Appellant Name Redacted

134TACD2020

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This matter relates to an appeal pursuant to Taxes Consolidation Act 1997 (TCA), section 811(7) against a Notice of Opinion (Notice) dated 23rd December 2009 issued by Name Redacted, the Nominated Officer of the Respondent in accordance with TCA section 811(6).

2. The Notice stated that the Nominated Officer formed the opinion that the transaction detailed therein (the Transaction) carried out by the Appellant was "*a tax avoidance transaction within the meaning of TCA, section 811 Taxes Consolidation Act 1997*". It specified that the tax advantages arising from the Transaction had been calculated cumulatively at €531,471 for the periods 2004 and 2005. The Notice also specified that the tax consequences of the opinion on becoming final and conclusive would be the disallowance of capital gains tax losses claimed in the sums of €1,408,469 and €1,248,889 for the years 2004 and 2005 respectively.

3. By letter dated 21 January 2010, the Appellant's agent lodged an appeal under TCA, section 811(7) against the Notice on the grounds, *inter alia*, that:

    (a) The Transaction was not a tax avoidance transaction.

    (b) The amount of the tax advantage calculated by the Respondent was incorrect.

(c) The actions proposed by the Respondent would not be just and reasonable for the purposes of withdrawing or denying any alleged tax advantage.

(d) The Respondent failed to calculate the amount of relief from double taxation which they propose to give.

(e) There were factual errors in the description of the Transaction contained in the Notice which suggested that the Notice was not validly formed.

Material Findings of Fact

4. My material findings of fact are as follows:

(a) The beneficial interests in the issued share capital in Name Redacted (CPS) were held by Name Redacted (Tax Advisors) and Name Redacted (Holdings).

(b) The beneficial interest in the issued share capital in Name Redacted (STN) was held by Tax Advisors.

(c) CPS and STN were commonly owned and therefore connected pursuant to TCA, section 10 and section 432.

(d) Name Redacted (NEL) was formed on 2nd June 2004 with CPS holding the single share entitling it to all voting rights. As a consequence, CPSs, STN and NEL were connected pursuant to TCA, section 10 and section 432.

(e) On 25th August 2004, the Appellant acquired 30,000 non-voting non-cumulative preference shares of €1 each in NEL. The Appellant was therefore connected with NEL again pursuant to TCA, section 10 and section 432.

(f) On 7th October 2004, NEL purchased a German Government Bond (Bond) with a nominal value €2,939,466 for €2,977,466 from Davy Stockbrokers.

(g) By **Call Option Agreement** dated 7th October 2004, for a premium of €2,677,000, NEL granted a call option to STN with the entitlement to purchase the Bond having a nominal value of €2,939,466.

(h) By **Bond Purchase Agreement** dated 7th October 2004 between NEL, STN and the Appellant whereby NEL undertook to sell the Bond having a nominal value of €2,939,466 to the Appellant for €578,529 subject to the **Call Option Agreement** between NEL and STN dated 7th October 2004. At Clause 5 of that agreement, STN

granted a put option to the Appellant to sell the Bond to STN on the same terms as set out in the **Call Option Agreement** between NEL and STN dated 7th October 2004.

(i) On 7th October 2004, the Appellant acquired the Bond with a nominal value €2,939,466 from NEL for €578,529 financed by an interest free loan of €280,000 provided by NEL and €298,529 from his own resources.

(j) Pursuant to clause 5 of the **Bond Purchase Agreement**, the Appellant, by letter dated 22nd October 2004, notified the directors of STN of his intention to exercise his put option requiring STN to acquire the Bond from him.

(k) On 22nd October 2004, STN issued a Confirmation Note confirming the purchase of the Bond with a nominal value of €2,939,466 from the Appellant for €319,938.

Tax Consequence of the Transaction

5. The following comprises the tax consequences of the aggregate arrangements:

(a) The sale of the Bond by NEL to the Appellant was a transaction between connected persons otherwise than by means of a bargain made at arm's length.

(b) The acquisition of the Bond by the Appellant was deemed to be for a consideration equal to €2,977,446, as NEL and STN were connected persons. As a consequence, the market value of the Bond was calculated as if the option did not exist notwithstanding that the Appellant only paid €578,529 to NEL for the Bond.

(c) Having acquired the Bond from NEL for €578,529 which he sold to STN for €319,938, the Appellant made an actual loss of €258,591. However, the Appellant asserted that in accordance with the combined effect of TCA, sections 31, 547 and 549, the disposal of the Bond gave rise to a capital gains tax loss calculated as follows:

Market Value of Bond on date of Disposal	€2,977,446
Consideration Received by the Appellant	€ 319,938
Capital Loss Claimed	€2,657,508

6. The calculation of the capital loss of €2,657,508 is €150 higher than that calculated in the Notice issued by the Nominated Officer which recorded the loss as €2,657,358. Therefore, for the purposes of this determination, reference is hereafter made to the higher loss of €2,657,508.

Full and True Return

7. The Appellant's tax returns for the years 2004 and 2005 failed to record that part of the arrangements associated with the Transaction were between "*connected parties*" and therefore the Respondent had no means of appreciating the particular significance of the Transaction specifically in light of the Appellant's reliance on market value rules between connected parties to generate the capital loss claimed.

Notice of Opinion

8. The Notice issued by the Nominated Officer dated 23rd December 2009 pursuant to TCA, section 811(6) was as follows:

> *"Dear* Name Redacted (Appellant)*,*
>
> *I,* Name Redacted*, have formed the opinion that the following transaction, that is to say your investment of €30,000 on 25th August by way of purchase of 30,000 non cumulative non voting preference shares of €1 each in NEL, the purchase by NEL on 7th October of a Germany Federal Republic 3.5% bond, 09 October 2009 bond with a nominal value of €2,939,466 for €2,977,446.27, the grant of options on 7th October by NEL and STN, a connected company under the following terms in consideration of STN paying an option premium of €2,677,000,*
>
> - *STN was granted the call option to purchase the bond from NEL at an option price in consideration of the grant by NEL to STN of the call option*
> - *STN granted to NEL a put option to sell the bond at the option price,*
> - *your agreement on 7th October to purchase for a consideration of €578,529 from NEL the Germany Federal Republic 3.5% bond with a nominal value of €2,939,466 subject to the options outlined above,*
> - *the arrangement whereby this purchase was partly funded by a loan of 280,000 from NEL, the disposal by you on 22nd October of the bond to STN for €319,938 (the option price) is a tax avoidance transaction within the meaning of Section 811 Taxes Consolidation Act 1997, transactions to avoid liability to tax.*
>
> *The tax advantage that I consider you have obtained arising from the transaction entered into in 2004 has been calculated as follows:*
>
> *Capital Gains Tax loss on the above transaction claimed against your capital gains in 2004: €1,408,469;*

Capital Gains Tax loss on the above transaction claimed against your capital gains in 2005, €1,248,889;

Total loss claimed, €2,657,358.

Tax advantage is the reduction in your Capital Gains Tax liability in 2004 and 2005, €2,657,358 at 20%, €531,471."

The tax consequence that would arise in respect of the transaction should this opinion become final and conclusive shall be that the Revenue Commissioners will (a) make an assessment to Capital Gains Tax for 2004 to withdraw the capital loss relief claimed by you in the sum of €1,408,469 and (b) amend the 2005 Capital Gains Tax assessment to withdraw the capital loss relief claimed by you in the sum of €1,248,889.

The opinion may be appealed in writing within 30 days from the above date as provided for by Section 811(7) Taxes Consolidation Act 1997."

Legislation

9. On hearing of an appeal against a notice of opinion in accordance with TCA, section 811(9)(a):

"the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under this section, and-

(i) in relation to an appeal made on the grounds referred to in subsection (7)(a), the Appeal Commissioners shall determine the appeal, in so far as it is made on those grounds, by ordering, if they or a majority of them-

(I) *consider that the transaction specified or described in the notice of opinion or any part of that transaction is a tax avoidance transaction, that the opinion or the opinion in so far as it relates to that part is to stand,*

(II) *consider that, subject to such amendment or addition thereto as the Appeal Commissioners or the majority of them deem necessary and as they shall specify or describe, the transaction, or any part of it, specified or described in the notice of opinion, is a tax avoidance transaction, that the transaction or that part of it be so amended or added to and that, subject to the amendment or addition, the opinion or the opinion in so far as it relates to that part is to stand, or*

(III) *do not so consider as referred to in clause (I) or (II), that the opinion is void,*

(ii) in relation to an appeal made on the grounds referred to in subsection (7)(b), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the tax advantage or the part of the tax advantage specified or described in the notice of opinion be increased or reduced by such amount as they shall direct or that it shall stand,

(iii) in relation to an appeal made on the grounds referred to in subsection (7)(c), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the tax consequences specified or described in the notice of opinion shall be altered or added to in such manner as they shall direct or that they shall stand, or

(iv) in relation to an appeal made on the grounds referred to in subsection (7)(d), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the relief from double taxation specified or

described in the notice of opinion shall be increased or reduced by such amount as they shall direct or that it shall stand."

10. TCA, section 811(1) contains the following relevant definitions:

""tax advantage" means –

(i) reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or
(ii) a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person, including any potential or prospective amount so refundable or payable,

arising out of or by reason of a transaction, including a transaction where another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction;"

….

"transaction means"

(i) any transaction, action, course of action, course of conduct, scheme, plan or proposal,

(ii) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and

(iii) any series of or combination of the circumstances referred to in paragraphs (i) and (ii),

whether entered into or arranged by one person or by 2 or more persons-

(I) *whether acting in concert or not,*

(II) *whether or not entered into or arranged wholly or partly outside the State, or*

(III) *whether or not entered into or arranged as part of a larger transaction or in conjunction with any other transaction or transactions."*

11. In considering corporate transactions involving connected parties, recourse must be made to the following provisions:

TCA, section 10(7):

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

TCA, section 432(2)

"For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire –

(a) the greater part of the share capital or issued share capital of the company or of the voting power in the company,

(b) such part of the issued share capital of the company as would, if the whole of the income of the company were distributed among the participators (without regard to any rights which such person or any other person has as a loan creditor), entitle such person to receive the greater part of the amount so distributed, or

(c) such rights as would, in the event of the winding up of the company or in any other circumstances, entitle such person to receive the greater part of the assets of the company which would then be available for distribution among the participators."

12. TCA, section 31 is entitled 'Amount chargeable' and provides:

"*Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting –*

(a) any allowable losses accruing to that person in that year of assessment, and

(b) in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75)."

13. The broad basis upon which a chargeable gain is to be calculated is contained in TCA, 545 as follows:

    (1) *Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no chargeable gain shall accrue on its disposal.*

    (2) *The amount of the gain accruing on the disposal of an asset shall be computed in accordance with this Chapter, and subject to the other provisions of the Capital Gains Tax Acts.*

    (3) *Except where otherwise expressly provided by the Capital Gains Tax Acts, every gain shall be a chargeable gain*

14. The principles by which losses are determined are governed by TCA, section 546 and provide:

    (1) *"Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.*

    (2) *Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.*

    (3) *Except where otherwise expressly provided, the provisions of the Capital Gains Tax Acts which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss and part not, and references in the Capital Gains Tax Acts to an allowable loss shall be construed accordingly."*

15. Transactions between connected persons are set out in TCA, section 549 and imposes market value rules on disposals between such persons in accordance with the following provisions:

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

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

(3) *Where on the disposal a loss accrues to the person making the disposal, the loss shall not be deductible except from a chargeable gain accruing to that person on some other disposal of an asset to the person acquiring the asset mentioned in subsection (1), being a disposal made at a time when they are connected persons.*

(4) *Subsection (3) shall not apply to a disposal by means of a gift in settlement if the gift and the income from it are wholly or primarily applicable for educational, cultural or recreational purposes, and the persons benefiting from the application for those purposes are confined to members of an association of persons for whose benefit the gift was made, not being persons all or most of whom are connected persons.*

(5) *Where the asset mentioned in subsection (1) is an option to enter into a sale or other transaction given by the person making the disposal, a loss accruing to a person acquiring the asset shall not be an allowable loss unless it accrues on a disposal of the option at arm's length to a person not connected with the person acquiring the asset.*

(6) *Where the asset mentioned in subsection (1) is subject to any right or restriction enforceable by the person making the disposal or by a person connected with that person, then that market value shall, where the amount of the consideration for the acquisition is in accordance with subsection (2) deemed to be equal to the market value of the asset, be what its market value would be if not subject to the right or restriction, reduced—*

(a) *by the lesser of—*

(i) *the market value of the right or restriction, and*
(ii) *the amount by which its extinction would enhance the value of the asset to its owner, or*

(b) *by the market value of the right or restriction, where the market value referred to in paragraph (a)(i) and the amount referred to in paragraph (a)(ii) are equal.*

(7) *Where the right or restriction referred to in subsection (6), –*

(a) *is of such a nature that its enforcement would or might effectively destroy or substantially impair the value of the asset without bringing any countervailing advantage either to the person making the disposal or a person connected with that person,*

(b) *is an option or other right to acquire the asset, or*

(c) in the case of incorporeal property, is a right to extinguish the asset in the hands of the person giving the consideration by forfeiture or merger or otherwise,

then, the market value of the asset shall be determined, and the amount of the gain accruing on the disposal shall be computed, as if the right or restriction did not exist.

(7A) (a) This subsection applies where the asset mentioned in subsection (1) is subject to any right or restriction enforceable by the person making the disposal or by the person connected with that person, and the market value of the asset at the date of its acquisition (without reference to any right or restriction) is greater than the consideration, in money or money's worth, given in payment for that asset.

(b) Where, on a subsequent disposal of an asset to which paragraph (a) applies by the person who acquired that asset, subsection (7) has the effect (without taking account of this subsection) of—

(i) increasing a loss, or

(ii) substituting a loss for a gain,

then that subsection shall not apply.

(8) (a) Where a person disposes of an asset to another person in such circumstances that –

(i) subsection (7) would but for this subsection apply in determining the market value of the asset, and

(ii) the person is not chargeable to capital gains tax under section 29 or 30 in respect of any gain accruing on the person's disposal of the asset,

then, as respects any subsequent disposal of the asset by the other person, that other person's acquisition of the asset shall for the purposes of the Capital Gains Tax Acts be deemed to be for an amount equal to the market value of the asset determined as if subsection (7) had not been enacted.

(b) This subsection shall apply –

(i) to disposals made on or after the 25th day of January, 1989, and

(ii) for the purposes of the determination of any deduction to be made from a chargeable gain accruing on or after the 25th day of January, 1989, in respect of an allowable loss, notwithstanding that the loss accrued or but for this section would have accrued on a disposal made before that day.

(9) Subsections (6) and (7) shall not apply to a right of forfeiture or other right exercisable on breach of a covenant contained in a lease of land or other property, or to any right or restriction under a mortgage or other charge.

16. Therefore, while TCA, section 549 deals with transactions between connected persons in determining the value of transactions between such persons it is necessary to consider the market value rules contained at TCA, section 547:

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

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

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

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

(i) for a consideration that cannot be valued,
(ii) in connection with the person's own or another person's loss of office or employment or diminution of emoluments, or
(iii) otherwise in consideration for or in recognition of the person's or another person's services or past services in any office or employment or of any other service rendered or to be rendered by the person or another person.

(2) .....
(3) ....

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

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

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

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

Preliminary Issues

Burden of Proof

17. The Appellant submitted that in an appeal against a Notice of Opinion, the burden of proving the "*Transaction*", the results and consequences flowing therefrom, falls on the Respondent and has been the universally accepted procedure since the enactment of Finance Act 1989, section 86. In *Revenue Commissioners -v- O'Flynn Construction Company Limited and Others* [2011] IESC 47, McKechnie J. espoused the following clarification of the law relating to the burden of proof in TCA, section 811 type appeals at paragraph 147:

> *"In my view, the situation arising under s86 is at least to a certain but definite extent, different from the situation where an appeal against an assessment is raised. In the first instance the avoidance provision can only be activated by the Revenue Commissioners, who, for the provision to have effect, must arrive at a view that the scheme or arrangement is captured by it. They must assess a violation and do so by issuing a Notice of Opinion to that effect. Such a notice can only issue if by reference to certain specified matters, they have reached a definite conclusion. This exercise is conducted by way of objective assessment. In addition, they assert, not simply a breach of the section, but also what, in their opinion and judgment, are the tax consequences which arise if such an arrangement had not taken place. All of these steps involve positive assertions on the part of the Revenue. In such circumstances, noting the wording and structure of the section, and in the absence of any provision to the contrary, it seems to me that if the notice is challenged the normal evidence rule* of "he who asserts must prove.""

18. In *McNamee* [2016] IESC 33, Charleton J. further confirmed at paragraph 14:

> *"As to the burden of proof on the hearing before the Appeal Commissioners, the Revenue Commissioners have conceded that, at such a hearing, they bear the burden of demonstrating that the use by the taxpayer of the system of allowances or exemptions in question amounted to avoidance. This concession may be helpful. It is to be noted that, in his judgment in the O'Flynn Construction case, McKechnie J at para. 147, dissenting as to the result, commented expressly on that issue:"*

19. In light of the above, the Respondent *"conceded"* that the burden of proving that the Transaction was a tax avoidance transaction rested with the Respondent.

Validity of the Notice of Opinion

20. The Appellant asserted that a component part of the overall transaction was misdescribed in the Notice by the Nominated Officer to the extent that it erroneously ascribed the granting of a put option on NEL by STN whereas the put option was conferred directly by STN on the Appellant under the terms of the Bond Purchase Agreement and therefore the Notice was void.

21. Therefore, in challenging the validity of the Notice, the Appellant made the following submissions:

(a) The "*Transaction*" generated the "*Tax Consequences*" for the purposes of TCA, section 811. If the alleged events which in aggregate constitute the "*Transaction*" never occurred, then the Notice was fatally flawed and of no effect. Indisputably, an event that did not exist cannot have a consequence. Therefore, as confirmed in *O'Flynn Construction,* the Notice of Opinion "*can only issue if by reference to certain specified events*"

(b) There can only be one composite "Transaction", comprising of a number of events. A "*Transaction*" is defined in TCA, section 811(1) as including a *"series*" of actions or agreements. These *"actions*" and "*agreements*" must have a reality and cannot exist in the realm of pure fiction. An "*agreement*" that never existed cannot validly form part of a series of events that comprise a "*Transaction*".

(c) A "*Tax Avoidance Transaction*" is defined in TCA, section 811(2) in terms of the "*results*" of the "*Transaction*". It is the "*Transaction*" as formulated in the Notice that must give rise to the results, and nothing else. It is not permissible to go outside the defined "*Transaction*" and import other results. Further, each component in the series of the defined "*Transaction"* must play a part in the creation of the "*results*" for a "*Tax Avoidance Transaction*" to exist.

(d) TCA, Section 811(1) defines a "*Tax Advantage*" broadly as a reduction of tax "*arising out or by reason of a transaction.*" Thus, it is the defined "*Transaction*" that must create a tax reduction. A "*tax reduction*" requires some arithmetical calculation, normally the difference between tax calculated absent TCA, section 811, and the tax recalculated after some recharacterization of events under TCA, section 811. That recalculation must be based on reality. A non-existent event cannot have an actual arithmetical effect.

(e) Much of the foregoing is captured in a single paragraph from the High Court's judgment in *McNamee v The Revenue Commissioners,* [2012] IEHC 500, when McGovern J. said at paragraph 22:

> "*A report sent to a Nominated Officer sets out the facts of the case, the tax implications and includes expert opinion, if appropriate, together with details of the work undertaken in the investigation. Once the Nominated Officer receives a complete report, together with supporting documentation, he is obliged, in forming an opinion pursuant to s. 811, to consider the transaction in detail, the results of the transaction, its use as means of achieving those results, any other means of achieving those results… "[Emphasis added]*

(f) It is "*the transaction in detail*" that gives rise to the subsequent analysis of its results and the "*tax advantage*". If the formulation of the "*Transaction*" is defective, then no legally valid result or consequence can flow therefrom.

(g) At a more general level, TCA, section 811 confers extraordinary powers on the Respondent. The tax code is recognised as an overly complex code. It is replete with specific provisions, leading to very particular fiscal consequences. TCA, section 811 is then superimposed on this very technical code to negate its otherwise effect. A taxpayer, having filed a complete and correct return in conformity with the technical code, is then exposed to having some aspect of the return "*recharacterised*" under TCA, section 811 to create a tax liability that otherwise would not exist. This extreme sanction brings with it an onus on the Respondent to get the requirements of TCA, section 811 precisely and no slackness is allowed.

(h) Certainty is an essential component of the Notice as confirmed by Mr. Justice Charleton in his decision in *McNamee v The Revenue Commissioners,* [2016] IESC at paragraph 28:

> *"In no sense is it necessary for the Revenue Commissioners to play some kind of 'snakes and ladders' analysis in their opinion and, indeed, in the case of this taxpayer, that was rightly eschewed. Rather, what is not excused by way of an analysis in this most demanding area of tax collection is any unthinking or lazy resort to a general overview: Appropriate consideration of the nature of the transaction is, instead, demanded. This is made clear within the subsection in the requirement that regard be had by the Revenue Commissioners to the "form of that transaction" to the "substance of that transaction" and related transactions, and to the final substance of the outcome."*

(i) Therefore, the failure of the Respondent to fully understand the full extent of the Transaction rendered the Notice invalid.

22. In response, the Respondent made the following submissions:

(a) Having considered the documents furnished by the Appellant, the Respondent notified the Appellant on 8th September 2009 that the transaction may constitute a tax avoidance transaction and provided an opportunity to make a submission as to why the transaction did not constitute a tax avoidance transaction. That letter summarised that the Appellant's investment consisted of an:

> *"investment of €30,000 by way of purchase of non cumulative non voting preference shares of €1 each in NEL, the purchase of the Germany Federal Republic 3.5% BDS bond with a nominal value of €2,939,466 subject to the option granted to STN for an option premium of €2.677 million for a price of €578,529 and the disposal by you of the bond to STN on 29th September 2004 for €319,938, may constitute tax avoidance transactions."*

(b) As such the Appellant could not have held any doubt as to the Respondent's understanding of the transaction. In response and by a letter dated 29th October 2009, the Agent for the Appellant denied having procured a tax advantage. As a consequence, by letter dated 23rd December 2009, the Respondent issued the Notice to the Appellant.

(c) The Notice identified the key and operative features of the transaction, the investment in NEL, the purchase of the impaired bond from NEL as a connected person and the disposal to STN as an unconnected person. It is those three features which resulted in the artificial capital loss that the Appellant sought to claim. Furthermore, in the description of the Transaction, there was no reference to the put option, because it was a minor component of the transaction.

(d) In his dissenting judgment in *O'Flynn Construction*, McKechnie J. made it clear at paragraph 170 that it is the transaction in its entirety that has to be considered, not its component parts.

(e) Furthermore, the Respondent fully complied with its statutory obligation pursuant to TCA, section 811(6)(a) as the Notice specified and described:

(i) the transaction which in the opinion of the Revenue Commissioners is a tax avoidance transaction,

(ii) the tax advantage or part of the tax advantage, calculated by the Revenue Commissioners which would be withdrawn from or denied to the person to whom the notice is given,

(iii) the tax consequences of the transaction determined by the Revenue Commissioners in so far as they would refer to the person, and

(iv) *the amount of any relief from double taxation calculated by the Revenue Commissioners which they would propose to give to the person in accordance with subsection (5)(c).*

(f) Finally, the Appellant's submission was academic as the Appeal Commissioners, pursuant to TCA, section 811(9) must have regard to all matters to which the Revenue Commissioners may or are required to have regard under any of the provisions of TCA, section 811.

Finding

23. In the Notice dated 23rd December 2009, the Nominated Officer, erroneously ascribed the granting of a put option by STN to NEL as opposed to the Appellant. However and contrary to the Appellant's submissions, , I am satisfied that the Nominated Officer understood the essential fundamentals of the Transaction as the Notice correctly identified that the Appellant acquired the Bond from NEL for €578,529 which he subsequently sold to STN for €319,938 pursuant to the exercise of his option in accordance with Clause 5 of the **Bond Purchase Agreement**. Furthermore, in the calculation of the "*tax advantage*", the Nominated Officer understood the connected party transactions and the associated legislation. In this regard, I am satisfied that as the Nominated Officer understood the essential fundamentals of the Transaction, the Notice could not be considered to be void.

24. Furthermore, and as submitted by the Respondent, the Appellant's submission is academic as the Appeal Commissioners, pursuant to TCA, section 811(9)(a) must have regard to all matters to which the Revenue Commissioners may or are required to have regard under the provisions of TCA, section 811.

25. As such, I have found that the Appellant engaged in a complicated series of transactions, as reflected on the Schedule attached at **Appendix 1**, and claimed a loss on the disposal of an asset which had no correlation to the actual monetary loss. The entitlement to the inflated capital gains tax loss of €2,657,508 was fundamentally dependent on an assortment of connected party transactions that imposed market value on acquisitions and disposals concluding with the disposal of the Bond to STN, an "unconnected" party.

26. In this regard, I have reviewed all the necessary documentation and had "*regard to all matters to which the Revenue Commissioners may or are required to have regard under this section"* and for reasons which will become apparent, I have concluded that the Appellant procured a '*tax advantage'*.

Time Limit Issue – Appellant's Submissions

27. The Appellant asserted that as the appellate process is still extant and as a result of the Respondent's failure to issue an amended assessment before 31st December 2010 charging the Appellant to capital gains tax for the year 2005, the process of imposing a tax on the Appellant would be "*legally impermissible".* In support of such an assertion, the Appellant made the following submissions:

    (a) When considering the issue of time limits, the difference between the structure of TCA, section 811 and the remainder of the tax code was the basis for the decision of the Supreme Court in *Revenue Commissioners v Hans Droog* [2016] IESC 55. Furthermore, as observed by McKechnie J. *O'Flynn Construction* at paragraph 147:

        > *"In my view, the situation arising under s86 is at least to a certain but definite extent, different from the situation where an appeal against an assessment is raised."*

    (b) Accordingly, it is important not to conflate time limit issues relating to TCA, section 811 appeals with those relevant to an appeal against an assessment.

    (c) Under the normal tax code, tax is collected through assessments. If there is no assessment, there is no tax in existence. Assessments are raised by the Respondent in accordance with Schedules and Cases, each of which has its own computational provisions. No tax liability arises until an assessment is raised, and no tax can be demanded or collected without an assessment. Once an assessment is raised, the tax comes into existence and is crystallised at that point.

    (d) TCA, sections 955 and 956 concern time limits and provide that no tax can be sought after four years after the return-filing year unless there is negligence or fraud on the taxpayer's part. TCA, section 956 is concerned with enquiries into tax returns, which is normally a precursor to an assessment whereas TCA, section 955 is concerned with assessments and provides that no tax is payable outside the four years.

    (e) *Droog* was concerned with a tension between TCA, Part 41 and section 811. TCA, section 950(2) provides that TCA, Part 41 applies to the Tax Acts unless "*otherwise expressly provided*". On the other hand, TCA, section 811(4) provides that the Revenue may "*at any time*" form an opinion. The question then was, which provision predominated?

    (f) The Appeal Commissioners, High Court and Supreme Court all held for the taxpayer, in that TCA, section 950(2) trumped TCA, section 811(4). The relevant part of the Supreme Court's judgment is contained in the various subparts of paragraph 7 set out below:

"7.4 However, the wording of s.955(2) as it stood in 2007 is clear. Section 955(2)(a)(i) says that no additional tax shall be payable by the chargeable person after the end of the relevant four-year period. That provision is expressed in clear and unambiguous terms. It is in addition to the prohibition on raising further assessments."

7.5 Another suggestion from Revenue drew attention to the fact that the liability to pay any sums which may become due as a result of an initial opinion under section 811 does not crystallise until such time as the appellate process has been completed. It is pointed out, and the courts are painfully aware of the fact, that the taxation appellate process frequently takes a very great deal of time. Indeed, this case itself is by no means a bad example although it is far from the worst case which the courts have encountered. On that basis it is said that it could not have been intended by the Oireachtas that s.955 would apply to a section 811 opinion because there would have been a very great risk that a section 811 opinion (even if speedily given) would not become final and conclusive, thus giving rise to an obligation to make a payment, within the four year period having regard to the appeals which the legislation allows."

7.6 Obviously what s.955 prohibits is an obligation to pay tax arising outside the four year time limit in those cases to which the section applies. The problem stems from a distinction between the way in which the ordinary system works in comparison with the way in which section 811 operates. In ordinary cases the raising of an assessment gives rise to an obligation to pay the tax or additional tax assessed subject only to the fact that, in certain cases, that obligation may be postponed or ultimately removed as a result of the appellate process. Section 811 works differently. No obligation to pay additional tax arises under section 811 unless and until the relevant opinion becomes final and conclusive which point of time can only be reached when any appellate process invoked has been exhausted. There is, thus, a difference between the point in time when tax becomes initially due as a result of the raising of an assessment, on the one hand, or as a result of the forming of a section 811 opinion, on the other. That difference in time could, of course, have a significant effect if s.955 operates to preclude the charging of extra tax in certain cases under section 811 outside the four year period because the charging of the tax under section 811 does not occur until after the appellate process has been exhausted."

7.7 The practical consequences are, indeed, as counsel for Revenue suggested. There may very well be a problem. But it does not seem to me that that problem can legitimately lead to construing the legislation in a way which its

wording does not allow. If the proper construction of the Taxes Acts leads to section 811 being governed by the time limits in Part 41 then the answer to that problem would have been to make an express provision in section 811 which stopped time running, for the purposes of s.955, as soon as notice of the relevant opinion was given. Such a regime could not be criticised in any way as being unfair for the taxpayer would know that his or her affairs for the relevant tax year were under challenge, notwithstanding a fully compliant return, within the four-year period. It seems to me to follow that the fact that there might be practical difficulties, which could have been capable of another solution, could not alter the proper construction of the legislation if it is not possible to say that section 811 (4) expressly disapplies the time limit contained in Part 41."

(g) There are structural differences between an assessment and the TCA section 811 Notice and the exhaustion of the appellate system has nothing to do with the date the Notice issued. Coming from two entirely different directions, the Supreme Court both in *O'Flynn Construction* (burden of proof) and *Droog* (section 811) held that TCA, section 811 operates differently to the ordinary tax appeal system.

(h) The Court rejected the Revenue's contention that the appellate system would routinely take longer than 4 years, and therefore tax would not routinely be payable within that time as a matter of practical administration. The effect of the Supreme Court's judgment is absolute, the time limit runs from the filing of the return, irrespective of whether or not the TCA, section 811 opinion was issued within or outside the 4-year time limit.

(i) The Court acknowledged the problem its decision holds for the Respondent in the operation of TCA, section 811. In effect the clock for the 4-year time limit continues to run until the appellate system is exhausted which was a major problem for the Respondent considering that virtually no appeals are finished within that timeframe. But, as the Court held, that is irrelevant to the proper interpretation, and result, of TCA, section 955.

(j) In *Droog*, the Supreme Court was not concerned with whether or not the TCA, section 811 opinion was formed within the 4-year timeframe from the filing of the tax return. Rather the Court held that the operative date in all circumstances is the date the appellate system is exhausted. If that time is four years after the 31st December in the year the relevant tax return was filed, the opinion is out of date. In arriving at that decision, the Court drew the crucial distinction between the way the assessment system and the TCA, section 811 procedures work. If the Court was concerned only with an opinion that was formed after the 4 years time frame, then there would be no need to consider, or even refer to, the appellate system.

(k) The Respondent's submission is clearly tainted by reasoning derived from the tax assessment system. But this appeal is not an appeal against an assessment. With the assessment system, the date of the assessment is critically important. An assessment will be in time if raised within the 4-year interval. But, as the Supreme Court held, the TCA, section 811 system operates differently. This difference has not been addressed at all by the Respondent in its submissions. With an assessment the 4-year clock runs forward from the filing of the tax return. With a TCA, section 811 opinion the time limit is calculated backwards from the date of exhaustion of the appellate process.

(l) Described directionally, for TCA, section 955(2)(a)(i) purposes, the 4-year time limit:

- With an assessment, time is calculated in the year the tax return is filed,
- With a section 811 opinion, time runs when the appellate system is complete, and
- The time difference between the two calculations can be, and usually is, several years.

(m) The High Court and Supreme Court decisions in *Droog* were the first time the Courts were asked to opine on the meaning of the time limits in Part 41 TCA. These judgments were handed down subsequent to the date of the issuing of the Notice and the filing of this appeal. Arguably, the judgements extended the protection afforded to taxpayers further than what had been previously thought to be the case. This certainly was so in the case of the Supreme Court's judgment in relation to TCA, section 955. The Appellant could not be expected to anticipate the *Droog* Supreme Court outcome in filing his appeal in January 2010 as the Supreme Court judgment in *Droog* was not delivered until over 6 years later.

(n) The determination of the Supreme Court in *Droog* at paragraph 9.1 was:

> *"the commencement of that process by the raising of the opinion in question can have no lawful objective. It must, therefore, itself be regarded as being legally impermissible."*

(o) The Respondent therefore is requesting the Commission to turn a blind eye to a "*legally impermissible*" action by the Respondent in issuing the TCA, section 811 opinion, and in addition that it would be "*just and reasonable*" for the Commission to do so.

(p) Apart altogether from *Droog*, it is submitted that the formation of the TCA, section 811 opinion was invalid due to TCA, section 955. The rationale of the Supreme Court's decision in *Droog* was that the 4-year time limit in Part 41 was the interval

between the filing of the relevant tax return and the time the opinion became final and conclusive to the extent that the span could not exceed 4 years. The Court held that one looks backwards from the conclusion of the TCA, section 811 appellate processes in applying the 4-year test. However, viewed from the standpoint of directly applying TCA, section 955(2)(a)(ii), and looking forwards from the filing of the return, the Opinion was out of date when formed.

(q) The Notice of opinion dated 23 December 2010 and applies to the fiscal year 2004. TCA, section 811(6)(a) mandates that the Revenue Commissioners "*immediately*" issue the Notice on the formation of the opinion. The time limit for appealing the Notice was 30 days. The appeal was filed on 21 January 2010.

(r) TCA, section 955(2)(a)(i) provides that:

> "*No additional tax shall be payable by the chargeable person after the end of that period of 4 years.*"

(s) The 4 years ended on 31 December 2009. As at 23 December 2009 there was no tax payable by 31 December 2009, because the time for appealing the Notice did not expire until 22 January 2010 (at least).

(t) Alternatively, if the question were asked on the 23 December 2009 "is tax payable on foot of this notice by 31 December 2009?", the answer categorically is "no". The Respondent could not initiate any tax collection procedure until, at the earliest, 23 January 2010, a date that fell outside the 4-year statutory limit that expired on 31 December 2009. Independently therefore of the Supreme Court judgment in *Droog*, it was submitted that the section 811 opinion was time barred, and accordingly void, at time of issue.

(u) An amendment was introduced by Finance 2012, section 140 subsection 5A into TCA, section 811 which provided that where an opinion under TCA, section 811 becomes final and conclusive, any time limit in Part 41 or 41A or any other provision of the Acts is not to apply on the making of an assessment on or after 28 February 2012. TCA, section 811(5A)(b) states:

> *"Where the opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving effect to this section, any time limit provided for by Part 41 or 41A, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax—*
>
> *(i) shall not apply, and*

(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable.

(v) However the Notice that issued to the Appellant on 23th December 2009 in respect of a transaction that was completed in October 2005 and reflected in his tax return, the Appellant relied on the following passages of the judgment of Clarke J.:

"7.6 That difference in time could, of course, have a significant effect if s.955 operates to preclude the charging of extra tax in certain cases under s 811 outside the four year period because the charging of the tax under s 811 does not occur until after the appellate process has been exhausted.
…..

8.2 The raising of an opinion whose only end can be to require the payment of additional tax in circumstances where such additional payment is prevented by the time limits contained in Pt 41 is clearly impermissible. To start a process which can have no lawful conclusion must itself be legally impermissible."

(w) Therefore, in this TCA, section 811 appeal, the appellate process is still extant and as a result of the Respondent's failure to issue an amended assessment before 31st December 2010 charging the Appellant to capital gains tax for the year 2005, the process of imposing a tax on the Appellant would be "*legally impermissible".* Furthermore, to impose a charge to tax on the Appellant in respect of transactions that occurred in 2004 would not only be resurrectory but unlawfully impose a charge to tax based on retrospective legislation.

Time Limit Issue – Respondent's Submissions

28. In response, the Respondent made the following submissions:

(a) The judgment in *Droog* can be distinguished on the basis that the Notice issued to the Appellant was within time for the tax years 2004 and 2005. Furthermore, in *Droog* which issued in 2016, the Supreme Court did not consider or make any reference to the amendment to TCA, section 811 by the insertion of subsection 5A by Finance Act 2012, section 130. As such there was no limitation contained within the TCA, section 811(5A) as to the period to which the opinion related and that its operation was not dependent on when the opinion was formed. As such the intention of the legislature was to apply irrespective of when the opinion was formed or the tax year to which the assessment or the year in which the liability arose. Therefore, the rationale of *Droog* does not apply as the Notice was formed within time and there now exists a statutory provision which expressly disapplies TCA, section 955 and it is operative as and from the 28th of February 2012.

(b) Furthermore, the protection preventing the Respondent making or amending a tax assessment after the prescribed 4 year period does not apply to the Appellant. In *Droog,* Clarke J. held at paragraph 7.4 that the 4 year time limit applied "*in the case of a person who has made a fully compliant return"*. The Respondent furnished copies of the Appellant's tax returns for the years 2004 and 2005 in which there was a failure to record that the Transactions were between "*connected parties*". As such the Respondent had no means of appreciating the particular significance of the Transaction specifically in light of the Appellant's reliance on market value rules between connected parties to generate the capital loss claimed. Therefore, there was no full and true disclosure made to the Respondent when the returns were furnished in 2005 and 2006 that the initial position was one between connected persons.

(c) The Respondent also argued that subsequent correspondence cannot cure the failure to make a compliant return. It is the return and not any subsequent disclosure or correspondence which triggers the time periods governed by TCA, sections, 955 and 956.

Time Limit Issue - Finding

29. The Appellant asserted that the Respondent was prevented from initiating any tax collection procedure until, at the earliest, 23 January 2010, a date that fell outside the 4-year statutory limit having expired on 31 December 2009. Therefore, as a direct result of the Supreme Court judgment in *Droog*, it was submitted that the Notice was time barred, and accordingly void, at time of issue. Furthermore, as the appellate process is still extant and as a consequence of the Respondent's failure to issue amended capital gains tax assessments before 31st December 2010, any attempt to now impose a tax on the Appellant would be, according to Clarke J. in *Droog* at paragraph 8.2, to engage in a process:

> *"whose only end can be to require the payment of additional tax in circumstances where such additional payment is prevented by the time limits contained in Pt 41 is clearly impermissible. To start a process which can have no lawful conclusion must itself be legally impermissible."*

30. However, as identified by the Respondent, as and from 28th February 2012, there is no limitation contained within TCA, section 811(5A) preventing the making of an amended assessment and expressly states:

> *"Where the opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving*

effect to this section, any time limit provided for by Part 41 or 41A, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax—

(i) shall not apply, and

(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable."

31. To determine that the opinion is void, the Appellant requires that I rely on the judgment in *Droog* and disregard the express wording of TCA, section 811(5A). However, I cannot accept such a submission as I am jurisdictionally constrained from departing from the statutory wording contained in TCA, section 811(5A) in respect of the making or amending an assessment on or after 28th February 2012. Therefore, unlike the Superior Courts, I do not possess the statutory or indeed constitutional authority to dispense with "*a process which can have no lawful conclusion"*.

32. While I acknowledge the Appellant's submission that to impose a charge to tax based on retrospective legislation is potentially unlawful, as noted above I am prevented from overriding an act of the Oireachtas. Furthermore, the principle of presumption of constitutionality of laws enacted by the Oireachtas was articulated by Hanna J. in *Pigs Marketing Board v Donnelly (Dublin) Ltd*. [1939] IR 413 at page 417 and requires that in considering the validity of any law, it must:

"*be accepted as an axiom that a law passed by the Oireachtas, the elected representative of the people, is presumed to be constitutional unless the contrary is clearly established"*

33. Therefore, it is incumbent on the Appellant to satisfy the Superior Courts that the Finance Act 2012 amendment that introduced subsection 5A to TCA, section 811 is in somehow unlawful or indeed repugnant to the Constitution.

34. It is also significant that as the appellate process is extant, the purported unlawful act of making or amending the 2004 and 2005 assessments has not yet occurred. Therefore, as the law currently stands, there is no statutory impediment restricting the Respondent from making or amending an assessment after appellate process has been completed. On this basis I am unable to consider the Appellant's submission on time limits.

Substantive Issue

Appellant's Submissions

35. The starting point in determining whether the transaction is a tax avoidance transaction is to establish the legislative purpose of TCA, sections 549 read in association with TCA, section 31, the effect of which produced a capital gains tax loss of €2,657,508.

36. The capital gains tax loss was computed in accordance with TCA sections 547 and 549. TCA, section 547(1) provides that market value is imputed to the acquisition of an asset. TCA, section 547(4)(a) imputes market value to the disposal of the asset. As such, the same value is attributed to both sides of the disposal in the computation of a capital gain or loss.

37. TCA, section 549 relates to transactions between connected persons, and applies TCA, section 547 to such a disposal. Where a disposal falls within TCA, section 549(1), the market value is imputed to both sides of the transaction. TCA, section 549(6) provides that the acquisition value of an asset, which is subject to a restriction, is the net value of the asset, after taking into account the restriction.

38. TCA, section 549(7) provides that where the restriction is such that it substantially destroys or impairs the value of the asset, or where there is an option over the asset, the taxable value of the asset is the gross market value as if the restriction or option did not exist. This also is the deemed acquisition cost. Therefore, at all times the outcome of TCA, sections 547 and 549 is balanced and neutral. The same monetary amount is applied to both the disposal (seller) and acquisition (buyer). The outcome is accordingly neutral from the fiscal standpoint. This is no different from the capital gains regime generally.

39. The fiscal neutrality of TCA, section 549 is underscored by subsection (8). As between 2 resident persons, the same (gross) value applies to the taxable consideration and allowable deduction, producing a balanced neutral result. In that scenario there is no overall "*Tax Advantage*". However, if the transferor is non-resident, and not therefore a chargeable person within the meaning of TCA, section 29, the net value is the allowable deduction. Absent subsection (8), the outcome would be asymmetrical, as the consideration received would not be within the ambit of Irish tax at all, while simultaneously the (gross) value would be allowable. Subsection (8) provides the clearest possible illustration of the tax neutral purpose, operation, and effect of TCA, section 549.

40. The legislature reacted to *McGrath v McDermott* by introducing the general anti-avoidance, which is now TCA, section 811 and by amending the connected party rules in

TCA, section 549. The amendment to TCA, section 549 ensured that the default rule that reduced the value of an asset that was subject to an impairment or restriction did not apply where a gain was made by a non-resident person. However, while there was an opportunity to also exclude artificial gains or losses, no such amendment was enacted.

41. The Respondent's submission seeks to disapply TCA, section 549(7) to the deductible acquisition cost. This disturbs the neutrality and balance of the entire CGT regime, as a different taxable consideration would apply to the seller. TCA, section 811 must in its tax consequences accord with the computational rules and basic principles of the TCA. The Respondent's approach distorts a fundamental principle of the entire capital gains tax code by applying differing amounts to the taxable consideration and deductible cost in the same transaction.

42. TCA, section 811(3)(a)(ii) provides that transaction will not be a "*Tax Avoidance Transaction*" if:

> "*The transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided."*

43. This wording necessarily involves an enquiry into the "purposes" of the provision(s) in question; in this case TCA, sections 549 and 31. In this context the purpose of any provision is to be ascertained from the statutory text itself as O'Donnell J. in *O'Flynn Construction* said at paragraph 65:

> "*The purpose of an Act is best discerned from the words used."*

44. Furthermore, McKechnie J. in *O'Flynn Construction* at paragraph 84 said:

> "*In my view there can be only one answer: policy must be anchored in the language used, recourse being had, where appropriate, to its context as disclosed by the statute (or relevant part thereof)"*

45. The loss claimed by the Appellant arose directly from the application of TCA, section 549, because in calculating the acquisition cost of the asset, the option over the asset was disregarded. The Appellant had no discretion over this fiscal outcome as it was prescriptively imposed upon him by TCA section 549(7).

46. TCA, section 549 is a technically complex provision and produces differing results depending on several factors, including whether:

(a) the parties are "connected" at time of acquisition- subsection (2).
(b) the parties are 'connected" at time of disposal – subsection (2)
(c) a loss is only allowable on gains occurring between the same parties - subsection (3)
(d) there is a "restriction" on the asset exercisable by the seller (or a person connected with him). The net value is the allowable expenditure/taxable consideration – subsection (6).
(e) the "*restriction…. substantially impairs*", the value of the asset, the gross value is the allowable expenditure/taxable consideration - subsection (7),
(f) the person disposing of the asset is liable to capital gains tax under TCA sections 29 or 30 on the disposal. If non-resident, then the allowable expenditure is the net market value – subsection (8).

47. Though complex, the technical outcome of TCA, section 549 is clear and unambiguous once the fact pattern is established. As noted above, TCA, section 549 results in a coherent, proportionate, and fiscally neutral outcome as between the seller, the purchaser, and the Respondent. That is its purpose and effect.

48. In *O'Flynn Construction*, O'Donnell J, in referring to the purpose of TCA, section 811 said at paragraph 74:

> *"The idea that any particular scheme can produce a result that the Oireachtas did not intend, is much more easily expressed than applied in practice. The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction which are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all, the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. <u>In other cases the provision may be so technical and detailed so that no more broad or general purpose can be detected, or may have its own explicit anti-avoidance provision. In such a case there may be no room for the application of s.86 since it may not be possible to detect a purpose for the provision other than the basic one that the Oireachtas intended that any transaction which met requirements of the section should receive the relief.</u> "(Emphasis added)*

49. The facts in this appeal fall foursquare within the foregoing underlined text. TCA, section 549 is a formulaic, generic and prescriptive statutory provision. As a result, no overriding purpose can be deduced that its application should apply to some types of transactions and not to others. It is precisely the type of "*technical and detailed*" provision whose purpose can only be discerned from the statutory text. Once there is compliance with

the statutory legislation, the statutory purpose is achieved. To repeat what O'Donnell J. said in *O'Flynn Construction* at paragraph 75:

> *"As Denham, J. observed, the purpose of an Act is best discerned from the words used."*

50. In *O'Flynn Construction* there was an underlying industrial regime, the export sales relief scheme. The Court therefore had a benchmark against which to evaluate the purpose of the legislation: which was the promotion of exports and the creation of employment in the State. In this case there is no such industrial/commercial backdrop to TCA, section 549. TCA, section 549 deals exclusively with an artificial tax provision divorced from commerce. It is a generic technical provision not directed at any specific industrial or commercial activity. It applies to all assets within the charge to capital gains tax. Unlike *O'Flynn Construction*, there is no commercial activity to fall back on in order to ascertain its purpose. Even in *O'Flynn Construction*, and with the benefit of the Export Sales Relief regime as a benchmark, there was no unanimity of judicial opinion; the Supreme Court dividing 3/2. The Minority (justices McKechnie J. and Macken J.) in somewhat trenchant language said at paragraph 96:

> *"it would seem <u>impossible</u> to hold that the purpose of the relief could be said to have been either abused or misused in this case." [Emphasis added]*

51. However, in this appeal it was not possible to discern a purpose from the application of TCA, section 549 read in association with TCA, section 31. While the effect of TCA, section 549 was to impose market value rules on transactions between connected parties, it was not possible to discern a purpose of that section.

52. If anything, on the balance of probabilities, *O'Flynn Construction* supports the Appellant's contentions on the purposes of TCA sections 31 and 549, that compliance with the statutory regime satisfies its purpose.

53. The TCA, section 31 loss is directly the result of the outcome of TCA, section 549 and nothing else. Absent TCA, section 549, there would be no loss. There was no value shifting in the "T*ransaction*", all elements thereof were at full market value. No values were "contrived", as alleged in the Respondent submission.

54. No other purpose can be discerned from TCA, section 549, other than that advanced by the Appellant. It is instructive that the Respondent in its submission failed to identify even a single section of the tax code that in any way cuts down, expands or otherwise impacts on the application of TCA, section 549, and by extension TCA, section 31. The Respondent asserted that the Appellant incurred a monetary loss of €259,591 but created capital gains tax loss relief of €2,657,508, for tax purposes. The Respondent thereby confused the purpose of the transaction with the purpose of the relief. It is the

purpose of the relief that is relevant, and only relevant, in the context of TCA, section 811(3)(a)(ii). O'Donnell J. in *O'Flynn Construction* made no reference to the "*transaction*". It is the purpose of the relieving provision that is relevant for section 811(3)(a)(ii), not the purpose of the "*transaction*".

55. In addition, the outcome of TCA, section 549 will always create the result that the deductible capital gains tax cost will exceed the monetary cost, thereby resulting in an inevitable loss. There is nowhere in the legislation that the requirement that deductible expenditure is to be calculated according to the monetary cost for example, a taxpayer who receives a gift of an asset (without any outlay whatever) has a deductible cost equal to the market value of the asset at time of acquisition. The Respondent's equation of deductible cost with monetary cost is misconceived.

56. Even absent the technical nature of TCA, section 549, the loss provision in TCA, section 31 is expressed in clear, emphatic and unambiguous language. The TCA section 31 "loss" is in no way qualified by terms such as "commercial", "monetary", "real", "arm's length" or similar language. Effect must be given to the clear words of the provision according to the usual principles of statutory construction, supported by the Supreme Court judgment quoted above, "th*e purpose of an Act is best discerned from the words used".* Moreover, this case is concerned with TCA, section 549 which itself creates an artificial world of deemed gains and deemed losses, thereby creating a disconnection with commercial reality.

57. This is also consistent with the approach adopted by McKechnie J. in *O'Flynn Construction* in which he embarked on a forensic examination of the relevant legislation, both current and historic and concluded at paragraph 96:

> *"Against this background it seems to me that one can only conclude that the unrestricted scope and nature of the exemption over such a period of time, was part of a deliberate policy supporting the total exemption of such profits from tax this at the corporate level and individual level. In such circumstances it would seem impossible to hold that the purpose of the relief could be said to have been either abused or misused in this case"*

58. The *O'Flynn Construction* judgments of O'Donnell J. and McKechnie J. intersect on the application of section 811(3)(a)(ii). Applying the rationale of both their judgments and acknowledging that they arrived at their conclusions by different routes, it is submitted that the Appellant's contention is consistent with both judgments. It is consistent with O'Donnell J. because of the very formulaic and prescriptive application of TCA, section 549. It is also consistent with McKechnie J. because of the untrammelled language of TCA, section 31.

59. It is possible to discern the purpose of certain reliefs in the Taxes Acts such as retirement relief (TCA, sections 598 & 599), the relief for the transfer of assets to a company (TCA, section 600), reorganisation relief (TCA, section 584), principal private residence relief(TCA, section 604), transfer of assets to a spouse (TCA, 1028) and the transfer of sites to children ((TCA, section 603A).

60. However, TCA, section 811(3)(a)(ii) is very deliberately framed to extend to all situations, many of which are of a family or social nature that have no commercial purpose. For instance, TCA, section 848A grants tax relief on donations by an individual to a charity up to a limit of €1,000,000. Similarly, the Capital Acquisition Tax Consolidated Act 2003 confers exemption on gifts from parent to child up to €320,000. Voluntary dispositions between spouses are exempt from stamp duty as are asset transfers between spouses are exempt from capital gains tax. None of these transactions have a commercial purpose, and on the flawed Respondent's logic would be denied relief by TCA, section 811.

61. The Courts have emphasised on numerous occasions the limitations on departing from an express statutory provision particularly in taxation statutes. In *Quigley-v-Harris,* Laffoy J. referred to the judgment of Kennedy C.J. *in Revenue Commissioners v. Doorley* [1933] I.R. 750 where in an oft-quoted passage, Kennedy C.J. stated at pp. 765 to 766:-

> *"The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms…"*

62. Justice Clarke in *Droog* implicitly rejected an *a priori* approach to statutory interpretation when he said:

> *"6.6. …Could it really be the case that Revenue could revisit the consequences of a fully compliant tax return, and an assessment made and paid as a result thereof, 30 years after the event? On the basis of the construction which Revenue urges there would not seem to be any obvious statutory barrier to such a course of action.*
>
> *6.7 However, in any event, the starting point has to be the wording of the legislation itself. I, therefore, turn to that issue." [emphasis added]*

63. The Respondent's submission asserted that "*As the loss of €2,657,358 is an artificially generated capital loss, the transaction is a blatant misuse or abuse of section 31 TCA 97".* This is precisely the type of *a priori* approach to statutory interpretation rejected in *Doorley*. Because the loss is alleged by the Respondent to be "*artificially contrived*" it is deemed *ipso facto* to be a misuse of TCA, section 31. Yet the submission makes no attempt to discuss or enquire into the rules pertaining to loss relief in TCA, section 31, or

to the creation of the loss under TCA section 549. The loss resulted directly from TCA section 549 and not from any artificiality on the taxpayer's part.

64. Furthermore, the quoted statutory text in the Respondent's submission is cut off at a crucial point: the phrase that follows "*having regard to the purposes for which it was provided*" is omitted. Unsurprisingly, the Respondent's submission failed to address any of the purposes of the relevant legislation in TCA sections 31 and 549.

65. There was no value shifting in the "*Transaction*". All elements thereof were at full market values. No values were "contrived" by the Appellant. The disposal was at market value. It was TCA, section 549 that assigned a different value to the acquisition, not the Appellant.

66. As noted above, the test under TCA, section 811 is an objective test of the "*Transaction*". TCA, section 549 will, in virtually all circumstances, result in a loss in excess of the monetary loss incurred, or, to use the Respondent expression, a "contrived" loss. The Respondent logic inescapably leads to the conclusion that TCA, section 549 will rarely, if ever, in fact have effect, and would be rendered obsolete by TCA, section 811. The presence or absence of a Tax Avoidance Transaction must be determined objectively. It is submitted that this entails a two- stage process:

    (a) First, it is necessary to determine the purposes of TCA sections 549 and 31. The loss herein directly flows from TCA section 549. Compliance with the requirements of TCA section 549 satisfies its purpose.

    (b) Secondly, enquire objectively whether the Transaction is a misuse of section 549, having regard to the purposes of TCA section 549. It logically follows that once the several statutory requirements are met, then there can no misuse as TCA section 549.

67. The loss in this case arose out of the precise application of a very technical provision of the capital gains tax legislation, TCA, section 549. The actual result achieved was precisely the purpose of the legislation, no more and no less.

68. TCA, section 549 is an anti-avoidance provision. It is a deeming legislative provision that deliberately creates an artificial result, as present in this case. A deeming provision is the hallmark of anti-avoidance legislation some of which include:

    (a) Section 135A: deemed distributions
    (b) Section 620A: Deemed disposals for capital gains tax.
    (c) Section 806: Attribution of foreign income to residents
    (d) Section 812: Sale of rights to income.
    (e) Section 815: Sale of securities.

69. The Respondent's own published guidance on the interpretation of TCA, section 549 commences as follows:

> "*This section provides measures to prevent avoidance of capital gains tax by the use of arrangements entered into by connected persons."*

70. O'Donnell J. in the extract from the *O'Flynn Construction* judgment at paragraph 74, in referring to a situation where the legislation contains its own anti-avoidance provision:

> *"In other cases the provision may … have its own explicit anti-avoidance provision. In such a case there may be no room for the application of s.86." [emphasis added]*

71. As TCA, section 549 is an anti-avoidance provision, for this reason alone, it is submitted that the appeal should be upheld.

72. Finally, there are two aspects of double taxation that are relevant:

(a) First, TCA, section 549 is structured to avoid double taxation. This is achieved by matching the taxable consideration of the disposal with the deductible cost of the acquisition. The TCA, section 811 opinion seeks to distort this balanced relationship. It also offends a cardinal computational principle of the capital gains tax code. That is double taxation.

(b) Second, the opinion should have allowed double taxation relief as it necessarily involves double taxation. In aggregate no Tax Advantage exists and the relief should match the quantum of the alleged Tax Advantage.

Substantive Issue - Respondent's Submissions

73. The Notice issued by the Nominated Officer concluded that the Transaction carried out by the Appellant was "*a tax avoidance transaction within the meaning of TCA, section 811 Taxes Consolidation Act 1997*". It specified that the tax advantages arising from the Transaction had been calculated, cumulatively, at €531,471 for the periods 2004 and 2005. The Notice also specified that the tax consequences of the opinion on becoming final and conclusive would be to disallow the capital gains tax losses claimed in the sums of €1,408,469 and €1,248,889 in the years 2004 and 2005 respectively.

74. The Transaction specified in the Notice issued to the Appellant on 23rd December 2009 and stated that during the year 2004 and 2005 the Appellant sold shares which gave rise to chargeable gains in the sum of €1,408,469 and €1,516,712. The Respondent believed that the Transaction to which the TCA, section 811 opinion applied was entered into by the Appellant with a view to creating an artificial capital loss for offset against gains.

75. The Transaction involved the Appellant acquiring the Bond for €578,529 from NEL on 7 October 2004 and selling the Bond to STN on 22nd October 2004 for €319,938, thereby incurring a monetary loss of €258,591. The cost of acquisition of the Bond was part-funded by way of a 0% interest rate loan granted to the Appellant from NEL on 22nd September 2004, in the amount of €280,000.

76. As at 7th October 2004 the Appellant was 'connected with' NEL for the purposes of the Capital Gains Tax Acts. The Appellant is deemed to have taken control of NEL by virtue of the fact that he owned the greater part of its issued share capital and therefore pursuant to TCA, section 10(7) and TCA, section 432(2) he controlled that company.

77. The Appellant was never connected with STN, although at all material times NEL and STN were connected with one another.

78. When the Appellant acquired the Bond from NEL on 7th October 2004 for €578,529, the Bond had a value of approximately €2,977,466 but was subject to a call option in favour of STN which had the effect of reducing the market value by more than 90%. The market value of the Bond was therefore in the region of €297,450.

79. As the Appellant acquired the Bond from a connected person, he was deemed, under TCA, sections 547(1) and 549(1) & (2), to acquire the Bond at market value. Furthermore, TCA, section 549(6) & (7) required the market value of the Bond to be ascertained without regard to the existence of the option in favour of STN, which would otherwise have had the effect of reducing the Bond's value by approximately 90%. For capital gains tax purposes, therefore, the Appellant was deemed to have acquired the Bond for a consideration of approximately €2,977,466 notwithstanding the actual payment of €578,529.

80. As the Appellant was not 'connected with' STN, the provisions of TCA, sections 547 & 549 were not applicable to the disposal of the Bonds on 22 October 2004. Consequently, for capital gains tax purposes, the proceeds of that disposal were the actual proceeds of €319,938.

81. The effect of the provisions of TCA, sections 547 and 549 was that, on the disposal of the Bonds, the Appellant was deemed to have made a loss of €2,657,508 for capital gains tax purposes. Under TCA, section 31 this loss was available for offset against chargeable gains accruing in 2004 and 2005, resulting in a total tax advantage of €531,471.

82. As such, the transaction was carefully arranged to take advantage of the capital gains tax rules in relation to options, and the interaction between those rules and the rules for disposals between connected persons.

83. The cumulative effect of the Transaction conferred a substantial tax advantage by generating a loss which far exceeded the actual monetary loss suffered by the Appellant. The Transaction did not take place in the course of any ordinary commercial activity but rather took place primarily for the purpose of generating the tax advantage thereby engaging TCA, section 811 TCA 1997.

84. In *Revenue Commissioners -v- O'Flynn Construction Company Limited and Others* [2011] IESC 47 Mr Justice O'Donnell provided an insightful background to TCA, section 811 and its legislative antecedent, Finance Act 1989, section 86, at:

> 62. *"Prior to TCA, section 86 the only question was whether or not the transaction came within the strict words of the statute sometimes literally and narrowly construed. In the case of a tax statute, if the component parts of the transaction did not come within the provision, then it was not possible to look at the substance of the transaction to contend that tax should be applied. Similarly in the case of a relief, if the transaction came within the words of the provision granting relief then the relief must be granted, no matter how contrived the scheme, nor how removed it was from the activity sought to be encouraged by the relief. But under s. 86 the potential tax benefit to a taxpayer may be disallowed if the Revenue Commissioners come to the conclusion that the transaction is one designed to confer a tax advantage and constitutes a tax avoidance transaction. As the Appeal Commissioners in this case have observed, the essential starting point to the application of s. 86 is a determination that absent its provisions the taxation charge would not apply or in the case of an exemption, that its benefit would be available to the tax payer, on a literal construction of the language of the relevant statute.*

63. *… appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view (sic) on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other … The fact that any given transaction gives rise to a tax advantage is not in itself enough to disallow that benefit. Such a transaction only becomes a tax avoidance transaction if it satisfies the requirements of (section 811(2)). That subsection directs the Revenue Commissioners to have regard to the results of the transaction, and its uses and means of achieving those results and any other means by which part of the results could have been achieved. In considering this issue the proviso to (TCA, section 811(3)) requires that the Revenue Commissioners have regard both to the form and substance of the transaction. The transaction will be a tax avoidance transaction if the Revenue Commissioners (having considered the matters set out above i.e. results, use, form and substance) form the opinion that the transaction gives rise to a tax advantage and that "the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage".*

64. *It may be of some significance that … (the subsection) … goes on to state positively what shall not be regarded as a tax avoidance transaction. That will arise if the Revenue Commissioners are satisfied that even though the transaction could have been structured in a way which had given rise to a greater amount of tax, the transaction was nevertheless "undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of business activities of a business carried on by the person", and "was not undertaken and arranged primarily to give rise to a tax advantage".*

65. *While this does not purport to be a definitive or detailed analysis of the provisions … it is clear that the distinction sought to be made in the section between permissible tax advantage and impermissible tax avoidance, is a distinction between legitimate tax mitigation of a genuine commercial transaction on the one hand, and a transaction undertaken or arranged primarily for the purposes of giving rise to a tax advantage. This is a distinction which is more easily described than applied, but for present purposes, it is neither necessary nor desirable to explore the well travelled and heavily contested borderline between these concepts …*

85. The Supreme Court's analysis and application of Finance Act 1989, section 86 and by extension, TCA, section 811 is instructive. O'Flynn Construction Company Limited ("OFCL") purchased resources for consideration but ultimately availed of a tax advantage as the company categorised the resources as being subject to export sales relief, despite the fact that OFCL was not engaged in the manufacture of goods for export.

86. In finding against the defendant company, the majority of the Supreme Court referred on more than one occasion to the lack of "*commercial logic*" to the transaction in that case and stated at paragraph 80:

> *"the form of the transaction was highly artificial and contrived. It was not the realisation of profits in the ordinary course of business activities. It was a transaction arranged primarily to give rise to a tax advantage, and the substance of the transaction was to permit OFCL to pass its distributable profits to its shareholders, without incurring tax."*

87. In *McNamee -v- Revenue Commissioners* [2016] IESC 33, the Supreme Court considered a series of transactions which resulted in the creation of a capital loss. The effect of TCA, section 811 and the view of the majority in *O'Flynn Construction* was summarised by Laffoy J. as follows at paragraph 18:

> *"As a matter of construction of the foregoing provisions of s. 811, when one considers subss. (2), (3) and (4) together, while it is true that in subs. (4) the task of forming an opinion that a transaction is a tax avoidance transaction is separate and distinct from the tasks of, inter alia, calculating the tax advantage and determining the tax consequences, before forming an opinion in accordance with those provisions, the Revenue Commissioners must consider the matters outlined in subss. (2) and (3), which O'Donnell J. succinctly summarised as "results, use, form and substance". Those matters must be considered by reference to a specific transaction which comes within the definition in subs. (1), not by reference to, say, some form of tax avoidance scheme of which the Revenue Commissioners have become aware."*

88. TCA, section 811(2) provides that a transaction is a '*tax avoidance transaction*' if, having regard to the results of the Transaction, the Revenue Commissioners form the opinion that:

(a) the transaction gives rise to, or but for TCA, section 811, would give rise to a tax advantage, and

(b) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

89. The result of the Transaction was that the Appellant reduced capital gains tax liability for the years 2004 and 2005 by €531,471 by entering into the Transaction which gave rise to a capital gains tax loss of €2,657,508. However, the Appellant's real monetary loss on the Transaction was only €258,591.

90. The Transaction was instrumental in achieving the results and the same result (i.e. a reduction in the capital gains tax liability) could have been achieved had a genuine loss

of €2,657,508 been incurred on the disposal of an asset in 2004. However, this would have involved a much more substantial real cost.

91. Having regard to the results and the use of the Transaction as a means of achieving these results, the Respondent formed the opinion that the Transaction gave rise to, or but for TCA, section 811 would have given rise to, a tax advantage as defined in TCA, section 811(1), and that it was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

92. Therefore, the Transaction gave rise to a reduction or avoidance of capital gains tax charges and/or capital gains tax assessments in the amount of €281,694 in 2004 and €249,777 in 2005, and that this reduction or avoidance is a tax advantage for the purposes of TCA, section 811.

93. As such the Transaction was not undertaken or arranged primarily for any purpose other than to give rise to the tax advantage identified above and no other purpose for the Transaction can reasonably be discerned.

94. Furthermore, the purpose of the Appellant's investment in shares in NEL was to 'connect' him with that company for the purposes of the 'connected persons' provisions in TCA. The connection between the Appellant and NEL was an essential ingredient of the Transaction. Absent this connection, the Transaction would not have resulted in the tax advantage. There is no commercial motive for this investment apart from the tax advantage.

95. The entire Transaction was completed in under one month in a largely circular transaction which achieved nothing commercially. When the Transaction was complete, the Appellant had resold the Bonds and was in essentially the same position commercially as before he embarked on it, save that he had expended €258,591 and had generated a capital gains tax loss of €2,657,508.

96. It is also significant that the Appellant paid NEL €578,529 for the Bond at a time when it was worth only approximately €297,500. His only possible motive for doing this was to put himself in a position to crystallise the artificial tax loss. There would appear to be no commercial reason whatever for purchasing the Bonds at an overvalue.

97. The Transaction was plainly not undertaken or arranged by the Appellant with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by him to enable the Appellant avail of the business profit exemption contained in TCA, section 811(3)(a)(i). 'Business' in this context means a trade, profession or vocation (TCA, section 811(1)).

98. There was no evidence to suggest that the Appellant carried on a business of trading in financial instruments in 2004. If he had, it was scarcely conceivable that he would have agreed to buy the Bonds for nearly twice their market value. There is no evidence to suggest that the Transaction was undertaken in the course of any business activity carried on by him. The fact that the transaction was categorised in his tax return for 2004, as a transaction giving rise to a loss for capital gains tax purposes, rather than as a loss for income tax purposes, strongly suggests that the transaction was not undertaken with a view to the realisation of profits in the course of the business activities of a business carried on by the Appellant.

99. Furthermore, the relevant documentation suggests that the Transaction was undertaken and arranged with a view to the realisation by the Appellant of a loss, not a profit. The Transaction was undertaken or arranged with a view to the generation of a significant artificial capital gains tax loss which the Appellant could use to shelter capital gains accruing, and no other interpretation of its purpose is possible. The reason that the Appellant voluntarily entered into a transaction which resulted in an actual loss of €258,591 was that the scheme, if successful, would result in a tax saving which would more than compensate for that loss.

100. In *Revenue Commissioners -v- O'Flynn Construction Ltd and Others* [2011] IESC 47 (SC) Mr Justice O'Donnell said in paragraph 63 that the provisions now contained in TCA, section 811(2) and (3):

> *"…appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other. This is apparent from [TCA, section 811(2)(ii)] and its mirror image in [TCA, section 811(3)(a)(i)(II)".*

101. The Transaction in this case clearly falls into the second category i.e. it is 'a purely tax-driven transaction designed to give rise to a tax advantage'.

102. The Transaction had no commercial purpose. The Appellant's only possible motive for entering into the Transaction was the avoidance of tax. In the circumstances, the provisions of TCA, section 811(3)(a)(i)(II) cannot prevent it from being regarded as a tax avoidance transaction.

103. The Transaction was however undertaken or arranged for the purpose of obtaining the benefit of an '*allowance or abatement*' provided by the Taxes Acts, namely the deduction of capital gains tax losses under TCA, section 31 that clearly resulted in a misuse or abuse of TCA, section 31 having regard to the purposes for which it was intended.

104. In O'Flynn Construction Mr Justice O'Donnell said in relation to the 'misuse or abuse' provision:

> 72. *….. Furthermore, while it is helpful to attempt to offer some definition of the individual component "abuse" and "misuse", and in that respect to distinguish between them, in my view, the section is best understood when those concepts illuminate each other. The statutory phrase, "misuse … or an abuse of the provision having regard to the purposes for which it was provided" is to be read as one comprehensive indication that the object of the subsection is to ensure that reliefs and benefits are only available to transactions which can be regarded as a proper and intended use of the provision. In any given case it will not matter whether that transaction is characterised as an abuse or misuse; what is important is that full effect is given to the intention of the section that only appropriate uses of the provisions get the benefit of the tax relief…*
>
> 73. *…*
>
> 74. *The idea that any particular scheme can produce a result that the Oireachtas did not intend, is much more easily expressed than applied in practice. The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction which are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all, the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme. In other cases the provision may be so technical and detailed so that no more broad or general purpose can be detected, or may have its own explicit anti-avoidance provision. In such a case there may be no room for the application of s.86 since it may not be possible to detect a purpose for the provision other than the basic one that the Oireachtas intended that any transaction which met requirements of the section should receive the relief. However, there are some cases of which this is one, where it may be possible to say with some confidence that though there has been compliance with the literal words of the statute, the result is not the sort of relief that the Act intended should result. In such cases, s.86 permits an evaluation of the particular transaction and a consideration as to whether it comes not just within the words, but also within the intended scheme, or is rather, a misuse or abuse of it. The fact that such an evaluation may be difficult and can create some uncertainty, is not a reason to avoid the task. Certainly in tax matters it is difficult to achieve and the desire to provide certainty to those who wish to avoid a taxation regime which applies to others similarly situated to them, is something which ranks low in the objectives which statutory interpretation seeks*

to achieve. The tax payer could, after all, achieve a high level of certainty, but at the price of paying tax on dividends received.

75. *The assessment of the purpose of any relief involves something somewhat more sophisticated that a repetition of a general dictum from a judgment, even one delivered by McCarthy, J. The question is not what the general purpose of any scheme is - the unsurprising subject of promoting manufacture and export and therefore maintenance of employment - it is what is the purpose of this particular scheme? As Denham, J. observed, the purpose of an Act is best discerned from the words used. When recourse is had to a generalised purpose such as the encouragement of exports, there is a frustrating of ascending the levels of generalisation rather than descending towards specificity."*

105. The Appellant's claim for loss relief in this case under TCA, section 31, cannot be regarded as a *'proper and intended use'* of that section, nor can it be described as an 'appropriate use' of the relief.

106. The purpose of capital gains tax loss relief is to ensure that taxpayers are taxed on their net chargeable gains. In the present case, the Appellant has exploited the market value rules in TCA, sections 547 & 549 so as to enable him to claim relief for a loss which has been artificially inflated to over ten times its real value. As the loss of €2,657,508 is an artificially generated capital loss, the Transaction is a blatant misuse or abuse of TCA, section 31.

107. What must be accepted by the Appellant is that the primary purpose of the transaction was to secure the benefit of the relief, allowance or other abatement. As such no consideration is required whether or not there was any commerciality attaching to this transaction. Therefore, the only matter for consideration is whether by reason of this transaction there has been a direct or indirect use or abuse of the provisions of the Act.

108. In *Flynn Construction,* O'Donnell J made the following important observation at para 69:

"The suggestion that the principles in McGrath preclude a 'purposive approach' is also perplexing. In the first place the express words of s.86 require the Commissioners to have regard to the 'purposes for which it [the relief] was provided'. Furthermore, the decision in McGrath itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay CJ restated at page 276 the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a 'consideration of the purpose and intention of the legislature'. Indeed, he says if McGrath stands for any principle."

109. In considering TCA, sections 549 and 31, it is necessary to determine what was the intention of the legislature and thereafter determine whether the transaction was undertaken or arranged for the sole purpose of securing an artificial capital loss to shelter capable gains. As such, the exercise involves a very close consideration of both sections and whether or not the use of TCA, section 549 amounted to an indirect abuse and misuse of TCA, section 31.

110. In using all of the aids to statutory interpretation available, it is necessary to determine what was the purpose and intendment of the legislature as regards TCA, sections 31 and 549. Thereafter a consideration of the form of this transaction, the substance of this transaction, the results of this transaction, the manner in which it was arranged and undertaken, whether or not that constituted an abuse or misuse directly or indirectly is required.

111. The Appellant suggested that no broad general purpose can be detected in interpreting TCA, sections 31 and 549. However, it was possible to discern a broad purpose if you have a purpose which is seeking to attain some socially desirable objective and an assortment of examples were provided. However, such an argument is wholly unsupportable.

112. The intent of TCA, section 549, even ignoring the possible application of TCA, section 31, is perfectly clear from a plain reading of the section. And its intention is to prevent the avoidance of tax by a disponer who is connected to the acquirer disposing of the asset at an undervalue by the simple device of artificially depressing the consideration or disposing of it at an undervalue.

113. Capital gains tax is a tax on disposals and operates in the real world. TCA, section 31 confers the relief and allows relief for losses as a consequence of suffering a financial deprivation. The Appellant has not suffered any deprivation other than the €298,000 paid to NEL for the facility of entering into this transaction which, the Appellant accepted, was entered into solely for the purposes of securing the loss relief and sheltering the very significant capital gains that he made in 2004 and 2005.

114. TCA, section 31 makes it abundantly clear, that it is net gains only that are to be taxed. The taxing of net gain is achieved by allowing a taxpayer, both in the year in which losses are incurred and to carry them forward, if not fully sheltered in that year or not fully set off in that year, and that relief arises because of the application of TCA, section 549 and the other rules that are provided for in the code. Not one of those rules confers an entitlement on a taxpayer to claim artificial losses or to claim losses in excess of those actually incurred.

115. For the reasons set out above, TCA, section 811(3)(a) does not preclude the respondent from regarding the Transaction in this case as a tax avoidance

transaction. TCA, section 811(3)(b) requires the Respondent, in forming an opinion that a transaction is a tax avoidance transaction, to have regard to:

(a) the form of that transaction,
(b) the substance of that transaction,
(c) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and
(d) the final outcome and result of that transaction and any combination of those other transactions which are so regulated or connected.

116. In forming their opinion that the Transaction is a tax avoidance transaction, the Respondent had regard to the said matters that were set out in the Notice.

117. In *O'Flynn Construction*, Mr Justice O'Donnell said of the transaction in that case at paragraph 39:

> *"The form of the transaction (or series of transactions) is highly artificial and has no commercial logic. Indeed a number of the steps that the participants were required to take to bring the scheme to fruition appear to defy commercial logic.*

118. This is equally true of the Transaction in the present case. Furthermore, the substance of the Transaction was that the Appellant incurred a monetary loss of €258,591 but created capital gains tax loss relief of €2,657,508 for tax purposes which was subsequently claimed against chargeable gains made in 2004 and 2005. While in form the Transaction involved the purchase and sale by the Appellant of the Bonds, in substance it constituted a scheme for the creation of an artificial capital gains tax loss.

Tax consequences of Opinion

119. The tax consequences specified in the Notice of opinion would be just and reasonable in order to withdraw or deny the tax advantage outlined above.

Double taxation relief

120. No question of double taxation relief arises in this case.

Substantive Issue – Analysis & Conclusion

Hearing of a TCA, section 811 Appeal

121. On the hearing of an appeal against an opinion, determination or calculation of the Revenue Commissioners, TCA, section 811(9)(a) mandates that "*the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under*" the provisions of TCA, section 811.

122. The Appeal Commissioners are therefore required, pursuant to TCA, section 811(2), to determine whether a transaction is:

> *"a "tax avoidance transaction" if having regard to any one or more of the following-*
>
> *(a) the results of the transaction,*
> *(b) its use as a means of achieving those results, and*
> *(c) any other means by which the results or any part of the results could have been achieved,*
>
> *….. that-*
>
> *(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and*
>
> *(ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,"*

123. A transaction is not be considered to be a tax avoidance transaction if it comes within either the 'Business Profit Exclusion' or the 'Relief Exemption' provisions contained in TCA, section 811(3)(a) and expressed as follows:

> *"Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the* [Appeal Commissioners] *shall not regard the transaction as being a tax avoidance transaction if they are satisfied that-*
>
> *(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction-*
>
> (I) *was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and*

(II) *was not undertaken or arranged primarily to give rise to a tax advantage,*

or

(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided."

124. In making such a determination it is also necessary to consider the following criteria contained in TCA, section 811(3)(b):

(i) "the form of that transaction,
(ii) the substance of that transaction
(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and
(iv) the final outcome and result of that transaction and any combination of those other transactions which are so regulated or connected."

125. Furthermore, in determining the appeal under any of the permitted grounds of appeal, TCA 1997, section 811(9)(a) prescribes the alternative determinations which may be made by the Appeal Commissioners.

Provisions of TCA, section 549 – Connected Party Transactions

126. The Transaction was categorised in the Appellant's tax return for 2004, as a capital gains tax transaction giving rise to a loss and therefore the focus of the Appellant's submissions relied on the assertion that the Transaction did not "*result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided."*

127. Therefore, it was not disputed that the assortment of elaborate arrangements structured by the tax advisors and pursued by the Appellant gave rise to a "*tax advantage*".

128. The procurement of the *"tax advantage*" involved the acquisition of the Bond by the Appellant from NEL having a market value of €2,977,466 but subject to an impairment in the form of the call option granted by NEL to STN in consideration of an option premium of €2,677,000. As a consequence, the value of the Bond was €297,500 notwithstanding

that the Appellant paid €578,529 for that asset which he subsequently sold to STN for €319,938.

129. Therefore, the Appellant was deemed, under TCA, sections 547(1) and 549(1) & (2), to have acquired the Bond at market value whereby the option granted to STN was ignored in accordance with TCA, section 549(6) & (7). Therefore, for capital gains tax purposes, the Appellant was deemed to have acquired the Bond for a consideration of €2,977,466.

130. Thereafter the Appellant was deemed to have disposed of the Bond at its unfettered market value of €2,977,466 as opposed to the €319,938 that he received. Therefore, and in accordance with the prescriptive application of the statute, the Appellant was deemed to have made a capital gains tax loss of €2,657,508. Furthermore, in accordance with TCA, section 31, the loss was available for offset against chargeable gains accruing in 2004 and 2005, resulting in a total "*tax advantage"* of €531,471.

131. Therefore, in the consideration of the evidence, I am satisfied that the purpose of the Appellant's investment in NEL was to '*connect*' him with that company for the purposes of the '*connected persons'* provisions. The connection between the Appellant and NEL was an essential component of the Transaction as was the disposal of the Bond to STN, a company unconnected with the Appellant but connected with NEL. In the absence of these circumstances, the Transaction would not have resulted in the '*tax advantage'* of €531,471. Furthermore, the disparity in the market value of the impaired Bond, the consideration paid to acquire the Bond and the consideration received by the Appellant on the sale of the Bond ostensibly demonstrated that there was no commercial motive for this investment apart from the "*tax advantage"*.

132. Furthermore, and as noted by the Respondent, the purchase of the impaired Bond had no commercial purpose other than to crystallise an artificial tax loss. As such in structuring the Transaction to avail of the connected party provisions in TCA, section 549, I am satisfied that the Appellant procured a "*tax advantage*" of €531,471 and that the purchase and sale of the Bond "*was …. arranged primarily …. to give rise to a tax advantage"* thereby constituting a *"tax avoidance transaction*".

133. I am also in agreement with the Respondent that the purpose of TCA, section 549 as discerned from the statutory wording is to prevent the avoidance of tax by a disponer who is connected to the acquirer by disposing of the asset at an undervalue by the simple device of artificially depressing the consideration or disposing of it at an undervalue. Furthermore, it also clear that any contrived impediments that has the effect of reducing the market value between connected parties are to be ignored.

Provisions of TCA, section 546 – Loss Relief Provisions

134. The entitlement to deduct "*allowable losses*" is governed by TCA, section 546 and provides:

> *(1) "Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.*
>
> *(2) Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed."*

135. At the time of disposal of the Bond in 2004, the calculation of the loss accruing to the Appellant on the disposal of the Bond to STN was governed by TCA, section 546. It was not until Finance Act 2010, section 59, that the TCA was amended to restrict allowable losses in respect of disposals made on or after 4 February 2010 by the insertion of section 546A to losses associated with "*arrangements to secure a tax advantage*".

136. Therefore, as the Appellant is claiming a loss on the disposal of the Bond to STN, an unconnected party, the corollary is that if a gain arose, that gain would have been liable to capital gains tax. In the absence of any other express statutory provision governing the calculation of the Appellant's loss on the disposal of the Bond in 2004, it is necessary to calculate the loss on the same basis as computing "*the amount of a gain accruing on a disposal."* Therefore, the Appellant's allowable loss on the disposal of the Bond calculated in accordance with TCA, section 546(2) is as follows:

Consideration Received by the Appellant	€ 319,938
Deemed Market Value of Bond on date of Disposal	€2,977,446
Capital Gains Tax Loss Claimed	(€2,657,508)

137. In this regard, TCA, section 546(2) is prescriptive to the extent that "*Except where otherwise expressly provided the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed."* Therefore, as noted above, the basis on which the Appellant calculated the loss conformed with TCA, section 546(2).

138. I therefore agree with the Appellant's submission that the calculation of the loss arising on the disposal of the Bond was prescriptively imposed upon him by TCA section 549(7).

Provisions of TCA, section 31 – Reduction in Chargeable Gains

139. As the transaction was arranged primarily to give rise to a tax advantage, I am required, pursuant to TCA, section 811(3)(a)(ii), to consider whether the Appellant's entitlement to reduce his chargeable gains in 2004 and 2005 in accordance with TCA, section 31, would result "*directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*".

140. TCA, section 31 provides:

> "*Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting –*
>
> *(a) any allowable losses accruing to that person in that year of assessment, and..*"

141. The Respondent submitted that the Appellant's claim for TCA, section 31 relief cannot be regarded as a proper and intended use of that section, nor can it be described as an appropriate use of the relief. The Respondent asserted that the purpose of capital gains tax loss relief operates in the real world and is to ensure that taxpayers are taxed on their net chargeable gains by conferring a relief to compensate a person for enduring a financial deprivation. The Respondent also argued that the Appellant exploited the market value rules in TCA, sections 547 & 549 to enable him claim relief for a loss which has been artificially inflated to over ten times its real value. As the loss of €2,657,508 was an artificially generated capital loss, the Transaction must therefore be considered to be a blatant misuse or abuse of the relief afforded by TCA, section 31 as there are no rules in capital gains tax code that confers an entitlement on a taxpayer to claim artificial losses or to claim losses in excess of those actually incurred. Therefore, no loss was suffered by the Appellant other than the €298,000 paid to NEL for the facility of entering into the Transaction.

142. The Appellant argued that the loss claimed arose directly from the application of TCA, section 549, because in calculating the acquisition cost of the asset, the option over the asset was disregarded and therefore there was no discretion over this fiscal outcome as it was prescriptively imposed by TCA section 549(7).

143. In light of the above, the Appellant during the hearing accepted the responsibility for proving that the Transaction "*would not result … in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided"* pursuant to TCA, section 811(3)(a)(ii). In pursuance of that obligation, the Appellant distinguished *O'Flynn Construction* where the Supreme Court noted that the relieving provision sought by the appellants in that case related to the promotion of exports. Furthermore, the

Appellant referred to the following observation of O'Donnell J. in *O'Flynn Construction* at paragraph 74:

> *"In other cases the provision may be so technical and detailed so that no more broad or general purpose can be detected.... In such a case there may be no room for the application of s.86 since it may not be possible to detect a purpose for the provision"*

144. In accepting the responsibility of bearing the burden of proof, there was a requirement on the Appellant to discharge the positive obligation to prove that the Transaction did not result in "*a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided".* However, if as asserted, that it is not possible to discern the purpose of TCA, sections 549 and 31, it is not clear how the Appellant can submit that those provisions were not misused or abused in claiming the artificial capital gains tax loss of €2,657,508.

145. It is also significant that the Appellant's submission focused on the purported discrepancies in the Respondent's interpretation of TCA, sections 549 and 31 rather than advance the positive obligation of discharging the burden of proof that there was no misuse or abuse of the statutory provisions.

146. Notwithstanding the parties' submissions, it is necessary to consider the clarification in the interpretation of tax statutes specifically in the consideration of TCA, section 811 espoused by O'Donnell J. in *O'Flynn Construction* at paragraph 70:

> *"the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in McGrath, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes. Accordingly, the Appeal Commissioners' conclusion that the principles set out in McGrath prohibited the adoption of a purposive approach is incorrect on a number of levels."*

147. Therefore, in accordance with the principles of law set out in *O'Flynn Construction*, I am satisfied that the loss claimed by the Appellant arose from the prescriptive interpretation and application of statutory provisions. Furthermore, an attempt must be made to discern a purpose of a contested statutory provision which as observed by O'Donnell J., at paragraph 74, requires:

> *"an evaluation of the particular transaction and a consideration as to whether it comes not just within the words, but also within the intended scheme, or is rather, a misuse or abuse of it. The fact that such an evaluation may be difficult and can create some uncertainty, is not a reason to avoid the task."*

148. As such and in the absence of a statutory definition of the noun "loss" for capital gains tax purpose, I rely on its ordinary meaning as denoting the process that leads to a position where you no longer have something or have less of something. The use of the noun "loss" in a financial context requires some element of tangible financial deprivation. Therefore, in the interpretation of "*losses accruing to that person"* as set out in TCA, section 31, I am satisfied that the intention of the Oireachtas, as discerned from the words deployed, is to provide relief to ameliorate actual financial hardship.

149. As such, the Appellant's entitlement to the loss relief was highly contrived. The granting of the call option by NEL to STN, a connected company, reduced the market value of the Bond however from a capital gains tax perspective, the Appellant was deemed to have acquired the Bond at its full market value without any recognition of the impairment caused by the call option. Thereafter the disposal of the Bond to STN, a company unconnected with the Appellant, for a consideration of €319,938 was higher than the value of the impaired Bond of €297,450 but 90% lower than the unfettered Bond of €2,977,446. As such, the result of those highly contrived steps could not be a series of transactions that could have been envisaged by the Oireachtas for the purposes of establishing an "*allowable loss*" calculated in accordance with TCA, section 546 deductible in reducing "*chargeable gains*" pursuant to TCA, section 31.

150. Therefore, in compliance with my statutory obligations, I engaged in an evaluation of the Transaction and the relevant legislation and I agree with the Respondent that the purpose of TCA, section 31 as discerned from express wording contained therein and indeed from the Act as a whole is to provide relief for the actual loss sustained. Fortification for this conclusion is derived from a consideration of TCA, section 556 that restricts indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or indeed converting an actual gain into a loss.

151. As a consequence, I have found that the series of contrived transactions that produced an artificial loss of €2,657,508 was arranged for the purpose of obtaining the benefit of the relief provided by TCA, section 31 and that the Transaction resulted in a misuse of that provision having regard to the purposes for which it was provided. Furthermore, it is significant that the Appellant failed to discharge his positive obligation to prove that the Transaction did not result in "*a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided"*. I am therefore satisfied that the Appellant's claim for capital gains tax loss relief cannot succeed.

Determination

Validity of Notice

152. Notwithstanding the misdescription in the Notice, I am satisfied that the Nominated Officer understood the essential fundamentals of the Transaction as the Notice correctly identified that the Appellant acquired the impaired Bond from NEL for €578,529 which he subsequently sold to STN for €319,938 pursuant to the exercise of his option in accordance with Clause 5 of the **Bond Purchase Agreement**. Furthermore, in the calculation of the "*tax advantage*", the Nominated Officer understood the connected party transactions and the associated legislation. In this regard, I am satisfied that as the Nominated Officer understood the essential fundamentals of the Transaction, the Notice could not be considered to be void.

153. However irrespective of the misdescription contained in the Notice, I have reviewed all the necessary documentation and had "*regard to all matters to which the Revenue Commissioners may or are required to have regard under this section"* in accordance with TCA, section 811(9)(a). Based on that review, I have concluded that the Appellant procured a "*tax advantage"* and that the Transaction was a "*tax avoidance transaction*" therefore the Nominated Officer's misdescription is irrelevant.

Time Bar

154. Notwithstanding the Supreme Court judgment in *Droog*, I am jurisdictionally constrained from departing from the statutory wording contained in TCA, section 811(5A) in respect of the making or amending an assessment on or after 28th February 2012. Therefore, unlike the Superior Courts, I do not possess the statutory or indeed constitutional authority to dispense with "*a process which can have no lawful conclusion"*.

155. Furthermore, the principle of presumption of constitutionality of laws enacted by the Oireachtas was articulated by Hanna J. in *Pigs Marketing Board v Donnelly (Dublin) Ltd*. [1939] IR 413 at page 417 and requires that in considering the validity of any law, it must:

> "*be accepted as an axiom that a law passed by the Oireachtas, the elected representative of the people, is presumed to be constitutional unless the contrary is clearly established."*

156. It is also significant that as the appellate process is extant, the purported unlawful act of making or amending the 2004 and 2005 assessments has not yet occurred. Therefore, as the law currently stands, there is no statutory impediment restricting the Respondent from making or amending an assessment after appellate process has been completed. On this basis I am unable to consider the Appellant's submission on time limits.

TCA, Section 811

157. I am satisfied that the purpose of the Appellant's investment in NEL was to '*connect*' him with that company. That connection was an essential component of the Transaction as was the disposal of the Bond to STN, a company unconnected with the Appellant but connected with NEL. In the absence of these carefully structured arrangements, the Transaction would not have resulted in the *'tax advantage'.* Furthermore, the disparity in the market value of the impaired Bond, the price paid to acquire the Bond and the consideration received by the Appellant on the sale of the Bond ostensibly demonstrated that there was no commercial motive for this investment apart from the "*tax advantage"*.

158. Therefore, the purchase and disposal of the Bond by the Appellant could have had no commercial purpose other than to crystallise an artificial tax loss. As such, in structuring the Transaction to avail of the connected party provisions in TCA, section 549, I am satisfied that the Appellant procured a significant "*tax advantage*" of €531,471 and that the purchase and sale of the Bond "*was …. arranged primarily …. to give rise to a tax advantage"* thereby constituting a *"tax avoidance transaction*".

159. Contrary to the positive obligation to demonstrate that there was no "*misuse …. or an abuse of"* TCA, section 31 "*having regard to the purposes for which it was provided"*, the Appellant asserted that no purpose could be discerned. Therefore, it is not clear how the Appellant can succeed when there was no articulation of the purpose of TCA, section 31.

160. In the absence of a statutory definition of the noun "*loss*" for capital gains tax purpose, I rely on its ordinary meaning as denoting the process that leads to a position where you no longer have something or have less of something. The use of the noun "*loss*" in a financial context requires some element of financial deprivation. Therefore, in the interpretation of the term "*losses accruing to that person"* as set out in TCA, section 31, I am satisfied that the intention of the Oireachtas, as discerned from the words deployed, is to provide relief to ameliorate actual financial hardship.

161. Fortification for my conclusion is derived from a consideration of TCA, section 556 that restricts indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or indeed converting an actual gain into a loss.

162. In this regard, I have concluded that the Appellant engaged in highly contrived series of steps that could not have been envisaged by the Oireachtas in enacting legislation that permits the calculation of "*allowable losses*" in accordance with TCA, section 546 to reduce "*chargeable gains*" pursuant to TCA, section 31.

163. Therefore, in compliance with my statutory obligations, I engaged in an evaluation of the Transaction and the relevant legislation and have found that the Appellant procured a '*tax advantage'* as a result of engaging in a "*tax avoidance transaction*" and that the Transaction resulted in a misuse of TCA, section 31 having regard to the purposes for which it was provided. I am therefore satisfied that the Appellant's claim for capital gains tax loss relief of €2,657,508, cannot succeed.

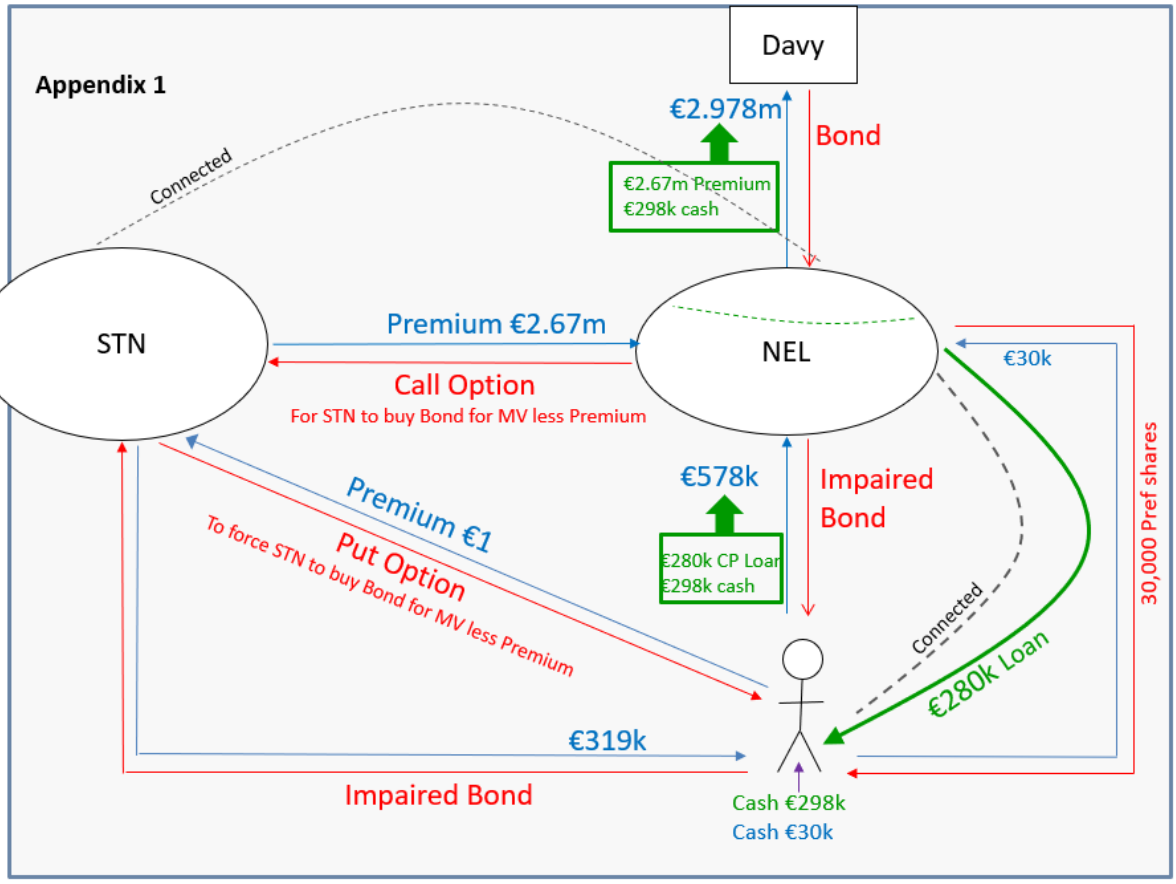
164. On this basis and pursuant to TCA, section 811(9)(a)(ii), the Appellant's entitlement to the capital gains tax loss relief in accordance with TCA, section 31 is calculated by reducing the proceeds of sale on the disposal of the Bond by the actual cost of acquiring that asset and is calculated as follows:

Consideration Received	€319,938
Cost of the Bond	€578,529
Allowable Capital Gains Tax Loss	(€258,591)

165. Therefore, the actual capital loss available to the Appellant as a consequence of this determination should be reduced to €258,591.

Conor Kennedy
Appeal Commissioner
2nd July 2020

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


Appendix 1
Davy
€2.978m
Bond
€2.67m Premium
€298k cash
Connected
STN
Premium €2.67m
NEL
€30k
Call Option
For STN to buy Bond for MV less Premium
€578k
Impaired
Bond
€280k CP Loan
€298k cash
Premium €1
Put Option
To force STN to buy Bond for MV less Premium
Connected
€280k Loan
30,000 Pref shares
€319k
Impaired Bond
Cash €298k
Cash €30k