> *What Lord Cave is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures, not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment.*

… The end of that sentence has a relevance in the present case. It can forcibly be said that a payment made in respect of several years under an exclusivity agreement relieves the appellant company of a revenue payment for several years, in that otherwise, in the appellant's business, expenditure would have to be made either annually by way of rebate or payment akin to rebate, or by paying travellers monthly or yearly salaries to secure business. Rowlatt J continues:

It means a thing that endures in the way that fixed capital endures. It is not always an actual asset, but it endures in the way that getting rid of a lease or getting rid of onerous capital assets or something of that sort as we have had in the cases, endures.

He goes on to say that he thinks that the Commissioners had been misled by the way in which they had taken "enduring" to mean merely something that extends over a number of years. Romer LJ agreed with Mr Justice Rowlatt that by "enduring" is meant "enduring in the way that fixed capital endures". He adds at page 274:

> *An expenditure in acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date.*

Payments made in respect of exclusivity agreements are made with a view to acquiring a market, the returns from which may be turned over in the course of trade and the process commences almost immediately.

The observations made in the Anglo Persian Oil Co Ltd v Dale [1931] 16 TC 253 *which I have cited above on the meaning of the word "enduring" seem to me to be well founded."*

43. In *Dolan*, Budd J. drew a distinction between the profit earning structure of the company and the outlay i.e. the costs of the company's profit earning activities. The Respondent relied on this distinction and submitted that in this case, the PAYE and VAT credits to the P&L simply relieved a revenue payment in the future but did not comprise part of the profit earning structure of the business. The Respondent submitted that there was no change to the profit earning structure of the company and that there was no enduring benefit. The Respondent submitted that the credits were thus revenue in nature.

44. In conclusion on this point, as regards the correct legal test to be applied I am bound by the Irish Supreme Court authority of *Dolan* and in particular the dicta of Budd J. affirming the dicta of Rowlatt J. in *Anglo-Persian* and I thus agree with the submission of the Respondent that the cases of *Anglo-Persian* and in particular, *Dolan*, clarified the scope Atherton *enduring benefit* test.

No single applicable test

45. Both the Appellants and the Respondent accepted that there are many indicia to assist a legal analysis which seeks to ascertain whether a receipt or an item of expenditure is capital or

revenue in nature and the following authorities *inter alia* were opened in support of that proposition;

46. In *Strick (H M Inspector of Taxes) v Regent Oil Co. Ltd Ltd [1966] AC 295 at 313, 43 TC 1 at 29,30,* Lord Reid stated;

> "*….. no one test or principle or rule of thumb is paramount. The question is ultimately a question of law for the court, but it is a question which must be answered in light of all of the circumstances which it is reasonable to take into account, and the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on strict application of any single legal principle*."

47. In *Tucker v Granada Motorway Services Limited 53 TC 92,* Lord Wilberforce stated:

> '*In the end the Courts can do little better than form an opinion which way the balance lies. There are a number of tests which have been stated in reported cases which it is useful to apply, but we have been warned more than once not to seek automatically to apply to one case words or formulae which have been found useful in another ….Nevertheless reported cases are the best tools, but sometimes they are blunt instruments. …'*

48. In the Supreme Court authority of *Dolan,* the following passage of Lord Pearce in *BP Australia v Commissioner of Taxation [1966] AC 224 at 264* of was cited and approved, namely;

> *"The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a commonsense appreciation of all the guiding features which must provide the ultimate answer. Although the categories of capital and income expenditure are distinct and easily ascertainable in obvious cases that lie far from the boundary, the line of distinction is often hard to draw in border line cases; and conflicting considerations may produce a situation where the answer turns on questions of emphasis and degree. The answer depends on what the expenditure is calculated to effect from a practical point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process (per Dixon J. in Hallstrom's case). …As each new case comes to be argued felicitous phrases from earlier judgments are used in argument by one side and the other. But those phrases are not the deciding factor, nor are they of unlimited application. They merely crystallise particular factors which may incline the scale in a particular case after a balance of all the considerations has been taken."*

49. I accept the position put by the parties that there are many indicia which fall to be considered as part of an analysis regarding whether a receipt or an item of expenditure is capital or revenue in nature and thus I include for consideration herein the following;

(1) The nature of the PAYE and VAT amounts pre examinership

(2) The extent to which the PAYE and VAT credits fall to be characterised by the examinership process

The nature of the PAYE and VAT amounts pre examinership

50. The Respondent submitted that the PAYE and VAT amounts (later written down during the examinership process) were revenue in nature in that they constituted a recurrent item of expenditure, payable to the Respondent as creditor pursuant to the provisions of the Taxes Acts and generated on foot of trades carried out by the Appellant companies.

51. The Appellants contended that the VAT and PAYE amounts were fiduciary taxes which were not revenue in nature. In relation to the PAYE, the Appellants submitted that while the PAYE arose in relation to wages (itself a revenue item of expenditure) the tax was unlikely to be revenue in nature. The Appellants submitted that while the expense of wages is deductible, there is no deduction for PAYE as an employer deducts PAYE and returns it separately to the Revenue Commissioners. The Appellants stated that even if the wages weren't paid to an employee, the fiduciary tax of PAYE would still have to be paid by the company under 996 TCA 1997.

52. It is uncontroverted that in the accounts, turnover always excludes VAT and both parties accepted that the VAT would not have been included in the profit and loss account.

53. Both parties accepted that the accounting treatment, while a relevant consideration, does not determine whether a receipt is capital or revenue in nature.

54. While the PAYE and VAT amounts did not feature in the profit and loss account prior to the write down in examinership, they comprise expenditure of a recurrent nature which arises in the Appellant companies by virtue of trade carried on, in particular, sales generated and wages incurred and thus I determine they are revenue in nature.

The extent to which the PAYE and VAT credits fall to be characterised by the examinership process

55. The Appellants submitted that cases are ultimately decided on their own particular facts and circumstances and they placed significant emphasis on the factual context in this case namely, that the write down arose pursuant to a scheme of arrangement in examinership. The Appellants contended that this factual context was distinct, that it was to be afforded

significance in the legal analysis and that it characterised the nature of the PAYE and VAT credits in issue in this case.

56. I agree with the position put to me by the Appellants namely, that a successful examinership provides a benefit to an ailing company. The Respondent agreed that a benefit was obtained, though did not accept it was a benefit in the *Atherton* sense. The Respondent opened the cases of *Lincolnshire Sugar Company v Smart [1937] AC 697* and *Lawson (Inspector of Taxes) v Johnson Matthey plc, [1992] 2 All ER* in support of a submission that that a trading receipt is a broad concept and can include payments made to supplement trading income and to secure a trading stability.

57. In this case the examinership was successful and thus a benefit was obtained. That will not be the case in every situation however. Some companies will go into liquidation during the examinership process, others will exit the process in good financial health and others will experience financial difficulties notwithstanding. The Appellants contended that in this case (involving a successful examinership) the benefit to the companies (of continuation as a going concern) was an enduring benefit per the *Atherton* test, giving rise to a capital advantage. Assuming this is so, the question which arises for consideration is how then would the same PAYE and VAT credits fall to be characterised if the examinership had become a liquidation or if the company had experienced financial difficulty or losses after exiting the process? It seems to me that in such a situation the PAYE and VAT credits would be determined by their original and inherent characteristics which, I have determined is revenue in nature. If the character of such credits for tax purposes turned on the outcome or proximate aftermath of an examinership, a significant degree of inconsistency could arise in the legal analysis seeking to clarify the nature of such credits.

58. The benefit of examinership is one focused on solvency with the objective that trade will continue. I determine as a matter of law that the benefit obtained by the Appellants from the process of examinership is not sufficiently enduring to satisfy the *Atherton* test. The Irish Supreme Court authority of Dolan, which affirms the dicta of Rowlatt J. in *Anglo Persian*, is authority for the proposition *inter alia* that a benefit which relieves a taxpayer of a revenue payment for a good number of years, is not a benefit which endures in the way that fixed capital endures and thus, is not capital in nature. In the present case, the VAT and PAYE written down amounts relieved the Appellants of payment of the said amounts over the period of time it would have taken to discharge these sums. Based on the dicta of Budd J. in *Dolan*, I am of the view that these items do not provide a benefit which is sufficiently enduring in nature to be regarded as capital and thus I determine as a matter of law that these sums are revenue in nature, both pre and post the examinership.

Summary

i. I agree with the Respondent that the Respondent's capacity in examinership is that of creditor whereas the Respondent's capacity in assessing taxes pursuant to the Taxes Acts is one imposed by statute and must be carried out in accordance with the provisions of the Taxes Acts. I determine that these are separate and distinct capacities.

ii. The Respondent submits that the Revenue Commissioners cannot be bound in examinership any further than the claims it had against the Appellant companies at the fixed point in time in relation to the pre-petition debts and I accept this submission on behalf of the Respondent.

iii. The stipulation in s.24(6) CAA 1990 that "*the proposals ….shall be binding on all the creditors …. affected by the proposals in respect of any claim or claims against the company*….' is answered by stating that the proposals are binding. The words *"..notwithstanding any other enactment.."* do not present a contrary position as there is no competing enactment in this case which could render the proposals anything other than binding.

iv. I find there is no conflict between section 76A TCA 1997 and section 24(6) CAA 1990 and thus I determine that the raising of corporation tax assessments in is not precluded by s.24(6) CAA 1990.

v. The Appellants' treatment of the management expenses written down presents credible opposition to the submission that section 24(6) overrides the TCA 1997 as a result of the inclusion of the words "*notwithstanding any other enactment*" because in adding back the management expenses per s.87 the Appellants appear to accept that section 24(6) CAA 1990 does not override section 87 TCA 1997.

vi. As I have determined above that section 24(6) CAA 1990 is not in conflict with nor does it override the provisions of the Taxes Acts, in particular, section 76A, it follows that section 24(6) CAA 1990 does not comprise an "*adjustment required or authorised by law*" for the purposes of section 76A TCA 1997 and thus the profits for tax purposes fall to be computed in accordance with established accounting principles as per section 76A(1) TCA 1997.

vii. In relation to the analysis on the subject of whether the credits were capital or revenue in nature and, as regards the issue of the correct legal test to be applied I am bound by the Irish Supreme Court authority of *Dolan* and in particular the judgment of Budd J. affirming the dicta of Rowlatt J. in *Anglo-Persian* which clarifies the scope the *Atherton* enduring benefit test.

viii. I accept the position put by the parties that there are many indicia which fall to be considered as part of an analysis regarding whether a receipt or an item of expenditure is capital or revenue in nature.

ix. While the PAYE and VAT amounts did not feature in the profit and loss account prior to being written off, they comprise expenditure of a recurrent nature which arises in the Appellant companies by virtue of trade carried on, in particular, sales generated and wages incurred. Thus I determine they are revenue in nature.

x. In the present case, the VAT and PAYE written down amounts relieved the Appellants of payment of the said amounts over the period of time it would have taken to discharge these sums. Based on the dicta of Budd J. in *Dolan*, I am of the view that these items do not provide a benefit which is sufficiently enduring to be regarded as capital and thus I determine as a matter of law that these sums are revenue in nature, both pre and post the examinership.

Conclusion

I determine that the corporation tax assessments shall stand and thus the appeal is determined in accordance with section 933(5) TCA 1997.

APPEAL COMMISSIONER

October 2016