33TACD2020

BETWEEN/

APPELLANT NO. 6

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

The Appellant is one of 32 individual Appellants who participated in one or more of the following Collectives; Collective No. 1, Collective No. 2 and/or Collective No. 3.

In general, under Irish income tax law, a dividend, including a foreign dividend, is taxable in the hands of the recipient under Case III of Schedule D or, if the recipient is trading in dividends, under Case I of Schedule D. In these appeals the Appellants contend that based on the provisions of section 812 TCA 1997, the dividends are not liable to tax in their hands.

These appeals are appeals against amended Schedule D assessments raised by the Respondent in respect of the tax years of assessment 2009 and/or 2010. The assessments disallow certain tax losses claimed by the Appellants in respect of the Appellants' participation in the Collectives.

The Appellants claimed that the losses were allowable Case I trading losses. The Respondent refused the losses on the grounds that they are not allowable trading losses. The Appellants duly appealed.

Background

The Appellants and a number of other individuals signed up to form a Collective and contributed funds to the Collective.

Prior to contributing funds to the Collective, the Appellants were provided with an opportunity to review a copy of an investment management proposal, background information documents and a Collective agreement. These documents confirmed that:

(i) Persons wishing to receive the services as a part of the Collective must be individuals who are resident or ordinarily resident in Ireland for tax purposes,

(ii) The opportunity best suited higher-rate taxpayers with sufficient income and/or capital gains to absorb any initial trading and/or tax loss, and may not be suitable for non-higher rate taxpayers

(iii) The initial contribution would not be returned.

The only documentation which the Appellants were required to sign in order to pay in to the Collectives was the subscription agreement, a capital loan application and a power of attorney.

Among the transactions in which the Collectives engaged, was the purchase of the right to receive a dividend payable by a company incorporated in the British Virgin Islands ('BVI') ('the AB/CD/EF/GH Dividend Transaction(s)').

Each AB/CD/EF/GH Dividend Transaction undertaken by Appellants was preceded by a significant new investment of capital by the Collective member.

The vendor in the AB/CD/EF/GH dividend transactions was also a company incorporated in the British Virgin Islands.

It is not disputed that both the company which paid the dividend and the holding company which sold the right to receive the dividend were resident outside the State at all material times.

The Collective did not purchase the shares on which the dividend was payable or any interest in those shares other than the right to receive a specific dividend or dividends.

The vast majority of the funds which the Appellants contributed to the Collective were funded by a limited-recourse loan from a third BVI-incorporated company, [Lender limited]. The loan agreement provided for a term of no more than 30 days. The loan was repayable only if and to the extent that the dividends from the first BVI company were actually paid to the Appellant. The funds provided under the loan agreement with [Lender limited] were used to purchase the dividend from the BVI company.

The remaining funds which the Appellant contributed to the Collective for a period of up to five years were funded from the Appellant's own resources or other borrowings of the Appellant. These funds were available for the purchase of a portfolio of transactions in financial securities.

The monies lent by [Lender limited] to the Appellants were drawn down by a transfer of funds directly to the vendor of the dividend as consideration for the purchase of the right to the dividend by the Appellants.

[Lender limited] also advanced a loan to the vendor of the dividend. The amount of the loan was very slightly higher (less than 0.1%) than the amount of the dividend which was purchased by the Appellants.

The proceeds of the loan from [Lender limited] to the vendor of the dividend were used to make a capital investment in the subsidiary which declared the dividend. The vendor of the dividend used the proceeds from the sale of the dividend to repay the vast majority of the loan which it owed to [Lender limited], leaving a small deficit.

The repayment by the Appellants of the loans from [Lender limited] and the payment of the fees charged by [Lender limited] under the loan agreements were completed by the payment of the dividend purchased by the Appellants directly to [Lender limited].

A very small surplus of between 0.7% and 0.12% of the value of the dividend purchased was then remitted by [Lender limited] to the Appellant.

Apart from the remittance of this small surplus by [Lender limited] to the Appellants, all transfers of funds related to the AB/CD/EF/GH dividend transaction, occurred in a period of less than one month.

In this appeal, one of the transactions the Collective entered into involved the acquisition from an offshore parent company YZ Limited ('YZ') of its right to receive an interim dividend declared by an offshore subsidiary company AB Limited ('AB'). As YZ Ltd. sold the right to receive the dividend without selling or transferring ownership of the underlying shares, the Appellants contended that the dividend qualified as a security for the purposes of section 812 TCA.

The factual background to that transaction was that [Lender limited] provided a loan to YZ Ltd. YZ then subscribed for share capital in AB Ltd. and AB placed that money on deposit. The new capital enabled AB to declare a dividend to YZ Ltd. which is the dividend that was later acquired by the Collective members. YZ Ltd. having sold the right to receive that dividend to the Collective members then used the sale proceeds to repay the majority of the loan that it had drawn down with [Lender limited]. When the dividend became payable to the Collective members, it was paid by AB to [Lender limited] in discharge of the limited-recourse loan to the Collective members.

The cost of acquiring the right to receive the dividend was treated by each Appellant as an expense in his/her trading accounts. In reliance on the operation of s.812 TCA 1997, the Appellant did not include the dividend income in the Appellant's tax computation for that accounting period and the resulting computational losses were offset by each Appellant against his/her taxable incomes pursuant to the provisions of section 381 TCA 1997.

Broadly speaking, the questions which arise in this appeal are; firstly, whether the Appellants were trading or investing and secondly, whether section 812 TCA 1997 applies.

Legislation

Section 812 of the Taxes Consolidation Act, 1997 – Taxation of income deemed to arise from transfers of right to receive interest from securities

(1) In this section-

"interest" includes dividends, annuities and shares of annuities;

"securities" include stocks and shares of all descriptions.

(2) Where in any year of assessment or accounting period an owner (in this section referred to as "the owner") of any securities sells or transfers the right to receive any particular interest payable (whether before or after such sale or transfer) in respect of those securities without selling or transferring those securities, then, and in every such case, the following provisions shall apply:

> *(a) for the purposes of the Tax Acts that interest (whether it would or would not be chargeable to tax if this section had not been enacted)-*
>
> > *(i) shall be deemed to be the income of the owner or, where the owner is not the beneficial owner of the securities and some other person (in this section referred to as "the beneficiary") is beneficially entitled to the income arising from the securities, the income of the beneficiary,*
> >
> > *(ii) shall be deemed to be income of the owner or the beneficiary, as the case may be, for that year of assessment or accounting period, as the case may be, [and]*

(iii) […]

(iv) shall, where the proceeds of the sale or transfer are chargeable to tax under Schedule C or under Chapter 2 of Part 4, be deemed to be equal in amount to the amount of those proceeds;

(b) […]

(c) where the securities are of such character that the interest payable in respect of the securities may be paid without deduction of tax, then, unless the owner or beneficiary, as the case may be, shows that the proceeds of any sale or other realisation of the right to receive the interest, which is deemed to be income of the owner or of the beneficiary, as the case may be, by virtue of this section, have been charged to tax under Schedule C or under Chapter 2 of Part 4, the owner or beneficiary, as the case may be, shall be chargeable to tax under Case IV of Schedule D in respect of that interest, but shall be entitled to credit for any tax which that interest is shown to have borne;

(d) where in any case to which paragraph (c) applies the computation of the tax in respect of the interest which is made chargeable under Case IV of Schedule D by that paragraph would, if that interest had been chargeable under Case III of Schedule D, have been made by reference to the amount received in the State, the tax chargeable pursuant to paragraph (c) shall be computed on the full amount of the sums received in the State in the year of assessment or in any subsequent year of assessment in which the owner remains the owner of the securities;

(e) nothing in this subsection shall affect any provision of the Tax Acts authorising or requiring the deduction of tax from any interest which is deemed by virtue of this subsection to be income of the owner or of the beneficiary or from the proceeds of any subsequent sale, transfer or other realisation mentioned in this subsection of the right to receive that particular interest.

(3) In relation to corporation tax-

(a) subsection (2)(c) shall apply (subject to the provisions of the Corporation Tax Acts relating to distributions) to any interest, whether or not the securities are of such character that the interest may be paid without deduction of tax, and as if ",but shall be

entitled to credit for any tax which that interest is shown to have borne" were deleted, and

(b) subsection (2)(d) shall not apply.

(4) The Revenue Commissioners may by notice in writing require any person to furnish them, within such time (not being less than 28 days from the service of the notice) as shall be specified in the notice, with such particulars in relation to all securities of which such person was the owner at any time during the period specified in the notice as the Revenue Commissioners may consider to be necessary for the purposes of this section or for the purpose of discovering whether-

(a) tax has been borne in respect of the interest payable in respect of those securities, or

(b) the proceeds of any sale, transfer or other realisation of the right to receive the interest in respect of those securities has been charged to tax under Schedule C or under Chapter 2 of Part 4.

Submissions in brief

The submission of the parties can be summarised as follows;

Trade v Investment

The Appellant submitted that in terms of the Appellant's involvement in the Collective, he/she was at all times carrying on a trade in financial instruments and securities. The Appellant did not accept the Respondent's submission that involvement in the Collective constituted investing and not trading.

The Respondent submitted that the Appellant's capital contribution to the Collective(s) was an investment. The Respondent refuted the Appellant's suggestion that he/she was carrying on a trade.

Section 812 TCA 1997

In addition, the Appellant submitted that the provisions of section 812 applied to exclude the dividend income from the Appellant's tax computation for that accounting period, which resulted in substantially increased computational losses which were then offset against the Appellant's taxable income.

The Respondent submitted that section 812 TCA 1997 did not have extra-territorial effect and did not apply and that as a result, the dividend income was taxable in the normal way under section 18 TCA 1997.

Expression of doubt

The Appellants submitted that the expressions of doubt filed by them were valid expressions of doubt, were genuine and were in compliance with the requirements of section 955(4) TCA 1997.

The Respondent submitted that the expressions of doubt failed to adequately specify the doubt, were not genuine, were not in compliance with section 955(4) TCA 1997 and were not valid.

EVIDENCE

Documentary evidence

Documentation furnished in evidence included *inter alia*; the investment management proposal, the background information document, the Collective agreement, the subscription agreement, a capital loan application and a power of attorney.

Relevant excerpts are cited in the analysis below.

Witness evidence

On behalf of the Appellants, evidence was provided by Appellant no. 27, Appellant no. 26 and Appellant no. 5. Evidence was also provided by Witness A of [Taxfirm] on behalf of the Appellants. On behalf of the Respondent, expert evidence was provided by Witness X.

Evidence of Appellant no. 27

Appellant 27, a trader in financial products by profession confirmed he was a participator in Collective no. 2 and Collective no. 3. He stated that he attended at perhaps two or three meetings with Witness A of [Taxfirm] where he was shown a background information document in relation to the proposed investment.

Appellant 27 confirmed that he participated in the Collective by making a capital contribution of 10%. The balance was effected by means of a limited-recourse loan from the BVI company, [Lender limited]. Through a power of attorney he authorised [Taxfirm] to sign a Collective agreement and a facility agreement on his behalf. The term of the loan was not for the duration of the Collective but for 30 days. Appellant 27 confirmed that the purpose of the loan was to allow the dividend to be purchased.

Page 13 of the background information document provided; *'On exit from the* [Collective] *the Member will be entitled to profits not already drawn, repayment of any capital loan but they will not receive back any part of the Initial Contribution. Any Initial Contribution remaining will become payable to the Administrator at the time of exit.'*

Appellant 27 accepted that the above statement meant that he would not receive his initial contribution back. The following excerpt from the evidence refers;

'Q: … this is an investment where you will never get your principal back?

A: Well --

Q: Isn't that right?

A: I can show you a list of four investments or trades in the last four months where I sure am not getting my investment back. Okay, it says that but to me it's just finance drivel speak. It can be worded in different ways but essentially what it's saying is, this is risky. This is not for the faint hearted. If you have got €3,000 and that's your last money in your bank account, that's not to be fill in.

Q: There is no element of risk here, … isn't that right? You are being told not that you are at risk of not getting your initial contribution back, you are being told that you will not get it back. That's part of the structure of the transaction.

A: But you are not involved in the trades or the transaction to just put €10,000 in and get €10,000 back. You are putting money at risk in a trade because you hope to make a profit, that's my understanding of it.

Q: But this is telling you that you will never get your initial contribution back, so if you paid in €15,000 you will never get that back. That's what it is telling you.

A: It certainly didn't scare me. It still doesn't scare me. If I see that again on a trade idea I will assess the trade on its merits.

Q: But it's nothing about scaring you, Mr. [redacted]. *It's not expressing some concern or some warning that you might not get your initial investment back. It's telling you that you will not get it back. Surely you can see --*

A: It's not –

Q: No, surely you can see the difference between those two things?'

Appellant 27 's position in evidence was that he entered into the transaction with a view to making a profit notwithstanding that the background information document made it clear that his initial contribution would not be returned.

Page 17 of the background information document provided: '*Subscribers to the* [Collective] *should consider the potential risks of participation, which include, but are not limited to, the following; the opportunity described herein best suits higher rate taxpayers with sufficient income and/or capital gains to absorb any initial trading and/or tax loss, and may not be as suitable for other investors.'*

During cross-examination, Appellant 27 was directed to this statement at page 17 of the background information document. He was asked why the rate of tax that a taxpayer has to pay should make any difference to the investment being made. The following exchange between Senior Counsel for the Respondent and Appellant 27 refers;

'Q: Why should the rate of tax that a taxpayer makes or has to pay make any difference to the investment being made?

A: …….. So higher tax, higher rate taxpayer means, to me means you have disposal income to invest, to take risk and it's -- if I was a low earner and I didn't have a whole lot of savings, that sentence would probably scare me. ..

Q: It doesn't talk about wealthy people, isn't that right? It talks about higher rate taxpayers?

A: Are they not one and the same thing?

Q: Why would you refer to the rate of tax somebody pays rather than to somebody being wealthy?

A: …But to me anyway the insinuation is, look stay away if you don't have money to risk.'

Page 18 of the background information document provides, under a heading '*General*' that;

> *'Persons wishing to receive the services contemplated by this document as part of a* [Collective] *must be individuals who are resident or ordinarily resident in Ireland for tax purposes.'*

Senior Counsel for the Respondent asked Appellant 27 whether he was struck by this statement and the following exchange ensued;

'Q: Did that not strike you at the time?

A: No, I don't know why it would.

Q: Well doesn't it suggest that the purpose behind this investment has to do with tax rather than making a return?

A:. I would disagree.

Q: You would disagree?

A: I would disagree.

Q: Is there any reason why you would disagree?

A: There is. I would say if you are going to try and run a fund where do you want to cast your net? Do you want to have the worldwide people investing all over the place and sending out letters to every which jurisdiction in the world or do you want to say, okay, this is open to Irish people. I wouldn't read into it any more than that.

Q: ….

A: …

Q: *I have to suggest that those words tell their own story and they suggest that this particular transaction was designed in fact to assist people who wished to save tax?*

A: *I am not sure if I could, I mean I am not sure if you want me to repeat myself but it doesn't say that to me."*

Appellant 27 confirmed that the background information document provided that each Collective member's capital contribution would be made up of two parts; one part money advanced by the Collective member himself and the balance, a loan from a British Virgin Islands company, [Lender limited]. The background information document provided that the only recourse Lender Limited would have in relation to the loan, would be in relation to the value of the investment in the Collective (but would not extend to the personal assets of the Collective participant). Appellant 27 confirmed that this was how he structured his capital investment.

In addition, the facility letter between Investment-Co and [Lender limited] provided, in a provision titled '*Limited Recourse'* that recourse was limited to the receipt of the dividend and [Lender Limited] did not have recourse to the other assets of the participants.

Appellant 27 accepted that he made a 10% contribution from his own resources and that the balance was contributed by the limited-recourse Lender loan. Thus, as a matter of fact, the [Lender Limited] loan was risk free to Appellant 27. He had no liability to the bank beyond the subject matter of the loan.

Initially, when asked whether he made a profit on the transactions he accepted it was '*not much'* but stated that it was always his intention to make a profit.

Under cross-examination, Appellant 27 was questioned in relation to the trading statement which he received regarding the period November to December 2010 which showed an opening balance of €20,000 (the cash amount he invested) less expenses of €10,358.83,

leaving a closing balance of €9,879.46. It was put to Appellant 27 by Senior Counsel for the Respondent, that it would be a tall order to generate sufficient income on €9,879.46 to generate a return in excess of €20,000. In reply, Appellant 27 stated that most trades earn nothing and that his firm earned about 50% of its total annual income in about 45 seconds. They then spent the rest of the year trying to match that. Appellant 27 stated that he did not see anything unusual about the numbers in the statements nor in the taking of expenses early on. Appellant 27 insisted that despite the mechanisms of the Collective, the deduction of expenses and the fact that his initial contribution would not be returned to him, he expected to make a return on his capital contribution.

Senior Counsel for the Respondent brought Appellant 27 through his trading statements for 2011 in some detail. The statements indicated that the gains generated on foot of trades were minimal if not negligible in value.

In relation to his contribution to Collective number two, having invested €20,000 of his own money and €180,000 of a loan, Appellant 27 's dividend was purchased for €194,992.06, the arrangement fee was €1,949.93, the dividend received was €197,180.27 and the profit on the dividend rights trade was €238.29. He accepted that this was not a good return on capital. When asked what the commercial rationale of the transaction was, a protracted exchange ensued between Appellant 27 and Senior Counsel for the Respondent. Further on in evidence, he accepted that the €238 gross trading profit translates into a net trading loss when offset against the administration fees.

In relation to his contribution to Collective number three, Appellant 27 contributed €13,500 of his own monies with a loan of €177,190.16. The purchase price of the dividend was €175,435.81 and the arrangement fee was €1,754.36. The gross trading profit on this occasion from the dividend purchase transaction was €227.97. Again, Appellant 27 confirmed that the administration fees exceeded this sum.

Appellant 27 was questioned as to why in his view, such large transactions were generating such small profits. He responded: '.. *but we don't know until the trade is done what profit or loss is going to be on it'* however, the Respondent pointed out that in fact he *did* know, because when you subtract the amount of the loan from the purchase price of the dividend you get the profit figure. Senior Counsel for the Respondent stated; *'We know that when you subtract the amount of the loan from the purchase price of the dividend you get the profit that was made and that's €227.97. So all of these documents were put in place in order to generate that profit and nothing more than that profit. I have to suggest to you looking back at it now that you*

know these facts, does it not surprise you that so much trouble was gone to in order to generate a profit of €227.97?'

The following exchange occurred:

'A: *I don't know why. I don't know the full commercials. But I would ask the team that put it together why didn't we do a million of these transactions and generate €228 million. Why didn't we do that? Also I would say there has to be some level of risk in a transaction that goes, was it 30 days?*

'Q: Well isn't the answer obvious to that?

A: Certainly not to me.

Q: Well I have to suggest to you the answer is obvious, … and the answer is - -

A: Are you suggesting my answer?

Q: Well, …. I haven't finished the question. The answer is … that this was done in order to generate a loss --

A: And it generated a profit.

Q: --- a loss that could be used for tax purposes, isn't that right, ..?

A: Well what I do know is that the [Collective] *has delivered three years of profits.*

Q: Isn't that right..? You must answer my question first, … Isn't that right?

A: In my opinion that is not correct.

Q: Well I have to suggest to you that it's the only explanation for a transaction of this kind.

A: I would disagree.'

Appellant 27 benefitted significantly from his participation in the Collectives as he claimed the following tax losses in his tax returns as a consequence of his participation in the Collectives;

- In relation to his statement of trading income and expenses for 2010, the amount of the loss claimed increased from €10,121 to €207,301 as a consequence of the Collective no. 2 dividend transaction.
- In relation to his statement of trading income and expenses for 2011 (but which is titled as 2010), the amount of the loss claimed increased from €7,528 to €184,947 as a consequence of the Collective no. 3 dividend transaction.

In addition, [Taxfirm], on behalf of the Collective participants including Appellant 27, filed a mandatory disclosure form (Form MD1) and ticked the box titled '*Loss Schemes – Individuals*' indicating that the Collective had a loss-making scheme for individuals.

It was put to Appellant 27 that this was a scheme designed to generate tax losses to be used by him as participant of the Collective. Appellant 27 did not accept this. It was put to Appellant 27 that the only explanation for his entering into the dividend transactions was to generate a tax advantage. Appellant 27 refused to accept this proposition.

Evidence of Appellant 26

The Appellant is an accountant by trade. He came to invest in the Collective through a friend who was familiar with Witness A of [Taxfirm]. The Appellant stated that he had met with Witness A.

Appellant 26 stated that he understood the opportunity with the Collectives to be one of trading in financial instruments. He stated that he understood that a loan would form the main part of his capital contribution.

When asked what Witness A told him of the product, Appellant 26 stated that he told him that it would be multiple trading with Investment-Co.

Page 13 of the background information document provided; *'On exit from the* [Collective] *the Member will be entitled to profits not already drawn, repayment of any capital loan but they will not receive back any part of the Initial Contribution. Any Initial Contribution remaining will become payable to the Administrator at the time of exit.'*

Appellant 26 was asked about his understanding of the fees. He replied that if you got out of the scheme early you would forego your contribution and that the fees were a way of keeping you in.

The Appellant stated that he had never before been in a situation where he was told that he would not get the amount of his investment back and he agreed with Senior Counsel that in his limited experience it was an unusual provision.

Page 17 of the background information document provided: '*Subscribers to the* [Collective] *should consider the potential risks of participation, which include, but are not limited to, the following; the opportunity described herein best suits higher rate taxpayers with sufficient income and/or capital gains to absorb any initial trading and/or tax loss, and may not be as suitable for other investors.'*

Appellant 26 was asked about this paragraph and he stated that he wouldn't take much from it and that it was targeting people who could afford to lose the contribution.

Page 18 of the background information document provides, under a heading 'General' that';

> *'Persons wishing to receive the services contemplated by this document as part of a* [Collective] *must be individuals who are resident or ordinarily resident in Ireland for tax purposes.'*

Senior Counsel for the Respondent asked Appellant 26 if it suggested that the underlying purpose of the agreement was in relation to tax. Appellant 26 stated that he didn't think so.

On behalf of the Respondent it was suggested: *'I'd have to suggest to you that those statements make sense if what this is designed to do is to generate a loss that can be used against your higher rate tax*? Appellant 26 answered: '*I can't – I'm not going to confirm something. To me, no.'*

Appellant 26 stated that he understood that a loan would form the main part of his capital contribution and that the loan would be limited recourse and that it would not put at risk any of his assets which were outside the Collective.

The Appellant was asked if he was happy with the returns on the investment. He said he was not quite qualified to say, but that it was a profit.

He was then asked if he was surprised to get a trading statement showing a net loss for the first year. He stated that he was disappointed and that he had hoped to make money. However, he accepted that the fees were well in excess of the modest profit amounts generated.

He confirmed that he did not at any time direct that any individual trade be undertaken in the Collective.

The Appellant was asked when he identified the tax consequences of the transaction. He replied that his background is in accounts and that he does his own tax return. In direct examination he stated that he received notification from [Taxfirm] on how to fill in the tax return. He said his view of this was mixed. He continued: *'Obviously when I got it and did my own research and digging and – it was mixed. It was like all these things, for me if you're giving a Protective Notification on something you're obviously coming out with something that might not necessarily be agreed on all side, which is obviously quite evident. On the other side, if there was a nice – lets be honest, a nice tax advantage that came with it, well that would be fantastic…'*

The Appellant was asked what Witness A had said about the tax advantages of entering into this arrangement. The Appellant stated that he was told that if there were losses in the trade you would be able to offset those losses against income. The Appellant stated there was no discussion about any dividend purchase arrangement or the tax treatment of a dividend purchase arrangement.

Senior Counsel for the Respondent brought the Appellant to a paragraph in the general information booklet which stated that if practices are changed to remove tax reliefs that the Collective has a right to proceed regardless. The Appellant was asked what were the tax reliefs that were described. The Appellant stated that he did not know.

The Appellant was brought to the statement of trading, income and expenses for the period ended 31 December 2010 which showed that Appellant 26 generated a net trading loss of €10,121 on the Collective dividend transaction but that this appeared as a tax adjusted loss of €207,301 in his tax return and the following exchange took place between Senior Counsel for the Respondent and Appellant 26:

'Q: *But you are able to claim an adjusted loss for tax purposes of €207,301?*

A: *Yes.*

Q: *Are you seriously suggesting …. that you didn't understand when you entered into the* [Collective] *arrangement through* [Taxfirm], *that you didn't understand that a loss of this kind was going to be generated?*

A: *Yes.*

Q: *Are you seriously suggesting that …?*

A: Yes.

Q: So are you saying that you were taken completely by surprise when you received this communication in early 2011. You were taken completely by surprise in thinking, oh my goodness, I have got this fantastic opportunity to claim losses of €207,301. That was a complete bolt out of the blue, is that your evidence?

A: Yes.

Q: So you had no idea whatsoever that that was going to happen?

A: No.

Q: You must have been jumping for joy?'

The Appellant was then brought through the figures in the quarterly statement and was asked if it struck him as odd that relative to his opening initial contribution of €20,000, the most significant transaction which takes place in the entire history of the account generates a profit of €238.29. The Appellant replied that he was not qualified to say what was a good deal.

The Appellant was then taken to the facility letter from [Lender limited] in relation to the loan taken out for acquiring the dividend. Senior Counsel for the Respondent asked the Appellant if it struck him as odd considering the detail and complexity of all the documents in relation to the transaction that people would go to so much trouble putting such a structure in place solely to acquire a profit of €238.29 in relation to a dividend which was purchased for €196,941.98. The Appellant agreed that it was a lot of work and documentation but stated that '*a profit is always a profit*'.

The Respondent suggested to the Appellant that there was no commercial rationale for the transaction. In response the Appellant agreed that the profit was small but stated that '*a profit is a profit*'. The question of commercial rationale was put to the Appellant a number of times by Senior Counsel for the Respondent, culminating in the following exchange;

'Q: And I am asking you again, I will ask you for the very last time, can you identify any commercial purpose to that structure? Can you?

A: The fact that it made a profit?

Q: That the profit of €238.29, you are saying that that represents a commercial rationale for going to all that trouble?

A: It's a lot of work yes.

Q: Yes.

A: It's a lot of work to get €238, yes.

Q: I have to suggest to you that no one in their right mind would consider a transaction of that kind as having any commercial purpose. Do you have anything to say in relation to that?

A: No.'

The Appellant stated that he entered into Collective number 10 in November 2011. He was asked by Senior Counsel for the Respondent why he entered another one of these Collectives when it was clear from his first statement in February 2011 that significant fees were required to be paid, leaving very little of his capital contribution. The Appellant stated that he was '*having a go*'. It was suggested to the Appellant that the reason he entered into the transaction was the existence of the tax loss. The Appellant responded to this suggestion that *'In my mind the tax we claim is not part of any decision making until the very end and if there's some nice piece that comes out of it, that's great, but no would be the answer ..'*

Evidence of Appellant No. 5

The Appellant stated that he entered into the Collective in 2009.

The Appellant was asked how he interacted with [Taxfirm] at the beginning. He stated that he had heard about the investment from his accountant who was also his business and tax advisor. The Appellant stated he had no direct interaction with [Taxfirm]. He stated that all he was told about the product was what was in the background information document.

The Appellant indicated that his understanding of what the Collective was intended to do was to buy and sell a number of different short-term financial instruments, bonds, futures etc. and to trade to make profit. He stated that over a period of five years the idea was to go from what they had, to a better place.

He had previously had a bad experience with his own pension and so he enquired with his business advisor about what other investment options were available.

Page 13 of the background information document provided; *'On exit from the* [Collective] *the Member will be entitled to profits not already drawn, repayment of any capital loan but they will not receive back any part of the Initial Contribution. Any Initial Contribution remaining will become payable to the Administrator at the time of exit.'*

Appellant 5 was asked if he understood that his initial investment would not be returned. He advised that he did understand that but he also understood that the Collective would use the nous of experienced investment traders to realise a profit over time and it wasn't going to do this in year one or two. The intention of the stake was to make the stake back and to make profits, he stated.

Senior Counsel for the Respondent pointed to the fact that the Appellant had explained at length in direct examination how he was not keen on getting involved in unsafe investments. The Respondent put it to the Appellant that notwithstanding this, he had paid out €25,000 to the Collective despite being told explicitly in the background information document that he would not get that €25,000 back and that all he had was the hope of earning a profit over the term.

The Appellant stated that every business adventure has a degree of risk to it and that he recognised that it was a long play. Senior Counsel for the Respondent queried why he would hand over €25,000 on the basis of the terms just mentioned if he was so risk adverse. The Appellant stated that his motivation was that it was €25,000 and no more and that he would let the investment work over the five-year period.

Appellant 5 stated that he recognised that he was not a specialist in financial trades. He stated that he was hoping that by trading these financial instruments that he would realise profit, that he would realise his investment plus. He stated that that was the motivation and that was his clear understanding.

The Appellant stated that the background information document indicated that the capital was subject to losses but he hoped there would be profits at the end. Senior Counsel for the Respondent put it to the Appellant that in order to generate profits to pay back the capital, he would have to earn the full amount of the initial contribution of 25,000 by way of profit and that he would also have to earn something more. The Appellant accepted that this was correct.

On the issue of tax losses, the following exchange occurred between the Appellant and his his Counsel during direct examination;

'Q: You did claim a loss significantly higher than the financial loss on the dividend trade?

A: That is what my accountant would have indicated to me after the end of the year of trading.

Q: And you had no concerns regarding that?

A: Well, it was a surprise, to be honest. I didn't – what I understood was that there was going to be potentially losses in the first year. I didn't actually understand that basically, that this might have an immediate impact on my tax.'

Senior Counsel for the Respondent directed the Appellant to the trading statement which stated that in December the Appellant had an opening cash balance of €25,000 and the deductions from that were almost 50% of his capital contribution. He was asked if it was alarming that the first document he received showed that 50% of the investment was gone. The Appellant replied '*No'* on the basis that there were fees that were going to be taken to begin with. The exchange below followed;

'Q: .. you are saying that you're not alarmed. And there's a reason why you're not alarmed and you know what it is. … and the reason why you're not alarmed is you know, as a consequence of the transaction that you have entered into, that you have earned for yourself through your 25,000 contribution a very large claim for tax relief; isn't that right?

A: No. I did not know that at the time at all.

Q: … let's be real about this, let's look at page 48 of the same book.

A: Is this on?

Q: It's the same book, the same tab. ….. Here is your statement of trading income and expenses for the period ended 31 December 2009 and what with do we find here, ….. we find that the loss or payment …of €12,492 suddenly becomes a claim for tax of €267,510, a very valuable claim for someone who is paying tax at the higher rate of 41%; isn't that right, a very, very valuable claim? You know, …. That if you were able to make a claim for tax purposes of a loss of €267,510, that has a significant impact on the amount of tax that you pay; isn't that right?

A: I would not have known that at the time of entering the [Collective].

Q: *… let's be real about this; the only reason why you entered into this* [Collective] *along with all the others, and I'll come to the others in a moment, the only reason you did it was for tax purposes; isn't that right?*

A: *That is incorrect.*

Q: *I have to suggest to you that's plainly wrong. Looking at the documents that we have just seen, the only rational explanation for entering into this transaction is an attempt to save on tax?*

A: *That is incorrect and I did not know that at the time of entering the* [Collective].

…

….

….

…

Q: [Appellant 5], *what makes this investment work is the tax claim, it doesn't work otherwise; isn't that right?*

A: *I don't think you can make that assertion because this is something that is done over a period of time, over five years anyway and beyond, because I do believe that our* [Collective] *is still running. So to that end, no, I don't agree. '*

Senior Counsel for the Respondent made the point that the Appellant had made losses and although he had stated that he was risk adverse, having seen the statement which showed that he lost half of his investment, he went on to sign up to the next Collective, Collective no. 2. He suggested that the Appellant did so in order to obtain the tax advantage. The Appellant refuted this. He stated that the intention of the second Collective was the same as the first which was to earn profit and that he had already decided that it was a worthwhile business adventure.

Senior Counsel for the Respondent put it to the Appellant that what made it *worthwhile* was the tax advantage. The Appellant reiterated that he was unaware of the tax treatment of the trades except that if there were profits, he would be taxed on those profits.

Again, it was put it to the Appellant that he would have been aware of the tax advantage by the time he signed up to Collective no.2. The Appellant stated '*I must have known that*'.

The Respondent's Senior Counsel then pointed to the fact that the Appellant did not just invest in Collectives 1 and 2 but also invested €20,000 in Collective no. 9 in 2011, a further €20,000 in Collective no. 15 in 2012 and a further €20,000 in Collective 23 in 2013. Over a period of five years the Appellant invested €100,000 in the Collectives.

The profit returned by the Appellant in the year ended December 2013 in respect of Collective no. 1 was €19. In respect of the 2014 tax year regarding Collective no. 1, the profit was €28 and in respect of 2015, the profit generated was €16.

Senior Counsel for the Respondent put it to the Appellant that as a matter of objective fact, the only advantage the Appellant obtained from Collective no. 1 was the tax advantage. In response, the Appellant reiterated that the intention was not to gain a tax advantage. The Appellant further stated that the profits had been disappointing but that it did not change the fact that his intention was to make a profit.

<u>Evidence of Witness A of [Taxfirm]</u>

Witness A was directed to page 13 of the background information document under the heading '*management and administration fees and expenses*' which provides: *"The administrator will receive an initial fee of 2.5% of members capital contributions'.* The definition of '*capital contribution'* is defined as '*The finance provided by an individual member, being the amount of his or her capital loan*'. Therefore, the 2.5% fee was confined to the amount of the loan to be provided by [Lender limited].

Senior Counsel for the Respondent identified some of the other fees which included an annual management and administration fee of €10,000 per annum divisible on a pro rata basis between the members of the Collective plus 1% of the gross income for the period which is paid in addition to the 2.5% fee. There was also an annual fee payable to Investment-Co which was charged to each Collective member. It was put to Witness A that the fees charged exceeded by far, the negligible profits generated.

Then followed lengthy questioning about fees in general and how they were allocated. Senior Counsel for the Respondent suggested that there was a correlation between the fees applied

and the dividend transaction, highlighting the fact that in the years where there was no dividend transaction the fees were substantially reduced.

Questions followed in relation to additional contributions that Collective members had paid and the fact that another 2.5% fee was applied to those. Senior Counsel for the Respondent suggested that the reason the Collective members made an additional contribution was because there was an additional dividend available. Senior Counsel put it to Witness A that '*the figures speak for themselves'* to which the witness responded '*okay'*.

Senior Counsel for the Respondent then asked Witness A why YZ Ltd. agreed to participate in the transaction and what was in it for them. Witness A stated that he believed that they had borrowings and that they felt that if they could sell the dividend early that they would be able to repay those borrowings early and save interest.

Senior Counsel for the Respondent then asked if the borrowings he was talking about were the borrowings they made in order to make the dividend. Witness A confirmed this but stated that he did not know that at the time.

Senior Counsel for the Respondent stated that it was difficult to believe he did not know this given his experience dealing with these arrangements in [location redacted] for several years before he moved back to Dublin. Witness A stated that those transactions were entirely different as they were funded by banks.

Senior Counsel for the Respondent pointed to the fact that YZ Ltd. sold the dividend at a discount of £40,000. He asked Witness A how YZ Ltd. got rewarded for that. Witness A reiterated that they had borrowings and so they would rather take £4.092 million now than wait one month for £4.137million. Senior Counsel for the Respondent stated that it was known that that was not the case, that YZ Ltd. did not have existing borrowings and that YZ Ltd. borrowed from [Lender limited] in order to pay the dividend. Witness A stated that he did not know at the time that YZ Ltd. did not have existing borrowings and that they borrowed from [Lender limited] to pay the dividend and he stated '*their rationale for selling the dividend is their issue'.*

Senior Counsel made the point that profit was too small for enough to be made to generate a sum equating to the initial contribution. It was put to Witness A that it was not in his interest to take risk in relation to the non-dividend transactions because at the end of the term, Witness A (*i.e.* [Taxfirm] as administrator) was entitled to the capital remaining. Senior Counsel said – '*You don't want to take risks with your own money, because that's your money?*'. Witness A answered '*That's not correct*'.

Senior Counsel for the Respondent suggested that the reason such a structured transaction was put in place was in order to allow a claim to be made under section 812 TCA 1997 and that the purpose behind the transactions was to make a case under section 812. Witness A stated that that was not correct. He further stated that they saw an opportunity to acquire a dividend, they bought it and made a profit. Senior Counsel for the Respondent pointed to the fact that they did not make a profit. Witness A reiterated that the fees cannot be directly attributable to a single trade. However, the trade in 2009 was the dividend transaction and the only transaction in 2009 to which the 2009 annual fee could have been referable was the dividend transaction.

Evidence of Witness X

Witness X, witness for the Respondent, gave evidence in an expert capacity. His curriculum vitae, an appendix to his report, set out, *inter alia*, accounting qualifications together with experience working in corporate finance, banking, structured finance and capital markets.

Witness X's expert report was taken as part of his evidence in chief for the purpose of the hearing.

Senior Counsel for the Respondent brought the witness to the investment objective of the Collective which was '*to achieve income and capital growth in excess of current cash returns while seeking to preserve capital*'. He asked the witness if the reference to preserving capital was consistent with the background information document. The witness stated that the capital that they invested will go down to zero when the Collective is terminated (after fees have been taken). He stated that to have your capital taken out in fees is inconsistent with that statement.

Witness X then outlined the monetary effects of the dividend transaction for the Collective members, specifically in respect of Appellant no. 5 which resulted in an adjusted loss for tax purposes of €267,510 which converted to a post-tax cash gain of €97,437.

The witness referred to his report where he stated that he was not sure why it should be a requirement that Collective members should be liable to Irish tax (as stipulated in the background information document) other than by being so, they would turn a loss making transaction into a profitable one, after tax.

The witness stated that he did not have a breakdown of the fees charged by [Taxfirm] and Investment-Co which totalled €12,492 but that he had worked backwards based on the fee outlined in the background information document and this could be found in appendix 2 of his report. The witness stated that it seemed to him that whenever a dividend transaction is done, the administration fees are very large and without putting an exact science on it, he stated that it is clear that a large part of the administration fees related to the dividend transactions. He further stated that whenever a dividend transaction is undertaken, the administration fees increase significantly.

He then stated that he came to the conclusion that the AB dividend (although it showed a small gross profit) was materially loss making once you take into account the expenses related to it.

The witness stated that, having reviewed the transactions, one could say that the total fees for the investment in the Collective are equivalent to the initial contribution.

The witness mentioned that he had heard over the past days of the hearing that despite the capital being halved from €25,000 down to €12,000 that there was an intention or expectation that the returns on this would be so huge as to repay the €25,000 that was originally contributed. The witness went on to state that the Collective would need to earn returns of 100% per annum, every year for the three remaining years of the Collective in order to make back the €25,000. He stated that it was highly unlikely that the investment strategies would increase the balance to above €25,000.

He further stated that the investment strategy seemed to be conservative and suggested that the prospect that the Collective would make a return of 100% per annum was a prospect that would fall into the *'too-good-to-be-true box'.* He stated that it was highly unlikely that the capital would ever be returnable in this way.

He also stated in relation to the investment objective (namely, to achieve income and capital growth in excess of current cash returns whilst seeking to preserve capital), that the capital was not being preserved at all. In fact, that capital was being paid away, all of it, to [Taxfirm].

The witness stated that the dividend transactions are self-standing transactions. The portfolio transactions are a group of transactions which will run until they stop running. One could do the dividend transaction and then stop. He stated that the dividend transaction does not lead onto the portfolio transactions.

The witness stated that Investment-Co is a firm which employs a number of people in the investment management business and that the portfolio type transactions which they do are quite different from the AB dividend transaction, which is a highly structured one-off transaction using special purpose vehicles in the British Virgin Islands. He stated that he did not see that being within Investment-Co's normal business remit but that he did see it as a matter within the competency of [Taxfirm] .

The witness also stated that the dividend investment was risk free given the limited-recourse nature of the loan as opposed to the transactions undertaken on the portfolio assets where what was at risk was the members' initial contribution if the trades went the wrong way.

The witness also stated that the loss that was going to arise on the AB dividend transaction was a known one, because you know that the gross profit is going to be €252, you know you have got at least an initial fee of 2.5% to pay [Taxfirm], plus some sort of allocation of the balance of fees. So, you are aware that a loss will be made. The witness stated that he found it difficult to reconcile with the investment objective (of achieving income and capital growth in excess of current cash returns whilst seeking to preserve capital) because capital was not being preserved and it was known that a loss was going to be made.

The witness was asked about his analysis of the Lender Ltd. loan facility which he dealt with in section 8 of his report. The witness stated that the loan was a very short-term loan for a maximum of 15 days and it carried an interest rate of 0% which was somewhat unusual.

The witness stated that the loan from Lender Ltd. was limited recourse meaning that if the AB dividend is not paid then the Collective members do not have to pay their loan back or their portion of the loan back to Lender Ltd. In these arrangements, recourse was limited to the receipt of the AB dividend. Lender Ltd. did not have recourse to the other assets of the participants. The facility letter from Lender Ltd. contained the limited recourse provision on the third page of that letter. Witness X stated that as the person taking the risk on the AB dividend is Lender Ltd. (because if the AB dividend is not paid then Lender Ltd. has lent money out which will not be returned) Lender Ltd. took a charge over the AB dividend to protect its position. In addition, the dividend goes straight to Lender Ltd. from AB by way of irrevocable payment instruction.

The witness referred in his evidence and in his report, to a letter from [Taxfirm] to the Revenue Commissioners dated 12 August 2014. The letter was responding to a question put by the Revenue Commissioners to [Taxfirm] asking them what enquiries they had made in

relation to YZ Ltd. or AB Ltd. In response [Taxfirm] stated that such inquiries had not been necessary on the basis that they had no grounds to question the representations made by the directors of YZ Ltd.

The witness stated that from his perspective the reason they did not to make enquiries was that they didn't have to because the loan was limited recourse.

The witness pointed to the fact that AB (a subsidiary of YZ Ltd.) made their application for incorporation on 7 December 2009, which was approximately one week before the dividend declaration. The dividend purchase agreement was entered into on 21 December and the dividend was paid on 29 December. The witness questioned how AB could pay a dividend of £4.1m having been in existence for just three weeks.

The witness stated (in page 154 of his report) that he identified two protections which Lender Ltd. had in relation to the limited recourse loan to the Collective members. One was the charge over the dividend purchase agreement (the right to receive the dividend was signed over by the Collective members to Lender Ltd.) and the other was the condition precedent in the Lender loan facility agreement (that the dividend would be paid directly to Lender Ltd.).

The witness stated in his report at paragraph 174 *'Based on my experience of structured finance transactions, it would seem to me that* [Lender Ltd] *and all of the other BVI companies involved in these arrangements were companies set up specifically for the* [Collective] *type structures. There is also certain documentation indicating, as I would expect, that there was some form of common influence over these companies. This being so I would not think it particularly difficult to arrange matters such that there was minimal, if any, risk for* [Lender Ltd] *and the BVI companies from participating in the arrangements in the way that they did'*.

The witness stated that in general, the way promoters get recompensed is to charge a fee upfront rather than taking a percentage of the tax benefit that arises.

The witness went on to say that he was '*very wedded*' to the content of his report regarding to the 2.5% fee relating to the Lender loan and the fact that it was directly applicable to the dividend transactions.

During cross-examination, Counsel asked the witness if the transaction was a reasonable commercial transaction. The witness replied that he would accept that it was profitable however, he expressed concern in relation to the fact that the transaction was with two companies in circumstances where the owners were not known, the directors were not known, company history is not known and where there are no public accounts.

The witness was asked about the fees and costs of the transaction. It was suggested to him that he had been critical of the transaction in his report. Witness X stated that he merely sought to do a factual analysis of how profitable the transaction was at a gross or net level and that he had not cast any aspersions on the transaction in his report and had not intended to do so.

The witness stated that the figures which he presented earlier in relation to the type of returns the Collective members would need to achieve in order to recoup their initial contribution (*i.e.* that they would need returns of 100% per annum) were very rough calculations to illustrate the magnitude of the task.

Counsel for the Appellants then asked Witness X the following question; *'But you do accept that, whilst they may have losses and may be loss making, there was a possibility and it is not an unreasonable position that each of the witnesses took, that they held some faith that this could come back*?' Witness X answered; *'Well hopes springs eternal and I am sure they all hoped that it – well, I don't know. It might just be, and I'm not being pejorative here, it might just be that they have written their initial contribution off and are just quite happy with the tax relief and were never expecting anything to come back anyway. It might just be that, I don't know. I don't know what was put to them or how it was persuaded. But if they are clinging on to the fact that, despite the tax benefits they have got, they really want to make some money of this, then I would say well, without being crass, I mean hope does spring eternal. You have got a real uphill struggle to make that within the five years that the Collective was programmed to run.'*

ANALYSIS I - Trading

Introduction

In order to establish that their losses were trading losses and that these losses were deductible under Case 1 of Schedule D, the Appellants must establish that they were trading in the first instance.

The Appellants contended that they were trading in financial instruments with a view to making a profit. The Respondent contended that the Appellant's involvement in the

Collective(s) was in the nature of an investment. Further, the Respondent's position was that the object of the investment was to produce tax losses which could be utilised by the Appellants to reduce taxable income.

As regards the question of whether the Appellants were carrying on a trade, the Appellants bear the onus of proof to establish that, as members of the Collectives, they were engaged in a trade. It is not sufficient to merely assert that one is engaged in a trade, there must be credible evidence to support that contention.

The question which arises under this head of analysis is whether the evidence adduced in this appeal bore the hallmarks of an investment or of a trade.

The Appellants submitted that they were '*engaged in a trade that consists of the acquisition and disposal of short-dated financial instruments with a view to making a profit on the trades otherwise than by way of investment'.*

In *Cooper v C & J Clark Ltd..* [1982] STC 335, at page 341, Nourse J. observed that; '*The* question *whether a given state of affairs does or does not amount to a trade is one of fact and degree'*.

The Respondent opened three authorities relevant to the consideration of whether dealing in financial securities constituted a trade. In the first of those authorities, *Emanuel & Son Ltd.. v White* [1965] 42 TC 369 the Court found that the company was carrying the trade of a dealing in securities. The later cases of *Cooper v C & J Clark Ltd..* [1982] STC 335 and *Salt v Chamberlain* [1979] STC 750 identified that participation in the purchase of stocks, shares and securities does not typically bear the hallmark of a trade. The starting point is that it is regarded as an investment. The Appellants in this appeal must overcome that hurdle and demonstrate that the relevant transactions were trading transactions.

Contemporaneous documentation

In considering the question of whether the Appellants were carrying on a trade, it is important to consider and examine the contemporaneous documentation.

The Investment-Co document is titled: *'Investment Management Proposal for* [Collectives] *June 2009'*.

Page three of the document provides:

> *'**Investment Objective***
>
> *The investment objective of* [the Collective] *is to achieve income and capital growth in excess of current cash returns while seeking to preserve capital'*
>
> ***Investment Policies***
>
> *The Investment Strategy will seek to achieve its investment objective by investing in the following:*
>
> ….'

Page 4 of the document provides;

> *'The* [Collectives] *may invest through directly or indirectly wholly owned subsidiaries or on a co-investment basis in accordance with the requirements of the Financial Regulator.'*

The Respondent submitted that what was being proposed on the face of this document was an investment strategy, not a trading strategy.

Turning next to the document titled; *'The (Ireland)* [Collectives] *Background Information and Application Forms, November 2009'*. Page 3 of the document (referring to Investment-Co as 'IC') provides;

> '[IC] *will only permit investors deemed to have sufficient investment experience to participate in and receive investment services as part of each of the* [Collectives] *that is proposed to be established by* [IC] *in the manner contemplated in this Document.* [IC] *reserves the right to refuse applications from any Applicant whom it believes lacks the necessary investment knowledge and experience to appreciate the risks involved in participating in a* [Collective].*'*

Page 4 of the document contains the following statement:

> *'Notwithstanding that participation rights in the* [Collectives] *are not financial instruments for the purposes of the MiFID Regulations, pursuant to the* [Collective]

arrangements [IC] *shall be providing investment services within the meaning of MiFID Regulations (including in particular, the service of portfolio management) to each participant in a* [Collective]*.'*

Page 9 of the document contains the following statement:

'It is intended that each [Collective] *would comprise a number of individual sole traders who are in business on their own account and severally liable.* [IC]*, in providing investment services to each individual Member in a* [Collective] *format enables each individual Member to participate and benefit on a coordinated basis…..'*

Page 14 of the document contains the following statement:

'Each [Collective] *comprises a number of individual sole traders who are in business on their own account and severally liable.* [IC]*, in providing investment services to each individual Member in a* [Collective] *format enables each individual Member to participate and benefit on a coordinated basis….'*

Page 16 of the document contains the following statement under the heading '*RISK FACTORS':*

'Investment in a [Collective] *involves a significant degree of risk and must rely on independent advice in respect of the legal, taxation, financial and other consequences of participating in a* [Collective] *…'*

There are many references in the documentation describing the opportunity as an '*investment*'. There are also references to '*investment strategy*', '*investment services*' and *'the investment objective of the* [Collective].

I am satisfied that the frequency and context of the references to '*investment*' add weight to the Respondent's submission that what was being proposed on the face of the documents was an investment strategy, not a trading strategy.

Oral evidence

In addition, there was oral evidence consistent with the strategy being one of investment. Appellant no. 5 in his evidence stated that he was minded to participate in the Collective where his previous investments with Hibernian Life and Canada Life '*tanked*'. In direct examination, Appellant no. 5 stated; '… *in 2009/2010, it was a fraught time within the country*

and so, therefore, as evidence of even what was happening to my pension – and not only the Hibernian pension, I could also say the Canada Life pension which also tanked.' Further on he stated; *'I suppose I was coloured by my experience with pensions. I told you already that Hibernian tanked from 15,000 to 937. And by the way, simultaneously Canada Life tanked from a 50,000 pension contribution to, you know, there's nothing happening here and it's going to be driven into appeals because somebody called Custom House .... they went into actual receivership.'*

Appellant 5 also explained that he had looked at several other forms of investment including section 23 investments and property. He stated: *'I sought advice from my business advisor, she had talked about a variety of different options. .... she had talked about section 23s and a variety of other – purchasing property for investment. ..... she indicated to me that there was an opportunity to look at investment opportunities looking at the financial markets and to utilise the expertise of people who were experienced in this to essentially work at it, make a good business and obviously earn profit by trading these financial instruments.'* The evidence of Appellant 5 indicated that he understood that he was participating in a form of investment.

During Appellant 26's evidence, the following exchange took place on day two of the hearing during direct examination;

> *'Q: Okay, and do you see, did you at any time direct that any individual trade be undertaken?*
>
> *A: Absolutely not, no.'*

This answer is consistent with somebody passively participating in an investment. It is inconsistent with somebody carrying on a trade.

The distinction between active participation and passive participation in an investment is an important consideration in determining whether a trade is in fact taking place. In this appeal, the Appellants paid a lump sum into the Collective but took no further part in the transaction(s) other than becoming parties to the dividend purchase agreement. The evidence given was that the Appellants hoped that in due course, they would receive a return on the money they had invested. This type of passive participation is a factor which points away from the existence of a trade.

Case Law

The Appellant contended that the Respondent, in submitting that the transaction the subject of this appeal was set up with a view to a tax advantage, was seeking to persuade this Commission to follow the *Ramsay* line of authority, a reference to *WT Ramsay Ltd. v Inland Revenue Commissioners* [1982] AC 300.

The Respondent was emphatic in its submission that it was not relying on *Ramsay*, nor asking this Commission to apply or to follow *Ramsay*.

The approach I have taken in this determination does not seek to examine the end result only and does not overlook intermediate steps. Rather, the approach taken seeks to examine each step of the transaction and to examine all the evidence and all documentation, in order to ascertain whether this transaction was set up with a view to carrying on a trade. The approach taken is to ask whether, as a matter of fact, the transaction in question was a trading transaction. This does not involve any application of the *Ramsay* principle.

Of particular assistance is the case of *FA & AB Ltd. v Lupton* 47 TC 580. The principles in *Lupton* are not based on the *Ramsay* case. The *Lupton* case predates the *Ramsay* decision. The principles in *Lupton*, a UK decision of the High Court, Court of Appeal and House of Lords, were accepted in Ireland in the High Court case of *MacCarthaigh v D* [1985] IR 73, by O'Hanlon J. at page 81 of the report, where he stated;

> *'Of more direct relevance to the present case is the judgment of Megarry J in the case of Lupton v FA & AB Ltd. [1968] 1 WLR 1401, where a complicated inter-company arrangement was entered into which produced a loss on paper for the taxpayer company of £170,000. It claimed this as a loss sustained in its trade as a dealer in stocks and shares. The following passage appears in the judgment of Megarry J at p 1423 of the report:–*
>
> > *"If at the end of the day a transaction, viewed as a whole, appears to be merely, or substantially, a trading transaction, then despite the presence of fiscal elements or fiscal motives a trading transaction it remains. If, on the other hand, the transaction as a whole appears to be no trading transaction but an artificial device remote from trade to secure a tax advantage, then the presence of trading elements in it will not secure its classification as a trading transaction."*

At page 82 of the report, O'Hanlon J. held that the taxpayer in *MacCarthaigh* was in fact carrying on a trade. He concluded; *'I am not prepared to hold, however, that the transaction which falls to be considered in the present case is so obviously devoid of commercial characteristics as to bring it within the scope of the Petrotim decision.'*

However, it is clear that O'Hanlon J. in the High Court regarded *Lupton* (and *Petrotim*) as decisions which were consistent with Irish law and I am satisfied that I may have regard to *Lupton* in my analysis.

FA & AB Ltd. v Lupton 47 TC 580

The case of *Lupton,* was concerned with the taxation of a number of dividend stripping transactions. Megarry J. in the High Court, on page 593 of the report summarised the position as follows;

> *'The case relates to five transactions involving dividend-stripping - for the most part forward dividend-stripping, but in some cases involving some backward dividend-stripping. The Special Commissioners found that in each case the Company entered into the transactions 'with the object of making money, bearing in mind the fiscal advantages which it was expected would flow from the transactions'."*

An issue arose in Lupton as to whether there was discord between two previous decisions of the House of Lords namely; *Finsbury Securities Ltd.. v Bishop* 43 TC 591 and *J. P. Harrison (Watford) Ltd. v Griffiths* 40 TC 281. At page 595 of the report, Megarry J. (quoting Lord Guest in the *Harrison* case); stated that it:

> *'by no means follows that the absence of an intention to make a profit or the intention to make a loss negatives trading. The test is an objective one. The question to be asked is, not quo animo was the transaction entered into, but what in fact was done by the Company". He added, at page 27, that in his opinion "one has to look at the transaction by itself irrespective of the object, irrespective of the fiscal consequences, and ask the question in Lord President Clyde's words in Commissioners of Inland Revenue v Livingston: 'whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made'.*
>
> *It seems to me that this is a narrow decision on a narrow point. The case merely decides that a transaction is not prevented from being a trading transaction merely because its*

object is not to make a trading profit but to obtain a tax advantage. The transaction involved was a simple transaction of purchasing, reaping the dividend and selling. It involved no superstructure of specially created shares of an extraordinary nature or warranties or a stakeholder or the like.'

The reference by Megarry J. to a '*superstructure of specially created shares*' is germane in the context of this appeal where it can be seen from the evidence including documentary evidence, that a superstructure did underlie the Collective transactions.

At page 597 of the report Megarry J. identified the co-ordinates of the analysis to be conducted stating;

'As in all such cases, it may well be difficult to draw the line. At one extreme lies a transaction which is merely a trading transaction. In such a case the transaction is not deprived of its trading nature merely by the presence of a fiscal motive for carrying it out, nor by the fact that as a trading transaction it makes a loss and not a profit. That, in the barest of outlines, is the Harrison case. At the other extreme lies the transaction that is far removed from trading, designed to secure a tax advantage. There the mere fact that the transaction includes the purchase and sale of shares by a trader in shares does not in itself suffice to make it a trading transaction. That, again in the barest of outlines, is the Finsbury case. Between those two extremes lies a continuous spectrum of possible transactions in which the elements of trading become smaller and smaller in relation to the elements of securing a tax advantage. A sufficiency of reported cases may in due course provide the co-ordinates which will make it possible to plot the position of the dividing line; but in this case I am not required to do more than decide whether these transactions fall on the right side or the wrong side of any reasonable line that could be drawn.'

He follows on page 598 by asking whether a particular transaction is trading or whether it is something else;

'In doing that, it seems to me that I must have regard to the following principles. If upon analysis it is found that the greater part of the transaction consists of elements for which there is some trading purpose or explanation (whether ordinary or extraordinary), then the presence of what I may call "fiscal elements", inserted solely or mainly for the purpose of producing a fiscal benefit, may not suffice to deprive the transaction of its trading status. The question is whether, viewed as a whole, the transaction is one which

> *can fairly be regarded as a trading transaction. If it is, then it will not be denatured merely because it was entered into with motives of reaping a fiscal advantage. Neither fiscal elements nor fiscal motives will prevent what in substance is a trading transaction from ranking as such. On the other hand, if the greater part of the transaction is explicable only on fiscal grounds, the mere presence of elements of trading will not suffice to translate the transaction into the realms of trading. In particular, if what is erected is predominantly an artificial structure, remote from trading and fashioned so as to secure a tax advantage, the mere presence in that structure of certain elements which by themselves could fairly be described as trading will not cast the cloak of trade over the whole structure. In speaking of the greater part of the transaction I am not, of course, referring to mere bulk. A long document, like a long speech, may do and say remarkably little. What seems to me to be of particular importance is the relative extent of the significant provisions which are made.'*

Thus, *Lupton* is authority for the proposition that in carrying out an analysis as to whether in fact a transaction was put in place for trading purposes or for some other purpose, the objective facts must be examined and considered.

The facts of the case involved five transactions involving dividend-stripping. The Special Commissioners found that in each case the Company entered into the transactions *'with the object of making money, bearing in mind the fiscal advantages which it was expected would flow from the transactions'.*

On page 600 of the report Megarry J., (having quoted from a judgment of Buckley J. in *Cooper v Sandyford Investments Limited* [1967] 1 WLR 1351 on the previous page) stated;

> *'Like Buckley J., I would regard the constituent parts of each of these transactions with which I am concerned "as part and parcel of one composite transaction": I take this phrase from page 1357. So regarded, the question for me is whether these five transactions are on the Harrison [3] side of the line or the Finsbury side. In each case there is a somewhat elaborate structure of dealings. That by itself would not necessarily take the transactions out of the category of trading, for there may be trading transactions of great complexity. Indeed, at one stage of the argument Heyworth Talbot roundly asserted that the greater the complexity the more assured it was that there was trading. I would agree with him if the complexity is a trading complexity. For in my view the answer to his assertion is that complexity per se proves little: what matters is the kind of complexity. A complexity of trading provisions will reinforce the trading nature of a*

trading transaction; a complexity of fiscal provisions will subtract from it. Here there is little or no explanation for the inclusion of some of the provisions other than fiscal advantage.'

In conclusion, Megarry J. held that each of the five dividend transactions were on the *Finsbury* side of the line rather than the *Harrison* side of the line and were therefore not trading. His decision was upheld in the Court of Appeal.

In the Court of Appeal, Lord Morris, at page 617 of the report (dealing with the fifth transaction) stated;

'So it becomes necessary carefully to examine this fifth transaction. Ought it, when viewed fairly and rationally, to be classed as a trading transaction coming within the trade of a dealer in shares? Ultimately this becomes a matter of judgment. In such cases as these some help may be derived from considering the decisions of courts as to how other transactions have been regarded. One transaction with certain features may have been held to have been a transaction properly to be regarded as being within the trade of a dealer in shares. Another transaction with other features may have been held not to have been one which could properly be so regarded. Deriving such help as a consideration of other cases may yield, the question for decision will be whether the particular transaction under review can and should be regarded as a trading transaction within the course of the trade of a dealer in shares.

This enquiry may or may not involve or necessitate a consideration of the profitability of a transaction or of the tax results of a transaction. One trading transaction may result in a profit. Another may result in a loss. If each of these, fairly judged, is undoubtedly a trading transaction its nature is not altered according to whether from a financial point of view it works out favourably or unfavourably. Nor is such a transaction altered in its nature according to how the revenue laws determine the tax position which results from the financial position. The opening words of s. 341 of the Income Tax Act 1952 are as follows: "Where any person sustains a loss in any trade, profession, employment or vocation". <u>If an application for an adjustment of liability is made in regard to an alleged loss in a trade the first enquiry will be whether the transaction alleged to have resulted in a loss was ever a transaction in the particular trade at all. Only if it was would it be necessary to consider whether or not a loss had resulted.'</u>

[emphasis added]

This is precisely the question that arises in this appeal; is this a trading transaction or is it not?

At the bottom of page 619 of the report, Lord Morris, says of the *Harrison* case;

> *'The transactions in the Harrison case were solely and unambiguously trading transactions. There was a purchase of shares and after receipt of a dividend a sale of shares. There was no term, express or implied, in any contract or any transaction which in any way introduced any fiscal element. No fiscal consideration or arrangement intruded itself in any way into any bargain that was made. There was merely an acknowledged reason which inspired one party to enter into certain trading transactions. If that party later made some tax claim that claim would be no part of a trading activity. The transactions in the Harrison case not only had all the characteristics of trading: there was no characteristic which was not trading. There was nothing equivocal. There was no problem to be solved as to what acts were done. To the question quid actum est there could be but one answer. The question quo animo was irrelevant. As Lord Reid said in giving the judgment of the Board in Iswera v Commissioner of Inland Revenue [1965] 1 W.L.R. 663 (P.C.) (at page 668):*
>
> > *"If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very, material factor when weighing the total effects of all the circumstances."*

Thus, Lord Morris says one looks at the facts objectively and it is only if it is not clear on an objective examination, that one has regard to the subjective intention of the taxpayer.

At the bottom of page 620, Lord Morris quotes and approves the passage from Megarry J. on page 598 of Lupton as follows;

> *'There are, therefore, cases where, as Megarry J. indicated, the fiscal element has so invaded the transaction itself that it is moulded and shaped by the fiscal elements. This was helpfully expressed by Megarry J. as follows:*
>
> > *"If upon analysis it is found that the greater part of the transaction consists of elements for which there is some trading purpose or explanation (whether ordinary or extraordinary), then the presence of what I may call 'fiscal elements', inserted solely or mainly for the purpose of producing a fiscal benefit, may not*

suffice to deprive the transaction of its trading status. The question is whether, viewed as a whole, the transaction is one which can fairly be regarded as a trading transaction. If it is, then it will not be denatured merely because it was entered into with motives of reaping a fiscal advantage. Neither fiscal elements nor fiscal motives will prevent what in substance is a trading transaction from ranking as such. On the other hand, if the greater part of the transaction is explicable only on fiscal grounds, the mere presence of elements of trading will not suffice to translate the transaction into the realms of trading. In particular, if what is erected is predominantly an artificial structure, remote from trading and fashioned so as to secure a tax advantage, the mere presence in that structure of certain elements which by themselves could fairly be described as trading will not cast the cloak of trade over the whole structure."

At page 631 of the report, a useful summary of the principles is set out by Lord Simon of Glaisdale, as follows;

'My Lords, much of the argument before your Lordships, as in the Courts below, was concerned with the decisions in Griffiths v J. P. Harrison (Watford) Ltd.. [1963] A.C. 1 and Bishop v Finsbury Securities Ltd.. [1966] 1 W.L.R. 1402, with their inter-relationship, and with whether the instant case fell within the precedent established by the one or the other case. Where the delightful and distinguished advocacy of counsel for the Appellants failed to carry my conviction was partly in its emphasis on particular passages in the speeches in Harrison's case without testing them against the decision in the Finsbury case, partly in concentrating on the facts in Harrison's case and matching them against the facts of the instant case. This was understandable; because what constitutes binding precedent is the ratio decidendi of a case, and this is almost always to be ascertained by an analysis of the material facts of the case - that is, generally, those facts which the tribunal whose decision is in question itself holds, expressly or implicitly, to be material. A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a pre-existing rule of law (either statutory or judge-made) and with the minor premise consisting of the material facts of the case under immediate consideration. The conclusion is the decision of the case, which may or may not establish new law in the vast majority of cases it will be merely the application of existing law to the facts judicially ascertained. Where the decision does constitute new law, this may or may not be expressly stated as a proposition of law: frequently the new law will appear only from subsequent comparison of, on the one hand, the material facts inherent in the major

premise with, on the other, the material facts which constitute the minor premise. As a result of this comparison it will often be apparent that a rule has been extended by an analogy express or implied. I take as an example a case remote from the field of jurisprudence with which your Lordships are instantly concerned, because it illustrates clearly, I think, what I have been trying to say - National Telegraph Co. v Baker [1893] 2 Ch. 186. Major premise: the rule in Rylands v Fletcher (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330. Minor premise: the defendant brought and stored electricity on his land for his own purpose; it escaped from the land; in so doing it injured the plaintiff's property. Conclusion: the defendant is liable in damages to the plaintiff (or would have been but for statutory protection). Analysis shows that the conclusion establishes a rule of law, which may be stated as "for the purpose of the rule in Rylands v Fletcher electricity is analogous to water", or "electricity is within the rule in Rylands v Fletcher". That conclusion is now available as the major premise in the next case, in which some substance may be in question which in this context is not perhaps clearly analogous to water but is clearly analogous to electricity. In this way, legal luminaries are constituted which guide the wayfarer across uncharted ways.'

The approach set out in *Lupton*, is that one would conduct an examination into the objective facts and then reach a determination as to whether *in fact* a transaction was put in place for trading purposes or for some other purpose. The principles in *Lupton* are not based on the *Ramsay* case. The *Lupton* case predates the *Ramsay* decision. The principles in *Lupton* were accepted in Ireland in the High Court case of *MacCarthaigh v D* [1985] IR 73, as set out above.

Objective Facts

In considering whether a transaction has been put in place for trading purposes, it is necessary to examine the objective facts in relation to the transaction, which are as follows;

1. The background information document
2. The pattern of dividend purchase transactions
3. That dividend purchase transactions were inherently loss making
4. That dividend purchase transactions are not market transactions.
5. The production of tax losses
6. Mandatory disclosure

1. The background information document

Page 13 of the background information document provides; *'Any initial contribution remaining will become payable to the administrator at the time of exit.'*

Therefore, this is a transaction in which one did not obtain a return of capital. The position was that no capital would be returned. The Respondent submitted that it was difficult to square this position with the submission by the Appellants that profit was the motivating factor for their involvement in the Collective(s).

Page 14 of the background information document contains a reference to '*the tax reliefs described herein'*. As a matter of fact, there are no tax reliefs described in the document. The Respondent submitted that the document and related transactions were motivated by tax.

Page 17 of the background information document under the heading *'General'* provides*: 'the opportunity described herein best suits higher rate taxpayers with sufficient income and/or capital gains to absorb any initial trading and/or tax loss and may not be suitable for other investors.'*

The Respondent submitted that it is the anticipated tax treatment that converts what would be an unprofitable transaction into a profitable one. The expert evidence of Witness X (paragraph 68 of Witness X's report) provides; *'I am not sure why it would be a requirement that* [Collective] *members be liable to Irish tax, other than the arrangements only being profitable by virtue of the tax reliefs being sought.'*

The Respondent submitted that the only explanation for the transaction was that it was a tax driven transaction where the anticipated tax treatment converted an unprofitable transaction into a very profitable one if section 812 TCA 1997 applied.

Witness X's report at paragraph 66 contains an illustration of the post-tax gain arising when one has regard to the claim under section 812 and where one allows for the trading loss per tax return. Witness X identified that there is a post-tax gain of €97,437 in respect of Appellant 5 and Appellant 6. If you were to take the initial contribution off of the reduction in tax of €109,679, one would still be entitled to a tax gain of approximately €82,000. The Respondent submitted that these figures made it clear that this was a tax driven transaction and that that was the only way in which the transaction made sense.

In short, the terms of the background information document set out above together with a review of the figures, the tax losses and the resulting tax deductions availed of by the Appellants, point to the tax oriented nature of these transaction.

The terms of Collective documentation and the ensuing computational figures strongly suggest that the tax advantages were known by the architects of the Collective and also by the participators in the Collectives, the Appellants.

2. The pattern of dividend purchase transactions

The pattern that existed demonstrated that Collectives were put together to enter into dividend purchase transactions. The dividend purchase transaction was always the first transaction entered into and it was always done at the end of a tax year. The dividend purchase transaction in each case was extremely substantial in terms of value, as compared with all of the other transactions entered into by the Collective. The value of the dividend purchase transaction was several million euro in each case, different in scale to the transactions entered into thereafter.

3. That dividend purchase transactions were inherently loss making

This is shown by Witness X in his report at page 27. There is no contrary evidence of how the loss is made up.

On page 27, Witness X looks at the charges made to Appellant 5. He calculated the amount referable to the 2.5% and he identified that the 2.5% is referable only to the dividend purchase transaction in circumstances where it is referable only to the [Lender limited] loan. There is no contrary evidence.

It was suggested that there were different ways in which the loss *could* be made up or in which the charge *could* be allocated or attributed. But no evidence was led in support of these alternatives. There was no evidence from Witness A on this point nor did the Appellants lead any expert evidence.

When the Appellants came to deal with their own accounts they included the full amount of the charge in the same year of trading as the claim in relation to the dividend purchase transaction loss. They did not seek to attribute it over the five-year lifetime of the Collective

arrangement. They claimed the sum in its entirety in the year in which the dividend purchase transaction took place, which was the first year.

An additional point that demonstrates that the fees charged to the Appellants were referable to the dividend purchase agreement is contained at pages 26 and 27 of Witness X's report. This evidence was not challenged. The only Collective in which there was a second dividend transaction, was Collective no. 1. In this Collective the fees charged to Appellant 18 increased significantly in respect of 2010 as compared with the fees charged to both Appellant 5 and Appellant 6 in that year. The reason for this is that Appellant 18 participated in a dividend purchase transaction in that year whereas Appellants 5 and 6 did not. That evidence was not challenged.

I accept the submission of the Respondent, that the charges were significantly referable to the dividend purchase transaction, which was inherently loss making.

The Respondent submitted that the purpose of this transaction was to obtain a tax advantage under section 812 TCA 1997. The Respondent submitted that that was the only way in which the dividend purchase arrangement made any sense for the participants.

The Appellants in their written submissions and in their oral evidence stated repeatedly that the tax advantage was not the purpose of the transaction, that they were unaware of the tax advantage when they entered into the transaction and that the tax advantage came as a complete surprise to them when they were filing their respective tax returns. I found their evidence in this regard to be entirely lacking in credibility. I do not believe that the Appellants were unaware that this transaction was geared to deliver them a tax advantage in the form of inflated tax losses that they would use to reduce their respective taxable incomes. The Appellants in evidence insisted they did not know this and that it came as a complete surprise. This evidence was simply not credible.

4. That dividend purchase transactions are not market transactions.

The dividend purchase arrangements are not market transactions. They are not dividends of existing trading companies which are available on the market or even available to be individually negotiated. They are put in place specifically through a complex structured set of steps or arrangements.

Those steps were, taking Collective no. 1 as an example; that YZ Ltd. and its subsidiary AB were incorporated on the same day, a number of days before the transaction was entered into. Neither YZ nor AB had assets of their own. [Lender limited] provided a loan to YZ. AB was then capitalised and paid a dividend to YZ which YZ sold to the Appellants in Ireland. The Appellants borrow money from [Lender limited] and that money is used to pay for the dividend. The Appellants then claimed relief under section 812 TCA 1997.

The Respondent submitted that the only inference that one could draw from the evidence was that the arrangements were put in place solely for the purpose of allowing a claim to be made under Section 812 TCA 1997.

The complex structured arrangements underlying the Collectives point away from the existence of real, market driven commercial transactions and away from the existence of a genuine and authentic trade. In addition, the strategic design of these complex transactions points towards an objective other than trading and other than profit and that is, the outcome which the Appellants' most hoped to obtain, which they did obtain, namely; the tax advantages in the form of substantial tax losses that are generated by the Collectives.

5. The production of tax losses

The Appellants claimed they entered into the Collective transaction not for tax reasons, but to make a profit through trading. After the dividend purchase transaction took place, Appellant 26, one of the investors, received a letter from [Taxfirm], on 28 February 2011 which enclosed a Collective No. 2 trading statement referable to Appellant 26. The statement records the transactions that took place in the period November to December 2010. However, in addition to this letter on 28 February 2011, [Taxfirm], the administrator of the scheme, also wrote to Appellant 26 and informed him:

> *'We have been advised that due to the operation of an anti-avoidance provision contained in the Taxes Acts, all* [Collective] *members have incurred a tax loss during the tax year ended 31 December 2010 as per the attached tax adjusted computation. This loss may be used to offset against your other taxable income of the same tax year. Any amount of unrelieved loss may be carried forward but may only be used to offset against income from the* [Collective] *trade in the future. The loss may not be carried back to offset against previous years income. The attached information should be attached to the professional advisor responsible for preparing your tax returns.'*

In addition to this letter, [Taxfirm] included a tax computation in respect of Appellant 26. The question which arises is; why would the administrator of a profit scheme prepare a tax computation for a participant in that scheme, if the purpose of the scheme was not tax related?

The Respondent submitted that this documentation went to the credibility of the Appellant's case that they entered into this transaction not for tax reasons, but to make a profit through trading. The Respondent submitted that the tax computation prepared and supplied to the Collective participants made '*perfect sense*' if in truth the transaction was directed at generating a tax advantage.

On day two of the hearing, Appellant 26, in direct examination stated: *'I was a little bit shocked yesterday to be quite honest to hear that there was no profit on the transaction'*. However, as is abundantly clear from the trading statements that the Appellants received, Appellant 26 knew that this scheme was not making a profit.

Thus, the Appellants' as a group were on actual notice of the tax losses generated by the Collective from an early stage as they were furnished with tax computations by [Taxfirm], the administrator of the Collectives, setting out precisely the respective losses they had generated. Yet in this appeal, the Appellants persisted in their submissions that they were taken by surprise when these tax losses arose.

6. Mandatory disclosure

Each Appellant filed a mandatory disclosure form (Form MD1).

On page 2 of the form, part 2, there is a section headed '*Specified descriptions*' which provides as follows;

> ***'2. Specified Descriptions***
>
> *From the following list, please indicate the specified description which applies to this transaction. Where more than one description applies, please indicate all such descriptions:'*

Confidentiality (Reg 7)	☐	Loss Schemes – Companies (Reg. 12)	☐
Fees (Reg 9)	☐	Employment Schemes (Reg 13)	☐
Standardised Tax Products (Reg 10)	☑	Income into Capital Schemes (Reg. 14)	☐
Loss Schemes – Individuals (Reg 11)	☑	Income into Gift Schemes (Reg 15)	☐

The boxes ticked on the form are those specified above. The Respondent emphasised in particular, the box titled '*Loss Schemes – Individuals*' referring to regulation 11 of the Mandatory Disclosure of Certain Transactions Regulations 2011(SI 7/2011). The tax agents and advisors who completed these forms on behalf of the taxpayers, considered this was a loss making scheme within the terms of those regulations.

The mandatory disclosure form, while certainly not conclusive on the question of the nature of the scheme, is a relevant item to be taken into account in weighing the evidence in this appeal.

Badges of Trade

The submissions of the Appellants referred to the '*badges of trade'* identified in 1954 by the Royal Commission and to the extended and updated, albeit non-exhaustive list of factors identified by Sir Nicholas Browne-Wilkinson VC in *Marson v Morton* [1986] 59 TC 381. These '*badges'* are relevant to the present appeals.

In *Marson v Morton* Browne-Wilkinson VC stated (at 391) that: *'Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.'*

The Respondent submitted that the fact that the dividend purchase transactions were isolated transactions made it less likely that they were trading transactions.

Another badge of trade is the existence of a profit seeking motive. Although the courts have occasionally held that a trade was being carried on in the absence of a profit motive (*CIR –v- Incorporated Council of Law Reporting for England and Wales* (1888) 22 QBD 279), such cases

are rare. The Respondent submitted that it would be virtually impossible to envisage a financial services trade being carried on where there is no view to profit.

The evidence showed that when fees and administrative expenses were taken into account, the Appellant did not make a profit on the purchase of the dividends. While the Appellants contended in evidence that they were motivated to make a profit, the documents and the figures did not support these claims.

The absence of a profit motive is also attested by the mandatory disclosure under section 817D TCA 1997 in which [Taxfirm], the administrator of the Collectives, acknowledged that the transaction was one which could be expected to result in losses,

Based on the evidence, the Appellant hoped that, under the provisions of section 812(2) TCA 1997, a modest commercial loss would be converted for tax purposes into a much larger tax loss which would be available for offset against the other income of the Appellants. Only the availability of the tax loss could convert a transaction which was inherently loss-making into one which gave rise to a post-tax gain.

In evidence, the Appellants were unable to identify a commercial rationale for the dividend purchase transactions, though they protested that the rationale was to generate a profit. I am satisfied that the transactions lacked the commercial characteristics of a trading transaction.

The Collective background information document provided that a Collective member would never receive a return of that member's initial contribution to the Collective. I accept the submission of the Respondent that this is not a normal commercial term and that in general, one would expect the capital invested, to be returned at the end of the investment term, plus or minus the profits or losses made on the capital invested.

In addition, the Respondent submitted that the passive nature of the Appellants involvement in the dividend purchase transactions as evidenced by the small number of documents to which the Appellant was party and which included a power of attorney, supported a finding that the Appellant was engaged in investment rather than trading.

As a matter of fact, approximately 90% of the Appellants' investment capital in the Collective(s) was funded by one or more loans from a British Virgin Islands company. As security for the loans, each Appellant provided the lender with a guarantee and charge over all of the Appellant's interests under the sale contract and over the BVI dividends. The loan

facility agreement also contained provisions under which each Appellant would not be required to repay the loan to the extent that the BVI dividend was not paid. This meant that the dividend purchase transactions were virtually risk free. The carrying on of a trade does not necessarily require that there be risk. However, the presence of risk is an indication of trade (*Eclipse 35 -v- HC* [2015] STC 1429 at 1455, paragraph 143). The Respondent submitted that the absence of risk pointed to the uncommercial character of the transaction.

The fact that, as disclosed by [Taxfirm] the transaction was a '*standardised tax product*' and a '*loss scheme'* within Regulations 10 and 11 of the Mandatory Disclosure of Certain Transactions Regulations 2011(SI 7/2011) also undermines the submissions of the Appellants that these transactions were trading transactions.

I find that an analysis in accordance with the badges of trade supports a finding that the Appellants were not involved in the carrying on of a trade in financial instruments and securities.

Clavis Liberty

The Respondent sought to rely on *Clavis Liberty 1 LP v Commissioners for Revenue and Customs Commissioners* [2016] UKFTT 0253 (TC), [2017] STC 2392, but limited to those aspects of the case which did not rely on *Ramsay.*

Paragraph 58 sets out the facts as follows;

> *'First, Schroders lent £61 million to Dickens on 20 March 2006. That sum was advanced to Helios as a capital contribution. It was deposited with Schroders and secured by a charge in their favour. Helios then declared the interim dividends and sold the rights to £60 million of them to the Partnership. The funds lent by SGHCI to the limited partners and contributed to the Partnership (just under £60 million – the second circular money flow: see below) were applied by the Partnership on 3 April 2006 in the payment of the consideration for the dividend rights due to be paid by the Partnership to Dickens. This payment 'freed up' the funds held by Helios from the charge in favour of Schroders, but that charge applied to the consideration payment received by Dickens. In this way Dickens was in funds to pay back the loan to Schroders with interest on 12 April 2006, thus closing the first circle of money flows. Schroders had maintained valuable security for their loan throughout.'*

There are differences in the facts insofar as there was a partnership in *Clavis Liberty*, while there is a Collective in the within appeal. There were also other transactions, different to the ones that were put in place in this appeal. However, the dividend purchase transaction is similar. Dickens was a British Virgin Island company and Helios was the subsidiary of Dickens (as in this appeal, AB is the subsidiary of YZ Ltd.).

Page 19 of the report sets out 'issue 2' which is described as follows; *'Were the particular transactions claimed to produce the loss (namely the transactions by which the Partnership arranged to receive the dividends from Helios) trading transactions?*'

Counsel for HC, is recorded at paragraph 98 of the report as making the following submission;

> *'Mr. Goy submitted that the transactions by which the Partnership arranged to receive the Helios dividends were very different from other transactions entered into by the Partnership. In particular, those other transactions involved unconnected third parties being the vendors of the debt obligations and the debtors under the debt obligations. The profit made on each of those other transactions was dictated by purchase prices fixed by the market. But the position regarding the purchase of the rights to the Helios dividends was fundamentally different. These were not transactions effected on any public market. The ability of Helios to pay out the dividends had been artificially brought about by Dickens making a contribution to Helios of the funds loaned by Schroders – artificial in the sense that it had no commercial rationale beyond facilitating the tax avoidance scheme. The profit of £42,000 apparently made by the Partnership when the Helios dividends were paid to it was there merely to give the whole transaction 'a faint air of commercial verisimilitude' (per Lord Templeman in Coates v Arndale Properties Limited [1984] STC 637 at 639). That profit had in fact been funded by the limited partners by way of fees paid to Mercury by the Partnership, which in turn had been passed on by Mercury to Dickens, in one case via Westall.'*

In short, HC in *Clavis Liberty* submitted that the transactions by which the Partnership arranged to receive the Helios dividends were very different from the other transactions entered into by the Partnership. In this appeal herein, the Respondent made a similar submission that the transactions by which the Collective arranged to receive the dividends were very different from the other transactions entered into by the Collective. The Respondent submitted that the dividend purchase transaction was put in place in a wholly different manner to the electronic transactions managed by Investment-Co. The Investment-Co transactions were market driven transactions whereas the transaction by which the

dividend purchase arrangement was put in place was solely to enable the dividend to be paid and bought by the Appellants.

The same consideration applies in this appeal insofar as the purchase price on the Investment-Co transactions were dictated by the purchase prices fixed by the market.

The Tribunal discussion then goes on to consider *Ramsay* and *Lupton* as follows;

At paragraph 101 the Tribunal observed*: 'Although the thrust of Mr. Goy's argument based on the 'Ramsay' principle was directed at his case on Issue 3 (whether section 730 ICTA has the effect claimed by the Partnership), we consider it is relevant to this Issue (2), because a single composite transaction involving both the purchase of rights to dividends and the payments of those dividends pursuant to those rights cannot, in our judgment, be regarded as a trading transaction.'*

And at paragraph 102: *'To the same, or similar, effect, we have concluded that the principle in Lupton does indeed cover this case.'*

The tribunal then addresses the *Lupton* case, drawing attention to the observations made by Lord Guest, Lord Morris and Lord Simon as follows;

> *'In Lupton, it was acknowledged that the taxpayer was at all relevant times trading as a dealer in stocks and shares (ibid. p.643G/H). The question which arose in Lupton was originally whether five particular transactions entered into by the taxpayer were transactions carried out in the course of its trade. By the time that the appeal reached the House of Lords only one of the transactions remained in issue, and their decision dealt with that one transaction. Lord Morris, giving the leading speech, was at pains to reject the proposition that the presence of a motive of securing tax recovery caused a trading transaction to cease to be such. However, he drew a distinction between trading transactions motivated by an intention to secure a tax advantage (as we consider the other transactions in short- dated securities in this case to have been) and transactions 'so affected or inspired by fiscal considerations that [their shape and character] is no longer that of a trading transaction' (ibid. p.647G). Lord Guest, agreeing with Lord Morris, said that the shares in Lupton 'were not bought as stock in trade of a dealer in shares but as pieces of machinery with which a dividend-stripping operation might be carried out' (ibid. p.651D). Lord Simon, to similar effect, said that 'what is in reality merely a device to secure a fiscal advantage will not become part of a trade of dealing*

> *in shares just because it is given the trappings normally associated with share-dealing within the trade of dealing in shares.'*

At paragraph 103 the Tribunal found;

> *'In our judgment, these dicta apply to the transactions by which the Partnership acquired the rights to the Helios dividends from Dickens and subsequently received the dividends pursuant to those rights. These were not trading transactions carried out with a tax avoidance motive – they were not trading transactions at all, but artificial arrangements entered into in order to enable the Partnership to claim a tax loss pursuant to its interpretation of section 730 ICTA. This is, in our view, cogently demonstrated by the fact that the delay in purchasing the dividend rights, from 31 March 2006 to 3 April 2006, had no effect at all on the purchase price….'*

In the *Clavis Liberty* case, the Tribunal could not identify any rationale or purpose behind the dividend purchase transaction other than tax avoidance.

Other considerations

<u>The Appellants claimed they knew nothing of YZ Ltd.</u>

On behalf of the Appellants in this appeal, it was submitted that they knew nothing of YZ. however, all Appellants are named as parties to the dividend purchase agreement with YZ. They are parties to that agreement as a matter of law and the fact that the agreement was entered into by a person authorised by power of attorney on behalf of the Appellants has no bearing on the matter. The Appellants cannot rely on a power of attorney signed by them, to separate themselves from the consequences of the YZ Ltd. arrangements.

In addition, as the evidence has borne out, there is never any hope of the participators in the Collective, the Appellants, making a return on their investments.

That it was highly unlikely that the participants in the Collective would get their money back

In the expert report of Witness X, Witness X at page 37, paragraph 103 stated;

> *'In quantitative terms,* [Appellant no. 6] *and* [Appellant no. 5]'s *Initial Contributions of €25,000 each were, within a few days, reduced by fees of €12,492 and income of €250, down to €12,758. To my mind it is highly unlikely that the investment strategies followed would increase the €12,758 above the €25,000 that was originally invested by* [Appellant no. 6] *and* [Appellant no. 5]. *The result of this is that from the beginning, it can be expected that* [Appellant no. 6] *and* [Appellant no. 5] *will not see any of their €25,000 Initial Contribution returned to them. Rather, the balance of the Initial Contribution still remaining (being €8,101 as at December 2011) would be paid over to [Taxfirm].'*

In his oral evidence Witness X stated that it was in the '*too good to be true'* box, that the participants would ever recover their investments.

The Portfolio Investment Transactions

Further, Witness X's statement on page 38 of his report at paragraph 109, where he stated that *'there was little or no economic linkage between the Dividend Transactions and the Portfolio Investment Transactions, in that … one could have been done without the other*' was not challenged by the Appellants.

Senior Counsel for the Respondent in his closing submissions stated*; ' …. when you look at the fact that the investors signed up to the balance of their money or initial contribution never being paid back to them, we would respectfully suggest, to use an expression of Kelly J., that the* [Investment-Co] *transactions were no more than a bagatelle; they're there to give the impression that this was something other than a tax avoidance transaction. But they have no substance to them in circumstances where the real beneficiaries of that element of the investment was not the investors themselves, but* [Taxfirm]'.

Findings including material findings of fact

1. It was a matter of undisputed fact that, as per the background information document and the Collective agreement, the initial contribution would not be returned to the Appellants.

2. I find as a material fact that there was no risk undertaken by the Appellants in respect of the dividend purchase transaction. The documentation provided and the Appellants knew and were on notice of the fact that their capital would not be returned. They each made capital contributions to participate in the Collective in the knowledge that their capital would *not* be returned. They were not at risk of not having their capital returned. They consented to not having their capital returned.

3. In relation to the dividend purchase transactions, I am satisfied that there was no risk for the Collective participants in respect of these transactions as the loan funding the transactions was limited recourse. The Collective granted a charge to [Lender limited] over the dividends payable. In addition, the dividend was not paid directly to the Collective members but was paid to [Lender limited].

4. I find that the fees and charges incurred by the Appellants were significantly referable to the dividend purchase transaction, which was inherently loss making.

5. I find that the complex structured arrangements underlying the Collectives point away from the existence of real, market driven commercial transactions and away from the existence of a genuine and authentic trade. In addition, the strategic design of these complex transactions points towards an objective other than trading and other than profit and namely, tax advantages in the form of substantial tax losses generated by the Collectives.

6. I find that an analysis in accordance with the badges of trade supports a finding that the Appellants were not involved in the carrying on of a trade in financial instruments and securities.

7. On consideration of the relevant case law, the badges of trade analysis and the six objective facts their cumulative weight and effect, I find as a material fact that the

Appellants were not carrying on a trade. I find as a material fact that the nature of the Appellants' involvement in the Collective(s) was that of investor and that each capital contribution to the Collective was in the nature of an investment.

8. I find that the Appellants failed to identify a commercial rationale for the Collective transactions and failed in their assertions that the commercial rationale was to generate a profit through trade.

9. I find as a matter of fact that the Collective documentation contained references which suggested that the purpose and object of the Collective was the generation of a tax advantage for its participants.

10. I find the Appellants' evidence that the principal object of the Collective was to generate profits over the lifetime of the Collective to be unsupported by the Collective documentation and lacking in credibility.

11. The Appellants repeatedly submitted that the generation of tax losses was not the purpose of the transaction, that they were unaware of the tax losses when they entered into the transaction and that the tax losses came as a complete surprise to them when they were filing their respective tax returns. I find their evidence in this regard to be completely lacking in credibility. I find that their evidence in this respect (bearing in mind that they were furnished with tax computations by [Taxfirm] setting out the losses they had generated) to be simply and plainly untrue.

12. I do not accept that the Appellants were unaware that this transaction was geared to deliver them a valuable tax advantage in the form of substantial tax losses that they would (and did) offset against their respective taxable incomes.

13. I find that the object and purpose of the dividend purchase transaction was that it converted a loss-making transaction into a valuable transaction from a tax perspective for each of the Appellants by means of the generation of tax losses which were utilised by the Appellants to reduce taxable income.

ANALYSIS II

On the matter of statutory interpretation, both parties contended that the appropriate interpretative approach to be taken in relation to s.812 TCA 1997 was a literal interpretation and I accept this submission on behalf of the parties.

The territorial scope of section 812 TCA 1997

The main rule in relation to the extra-extraterritorial effect of legislation, as set out in *Colquhoun v Heddon* [1890] 25 QBD 129, is that a statute does not have extra-territorial scope unless it explicitly provides for same.

In *Colquhoun –v- Heddon* [1890] 25 QBD 120, the Income Tax Act then in force made provision for the deduction from assessments under Schedule D of the premium paid by the taxpayer in respect of life assurance entered into '*with any insurance company existing on the 1st November 1844 or…with any insurance company registered pursuant to the Act 7 & 8 Vict C 100'.* The taxpayer claimed to be entitled to an allowance for a premium paid to a New York life insurance company incorporated under New York law. The question which arose was whether the New York insurance company could be said to fall within the provisions of the relevant UK tax statute. The Court of Appeal held that it did not fall within the ambit of *'any insurance company existing on the 1st November 1844'.*

Lord Esher said (at 134-35):

> *'It seems to me that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations the Courts of this country must obey the enactment, the proper construction to be put on general words used in an… Act of Parliament is, that parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction and that we ought to assume that parliament (unless it expressly declares otherwise) when it used general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when parliament is regulation the person of thing which is mentioned in the general words. But it seems to me that our parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction and, unless it does so in express terms so clear that their meaning is beyond doubt, the Courts ought*

always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of Parliament…'

As regards section 812 TCA 1997, there is nothing in section 812 which defines its territorial scope and there is nothing in the provision which would extend its territorial scope beyond its ordinary territorial scope.

The Respondent correctly submitted that the onus was on the Appellant to point to a basis for suggesting that the normal principle of statutory construction (*i.e.* that a statute doesn't have extra-territorial scope) is displaced in relation to section 812.

Irish tax legislation is geographically limited in its scope. In *Colquhoun v Brooks* [1889] 14 App Cas 493, Lord Herschell, at page 504 stated; '*The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.'*

It is the person whose income is to be taxed who must be resident in the State. The person whose income is to be taxed on the application of section 812, if it applies, is not the Irish resident Collective member, it is the British Virgin Islands resident company which owns the securities, namely, YZ Ltd. Because section 812 could not have the effect of making YZ Ltd. liable to Irish tax, the Respondent submitted that the transaction fell outside of the territorial scope of section 812.

The case of *Astor v Perry* [1935] AC 398 approved *Colquhoun v Brooks* where, at page 417 of the report Lord Macmillan stated: '*A notable instance is the case of Colquhoun v Brooks, decided nearly thirty years ago, and always followed.*'

The Appellant in its submissions stated that dividends were not confined by section 812 to Irish dividends and securities were not confined territorially to Irish stocks or shares. In response, the Respondent submitted that based on the authorities of *Colquhoun v Brooks, Astor v Perry* and *Becker v Wright*, when a section refers to the income of a person, it is necessarily referring to income which is within the charge to Irish tax. The Respondent submitted that there did not need to be an express territorial limitation on the definition of either '*interest'* or '*securities'*.

Turning to the authorities on this point; *Astor v Perry* addresses the meaning of the term 'any income' and in this regard Lord Macmillan at page 419 of the report stated:

> *'If the words "any income" are construed, as they reasonably may be, to mean any income chargeable with tax under the British Finance Act of the year, the difficulties of the Crown's interpretation to a large extent disappear. For the income of the American trustee, being the income of a foreign non-resident, is not brought into charge, while the income so far as received by the resident in this country is, consistently with the scheme of the Income Tax Acts, brought into charge under its appropriate head, in the present instance Rule 2, and is by force of s. 20 amalgamated with the resident's income derived from sources within the United Kingdom.'*

In the case of *Becker v Wright* [1966] 1 WLR 215 the Chancery Division considered the provisions of section 392 of the Income Tax Act 1952 (UK) which are similar to those of section 812 TCA 1997. Under section 392 of the UK Act, where a disposition was made under which income was payable to or for the benefit of a person other than the disponer for a period of less than six years, such income was deemed for *'all the purposes of this Act'* to be the income of the disponer.

In *Becker v Wright* [1966] 1 WLR 215 the taxpayer was a UK resident who was assessable in respect of his wife's income. The taxpayer's wife had received a sum of foreign income under a deed of covenant executed by her father, who was a non-resident. The question was whether the income was that of the taxpayer's wife or of the taxpayer's father-in-law. The relevant legislative section was section 392 of the Income Tax Act 1952 which provided:

> *'Any income which, by virtue or in consequence of any disposition made, directly or indirectly, by any person after the first day of May, 1922 (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed six years shall be deemed for all the purposes of this Act to be the income of the person, if living, by whom the disposition was made, and not to be the income of any other person.'*

If section 392 of the Income Tax Act 1952 applied, the income would have remained that of the father-in-law who was outside the charge to tax as opposed to the income of his daughter and son-in-law who were within the charge to tax. Stamp J. held that the reference to '*any income'* in section 392 must be read as if it were a reference to '*any income*' taxable in England and therefore did not apply on the facts of the case. Stamp J. at page 218 of the judgment stated as follows;

'If, here, the income in question is to be deemed to be the income of the covenantor, it will be altogether outside the ambit of the Income Tax Acts, whereas the express words of section 392 direct that it is to be deemed to be the covenantor's income "for all the purposes of" the Income Tax Act, 1952. It is emphasised, with reference to the wording of the section, that it does not provide that the income shall be deemed to belong to the covenantor but that it shall be deemed to be his income for all the purposes of this Act, and that to construe it in the former sense would be to do violence to its terms. And if, urges Mr. Warner on behalf of the Crown, income with which one is concerned is not susceptible to such a deeming, then despite the opening words of the section, "any income which" — words which on the face of it are all-embracing — that income is not within it.

Of course, section 392 must be read in the context of the Income Tax Acts. It is clear that the words "any income" at the beginning of the section do not refer to that which is not income within the meaning of the Income Tax Acts but might be treated as income in another context, e.g., income derived from playing bridge or backing horses or income received by a man by way of allowance from his father: the section is confined to income which, under the Income Tax Acts, is taxable under those Acts: for this purpose, see the speech of Lord Wrenbury in Whitney v. Inland Revenue Commissioners. It is also clear from that same speech, where Lord Wrenbury quotes Lord Herschell in Colquhoun v. Brooks, that there is a territorial limit to the Income Tax Acts, which do not purport to tax income which is "neither derived from property in the United Kingdom nor income received by a person resident in the United Kingdom." It follows that whatever may be the effect of section 392, it does not subject the covenantor to United Kingdom income tax. There is no machinery for that purpose to be found within section 392, and in order to subject him to liability there would have to be something to bring the income within the one or other of the Schedules to the Income Tax Act. Case V of Schedule D does not apply to income arising or accruing to a foreign resident, and, as Mr. Warner points out, there is no such thing as an assessment under section 392.

In Astor v. Perry the phrase "any income" fell to be considered by the House of Lords. There it was sought to treat the words "any income" as extending to income of trustees who were resident abroad. Lord Macmillan, in the leading speech of the majority in the House of Lords, pointed out a number of anomalies which would result if such a view of the section was adopted, and, in considering those anomalies, he asked how a British Income Tax Act could impute to an American citizen "for the purposes of the enactments relating to income tax" — and I underline the words "for the purposes of the enactments

> *relating to income tax" — an income of which that American citizen had divested himself under the law of his own country and to which the provisions of the Income Tax Acts, of course, in no way applied. But if the taxpayer is right in the present case that is precisely what section 392 does. Lord Macmillan concluded that the words "any income" should be construed to mean "any income chargeable with tax under the British Finance Act of that year" and not in the wider sense which Lord Russell of Killowen, in his dissenting speech, thought they ought to bear.'*

Becker -v- Wright makes it clear that if the effect of a deeming provision in a statue is that income is deemed to be that of someone not under the jurisdiction of the enacting parliament and whose income is not subject to the income tax acts, the section directing the deeming will not apply.

The Appellants in this appeal seek to argue that a provision (section 812(2)) which would deem the dividend to be the income of the BVI vendor, should apply in this case, notwithstanding that the vendor is neither subject to the jurisdiction of the Oireachtas nor within to Irish income tax. I am satisfied that on the authority of *Becker -v- Wright* the Appellant's submission in this regard is erroneous.

In *Re Clarkes of Ranelagh Ltd.* (in liquidation) [2004] 3 IR 264 Finlay Geoghegan J was referred to and accepted a number of principles as to the territorial application of statutes. First, the Court was referred to *Bennion on Statutory Interpretation* (4th ed, p.306) which stated:

> *'Unless the contrary intention appears, and subject to any privilege, immunity or disability arising under the law of the territory to which an enactment extends (that is within which it is law), and to any relevant rule of private international law, an enactment applies to all persons and matter within the territory to which it extends, but not to any other persons and matters'.*

The Court was also referred to the further statement in *Bennion* (pp.306-07), with the Court noting that this appeared to be a quotation from Maxwell, *The Interpretation of Statutes* (12th ed, p.183), in the following terms:

> '*Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statue is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and*

the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language'.

In short, there is clear and cogent authority for the proposition that 'income' in a taxing statute means income within the charge to tax. In accordance with these authorities, the word '*income'* in Section 812 means income within the charge to Irish tax.

Returning now to the facts of this appeal and in the context of section 812, taking the first dividend transaction as an example; the '*owner'* of the securities is YZ Ltd., the securities are the shares in AB, the interest is the dividend that AB paid (declared to YZ but ultimately paid to the Collective members) and the effect, if the section were to apply, would be that the dividend would be deemed under subsection 2(a)(i) to be the income of the owner i.e. the income of YZ Ltd.

In short, the income itself is foreign as it is a British Virgin Islands dividend and the owner is a British Virgin Islands resident and incorporated company. Therefore, neither the source of the income, nor the residence of the person who is sought to be taxed under this section, is Irish. For that reason, the transaction does not fall within the territorial scope of section 812 TCA 1997.

Section 812(4) provides:

(4) The Revenue Commissioners may by notice in writing require any person to furnish them, within such time (not being less than 28 days from the service of the notice) as shall be specified in the notice, with such particulars in relation to all securities of which such person was the owner at any time during the period specified in the notice as the Revenue Commissioners may consider to be necessary for the purposes of this section or for the purpose of discovering whether-

(a) tax has been borne in respect of the interest payable in respect of those securities, or

(b) the proceeds of any sale, transfer or other realisation of the right to receive the interest in respect of those securities has been charged to tax under Schedule C or under Chapter 2 of Part 4.

This provision envisages a notice in writing from the Revenue Commissioners directed to the owner of the securities. The owner of the securities is YZ Ltd, a BVI company. A BVI company

would not be compellable by the Revenue Commissioners in this appeal. What the subsection envisages is an Irish resident owner or an owner who is in some way compellable by the Irish authorities (for example, if the owner was an Irish resident, Irish incorporated or had an Irish source income). However, the provision could not apply to a BVI company whose only income and assets derive from the British Virgin Islands.

The Appellant contended that the case of *Revenue and Customs Commissioners v Bank of Ireland Britain Holdings* [2008] STC 398 was authority that the United Kingdom Court of Appeal had resiled from the established law set out in *Colquhoun v Brooks*. However, the *Bank of Ireland* case does not discuss territorial issues, does not cite *Colquhoun v Brooks*, nor does it discuss the principles set out in *Colquhoun v Brooks.* In short, it doesn't purport to change nor does it address, the law on territoriality.

In conclusion, I am satisfied that section 812 does not apply to deem a dividend to be the income of '*the owner*' of the underlying securities where that owner is established outside the State and is neither within the jurisdiction of the Oireachtas nor within the charge to Irish tax.

Taxation of foreign dividends

The Appellant submitted that the Appellants cannot be taxable in respect of the dividends received, where section 812 TCA 1997 deems the dividends to be the income of the shareholder.

The Respondent submitted that, even if the application of section 812 were not subject to the territorial limitations outlined above, the fact that a dividend was deemed by section 812(2)(a) as amended, to be the income of the shareholder would not preclude it from being also the income of the recipient for tax purposes.

Section 40(1), Finance Act 2006 deleted subparagraph (iii) of section 812(2)(a) which read *'shall not be deemed to be income of any other person'*.

Although, prior to this amendment, a dividend which, under section 812, was deemed to be the income of the owner of the shares could not also be the income of any other person for the purposes of the Tax Acts, the Respondent submitted that post the Finance Act 2006, this is no longer the case. The Respondent submitted that there is now nothing in the provisions of section 812 to prevent the dividend in this case from being the income of the Appellant for tax purposes.

In the Irish Supreme Court case of *O'Connell v Keleghan* [2001] 2 IR 490, which involved the interpretation of a deeming provision, Murphy J. stated:

> *'That legislation may and does from time to time deem acts or events to be what they are not is common particularly in legislation imposing taxation or seeking to prevent its avoidance. There is no reason why the courts would not enforce such legislative fictions as fully and faithfully as any other legislation or "boggle when it comes to the inevitable corollaries" of the fiction. The courts are not unaccustomed to dealing with notional or hypothetical situations or (in the words of Danckwert J in In re Holt [1953] 1 WLR 1488 at p 1492) entering "into a dim world peopled by the indeterminate spirits of fictitious or unborn sales". If the second schedule to the Act of 1975 requires that the loan notes should be deemed to be or treated as if they were shares in Gladebrook Limited so be it. The difficulty from the appellant's point of view is that the legislation does not so provide and the only justification for accepting that fiction would be the alleged purpose of the particular legislation. It was contended that the purpose of the fiction was to permit the first transaction to escape tax on the footing that tax would be payable on a subsequent disposition as if no change had taken place in the share holdings of the parties to the original transaction. In my view the requirement to treat the disposal of the loan notes in February, 1993, as a disposal in substance of shares in Gladebrook Limited is in no sense a consequence or a corollary of the original fiction which deemed the exchange not to be a disposition or of the further "selective" fiction requiring the cost price of the Gladebrook shares to be that of the loan notes. There was no necessary requirement in law or in logic for the extension of the fiction. The legislature might well have been content to impose tax by reference to the price which might be expected to be obtained for the asset received in exchange for the original share holding. In my view the learned trial judge was correct in concluding that the asset realised by way of redemption in February, 1993, was in law, as it was in fact, a disposition of the loan notes which had been issued to the respondent for his shares in Gladebrook Limited.'*

Thus, Murphy J. stated that the correct approach is to examine the original fiction and consider the consequences and corollaries of that, but not to extend that fiction.

The Respondent submitted that if one approaches the present case as Murphy J. approached *O'Connell -v- Keleghan*, the '*original fiction*' under section 812(2)(a) is that a dividend, which is in fact the income of the recipient, is deemed to be the income of the shareholder. The Respondent submitted that that is the full extent of the statutory fiction under section

812(2)(a) and that there was no inevitable or necessary consequence or corollary as regards the *recipient* of the dividend.

I accept the Respondent's submission in this regard and I am satisfied that in applying section 812(2)(a) it is appropriate that I should take a strict approach to the construction of the deeming provision, as the Supreme Court did in *O'Connell -v- Keleghan*, and that I should not seek to extend its application beyond what is provided for in the legislation.

Prior to deletion by Finance Act 2006, sub-section 812(2)(a)(iii) provided;

> *'(2)(a) for the purposes of the Tax Acts that interest (whether it would or would not be chargeable to tax if this section had not been enacted) –*
>
> *…*
>
> *(iii) shall not be deemed to be income of any other person, and*
>
> *…'*

It was common ground between the parties that if section 812 were applicable and if it were a pre-2006 transaction and if the section had the effect of deeming the dividend to be the income of the owner, YZ Ltd., it could not also deem the income to be that of the Collective members. However, we are not dealing with the pre-2006 legislation and the provision as it applies to the transactions the subject of the within appeals, is the provision absent sub-section (2)(a)(iii).

If an Irish resident receives a foreign dividend, it is part of their income for tax purposes and they are liable to Irish tax in respect of this income. The Appellants in this appeal claim that the operation of section 812 removes from their income and the charge to tax, the foreign dividend received. However, with the deletion of sub-section 812(2)(a)(iii), there is no provision which deems that the dividend is *not* their income. In these circumstances, the foreign dividend simply falls within section 18 TCA 1997 (Schedule D) in the normal way and is subject to income tax accordingly.

The case of *R v Dimsey* [2001] STC 1520 involved a Revenue prosecution under the UK transfer of assets abroad legislation. In the context of that case, consideration was given to the wording of section 21 of the Finance Act 1936 which dealt with settlements made by a settlor in respect of his children. Subsection (1) provided that any income of a settlement

paid to or for the benefit of an unmarried infant child of the settlor *'shall ... be treated for all the purposes of the Income Tax Acts as the income of the settlor ... and not as the income of any other person*'

Mr. Dimsey's argument was that the transfer of assets abroad legislation deemed the income to be that of the UK resident and argued that it could not also be the income of the foreign companies. A similar contention (*i.e.* if income is the income of A it cannot also be the income of B) is made on behalf of the Appellants in this appeal.

At paragraphs 47 to 50 of the judgment, Lord Scott stated;

> ***'[47]*** *Section 18 was not the only provision in the 1936 Act that sought to combat tax avoidance. Section 21 dealt with settlements made by a settlor on his children. Subsection (1) provided that any income of a settlement paid to or for the benefit of an unmarried infant child of the settlor 'shall ... be treated for all the purposes of the Income Tax Acts as the income of the settlor ... and not as the income of any other person [emphasis added]'.*
>
> ***[48]*** *Confronted by the express words in s 21(1), 'and not as the income of any other person', it seems to me very difficult, if not impossible, to argue that those words, or something similar, which are notably absent from s 18(1) should be an implied addition to s 18(1). A comparison between s 18(1) and s 21(1) suggests strongly that the omission of any such words from s 18(1) was deliberate.*
>
> ***[49]*** *Section 24 of the Finance Act 1938 (the 1938 Act) fortifies the point. The section deals with the case where an owner of securities has transferred to someone the right to receive interest payable in respect of the securities while himself remaining the owner of the securities. Subsection (1), which provides in para (a) that the interest 'shall be deemed to be the income of the owner ...', provides also, in para (c), that the interest 'shall not be deemed to be the income of any other person'. Section 730 of the 1988 Act reproduces the deeming provisions originally to be found in section 24 of the 1938 Act. Paragraphs (a) and (c) of sub–s (1) are to all intents and purposes in the same terms as in the 1938 Act.*
>
> ***[50]*** *In other statutory deeming provisions, too, there is express reference to the tax liability of persons other than the person at whom the deeming provision is principally aimed. Section 660 of the 1988 Act deals with short term dispositions. Subsection (1)*

provides that the income of the property thus disposed of 'shall be deemed for all the purposes of the Income Tax Acts to be the income of the person, if living, by whom the disposition was made, and not to be the income of any other person'.

Lord Scott at paragraph 51 concluded that the wording in the tax avoidance provisions strongly supported the submission of the UK Revenue authorities.

The Respondent also relied on the UK First Tier Tribunal case of *Clavis Liberty 1 LP v Commissioners for Revenue and Customs* [2016] UKFTT 0253 (TC)

At paragraph 114-115 of the decision, the tribunal, referring to the submissions of Counsel for *HC, stated;*

*'**[114]** Mr. Goy submitted that the amendment of s 730(1) by the F(2)A 2005 removed the rule that had previously applied, that where income of a transferee was deemed to be income of the transferor it could not also be regarded as the income of the transferee. He accepted in argument that if s 730(1)(c) were in force for the period relevant to this appeal, then s 730 ICTA would indeed have the effect claimed for it by the Partnership. But he said that Parliament, in repealing s 730(1)(c) had clearly intended to introduce a possibility that income deemed to be the income of person A under s 730(1)(a) could also be the income of person B if it could otherwise be attributed to person B. …*

***[115]** Mr. Goy referred us to [47]–[49] of R v Dimsey, where Lord Scott makes explicit reference to s 730 ICTA before its amendment by F(2)A 2005. He submitted that it was clear from what Lord Scott said that he regarded the omission of any words, such as those formerly found in s 730(1)(c), from s 739 made it 'very difficult, if not impossible, to argue that those words, or something similar' should be an implied addition to s 739. So here, the removal of s 730(1)(c) showed, in Mr. Goy's submission, a clear Parliamentary intention that there should be no consequence from s 730 for the tax liability of persons other the person at whom the deeming provision is principally aimed..'*

In this appeal herein, person A/the owner, is YZ Ltd. while person B/the recipient is the Collective member. The British Virgin Islands dividend, can otherwise be attributed to the Collective member because the Collective member is an Irish resident.

The tribunal accepted Mr. Goy's submission at paragraph 122 as follows;

> *'In accepting Mr. Goy's submissions, we consider that the amendment of s 730 ICTA by the removal of the former s 730(1)(c) clearly had the effect for which he contended, namely that it removed the provision by which there was a prohibition on treating the distribution as the income of any person other than the owner of the shares. We regard Mr. Thornhill's argument that the repeal of s 730(1)(c) had the effect only of allowing the income to be 'deemed' to be the income of another person (in addition to the owner of the shares)—as opposed to allowing it to be treated as the income of any other person—as being, with respect, far-fetched. We can discern no statutory purpose for an amendment having such a limited effect.'*

Thus, the Tribunal rejected the Appellant's submission on the matter of the deeming provision, concluding that with the statutory words removed by Parliament, the provision was to be read as it stood and without reference to those words.

The Appellants in this appeal claimed that section 812 TCA 1997 applied and that the operation of section 812 removed from their income and the charge to tax, the foreign dividend received. However, even if section 812 did apply, the position is that with the deletion of sub-section 812(2)(a)(iii), there is now nothing in the provisions of section 812 (or in the Taxes Acts) to prevent the dividend in this case from being the income of the Appellant for tax purposes. In these circumstances, the foreign dividend simply falls within section 18 TCA 1997 in the normal way and is subject to income tax accordingly.

Double taxation

The Appellants contended that if the income is deemed by section 812 to be that of YZ Ltd., it cannot also be the income of the Collective members because if that were the case, the same income would be liable to be taxed twice, i.e., in the hands of both the transferor and the transferee. The Appellants contended that this would lead to double taxation.

A similar submission in relation to section 739 of the UK Income and Corporation Taxes Act 1988, was rejected by the House of Lords in the *Dimsey* case. Lord Scott, addressing the issue of double taxation at paragraphs [57] and [58] stated;

> ***'[57]** This, however, is more a theoretical point than a real one. It is in practice highly unlikely that United Kingdom tax can be recovered from a s 739 transferee. Transferees are chosen by tax avoiders in order to avoid United Kingdom tax. Non-resident and foreign domiciled transferees are likely to be chosen. They do not submit tax returns to*

> *the Revenue. In the present case it is only because Mr. Chipping, the transferor, so involved himself in the affairs of his offshore companies that they became resident in the United Kingdom that their liability to corporation tax arose.*
>
> ***[58]** Accordingly, the double taxation possibilities that the Revenue's case undoubtedly leaves theoretically open do not seem to me to carry weight in considering the correct construction of s 739(2).'*

At paragraph 60, Lord Scott continued;

> ***'[60]** None of this, in my opinion, bites in the present case. There is no doubt about the liability in principle of companies resident in the United Kingdom to corporation tax. There is no constitutional problem. The question is whether Parliament, in imposing the s 739 tax liability on tax avoiders, intended thereby to relieve the transferees of their normal liability to tax on their income, the income which forms the basis of the tax liability imposed on the tax avoider. Vestey does not, in my opinion, assist in answering this question. I would answer the question in the negative. Section 739(2) on its true construction does not, in my opinion, relieve transferees of their normal liability to pay tax on their income.'*

As a general proposition, foreign dividend income received by Irish residents is taxable pursuant to section 18 TCA 1997. Based on the evidence and submissions in this appeal, there is no basis upon which to take the view that the Appellants are *not* subject to income tax on their foreign dividend income in accordance with section 18 TCA 1997.

The Respondent submitted that double taxation means double taxation of the same person in relation to the same source or matter. The Appellant has not identified double taxation of this nature in this appeal.

Further, as set out above, I am satisfied that section 812 does not apply to deem a dividend to be the income of '*the owner*' of the underlying securities where that owner is established outside the State and is neither within the jurisdiction of the Oireachtas nor within the charge to Irish tax. Therefore, YZ Ltd. is not within the charge to Irish tax.

In short, the Appellants have not identified any double taxation in this appeal and I am satisfied that the submission on double taxation is at best, theoretical and does not require further elaboration.

Section 812 and trading receipts.

It is long established that trade receipts are taken into account in determining the balance of profits and gains assessable under Case I. Tax under Case I is charged on annual profits or gains from a trade, that is, turnover plus addbacks less allowable deductions. Tax under Case I is charged on profits. It is not charged on turnover (unless there are no allowable expenses).

The Respondent, citing dicta from *Commissioners of Inland Revenue v Paget* [1938] 2 KB 25 (Lord Romer at page 45 of the report) and from *Cenlon Finance Co Ltd. v Ellwood* [1962] AC 782 (Lord Reid at page 795 of the report) stated that for traders, a dividend received in the course of a trade in dividends or securities is not a separate item but an item to be taken into account in computing taxable Case I profit. As a matter of tax law, this proposition is fundamental and undoubtedly correct.

Following from that, because the reference in section 812 is to '*income*' rather than to '*profit*' the Respondent submitted that section 812 does not apply to gross dividends if those dividends are received as trading items. As I have determined, for the reasons set out above, that the transactions are not within the scope of section 812, this particular question has become moot. In addition, I have determined under **ANALYSIS I** above that the Appellants were not involved in the carrying on of a trade and that dividends received by the Appellants were not received as trading receipts.

ANALYSIS III - Expression of Doubt

Section 955(4) provides:

> *'(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.*

(b) This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question.'

Expressions of doubt per the tax returns

The 2009 income tax return made by Appellant no. 5 provides; '*You have indicated that you are unsure about the tax treatment of an item in your Return'.* The answer provided by Appellant no. 5 on the form is '*Yes*'. The details provided on the return are as follows;

'We have been advised that a transaction entered into as part of the Schedule D Case I trade could fall within section 812 of the [Taxes] *Consolidation Act 1997. The computation of the relevant Schedule D Case I trade has been prepared on the basis of s812 TCA 1997.'*

The 2010 income tax return made by Appellant no. 27 provides: '*You have indicated that you are unsure about the tax treatment of an item in your Return'.* The answer provided by Appellant no. 27 on the form is '*Yes*'. The details provided on the return are as follows:

'In December 2010, the client above entered into a [Collective] *formed for the purposes of trading financial instruments on a pooled basis. The trading strategy of the* [Collective] *is to ake* [sic] *advantage of short term opportunities to make trading profits by acquiring various financial instruments or income sources with a view to realising them to make profit in a short space of time. The* [Collective] *uses leverage to enhance the returns to individual* [Collective] *members. FORM PN1 Protective Notification has been sent to* [Appellant 27's] *local tax office.'*

The Respondent submitted that the above expressions of doubt were not genuine expressions of doubt in accordance with s.955(4)(b) which provides that: '*This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine. '*

In order to ascertain whether an expression of doubt is genuine, it must be considered from the perspective of the taxpayer who filed it.

Evidence in relation to the expression of doubt

Appellant 27 in direct examination, when questioned about his understanding of the expression of doubt stated;

> *'Yes. I guess when it was, well certainly I never heard of an expression of doubt before, It wasn't my idea to file an expression of doubt originally. I didn't even know what it was but it's something that either, well I presume my - - we are talking about 2000* [sic] *and, like seven years ago at this stage but obviously my financial advisor accountant would have talked me through what it is and why I'm doing it. To my mind it's a prudent step. ….. It's just being upfront with explaining how you have treated something. So that's I guess prudence I guess is what I would say.'*

During cross-examination, the following exchange occurred between Appellant no. 27 and Senior Counsel for the Respondent;

'Q: *In relation to your expression of doubt, … was that done on the advice of your tax advisor?*

A: *I am sure it was. It certainly wasn't my idea.*

Q: *So you didn't have any doubt about the transaction, is that what you are saying?*

A: *I would trust my financial advisor. So if he says this is a, that this trading* [Collective] *is okay to trade with, I don't see anything wrong with it. I say okay. I mean I don't think, I don't think the arrangement I have with him is such that he, it's not in his interest for me to make mistakes.*

Q: *What discussion did you have with him about the expression of doubt?*

A: *I can't recall, it was a long time ago. But I mean it's like I have to defer to him. It's the first expression of doubt I have ever filed in. So I had never seen one before. I don't remember exactly how he, what he said but I am pretty sure that if, I'm pretty sure he wouldn't have got me to file it if the trade investment was not worth doing, put it like that. '*

Appellant no. 5 in evidence, when asked how the expression of doubt came about, the Appellant answered;

'I said if this is something that is advised, is it right and is it proper, that actually is where it came from, is it right and is it proper. They said yes, it is appropriate, it is right, it is proper. So therefore they asked me to sign this expression of doubt which indicated that there may be a differing interpretation of tax regulations, but that they would, it was important to flag this for Revenue in case there was an issue. And so, therefore, I signed it. So under advice from my accountant that's what I did.'

On the matter of the expression of doubt, the Appellant no. 26 stated that he would have followed the advice of [Taxfirm] and would have assumed that he did file an expression of doubt.

In direct evidence he stated that at the time he filed his tax return *'My read of it was that it was absolutely fair and okay to put in my Tax Return which is the first thing and obviously then if there was notification to Revenue I was happy with that obviously because that's actually all being above board.'*

It was put to Appellant 26 that he did not in fact make an expression of doubt. He was asked by Senior Counsel for the Respondent whether he was referring to the protective notification filed on his behalf. The Appellant stated that he would have to check his records. Having reviewed the return of Appellant 26 for the tax year of assessment 2010, I have been unable to identify any expression of doubt.

<u>The requirement of genuine doubt</u>

Responding to questions about the expression of doubt while providing oral evidence, the answers of the Appellants were very much focused on the fact that they were advised to file expressions of doubt by their tax advisors. Appellant 27 said he filed on the advice of his tax advisor and that '*It certainly wasn't my idea'*. Appellant 5 stated that: '*under advice from my accountant that's what I did'.* Neither Appellant identified what particular doubt they had about the application of the law. Neither Appellant spoke to the substance and content of the expressions of doubt filed on their respective behalves and neither Appellant articulated what the doubt was. The Appellants spoke merely to the fact of the expression of doubt having been filed and the fact of it having been done in accordance with tax advice.

Having considered the factual background, the evidence, the relevant documentation and the legislative provisions underlying the Collective transactions, I am satisfied that many

Appellants had no genuine doubt about the application of the law, rather, they paid over their capital based on the erroneous view taken of s.812 TCA 1997. Some Appellants invested in the Collectives repeatedly and successively.

Perhaps other Appellants harboured a hope, an aspiration or an expectation, that Collective tax arrangements would withstand scrutiny if they were to be challenged by the Revenue Commissioners at a future date. In my view, such hopes and aspirations do not equate to a genuinely held doubt about the application of the law.

It was always going to be a challenge to succeed on the basis of the proposition that a domestic tax provision could apply extra-territorially to a British Virgin Islands company - that's not to say that the question of extra-territoriality can *never* be the subject of genuine doubt. However, the question is not whether the matter was objectively free from doubt, but whether the Appellants themselves believed that there was a genuine doubt as to the application of the law and whether they specified this doubt in their returns.

The Appellants opted to take a risk (a legal risk that is, as opposed to an entrepreneurial risk) and to invest in the Collective to create tax losses for offset against their other income. The evidence herein is that the filing of the expressions of doubt was undertaken on advice of the tax advisors, but the Appellants could put it no better than that in their oral evidence. They did not articulate or specify in their tax returns nor in their evidence, what the doubt was. As a result, I am not satisfied that there was a genuine doubt on the part of the Appellants as to the application of the law in accordance with section 955(4) TCA 1997.

Specification of the doubt

Section 955(4)(a) provides:

> *'(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.*

[emphasis added]

The 2009 income tax return made by Appellant no. 5 contains the following expression of doubt;

> *'We have been advised that a transaction entered into as part of the Schedule D Case I trade could fall within section 812 of the* [Taxes] *Consolidation Act 1997. The computation of the relevant Schedule D Case I trade has been prepared on the basis of s812 TCA 1997.'*

I note that this expression of doubt does not identify or specify the basis upon which section 812 might not apply. In particular, there is no mention of the fact that the Appellant is purporting to apply section 812, a domestic tax provision, as though it had extra-territorial effect. In addition, there is no identification of any of the other reasons section 812 might not apply to the dividend purchase transactions and there is no specification of doubt about whether the Appellant was in fact carrying on a trade.

The 2010 income tax return made by Appellant no. 27 contains the following expression of doubt:

> *'In December 2010, the client above entered into a* [Collective] *formed for the purposes of trading financial instruments on a pooled basis. The trading strategy of the* [Collective] *is to ake* [sic] *advantage of short term opportunities to make trading profits by acquiring various financial instruments or income sources with a view to realising them to make profit in a short space of time. The* [Collective] *uses leverage to enhance the returns to individual* [Collective] *members. FORM PN1 Protective Notification has been sent to* [Appellant 27's] *local tax office.'*

This expression of doubt is similarly absent the specification of any particular doubt. While the reference to filing the form PN1 points to the possibility that from the taxpayer's perspective there was a possibility of a tax advantage, there is no information specified which would identify how or why this might arise.

The Respondent submitted that the above statements did not adequately specify or identify doubt, as required by section 955(4)(a) TCA 1997. The Respondent submitted that as a result, there was no valid expression of doubt. The oral evidence of the Appellant witnesses also failed to specify, identify or articulate what the doubt was. As stated above, the evidence focused squarely on the fact that the Appellants were advised to file expressions of doubt and they acted on that advice, as advised.

In the circumstances, I am satisfied that the expressions of doubt filed by Appellants 5 and 27 failed to specify the doubt as required by section 955(4)(a).

In addition, in accordance with s.955(4)(b) TCA 1997, I am satisfied that these expressions of doubt were not genuine and I am satisfied that the Appellants were acting with a view to the avoidance of tax.

Having not seen the expressions of doubt filed on behalf of the remaining Appellants of this group of 32 Appellants, I make no specific determination on the validity of those expressions of doubt other than to reiterate my view as set out above, that section 955(4) requires that the doubt as to the application of the law must be identified and specified and in these appeals it is not sufficient to merely assert a trading position or to refer to a statutory provision and suggest that it might apply.

Protective notification

The Appellants argued that, having been notified of the transaction through a protective notification under Section 811A and the expression of doubt mechanism under section 955(4), the Respondent was required to form a view that the transaction was a tax avoidance transaction within two years of receiving notification and that they failed to do so. The Appellants contended that the Respondent was therefore precluded from now forming such a view.

The Respondent rejected this submission on the basis that the two year time limit provided for in s.811A did not have any application to the within appeal and that, based on the Supreme Court case of *McNamee v Revenue Commissioners* [2016] IESC 33, which accepted that there was a difference between tax avoidance as a general principle and section 811 tax avoidance, there was no impediment to the submissions of the Respondent that the transaction in this appeal was never a trading transaction because its real purpose was tax avoidance. I accept this submission on behalf of the Respondent.

CONCLUSION AND DETERMINATION

Burden of Proof

In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellants who must prove on the balance of probabilities that the assessments to tax are incorrect. In cases involving tax reliefs or exemptions, it is incumbent on the taxpayers to demonstrate that they fall within the relief, see *Revenue Commissioners v Doorley* [1933] 1 IR 750 and *McGarry v Revenue Commissioners* [2009] ITR 131.

In the High Court case of *Menolly Homes Ltd. v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

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

Having considered the evidence and facts, the relevant legislation and case law, I determine, for the reasons set out in this determination herein, that the Appellants have not succeeded in discharging the burden of proof in this appeal and have not demonstrated that the amended Schedule D assessments raised by the Respondent in respect of the tax years of assessment 2009 and/or 2010 are incorrect.

Object and purpose of the dividend purchase transactions

The purchase of the British Virgin Islands dividend(s) were complex transactions to acquire dividends from a particular British Virgin Island company, financed by a loan from a British Virgin Island lender [Lender limited] carried out in order to generate a tax advantage for the participants of the Collective, in the form of tax losses.

All of the objective facts point towards the transaction having been put in place for tax purposes to secure a tax advantage through generating a loss of the kind that was ultimately claimed in these appeals. I accept the evidence of Witness X, that stated that the dividend transactions were self-standing transactions and that the dividend transaction did not lead onto the portfolio transactions.

In short, a dividend transaction is entered into and is completed before the end of the tax year and the transaction generates or rather, purports to generate a tax loss which is then claimed

(in accordance with section 381 TCA 1997) by the taxpayers in their returns in respect of that tax year.

I determine that the object and purpose of each dividend purchase transaction was to convert a loss-making transaction into a valuable transaction from a tax perspective for each of the Appellants by means of the generation of tax losses which were utilised by the Appellants to reduce taxable income.

Trading

The Appellants bear the onus of proof to establish that, as members of the Collectives, they were engaged in a trade. It is not sufficient to merely assert that one is engaged in a trade, rather, there must be credible evidence to support that contention.

The Appellants failed to identify a commercial rationale for the Collective transactions and failed in their assertions that the commercial rationale was to generate a profit through trade. The Appellants' evidence that the principal object of the Collective was to generate profits over the lifetime of the Collective was unsupported by the Collective documentation and was lacking in credibility.

Accordingly, on consideration of the relevant case law together with the six objective facts set out above, their cumulative weight and effect, I determine that the Appellants were not carrying on a trade in financial instruments and securities.

I determine that the nature of the Appellants' involvement in the Collective(s) was that of investor and that each capital contribution to the Collective was in the nature of an investment.

Section 812 – territoriality

I determine that section 812 does not apply to deem a dividend to be the income of '*the owner*' of the underlying securities where that owner is established outside the State and is neither within the jurisdiction of the Oireachtas nor within the charge to Irish tax.

As a general proposition, foreign dividend income received by Irish residents is taxable pursuant to section 18 TCA 1997. Based on the evidence and submissions in this appeal, there was and is no basis upon which to take the view that the Appellants were *not* subject to income tax on their foreign dividend income in accordance with section 18 TCA 1997.

The Appellants in this appeal claimed that section 812 TCA 1997 applied and that the operation of section 812 removed from their income and the charge to tax, the foreign dividend received. However, even if section 812 did apply, the position is that with the deletion of sub-section 812(2)(a)(iii), there is now nothing in the provisions of section 812 (or in the Taxes Acts) to prevent the dividends in this case from being the income of the Appellant for tax purposes. In these circumstances, the foreign dividend simply falls within section 18 TCA 1997 in the normal way and is subject to income tax accordingly.

The Appellants have not identified any double taxation in this appeal and I am satisfied that the submission on double taxation is at best, theoretical and does not require further elaboration.

I determine that the Appellants who are Irish resident, fall squarely within the charge to tax in section 18 TCA 1997, in respect of their foreign dividend income.

Expression of doubt

I determine that the expressions of doubt filed by Appellants no. 5 and no. 27 failed to specify the doubt as required by section 955(4)(a). In addition, in accordance with s.955(4)(b) TCA 1997, I determine that these expressions of doubt were not genuine and I am satisfied that the Appellants were acting with a view to the avoidance of tax.

Determination in relation to the assessments

I determine that the amended Schedule D assessments raised by the Respondent in respect of the tax years of assessment 2009 and/or 2010 shall stand

These appeals are hereby determined in accordance with section 949AK TCA 1997

COMMISSIONER LORNA GALLAGHER

13th day of December 2019

This determination has been the subject of a request for appeal to the High Court by way of case stated in accordance with section 949AQ TCA 1997.