



135TACD2021

BETWEEN/

[REDACTED]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

[1] This is an appeal against an Amended Notice of Assessment to Capital Gains Tax for the year 2010 dated 1 December 2015. The net amount chargeable to tax is €30,688,342. The capital gains tax @ 25% is €7,672,085. A Notice of Appeal dated 22 December 2015 was submitted on behalf of the Appellant.

Facts

[2] On [REDACTED] 2010, [REDACTED] disposed of [REDACTED] shares in [REDACTED]. [REDACTED] was a Maltese tax resident company incorporated on [REDACTED] in Cyprus. [REDACTED] was an Irish tax resident trading company. At the date of disposal, the Appellant owned 100% of the shares in [REDACTED] and the business of [REDACTED] consisted wholly or mainly of the carrying on of a trade.



[3] The Appellant is an Irish domiciled individual who was tax resident and ordinarily resident in Ireland in the year at issue.

[4] The [] shares in [] were allotted to [] for €5,000. The [] shares were legally owned by [] from the date of issue in [] to the date of disposal in [] 2010.

[5] [] disposed of the [] shares in [] to [] [] [] for initial consideration of €21,111,855. The agreed consideration also included a deferred contingent element in the form of an earn-out. The earn-out received by [] was €7,969,402. The total consideration received by [] for the disposal of the [] shares was €29,081,257.

[6] The [] shares in [] were not specified assets under section 29(3) of the Taxes Consolidation Act, 1997.

[7] [] held over 5% of the issued share capital of [] for a continuous 12 month period ending in the previous 24 months prior to disposal.

[8] [], as a non-resident company, was not within the charge to Irish capital gains tax nor within the charge to Irish corporation tax on chargeable gains in respect of the disposal of the [] shares in [].

[9] An Amended Notice of Assessment to Capital Gains Tax issued to increase the chargeable gain in 2010 by €29,076,257 to €30,799,777. The increase of €29,076,257 was the sum of the initial consideration of €21,111,855 plus the earn-out of €7,969,402 less the base cost of the shares of €5,000.

Legislation

[10] Section 28 of the Taxes Consolidation Act, 1997 provides:

“28 *Taxation of capital gains and rate of charge*

- (1) *Capital gains tax shall be charged in accordance with the Capital Gains Tax Acts in respect of capital gains, that is, in respect of chargeable gains computed in accordance with those Acts and accruing to a person on the disposal of assets.*
- (2) *Capital gains tax shall be assessed and charged for years of assessment in respect of chargeable gains accruing in those years.*
- (3) *Except where otherwise provided by the Capital Gains Tax Acts, the rate of capital gains tax in respect of a chargeable gain accruing to a person on the disposal of an asset shall be 25 per cent, and any reference in those Acts to the rate specified in this section shall be construed accordingly.”*

[11] Section 29(3) of the Taxes Consolidation Act, 1997 provides:

“29 *Persons chargeable*

...

- (3) *Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident nor ordinarily resident in the State shall be chargeable to capital gains tax for a year of assessment in respect of chargeable gains accruing to such person in that year on the disposal of –*
 - (a) *land in the State,*
 - (b) *minerals in the State or any rights, interests or other assets in relation to mining or minerals or the searching for minerals,*
 - (c) *assets situated in the State which at or before the time when the chargeable gains accrued were used in or for the purposes of a trade carried on by such person in the State through a branch or agency, or which at or before that*



time were used or held or acquired for use by or for the purposes of the branch or agency,

- (d) *assets situated outside the State of an overseas life assurance company (within the meaning of section 706(1)), being assets which were held in connection with the life business (within the meaning of section 706(1)) carried on by the company, which at or before the time the chargeable gains accrued were used or held by or for the purposes of that company's branch or agency in the State."*

[12] Section 31 of the Taxes Consolidation Act, 1997 provides:

"31 Amount chargeable

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

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

[13] Section 545 of the Taxes Consolidation Act, 1997 provides:

"545 Chargeable gains

- (1) *Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no chargeable gain shall accrue on its disposal.*
(2) *The amount of the gain accruing on the disposal of an asset shall be computed in accordance with this Chapter, and subject to the other provisions of the Capital Gains Tax Acts.*
(3) *Except where otherwise expressly provided by the Capital Gains Tax Acts, every gain shall be a chargeable gain."*

[14] Section 590 of the Taxes Consolidation Act, 1997 provides:

“590 Attribution to participators of chargeable gains accruing to non-resident company

(1) *In this section –*

- (a) *‘participator’, in relation to a company, has the meaning assigned to it by section 433(1);*
- (b) *references to a person’s interest as a participator in a company are references to the interest in the company which is represented by all the factors by reference to which the person falls to be treated as such a participator; and*
- (c) *references to the extent of such an interest are references to the proportion of the interests as participators of all the participators in the company (including any who are not resident or ordinarily resident in the State) which on a just and reasonable apportionment is represented by that interest.*

(2) *For the purposes of this section, where –*

- (a) *the interest of any person in a company is wholly or partly represented by an interest (in this subsection referred to as the ‘person’s beneficial interest’) which the person has under any settlement, and*
- (b) *the person’s beneficial interest is the factor, or one of the factors, by reference to which the person would be treated, apart from this subsection, as having an interest as a participator in the company,*

the interest as a participator in the company which would be that person’s shall be deemed, to the extent that it is represented by the person’s beneficial interest, to be an interest of the trustees of the settlement, and not an interest of the person’s, and references in this section, in relation to a company, to a participator shall be construed accordingly.

(3) *This section shall apply as respects chargeable gains accruing to a company –*

- (a) *which is not resident in the State, and*

- (b) *which would be a close company if it were resident in the State.*
- (4) *Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person.*
- (5) *The part of the chargeable gain referred to in subsection (4) shall be equal to the proportion of that gain that corresponds to the extent of the participator's interest as a participator in the company.*
- (6) *Subsection (4) shall not apply in the case of any participator in the company to which the gain accrues where the aggregate amount falling under that subsection to be apportioned to the participator and to persons connected with the participator does not exceed one-twentieth of the gain.*
- (7) *This section shall not apply in relation to –*
- (a) *a chargeable gain accruing on the disposal of assets, being—*
 - (i) *tangible property, whether movable or immovable, or a lease of such property, or*
 - (ii) *specified intangible assets within the meaning of section 291A(1), where the assets were used, and used only, for the purposes of a trade carried on by a company, or by another company which is a member of the same group (within the meaning of subsection (16)) as the first-mentioned company, wholly outside the State,*
 - (b) *a chargeable gain accruing on the disposal of currency or of a debt within section 541(6), where the currency or debt is or represents money in use for the purposes of a trade carried on by the company wholly outside the State, or*
 - (c) *a chargeable gain in respect of which the company is chargeable to capital gains tax by virtue of section 29 or to corporation tax by virtue of section 25(2)(b).*
- (8) *Where –*



- (a) *any amount of capital gains tax is paid by a person in pursuance of subsection (4), and*
- (b) *an amount in respect of the chargeable gain is distributed, whether by way of dividend or distribution of capital or on the dissolution of the company, within 2 years from the time when the chargeable gain accrued to the company,*

that amount of tax, so far as neither reimbursed by the company nor applied as a deduction under subsection (9), shall be applied for reducing or extinguishing any liability of the person to income tax in respect of the distribution or (in the case of a distribution falling to be treated as a disposal on which a chargeable gain accrues to the person) to any capital gains tax in respect of the distribution.
- (9) *The amount of capital gains tax paid by a person in pursuance of subsection (4), so far as neither reimbursed by the company nor applied under subsection (8) for reducing any liability to tax, shall be allowable as a deduction in the computation under the Capital Gains Tax Acts of a gain accruing on the disposal by the person of any asset representing the person's interest as a participator in the company.*
- (10) *In ascertaining for the purposes of subsection (8) the amount of income tax chargeable on any person for any year of assessment on or in respect of a distribution, any such distribution mentioned in that subsection which falls to be treated as income of that person for that year of assessment shall be regarded as forming the highest part of the income on which the person is charged to tax for the year of assessment.*
- (11) *To the extent that it would reduce or extinguish chargeable gains accruing by virtue of this section to a person in a year of assessment, this section shall apply in relation to a loss accruing to the company on the disposal of an asset in that year of assessment as it would apply if a gain instead of a loss had accrued to the company on the disposal, but shall only apply in relation to that person; and, subject to the preceding provisions of this subsection, this section shall not apply in relation to a loss accruing to the company.*

- (12) *Where the person who is a participator in the company at the time when the chargeable gain accrued to the company is itself a company which is not resident in the State but which would be a close company if it were resident in the State, an amount equal to the amount apportioned under subsection (5) out of the chargeable gain to the participating company's interest as a participator in the company to which the gain accrues shall be further apportioned among the participators in the participating company according to the extent of their respective interests as participators, and subsection (4) shall apply to them accordingly in relation to the amounts further apportioned, and so on through any number of companies.*
- (13) *The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include trustees who are participators in the company, or in any company amongst the participators in which the gain is apportioned under subsection (12), if when the gain accrued to the company the trustees are neither resident nor ordinarily resident in the State.*
- (14) *Where any tax payable by any person by virtue of subsection (4) is paid by the company to which the chargeable gain accrues, or in a case under subsection (12) is paid by any such other company, the amount so paid shall not, for the purposes of income tax, capital gains tax or corporation tax, be regarded as a payment to the person by whom the tax was originally payable.*
- (15) *For the purposes of this section, the amount of the gain or loss accruing at any time to a company which is not resident in the State shall be computed (where it is not the case) as if the company were within the charge to corporation tax on capital gains.*
- (16) (a) *In this subsection –*
'group' shall be construed in accordance with subsections (1) (excluding paragraph (a)), (3) and (4) of section 616;
'non-resident group' of companies –
(i) *in the case of a group none of the members of which is resident in the State, means that group, and*



- (ii) *in the case of a group 2 or more members of which are not resident in the State, means the members not resident in the State.*
- (b) *For the purposes of this section –*
 - (i) *section 617 (other than paragraphs (b) and (c) of subsection (1)), section 618 (with the omission of the words ‘to which this section applies’ in subsections (1)(a) and (2), of ‘such’ in subsection (1)(c) and of subsection (3)), section 619(2) (with the substitution for ‘in the course of a disposal to which section 617 applies’ of ‘at a time when both were members of the group’) and section 620(2) (with the omission of the words ‘to which this section applies’) shall apply in relation to non-resident companies which are members of a non-resident group of companies as they apply in relation to companies resident in the State which are members of a group of companies, and*
 - (ii) *sections 623 (apart from paragraphs (c) and (d) of subsection (2) and 625 shall apply as if for any reference in those sections to a group of companies there were substituted a reference to a non-resident group of companies, and as if references to companies were references to companies not resident in the State.”*

[15] Section 626B of the Taxes Consolidation Act, 1997 provides:

“626B Exemption from tax in the case of gains on certain disposals of shares

- (1) (a) *In this section, section 626C and Schedule 25A –*
 - ‘investor company’ and ‘investee company’ have the meanings assigned by subsection (2);*
 - ‘relevant territory’ means –*
- (i) *a Member State of the European Communities,*



- (ii) *not being such a Member State, a territory with the government of which arrangements having the force of law by virtue of section 826(1) have been made, or*
- (iii) *not being a territory referred to in subparagraph (i) or (ii), a territory with the government of which arrangements have been made which on completion of the procedures set out in section 826(1) will have the force of law;*

‘tax’ in relation to a relevant territory other than the State means any tax imposed in that territory which corresponds to income tax or corporation tax in the State;

‘2 year period’ means a period ending on the day before the second anniversary of the day on which the period began.

- (b) *For the purposes of this section, section 626C and Schedule 25A –*
 - (i) *a company shall only be a parent company in relation to another company at any time if that time falls within an uninterrupted period of not less than 12 months throughout which it directly or indirectly holds shares in that company by virtue of which –*
 - (I) *it holds not less than 5 per cent of the company’s ordinary share capital,*
 - (II) *it is beneficially entitled to not less than 5 per cent of the profits available for distribution to equity holders of the company, and*
 - (III) *it would be beneficially entitled on a winding up to not less than 5 per cent of the assets of the company available for distribution to equity holders,*
 - and for the purposes of this subparagraph –*
 - (A) *subsections (2) to (10) of section 9 shall apply with any necessary modifications, and*
 - (B) *sections 413 to 419 shall apply as they apply for the purposes of Chapter 5 of Part 12 but as if ‘in a relevant territory’ were*



substituted for 'in the State' in subparagraph (iii) of section 413(3)(a) and as if paragraph (c) of section 411(1), other than that paragraph as it applies by virtue of subparagraphs (i) and (ii), were disregarded,

- (ii) *in determining whether the conditions in paragraph (a) of subsection (2) are satisfied, a company that is a member of a group shall be treated as holding so much of any shares held by any other company in the group and as having so much of the entitlement of any such company to any rights enjoyed by virtue of holding shares*

—

(I) *as the company would not, apart from this paragraph, hold or have, and*

(II) *as are not part of a life business fund within the meaning of section 719,*

and, for the purposes of this subparagraph, 'group' means a company which has one or more 51 per cent subsidiaries together with those subsidiaries,

- (iii) *in determining whether the treatment provided for in subsection (2) applies, the question of whether there is a disposal shall be determined without regard to section 584 or that section as applied by any other section: and, to the extent to which an exemption under subsection (2) does apply in relation to a disposal, section 584 shall not apply in relation to the disposal,*

- (iv) *where assets of a company are vested in a liquidator under section 230 of the Companies Act 1963 or otherwise, the assets shall be deemed to be vested in, and the acts of liquidation in relation to the assets shall be deemed to be the acts of, the company (and acquisitions from, and disposals to, the liquidator shall be disregarded accordingly),*

- (v) *section 616 shall not apply.*

- (2) *A gain accruing to a company (in this section referred to as the ‘investor company’) on a disposal of shares in another company (in this section referred to as the ‘investee company’) is not a chargeable gain if –*
- (a) *the disposal by the investor company is at a time –*
 - (i) *when the investor company is a parent company of the investee company, or*
 - (ii) *within the 2 year period beginning on the most recent day on which the investor company was a parent company of the investee company,*
 - (b) *the investee company is, by virtue of the law of a relevant territory, resident for the purposes of tax in the relevant territory at the time of the disposal, and*
 - (c) *at the time of the disposal –*
 - (i) *the investee company is a company whose business consists wholly or mainly of the carrying on of a trade or trades, or*
 - (ii) *the business of –*
 - (I) *the investor company,*
 - (II) *each company of which the investor company is the parent company, and*
 - (III) *the investee company, if it is not a company referred to in clause (II), and any company of which the investee company is the parent company,**taken together consists wholly or mainly of the carrying on of a trade or trades.*
- (3) *The treatment of a gain, as not being a chargeable gain, provided by this section and section 626C shall not apply –*
- (a) *to a disposal that by virtue of any provision relating to chargeable gains is deemed to be for a consideration such that no gain or loss accrues to the person making the disposal,*

- (b) *to a disposal a gain on which would, by virtue of any provision other than this section or section 626C, not be a chargeable gain,*
 - (c) *to disposals, including deemed disposals, of shares which are part of a life business fund within the meaning of section 719,*
 - (d) *to a disposal of shares deriving their value or the greater part of this value directly or indirectly from assets specified in paragraphs (a) and (b) of subsection (3) of section 29 and subsection (6) of that section*
 - (e) *to deemed disposals under section 627.*
- (4) *Schedule 25A shall have effect for the purposes of supplementing this section and section 626C.”*

Evidence

██████████ (Appellant)

[16] The witness gave evidence at the hearing and was subject to examination and cross-examination. I have carefully considered the transcript of the evidence of the witness.

[17] The witness gave evidence that he was involved in a company – ██████████ – from ████████ to ████████ when he successfully sold his shares and exited the business. The witness stated that he was then involved in a company – ██████████ – from ████████ to ████████ when he successfully sold his shares and exited the business. This was an online business selling ██████████ (██████████). As a result of his success, the witness was independently wealthy and formed the intention to leave Ireland to explore lifestyle options abroad. In pursuit of his intention, he purchased a property in the UK in ██████████ and a property in the US in ██████████.

[18] The witness stated that he was approached in ████████ to become involved in a company – ██████████ – which was an online ██████████ business mainly selling ██████████ (██████████). The witness stated that the founder of the



business, [REDACTED], was a second-generation [REDACTED] and approached the witness with a view to driving the business forward. The witness stated that the pace of growth of the business strengthened from [REDACTED] when the company began offering online [REDACTED]. At that time, there was a gap in the market from the departure of [REDACTED] from the [REDACTED] business. The witness stated that the [REDACTED] business was a strategic acquisition for [REDACTED]. The witness stated that he agreed to continue his employment with [REDACTED] as the transaction was very lucrative and beyond his expectation in terms of success. The witness retained his intention to leave Ireland, which had been formed in [REDACTED], when the handover period with [REDACTED] was complete in [REDACTED]. The witness gave evidence that he decided to pursue another business opportunity which crossed his desk and this delayed his departure from Ireland. The witness stated that he became involved in a company – [REDACTED] – from [REDACTED] to [REDACTED]. This was a [REDACTED] business. The witness was appointed CEO in [REDACTED] and he continued in that role until [REDACTED]. The witness departed Ireland in [REDACTED] and resides in the UK with his wife and children. The witness may have pursued business opportunities in Ireland but he retained his intention to leave Ireland.

[19] The witness confirmed that a Form B10 for [REDACTED] showed that the witness was appointed a Director with effect from [REDACTED]. The witness confirmed that a resolution was passed changing the name of the company to [REDACTED]. A Certificate of Incorporation dated [REDACTED] showed the change of name from [REDACTED] to [REDACTED]. The witness confirmed that the Memorandum and Articles of Association of [REDACTED] adopted by special resolution on [REDACTED] 2008 provides that the objects of the company include ‘[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]’.



The documents referred to were a subscription and shareholder agreement to be entered into between [REDACTED], [REDACTED], [REDACTED] and [REDACTED] and a confirmation from [REDACTED] of a shareholders agreement between [REDACTED], [REDACTED] and [REDACTED]

[22] The witness confirmed that a Subscription and Shareholders Agreement dated [REDACTED] 2008 entered into between [REDACTED], [REDACTED], [REDACTED] and [REDACTED] provides “*On the Completion Date [REDACTED] 2008], [REDACTED] shall be allotted and issued for the aggregate sum of €5,000 such number of ordinary shares (which shall, subject to the following provisions of this Agreement, rank parri passu with the existing issued shares in the capital of the Company) as represents [REDACTED] % of the fully diluted issued and to be issued share capital of the Company [REDACTED], being [REDACTED] Ordinary Shares of €1 each*”. The agreement also provides “*The Company shall as soon as practicable following the Completion Date enter into a Service Agreement containing the key terms as set out in Schedule 1 with [REDACTED] and [REDACTED] shall be deemed appointed as a director to the Company as and from the Completion Date*”.

[23] The witness confirmed that a Form B5 for [REDACTED] showed an allotment of [REDACTED] ordinary shares to [REDACTED] on [REDACTED] 2008. The form showed a nominal value of €1 per share and that [REDACTED] paid €[REDACTED] for each share. The amount paid by [REDACTED] was €5,000. The witness confirmed that a Desktop Valuation Report was produced by [REDACTED] to value the entire issued share capital of [REDACTED] and the value of a [REDACTED] % shareholding to be issued for the witness. The report concluded that the market value of [REDACTED] at 31 December 2007 was €[REDACTED]. However, the report concluded that the shareholding to be issued for the witness ‘*will only have nominal value at present as there is no immediate prospect of the company reaching a valuation of €[REDACTED] above which the shares will be entitled to consideration under the proposed shareholder agreement*’ and that in the opinion of the valuer ‘*it will prove difficult to realise value for the shareholding*’ having regard to the factors identified in the valuation report.

[24] The witness gave evidence that he provided a loan of €5,000 to [REDACTED] to acquire the shares in [REDACTED]. At the time, [REDACTED] did not have a bank account. The witness confirmed that the minutes of a meeting of [REDACTED] held on [REDACTED] 2008 showed the resolution to open a bank account. The witness stated that it was several months before the bank account was established. The witness gave evidence that he discharged other invoices for [REDACTED] during the period when the company did not have a bank account. The witness confirmed that the Financial Statements for [REDACTED] for the period [REDACTED] ([REDACTED]) to 31 December 2008 showed the investment of €5,000 in [REDACTED] for a [REDACTED]% shareholding. The witness confirmed that the amount of €[REDACTED] recorded as ‘*payables to shareholders*’ included the loan of €5,000 for the acquisition of shares in [REDACTED]. The witness confirmed that a Swift Transfer Request dated [REDACTED] 2009 requesting the transfer of €[REDACTED] from [REDACTED] to the witness and marked ‘Settlement of Loan’ included the repayment of the loan of €5,000 for the acquisition of shares in [REDACTED].

[25] The witness confirmed that the Financial Statements for [REDACTED] for the period 1 April 2009 to 31 March 2010 showed retained profit of €[REDACTED] at 31 March 2009 and retained profit of €[REDACTED] at 31 March 2010. The financial statements showed the following in respect of transactions involving directors and related party transactions –

“[REDACTED]
[REDACTED]
[REDACTED].”

The witness confirmed that the Financial Statements for [REDACTED] for the period 1 April 2010 to 31 March 2011 showed the following in respect of transactions involving directors and related party transactions –

“[REDACTED]
[REDACTED]
[REDACTED].”

The witness stated that [REDACTED] held [REDACTED] ordinary shares in [REDACTED]. The dividend paid to [REDACTED]





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

[REDACTED]
[REDACTED]
[REDACTED].

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

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].”

[29] The witness confirmed that the minutes of a meeting of [REDACTED] held on [REDACTED] 2010 showed the following “[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].”

[30] The witness confirmed that the Share Purchase Agreement dated [REDACTED] 2010 entered into between [REDACTED], [REDACTED], [REDACTED], [REDACTED]

and [REDACTED] as ‘Sellers’ and [REDACTED] as ‘Buyer’ showed the following in respect of the shareholding of [REDACTED]

	Authorised	Issued	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Ordinary shares of €1	[REDACTED]	[REDACTED]	[REDACTED]	-	[REDACTED]	-	[REDACTED]
A redeem shares of €1	[REDACTED]	-	-	-	-	-	-
B1 ordinary shares of €1	[REDACTED]	[REDACTED]	[REDACTED]	-	[REDACTED]	[REDACTED]	-
B2 ordinary shares of €1	[REDACTED]	[REDACTED]	[REDACTED]	-	[REDACTED]	[REDACTED]	-
B3 ordinary shares of €1	[REDACTED]	[REDACTED]	[REDACTED]	-	[REDACTED]	[REDACTED]	-
B4 ordinary shares of €1	[REDACTED]	[REDACTED]	[REDACTED]	-	[REDACTED]	[REDACTED]	-
B5 ordinary shares of €1	[REDACTED]	[REDACTED]	[REDACTED]	-	[REDACTED]	[REDACTED]	-
C ordinary shares of €1	[REDACTED]	[REDACTED]	-	[REDACTED]	-	-	-

[31] The witness confirmed that the consideration attributed to [REDACTED] in the Share Purchase Agreement was €21,111,855 in respect of the [REDACTED] ordinary shares. The witness confirmed that the consideration attributed to him in the Share Purchase Agreement was €2,138,145 in respect of the [REDACTED] B1 ordinary shares (€[REDACTED]), [REDACTED] B2 ordinary shares (€[REDACTED]), [REDACTED] B3 ordinary shares (€[REDACTED]), [REDACTED] B4 ordinary shares (€[REDACTED]) and [REDACTED] B5 ordinary shares (€[REDACTED]). The witness confirmed that the Share Purchase Agreement provides ‘*The Sellers agree to sell as legal and beneficial owners and the Buyer agrees to purchase the Shares free from all Encumbrances together with all rights of any nature whatsoever now or after the date of this Agreement up to Completion attaching or accruing to them*’. The witness confirmed that bank documents showed payments to [REDACTED] on foot of the agreement with [REDACTED] including a payment on [REDACTED] 2010 in the amount of €21,111,855.

[32] The witness confirmed that a Form B1 for [REDACTED] for the period 1 April 2010 to 31 March 2011 showed the transfer of [REDACTED] ordinary shares from [REDACTED] to [REDACTED]. The witness confirmed that the Financial Statements for





report refers to the ‘value of the [REDACTED] % shareholding to be issued to [REDACTED] at same date’ (the date being as at [REDACTED]); to the ‘proceeds of any sale of the company in excess of €[REDACTED] will be split in the ratio [REDACTED] between [REDACTED], [REDACTED] and [REDACTED] respectively’; and to ‘the ordinary shares to be issued to [REDACTED] will only have nominal value at present as there is no immediate prospect of the company reaching a valuation of €[REDACTED] above which the shares will be entitled to consideration under the proposed shareholder agreement’. The witness stated that he believed the report was produced before he acquired his shares in [REDACTED] on [REDACTED] 2008. The witness stated that the report was ‘drawn up on the basis that it was going to be me in some form or another’.

[36] The witness was questioned on the evidence to show that he provided a loan of €5,000 to [REDACTED] to acquire the shares in [REDACTED]. The witness stated that the amount of €[REDACTED] recorded as ‘payables to shareholders’ in the Financial Statements for [REDACTED] for the period [REDACTED] to 31 December 2008 represented the loan of €5,000 and other administrative expenses discharged by the witness. The witness stated that the Swift Transfer Request dated [REDACTED] 2009 requesting the transfer of €[REDACTED] from [REDACTED] to the witness differed from the amount of €[REDACTED] as the witness had discharged other expenses for [REDACTED] in early 2009. The witness was questioned on the amount of €[REDACTED] recorded as ‘unpaid share capital’ in the Financial Statements for [REDACTED] for the period 1 January 2008 to 31 March 2009 and whether this represented the acquisition of shares by [REDACTED]. The witness stated that he did not know what the amount related to but he did not agree that it related to [REDACTED] as he had provided a loan to [REDACTED] to acquire the shares. The witness confirmed that the Financial Statements for [REDACTED] for the period 1 January 2008 to 31 March 2009 recorded ‘share premium’ of €[REDACTED] which correlates to the acquisition of [REDACTED] shares in [REDACTED] at a nominal value of €[REDACTED] plus a share premium of €[REDACTED].

[37] The witness was questioned on the signing of the Financial Statements for [REDACTED] for the period [REDACTED] to 31 December 2008 on [REDACTED]. The witness stated that he could not recollect any particular reason for the timing. The witness was questioned on whether the timing related to his persistent absence from the meetings of [REDACTED]. The witness stated that he was not persistently absent from meetings but stated that the logistical arrangements in travelling to Cyprus were difficult and that he was under pressure for time particularly given the stressful role of growing the business of [REDACTED].

[38] The witness was questioned on the Subscription and Shareholders Agreement dated [REDACTED] 2008 and the circumstances leading to the witness being a party to the agreement given that the agreement related to the allotment of [REDACTED] ordinary shares to [REDACTED]. The witness was questioned whether the real substance of the matter was that the witness was at all times the person who purchased the shares and the person to whom the shares were to be allotted and that [REDACTED] was interposed at the end as a legal mechanism for the witness to avoid tax on a disposal at a future date. The witness did not agree as he had acquired the shares in [REDACTED] in [REDACTED] 2008 to establish an investment platform and the company had acquired the shares in [REDACTED] in [REDACTED] 2008, which was over two years prior to the agreement with [REDACTED] in [REDACTED] 2010. The witness stated that there was no certainty that [REDACTED] would be successful and there was also the requirement that the €[REDACTED] threshold be reached. The witness stated that at the time he established the investment platform he was independently wealthy and was exploring lifestyle options abroad. The witness stated that his flexibility as regards his living arrangements are reflected in his purchase of a property in the UK in [REDACTED] and the purchase of a property in the US in [REDACTED]. The witness was questioned on the 'Exit Preferences' clause in the Subscription and Shareholders Agreement which provides that on a sale of [REDACTED] the order of priority of the sale proceeds would be a payment of €[REDACTED] to [REDACTED] and, thereafter, a payment of the remainder to [REDACTED] and [REDACTED] in accordance with their respective shareholding. The witness was questioned whether this showed that he



could not have moved abroad because to create value above €[REDACTED] in [REDACTED] [REDACTED] meant the witness was bound to remain in Ireland. The witness did not agree. He was not compelled to remain in the business.

[39] The witness was questioned on the ‘*Covenants regarding [REDACTED]*’ clause in the Subscription and Shareholders Agreement which refers to ‘[REDACTED] and [REDACTED] warrant, represent and undertake’ and specifically ‘*that the sole business of [REDACTED] at the date of this Agreement is the holding of the shares allotted to [REDACTED] under this Agreement and that this will continue to be the case for the entire duration of this Agreement other than with the prior written consent of [REDACTED]*’. The witness was questioned whether this showed that [REDACTED] were only permitted to hold shares in [REDACTED] from 2008 onwards and did not operate as an investment platform. The witness stated that [REDACTED] could make other investments on securing the prior written consent of [REDACTED]. The witness stated that [REDACTED] did not make other investments in the period from 2008 to the disposal of the shares in [REDACTED] 2010.

[40] The witness was questioned on the ‘*Default*’ clause in the Subscription and Shareholders Agreement which refers to ‘[REDACTED] covenants with and undertakes to [REDACTED] that, in the event of his being a Bad Leaver, [REDACTED], shall, for a period of twelve (12) months thereafter, have the right to offer and purchase [REDACTED] shares in the capital of the Company [REDACTED], and the price due to [REDACTED] for its entire holding of Shares in such circumstances shall be the sum of €[REDACTED]’ with ‘Bad Leaver’ referring to certain actions pertaining to the witness. The witness was questioned on the capacity of the witness to provide a covenant and undertaking regarding shares which were held by [REDACTED]. The witness stated that [REDACTED] are a party to the agreement. The witness stated that he considered that [REDACTED] was seeking to protect his interest in securing these commitments from the witness.



[41] The witness was questioned on the ‘*Transfers of Shares*’ clause in the Subscription and Shareholders Agreement which refers to ‘[redacted] and [redacted] (in respect of the shares held by [redacted] and any other shares (if any) which may subsequently be held by or on behalf of [redacted] at any time) and [redacted] agree that neither [redacted] on the one hand nor [redacted] on the other hand may without the prior consent in writing of the other (and, for the avoidance of doubt, the prior consent of [redacted] may be provided by [redacted]) transfer any of their respective shares in the capital of the Company [redacted] (or any interest therein) to any other person’. The witness was questioned whether this showed that the witness and [redacted] were two sides of the same coin and that the real substance of the matter was that the witness was at all times the person who purchased the shares and the person to whom the shares were to be allotted and [redacted] was simply interposed at the end. The witness stated that he and [redacted] are two separate parties to the agreement. The witness stated that he was not involved in the drafting of the agreement and was not in a position to explain the wording ‘[redacted]’, however, the agreement was for [redacted] to acquire the shares in [redacted].

[42] The witness was questioned on the minutes of a meeting of [redacted] held on [redacted] 2008 and how ‘*detailed consideration*’ of the terms of the Subscription and Shareholders Agreement could have been given as the witness was absent from the meeting. The witness stated that he could not recollect the details pertaining to this meeting but stated that typically if he was unable to attend a meeting he would provide information before the meeting. The witness stated that the minutes showed that the relevant documents were provided for consideration at that meeting.

[43] The witness was questioned on the Share Purchase Agreement dated [redacted] 2010. The witness confirmed that [redacted] was selling the [redacted] ordinary shares as legal and beneficial owner of the shares. The witness was questioned on the ‘*Keyman Payments*’ clause which provides for payments of €[redacted] if certain conditions relating to the continued employment of the witness were fulfilled on [redacted] 2012 and [redacted] 2013.



The witness stated that these payments formed part of the earn-out and were payments to the shareholders of [REDACTED], which included [REDACTED], in accordance with their respective shareholding. The witness stated that certain shareholders had the benefit of these payments who were not connected to the 'keyman' clauses. The earn-out did not apply to the B ordinary shares held by the witness. The witness was questioned whether the 'keyman payments' in respect of the witness were effectively payments channelled to [REDACTED] for work performed by the witness thereby showing the real substance of the matter that the witness and [REDACTED] were two sides of the same coin, which was further illustrated by the fact that the other [REDACTED] ordinary shares in [REDACTED] were held by individuals rather than through a company. The witness was questioned whether the documents showed that [REDACTED] was interposed by the witness as a legal mechanism to protect the witness from being subject to tax on the disposal of shares in [REDACTED]. The witness stated that he did not interpose [REDACTED]. It was [REDACTED] that acquired the shares in [REDACTED] 2008 and [REDACTED] that received the consideration on the disposal of the shares in [REDACTED] 2010. The consideration was transferred to bank accounts held by [REDACTED] in Switzerland as the banking system in Switzerland provided stability. The witness stated that [REDACTED] has made substantial investments, which is reflected in the financial statements.

[44] In re-examination, the witness confirmed that the Financial Statements for [REDACTED] for the period 1 January 2008 to 31 March 2009 recorded 'share premium' of €[REDACTED] which correlates to the acquisition of [REDACTED] shares in [REDACTED] at a nominal value of €[REDACTED] plus a share premium of €[REDACTED]. The witness confirmed that he was a party to the Subscription and Shareholders Agreement as it included matters which related to him personally. Clause 3.1 refers to [REDACTED] entering into 'a Service Agreement containing the key items as set out in Schedule 1 with [REDACTED] and [REDACTED] shall be deemed appointed as a director of the Company as and from the Completion Date'. Clause 3.2 refers to the witness being subject to non-compete and other similar post termination restrictions and that '[REDACTED] agrees to indemnify and hold the Company



and [REDACTED] harmless from and against any and all costs claims liabilities or expenses incurred by the Company or [REDACTED] arising in relation thereto'. The witness confirmed that the 'Default' clause in the Subscription and Shareholders Agreement also refers to [REDACTED] granting an option to [REDACTED] to purchase the shares of [REDACTED] at market value if the witness did not continue his employment with [REDACTED] for certain stated reasons. The witness confirmed that the 'Covenants regarding [REDACTED]' clause in the Subscription and Shareholders Agreement refers to the witness as the 'sole legal and beneficial owner of the entire issued share capital of [REDACTED]' as the context for the covenants.

Submissions on behalf of the Appellant

Section 590

[45] The Appellant submits that section 590 attributes chargeable gains of non-resident companies to participators. If [REDACTED] were an Irish resident company the disposal of the [REDACTED] ordinary shares in [REDACTED] would come within section 626B as a disposal by a parent company of shares in a trading company tax resident in the EU. This means that the gain accruing to [REDACTED] on the disposal of the [REDACTED] ordinary shares in [REDACTED] would not be a chargeable gain by reason of section 626B. Consequently, as no chargeable gain accrued to [REDACTED], section 590 does not operate to attribute chargeable gains to the Appellant.

[46] The Appellant submits that establishing that a gain is not a chargeable gain under section 626B is relevant in the context of section 590 as the section applies to chargeable gains. Section 590(3) provides that the section applies 'as respects chargeable gains accruing to a company (a) which is not resident in the State, and (b) which would be a close company if it were resident in the State'. Therefore, for section 590(3) to apply there must be a 'chargeable gain' accruing to [REDACTED]. Section 590(4) provides 'every person who at the time when the chargeable gain accrues to the company is resident or

ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person'. Section 590(4) refers to the 'chargeable gain' being attributed to a participator. Given that [REDACTED], as a non-resident company, is not within the charge to Irish tax, how is the 'chargeable gain' of a non-resident company to be established? It is clear that section 590 must be considered from a position that the non-resident company is treated as if it was within the charge to Irish tax. Consequently, it must be established as a 'chargeable gain' in accordance with the provisions of the Capital Gains Tax Acts. This requires a consideration of the relevant taxing statute provisions including those pertaining to exemptions, reliefs and quantification. In establishing if a 'chargeable gain' accrued to [REDACTED], it would be discriminatory to proceed otherwise than to afford equal treatment to [REDACTED] as compared to a company resident in the State.

[47] Section 590(15) provides *'For the purposes of this section, the amount of the gain or loss accruing at any time to a company which is not resident in the State shall be computed (where it is not the case) as if the company were within the charge to corporation tax on capital gains'*. The Appellant referred to ***Erin Executor and Trustee Company Limited (as trustee of Irish Pension Fund Property Unit Trust) -v- The Revenue Commissioners*** [1998] 2 IR 287 (16 December 1997) wherein the Supreme Court stated *'When something is deemed by a statutory provision to be so it becomes a matter of construction of that provision to determine to what extent it is deemed to be so. Is it deemed to be so for all purposes or only for some purposes? In the present case s. 4(4) clearly says that it is to be so deemed for the purposes of section 3(1)(f). In other words it is deemed to have been supplied so that tax becomes payable in respect of it. It is not deemed to have been supplied for any other purpose. This is in accord with the principle of the strict construction of taxing statutes. If the legislature had intended the result contended for by the respondents, it would have said so in clear terms'*. The Appellant submits that the statutory fiction created in section 590(15) is that the non-resident company is treated as being within the charge to Irish tax for computation purposes. This means that the relevant



taxing statute provisions are considered and applied (including those pertaining to exemptions, reliefs and quantification) as if the non-resident company was resident in the State. In this appeal, if [REDACTED] is treated as if it was resident in the State the gain accruing on the disposal of the [REDACTED] ordinary shares in [REDACTED] would not be a 'chargeable gain' by reason of section 626B.

[48] The Appellant referred to section 626B(3A) which was inserted by Finance Act, 2014 and applying for disposals on or after 18 November 2014. This section provides:

- '(3A) (a) In this subsection 'relevant treatment of a gain' means the treatment, provided by this section or section 626C, of a gain as not being a chargeable gain.*
- (b) Notwithstanding any provision of section 590, the relevant treatment of a gain shall not apply for the purposes of section 590, but this is subject to paragraph (c).*
- (c) The relevant treatment of a gain shall apply for the purposes of section 590 where the participator (within the meaning of that section) is a company.'*

The Appellant submits that the insertion made by Finance Act, 2014 is relevant to the interpretation of section 590 and section 626B operative in 2010. The insertion operates to provide that the treatment of a gain as not being a chargeable gain under section 626B does not apply for the purposes of section 590, unless the participator is a company. Section 590 applies to chargeable gains. Section 626B treats a gain as not being a chargeable gain. Section 626B(3A) expressly connects section 590 and section 626B and provides that if a gain is not a chargeable gain by reason of section 626B this does not mean that the chargeable gain cannot be attributed to a participator under section 590. However, this position does not apply where the participator is a company. This shows that, for disposals on or before 18 November 2014, if section 626B applies to treat a gain as not being a chargeable gain then section 590 does not operate, whether the participator is an individual or a company.

[49] The Appellant submits that given the character of the change introduced by section 626B(3A), namely preserving the position that chargeable gains should not be attributed under section 590 if section 626B applies where the participator is a company and changing the position where the participator is an individual, then the insertion made by Finance Act, 2014 may be considered as an aid in the interpretation of section 590 and section 626B operative in 2010. The insertion made by Finance Act, 2014 shows the interrelationship between section 590 and section 626B.

[50] The Appellant submits that if the Revenue Commissioners are correct that section 626B has no bearing on the interpretation of section 590 in respect of a disposal in 2010, then a participator who is a company would not be entitled to rely on section 626B to establish that chargeable gains should not be attributed under section 590 as the entitlement of a participator who is a company to rely on section 626B was only established by the insertion made by Finance Act, 2014. The Appellant submits that if the Revenue Commissioners are correct on the interpretation of section 590(15), that it is limited to the amount of the gain and not the nature of the gain as a chargeable gain, then the insertion of section 626B(3A)(c) would have no effect as a participator who is a company would not be entitled to rely on section 626B to establish that chargeable gains should not be attributed under section 590 as section 590(15) would apply regardless of whether the gain was not a chargeable gain.

[51] In replying to the submissions on behalf of the Revenue Commissioners, the Appellant stated that the wording in section 545(3) shows that in construing 'chargeable gains' the provisions of the Capital Gains Tax Acts are considered including those which provide that a gain is not a chargeable gain. Given the submission by the Revenue Commissioners that section 590 operates on the hypothesis that the company is resident in the State, then for the purposes of interpreting section 590 this means considering 'chargeable gains' and provisions relevant to 'chargeable gains' including section 626B. Section 590(3) and section 590(4) refer to 'chargeable gains' rather than 'gain'. The Amended Notice of Assessment to Capital Gains Tax dated 1 December 2015 refers to



‘chargeable gains’. The Revenue Commissioners included the earn-out received by [REDACTED] in the assessment, which was received by [REDACTED] in 2012 and 2013, being subsequent to the year of assessment in which the chargeable gains were attributed to the Appellant.

[52] The Appellant stated that the Revenue Commissioners did not raise the matter of the requirements in section 626B at any time prior to making submissions at the hearing. In any event, the Appellant submits that the requirements in section 626B have been satisfied. The relevant period is the 12 month period prior to the disposal of the [REDACTED] ordinary shares in [REDACTED]. It is accepted that the requirement in section 626B(1)(b)(i)(I) [*holds not less than 5 per cent of the company’s ordinary share capital*] is satisfied. As regards section 626B(1)(b)(i)(II) [*beneficially entitled to not less than 5 per cent of the profits available for distribution to equity holders of the company*], the Appellant referred to the Financial Statements for [REDACTED] for the period 1 April 2009 to 31 March 2010 which showed ‘Dividends’ of €[REDACTED] with dividends of €[REDACTED] being paid to [REDACTED]. This represents 29.47% of the profits available for distribution. The Financial Statements for [REDACTED] for the period 1 April 2010 to 31 March 2011 showed ‘Dividends’ of €[REDACTED] with dividends of €[REDACTED] being paid to [REDACTED]. This represents 34.29% of the profits available for distribution. As regards section 626B(1)(b)(i)(III) [*beneficially entitled on a winding up to not less than 5 per cent of the assets of the company available for distribution to equity holders*], the Appellant referred to the Memorandum and Articles of Association of [REDACTED] adopted by special resolution on [REDACTED] 2010 which refers to (i) Ordinary Shares (ii) ‘A’ Redeemable Ordinary Shares (iii) B’ Ordinary Shares and (iv) ‘C’ Ordinary Shares and includes the following as regards the rights attaching to the Ordinary Shares:

“(iii) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

It includes the following regarding the rights attaching to the ‘B’ Ordinary Shares:

“(iii) [REDACTED]

The Appellant submits that, as the requirement in 626B(1)(b)(i)(III) refers to a notional distribution on a winding up, the Share Purchase Agreement dated [REDACTED] 2010 provides the nearest indicator of the value of the company and the structure of the distribution on a winding up. The total initial consideration is €[REDACTED] million. The consideration attributed to the ‘B’ ordinary shares is €5,701,720. The consideration attributed to [REDACTED] is €21,111,855. If the assets of [REDACTED] available for distribution on a winding up even had a value of €[REDACTED] million (and having regard to the position that there would be no payment of €[REDACTED] to [REDACTED] on a winding up), this value range would compute as [REDACTED] being entitled to not less than 5 per cent of the assets. The Share Purchase Agreement represents an arm’s length transaction in which the initial consideration was €[REDACTED] million. Based on this analysis, it is reasonable to conclude that

██████████ would be entitled on a winding up to not less than 5 per cent of the assets of the company available for distribution. The requirements in section 626B are satisfied.

[53] In conclusion, the Appellant submits that the gain accruing to ██████████ on the disposal of the ██████ ordinary shares in ██████████ is not a chargeable gain by reason of section 626B, therefore, section 590 does not operate to attribute chargeable gains to the Appellant.

Double Taxation Agreement (DTA)

[54] The Appellant submits that the taxing rights on the gain accruing to ██████████ are allocated to Malta under the DTA between Ireland and Malta. In *Murphy (Inspector of Taxes) -v- Asahi Synthetic Fibres (Ireland) Limited* [1986] IR 777 (18 December 1986) the Supreme Court stated ‘*it is agreed that it is the only issue in this appeal – whether there is now a conflict between the Convention [between Ireland and Japan] and ss. 83 and 84 of the Act of 1976. It is common case that if there is such a conflict, it is the terms of the Convention that must prevail*’. The parties agree that a DTA has precedence over domestic provisions, that ██████████ was tax resident in Malta at the material time and that the gain on the disposal of the ██████ ordinary shares in ██████████ accrued to ██████████. Article 13(5) of the DTA between Ireland and Malta provides ‘*Gains from the alienation of any property other than that referred to in the preceding paragraphs of this Article shall be taxable only in the Contracting State of which the alienator is a resident*’. This means that the gain accruing to ██████████ is taxable only in Malta. However, the gain is being taxed in Ireland as the gain has been attributed to the Appellant and included in the amended assessment dated 1 December 2015. The DTA must prevail meaning the gain must be taxable only in Malta.

[55] In *Lord Strathalmond -v- Inland Revenue Commissioners* [1972] 3 All ER 715 (23 June 1972) the question was whether the US income of Lady Strathalmond should be



exempt from UK tax under double taxation arrangements between the UK and the US. The taxpayer was Lord Strathalmond who was a UK citizen. His spouse was Lady Strathalmond who was a US citizen. Both were resident in the UK. The Court stated *‘the issue turns wholly on the construction of certain provisions’* of double taxation arrangements. The Court concluded *‘on their natural construction in the context of the new art XV the words ‘resident... of that other Contracting Party’ are appropriate to import, as regards Lady Strathalmond, the definition of ‘resident of the United Kingdom’ in art II, and as that definition excepts a citizen of the United States, she is excepted from that definition’*. This meant that the US income of Lady Strathalmond, which had been assessed on Lord Strathalmond, was exempt from UK tax. The Appellant submits that, similar to **Lord Strathalmond**, the gain accruing to [REDACTED] retains the character of a gain taxable only in Malta under the DTA between Ireland and Malta even if the gain is attributed to the Appellant for the purposes of Irish tax.

[56] In **Bricom Holdings Limited -v- Inland Revenue Commissioners** [1997] STC 1179 (25 July 1997) the question was whether assessments to corporation tax on Bricom Holdings Limited, a UK resident company, were incorrect because the chargeable profits of a controlled foreign company (Spinneys International BV) included interest received by that company which was exempt from UK tax under double taxation arrangements between the UK and the Netherlands. Spinneys was incorporated and resident in the Netherlands. Under a heading *‘Stage 1: the ascertainment of Spinneys’ chargeable profits’* Millett LJ stated *‘Spinneys’ chargeable profits are ascertained under s 747(6)(a) on the assumptions contained in Sch 24. They are the amount on which Spinneys would be chargeable to United Kingdom corporation tax on the assumptions directed by the Schedule. The relevant assumption in the present case is that, contrary to the facts, Spinneys was resident in the United Kingdom.’* He concluded:

“In the present case the purpose for which the assumptions are required is self-evident. A controlled foreign company is ex hypothesi resident outside the United Kingdom. As a non-resident, it will not normally be subject to United Kingdom corporation tax and will have



made no claim to relief from such tax. The computation of the profits on which corporation tax is chargeable, therefore, involves ascertaining a hypothetical amount, that is to say the amount which would have represented the amount of such profits if the controlled foreign company had been resident in the United Kingdom and had made all necessary claims for relief. The assumptions which Sch 24 requires are not additional assumptions to be made in combination with the actual facts. In relation to the matters which they cover they are substituted for the actual facts. Spinneys was resident outside the United Kingdom; this means that it had no profits actually chargeable to corporation tax; accordingly its chargeable profits are to be ascertained on the footing that it was resident in the United Kingdom instead.”

[57] Under a heading ‘Stages 2 and 3: the apportionment and charge to tax’, Millett LJ stated:

“In the Strathalmond case the taxpayer’s wife was an American citizen resident for tax purposes in the United Kingdom. Because of her American citizenship, however, she was not resident in the United Kingdom for the purposes of the double taxation agreement between the United Kingdom and the United States. Her husband was assessed to tax on her American dividends. The assessments were discharged on the ground that the dividends were exempted from United Kingdom tax by the double taxation agreement. Thus the case shows that the relief from United Kingdom tax accorded by a double taxation agreement can enure for the benefit of a third party. But the taxpayer in that case was directly assessable on his wife’s income, which the relevant statutory provisions (most recently contained in s 279 of the 1988 Act but now repealed) deemed to be the income of her husband. The decision would support the taxpayer company’s argument in the present case if s 747 deemed Spinneys’ income to be the income of the taxpayer company or apportioned Spinneys’ income to the taxpayer company; but it does not assist the taxpayer company’s contention that that is what the section does.

...

In my judgment these cases show that the question turns on the nature of the statutory process. Interest from exempt securities does not cease to be such by being included as a component element of the recipient's taxable profits (see Hughes). Exempt income does not change its character or lose its exemption merely because it is deemed to be the income of another person or is imputed to him (see Strathalmond). But where tax is charged on a conventional or notional sum which exists only as the product of a calculation, the fact that one of the elements in the calculation is measured by reference to the amount of exempted income does not make the exempted income the subject of the tax (see Australian Mutual Provident Society)."

[58] The Appellant submits that section 590 deems the gain accruing to [REDACTED] to be the gain of the Appellant. Therefore, having regard to the conclusion in **Bricom Holdings Limited**, the gain accruing to [REDACTED] is taxable only in Malta and that does not change merely because the gain is deemed to be the gain of the Appellant.

[59] The Appellant referred to a Capital Gains Manual published by HM Revenue and Customs relating to non-resident companies which states:

"You should always check whether there is a double taxation agreement between the UK and the country in which the company making the gain is resident. If there is no double taxation agreement any TCGA92/S13 charge is unaffected. Similarly if the agreement does not refer to capital gains or capital gains tax the charge under TCGA92/13 is unaffected. But, if the agreement provides that gains of the type realised by the non-resident company are only taxable in that company's country of residence TCGA92/13 cannot apply. For example, Article 15(4) of the Kenya/UK Double Taxation Agreement would prevent TCGA92/13 applying to the disposal of stocks and shares by a company resident in Kenya. Agreements will often treat gains on the disposal of particular types of asset differently."

[60] Section 13 of the Taxation of Chargeable Gains Act, 1992 is equivalent to section 590. Article 15(4) of the DTA between the UK and Kenya is equivalent to Article 13(5) of



the DTA between Ireland and Malta. The position expressed by HM Revenue and Customs corresponds with the position of the Appellant in this appeal that the gain accruing to [REDACTED] is taxable only in Malta and, consequently, the tax charged in Ireland on the Appellant on the gain contravenes the DTA.

[61] In replying to the submissions on behalf of the Revenue Commissioners, the Appellant stated that ***Bricom Holdings Limited*** shows the distinction between a provision which deems income to be income of another person or attributes income to another person and a provision which seeks to ascertain a notional amount on which tax is charged. In this appeal, section 590 attributes the gain of [REDACTED] to the Appellant rather than seeking to ascertain a notional amount which exists only as the product of a calculation.

Treaty on the Functioning of the European Union (TFEU)

[62] In ***European Commission -v- United Kingdom*** [Case C-112/14] (13 November 2014) an action was commenced by the European Commission seeking a declaration that, by adopting and maintaining tax legislation concerning the attribution of gains to participators in non-resident companies which provided for a difference of treatment between resident and non-resident companies, the UK failed to fulfil its obligations under Article 63 TFEU (free movement of capital), or in the alternative, under Article 49 TFEU (freedom of establishment). The UK tax legislation was described as ‘*Section 13 of the Taxation of Chargeable Gains Act 1992 (‘the TCGA’) provides that, where chargeable gains accrue to a company not resident in the United Kingdom which would be regarded as a close company if it were resident there (‘non-resident close company’), those gains, or part of them, are immediately taxed in the United Kingdom. They are immediately attributed to participators in such a company who are United Kingdom residents, if they hold more than 10% of the company’s shares and, consequently, rights to more than 10% of those gains, whether or not they actually receive the gains*’. In relation to the operation of section 13, it was stated ‘*It is also possible that, because of a double taxation agreement, no tax is due*’.

[63] The judgment refers to the pre-litigation procedure which included a letter from the UK dated 18 January 2010 expressing its disagreement with the position of the European Commission and *‘stating the view that any restrictions affecting companies incorporated outside the United Kingdom were justified by the public interest in protecting the tax system of the United Kingdom from tax avoidance and were proportionate to that aim’* and a further letter from the UK dated 11 April 2011 stating *‘that it would amend its legislation to make it compatible with EU law’*. As the UK tax legislation had not been amended by the time the period prescribed in the reasoned opinion expired, the Commission commenced the action against the UK.

[64] The judgment refers to the arguments of the parties. The Commission considered that section 13 was a restriction within the meaning of Article 63 TFEU. The Commission acknowledged that section 13 *‘is appropriate for achieving the objective of combating tax avoidance relied on by the United Kingdom, but considers that it goes beyond what is necessary for that purpose’*. The UK position was *‘that the national legislation was amended, with retroactive effect from 6 April 2012, and concedes that the version of section 13 of the TCGA which was in force on 16 April 2011 was incompatible with the Treaty, and that the action by the Commission is consequently well founded.’*

[65] The findings of the CJEU were:

“16 It must be observed, as a preliminary point, that section 13 of the TCGA applies where a participator resident in the United Kingdom holds more than 10% of the shares of the non-resident close company in question. It can therefore apply both to holdings enabling their holder to exert a definite influence over the decisions of that company and determine its activities and to holdings acquired for investment purposes. It thus cannot be ruled out that that section may affect both freedom of establishment and free movement of capital (...) Accordingly, that section could be examined, first, in the light of Article 49



TFEU and Article 31 of the EEA Agreement and, secondly, in the light of Article 63 TFEU and Article 40 of the EEA Agreement.

17 However, since the Commission seeks primarily a declaration that the United Kingdom has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement, the Court should confine itself to examining the present case from the point of view of the provisions of the Treaty and the EEA Agreement on the free movement of capital, an examination from the point of view of freedom of establishment being necessary only if the failure to fulfil obligations alleged primarily is not established.

18 According to settled case-law of the Court, the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States.

19 In the present case, it is common ground that the effect of section 13 of the TCGA is that taxable gains made by non-resident close companies, including those resident in another Member State of the European Union, are immediately attributed for tax purposes to participators in those companies who are United Kingdom residents, if they hold rights over more than 10% of the gains. Those participators are then liable to tax on the amount of those gains, whether or not they have actually received them, the tax being calculated according to the gain made by the company itself. By contrast, for close companies resident in the United Kingdom, tax is charged only in the event of a distribution of the gains to the participators, or if the participators dispose of their interests in the company in question, the tax then being calculated, moreover, according to the amount actually received by the participator.

20 Consequently, in so far as that legislation is such as, first, to discourage residents of the United Kingdom, whether natural or legal persons, from contributing their capital to non-resident close companies and, secondly, to impede the possibility of such a company

attracting capital from the United Kingdom, it constitutes a restriction of the free movement of capital, which is prohibited in principle by Article 63 TFEU.

21 That classification cannot be called in question by the fact that the tax burden on a participator in such a company may in some cases, set out in paragraph 5 above, be reduced or eliminated. It suffices to note here that those possibilities do not allow the restriction to be eliminated in all cases in which it occurs.

22 It must be examined, however, whether the restriction can be objectively justified by legitimate interests recognised by the law of the European Union.

23 According to settled case-law of the Court, the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned in Article 65 TFEU or by overriding reasons in the public interest as defined in the Court's case-law, to the extent that there are no harmonising measures at European Union level ensuring the protection of those interests.

24 Thus the Court has repeatedly held that the objectives of combating tax evasion and tax avoidance may justify a restriction of the free movement of capital. That restriction must, however, be appropriate for attaining those objectives and not go beyond what is necessary for attaining them.

25 A national measure restricting the free movement of capital may thus be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose sole purpose is to avoid the tax normally payable on the profits generated by activities carried out on national territory.

26 In the present case, the Commission does not dispute that section 13 of the TCGA may contribute to attaining the objective of combating tax avoidance. However, it submits that the provision goes beyond what is necessary for attaining that objective.

27 *According to settled case-law of the Court, where rules are predicated on an assessment of objective and verifiable elements making it possible to identify the existence of a wholly artificial arrangement entered into for tax reasons alone, they may be regarded as not going beyond what is necessary to prevent tax evasion and tax avoidance, if, on each occasion on which the existence of such an arrangement cannot be ruled out, those rules give the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction.*

28 *It is clear, however, that section 13 of the TCGA is not confined specifically to targeting wholly artificial arrangements which do not reflect economic reality and are carried out for tax purposes alone, but also affects conduct whose economic reality cannot be disputed. The section applies generally to gains made on the disposal of assets by companies not resident in the United Kingdom controlled by no more than five persons, in particular without taking into account whether or not the taxpayer resident in the United Kingdom to whom the gain resulting from such a disposal is to be attributed is one of those persons, with its application being excluded only in a few circumstances, such as the disposal of an asset used exclusively for the purposes of a trade carried on by that company outside the United Kingdom. Furthermore, the section does not allow the taxpayer concerned to provide evidence to show the economic reality of his participation in the company in question.*

29 *It follows that section 13 of the TCGA goes beyond what is necessary for achieving its objective, as, moreover, is not contested by the United Kingdom.”*

[66] The Appellant submits that section 13 of the Taxation of Chargeable Gains Act, 1992 is equivalent to section 590. The CJEU held that section 13 was incompatible with EU law. In this appeal, section 590 discourages the Appellant, as a resident of Ireland, from making an investment to acquire share capital in a company resident in another Member



State rather than a company resident in Ireland. The acquisition of share capital in a company resident in another Member State is an exercise of the free movement of capital. The Appellant is being charged to tax because he invested in a company resident in another Member State. The Appellant would not be charged to tax if he invested in a company resident in Ireland. Consequently, section 590 is incompatible with EU law and must be disapplied.

[67] Section 590 was amended by Finance Act, 2015 and Finance Act, 2017. The Explanatory Memorandum of the Finance Bill, 2015 states:

“Section 36 amends section 590 of the Taxes Consolidation Act 1997. That section prevents persons avoiding CGT by transferring assets to controlled companies abroad. It enables Revenue to look through the non-resident company to its resident participators and, subject to exceptions, to assess them to CGT on their share of the gains made by the company. The amendment deals with concerns that have been raised as to whether the section is compatible with EU law. It provides that the section will not apply to a gain accruing on the disposal of assets where it is shown to the satisfaction of the Revenue Commissioners that the disposal was made for bona fide commercial reasons and did not form part of an arrangement of which the main purpose or one of the main purposes was the avoidance of liability to capital gains tax or corporation tax.”

[68] The Appellant submits that Murray J. in *Lee -v- The Revenue Commissioners* [2021] IECA 18 (28 January 2021) makes clear that the Appeal Commissioner has jurisdiction to disapply national law which is incompatible with EU law wherein the Court stated:

“74 Finally, in the course of his submissions counsel for the plaintiff submitted that since the decision of the CJEU in C-378/17 Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission [ECLI:EU:C:2018:979], the Appeal Commissioners may be invited to disapply domestic legislation which they determine to be

incompatible with European law. The principle is only engaged where the Appeal Commissioners are dealing with an issue within their remit, whether in an appeal against an assessment to tax or otherwise. It was suggested that this in some sense implied a broadening of their jurisdiction as a matter of national law. This does not at all follow. The Workplace Relations Commission decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law.”

[69] The Appellant referred to the recent Supreme Court judgment in **Zalewski -v- Workplace Relations Commission** [2021] IESC 24 (6 April 2021) wherein the Court stated:

“125 The decision in Minister for Justice v. W.R.C. (C.J.E.U.) is certainly striking, but that case was decided explicitly on the basis that the obligation to disapply national law considered to be inconsistent with E.U. law was an obligation that lay on any body, whether judicial or administrative, which had the obligation to apply or enforce law. Indeed, the case itself was decided on the basis that the W.R.C. was an administrative, and not a judicial, body. The disapplication of national law and the enforcement of law was not treated by the C.J.E.U. as a judicial function, but instead an obligation on any body applying the law. If, indeed, all the bodies subject to that obligation were to become thereby bodies administering justice under Article 34, and not entitled to benefit from the saver in Article 37, then the unconstitutionality would sweep very far indeed. Indeed, the logic of



*MacMenamin J.’s approach would appear to lead not only to the conclusion that the functions currently performed by the W.R.C. are the administration of justice which can only be carried out by a court, but also to a finding that only the High Court could do so, since he considers the disapplication of national law a judicial function which could not be carried out by a court of local and limited jurisdiction. In fairness, it should be observed that neither this contention, made in reliance on the *Minister for Justice v. W.R.C.*, nor the argument that the W.R.C. and or/the Labour Court are engaged in the exercise of a criminal jurisdiction (and thus excluded from Article 37) was advanced in argument or even touched on by either of the parties, and are not endorsed by any other member of the Court.”*

[70] In replying to the submissions on behalf of the Revenue Commissioners, the Appellant referred to ***Minister for Justice and Equality and Commissioner of An Garda Síochána -v- Workplace Relations Commission*** [Case C-378/17] (4 December 2018) wherein the CJEU stated:

“33 In that regard, it should, first of all, be pointed out, as the Advocate General has noted in point 45 of his Opinion, that a distinction must be drawn between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that that provision is no longer valid for any purpose.

...

38 As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State - including administrative authorities - called upon, within the exercise of their respective powers, to apply EU law (...).

39 It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.”

[71] The Appellant submits that it has been established that the Appeal Commissioner has jurisdiction to refer a question for preliminary ruling to the CJEU (for example, the Appeal Commissioner referred a question for preliminary ruling in *Cabletron Systems Limited -v- The Revenue Commissioners* [Case C-463/98] with judgment delivered on 10 May 2001). It would be absurd if the CJEU delivered a ruling that a provision of national law was incompatible with EU law, but the Appeal Commissioner was not required to apply that ruling and disapply national law.

[72] The Appellant submits that the principle of conforming interpretation relates to ascertaining the meaning of statutory provisions. If a statutory provision has the potential for two contrasting interpretations – one interpretation does not contravene EU law and the other interpretation does contravene EU law – the principle of conforming interpretation means that the statutory provision must be interpreted in the manner which does not contravene EU law. The question whether national law must be disapplied insofar as it is incompatible with EU law only arises if no interpretation of national law compatible with EU law proves possible. The Revenue Commissioners submit that to achieve a conforming interpretation of section 590 the insertions made by Finance Act, 2015 and Finance Act, 2017 should be inferred in the section. The Appellant submits that this approach is not conforming interpretation but rather statutory amendment, which is impermissible. In any event, in *European Commission -v- United Kingdom* the Court held that no conforming interpretation of a provision equivalent to section 590 could be achieved. It was held to be incompatible with EU law. Section 590 was amended by Finance Act, 2015 and Finance Act, 2017 in order to achieve a wording compatible with EU law.

[73] The Appellant submits that there is no requirement to undertake an analysis of EU case-law to establish if the Appellant was exercising the free movement of capital and/or the freedom of establishment, whether section 590 involves a restriction of the free movement of capital (Article 63) and/or the freedom of establishment (Article 49), and whether there is a justification for the restriction as the judgment in *European Commission -v- United Kingdom* establishes that section 590 constitutes a restriction of the free



movement of capital which is prohibited by Article 63 TFEU and there is no justification for the restriction. Consequently, the Appeal Commissioner must disapply section 590 because its application in the circumstances of this appeal is incompatible with EU law. In any event, to the extent required, the Appellant submits that an analysis of EU case-law endorses the position that the Appellant was exercising the free movement of capital in making an investment to acquire share capital in a company resident in Cyprus, that section 590 involves a restriction of the free movement of capital and that there is no justification for the restriction.

[74] The Appellant referred to *Baars -v- Inspecteur der Belastingdienst Particulieren* [Case C-251/98] (13 April 2000) on the circumstances relevant in considering whether there is an exercise of the freedom of establishment wherein the CJEU stated:

“20 Under Netherlands laws, a substantial holding, which is essentially a holding for the last five years of at least one third of the shares in a company and more than seven percent of paid-up nominal capital, does not necessarily imply control or management of the company, which are factors connected with the exercise of the right of establishment. Consequently, the fact that a Member State does not allow its taxpayers the undertaking exemption for a substantial holding, within the meaning of its domestic legislation, in companies established in other Member States does not necessarily affect freedom of establishment.

21 However, the situation from which the main proceedings have arisen concerns a national of a Member State who resides in that Member State and who holds all the shares in a company established in another Member State. A 100% holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the right of establishment.

22 It is clear from the second paragraph of Article 52 of the Treaty that freedom of establishment includes the right to set up and manage undertakings, in particular



companies or firms, in a Member State by a national of another Member State. So, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment.”

[75] The Appellant referred to *X and Y -v- Riksskatteverket* [Case C-436/00] (21 November 2002) on the circumstances relevant in considering whether national law involves a restriction of the free movement of capital and/or the freedom of establishment wherein the CJEU stated:

“66 *In the light of the answer given to the question as regards the Treaty provisions on freedom of establishment, insofar as it concerns the Treaty provisions on free movement of capital, that question need be considered only to the extent that, in the light of the latter provisions, the national provision at issue is such as to involve a separate restriction, where the Treaty provisions concerning freedom of establishment do not apply.*

67 *In that regard, as is clear from paragraphs 38 and 65 above, as regards type B share transfers, the national provision at issue entails an unjustified restriction on freedom of establishment. On the other hand, as regards type A share transfer, it is clear from paragraphs 37 and 65 above that Article 43 EC precludes the national provision at issue only to the extent that the holding which the transferor has in the transferee company established in another Member State gives him definite influence over that company's decisions and allows him to determine its activities.*

68 *It is therefore appropriate to answer the question referred for a preliminary ruling, insofar as it concerns the provisions relating to free movement of capital, only in respect of the situation where, on a type A share transfer, Article 43 EC does not apply having regard to the insufficient level of participation of the transferor in the transferee company established in another Member State.*

69 *In that regard, the national provision at issue cannot be considered to be a purely internal measure because it applies in the event of movements of capital between Member States resulting from the transfer at undervalue of shares by a resident of a Member State to a company established in another Member State in which the transferor or his kin directly or indirectly has a holding.*

70 *It is common ground, moreover, that the national provision at issue is liable to dissuade those liable to Swedish tax on gains from transferring shares at undervalue to transferee companies established in other Member States in which they directly or indirectly have a holding and, therefore, constitutes, for those taxpayers, a restriction on free movement of capital within the meaning of Article 56 EC.*

71 *It must therefore be determined whether such a restriction can be justified.”*

[76] The Appellant referred to ***Cadbury Schweppes -v- Commissioners of Inland Revenue*** [Case C-196/04] (12 September 2006) on the circumstances relevant in considering whether national law involves a restriction on the freedom of establishment which can be justified wherein the CJEU stated:

“54 *Having regard to that objective of integration in the host Member State, the concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period (...) Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there.*

55 *It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial*

arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.”

[77] The Appellant referred to ***Geurts and Vogten -v- Administratie van de BTW*** [Case C-464/05] (25 October 2007) on the circumstances relevant in considering whether national law involves overt and/or covert forms of discrimination affecting the freedom of establishment wherein the CJEU stated:

“19 According to the case-law of the Court, legislation of a Member State which provides for a difference in treatment between taxpayers on the basis of the place where the company of which those taxpayers are shareholders has its seat is in principle contrary to Article 43 EC (...). The same is true of legislation of a Member State which provides for a difference in treatment between taxpayers on the basis of the place where the company owned by those taxpayers employs a certain number of workers for a certain period of time.

20 It follows from the case-law of the Court that, as far as concerns freedom of establishment, the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality or, in the case of companies, their seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.”

[78] The Appellant referred to ***Bouanich -v- Directeur des services fiscaux de la Drôme*** [Case C-375/12] (13 March 2014) on the circumstances relevant in considering whether national law comes within the scope of the free movement of capital and/or the freedom of establishment wherein the CJEU stated:

“24 Since the questions referred for a preliminary ruling were raised in the light of Article 49 TFEU as well as Article 63 TFEU and Article 65 TFEU, it must be established

whether the national legislation falls within the scope of freedom of establishment, free movement of capital or both freedoms.

25 *Ms Bouanich, the French Government, the United Kingdom Government and the European Commission consider that the freedom at issue in the main proceedings is the free movement of capital, enshrined in Article 63 TFEU. For the EFTA Surveillance Authority, in so far as the contested national legislation is applicable regardless of the size of the shareholding giving rise to dividends, and leaving aside the question whether the holding is such as to give definite influence on the company's decisions and to allow the shareholders to determine its activities, the contested measures fall within the scope of both Article 49 TFEU and Article 63 TFEU. Their application must therefore be examined in parallel.*

26 *In this connection, it is to be noted that the tax treatment of dividends may fall within Article 49 TFEU on freedom of establishment and Article 63 TFEU on the free movement of capital.*

27 *As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration.*

28 *In that respect, it has previously been held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment (...) On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in the light of the free movement of capital.*

29 *In the present case, the national legislation at issue in the main proceedings applies regardless of the amount of the shareholding held in a company. As the French Government notes, the application of that legislation does not depend on the size of the holdings acquired in a non-resident company and is not limited to situations in which the shareholder can exercise definite influence on the decisions of the company concerned and determine its activities.*

30 *Consequently, in so far as those rules relate to dividends which originate in a Member State, it cannot therefore be determined from their purpose whether they fall predominantly within the scope of Article 49 TFEU or Article 63 TFEU. In such circumstances, the Court takes account of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or other of those provisions.*

31 *However, neither the order for reference nor the documents before the Court provides information in that respect. Consequently, it must be held that national legislation such as that at issue in the main proceedings is liable to affect both the free movement of capital and the freedom of establishment and must, therefore, be examined in the light both of Articles 63 and 65 TFEU and of Article 49 TFEU.*

...

88 *Therefore, the answer to the questions is that Articles 49 TFEU, 63 TFEU and 65 TFEU must be interpreted as precluding legislation of a Member State under which, where a resident of that Member State who is a shareholder of a company established in another Member State receives dividends taxed in the two Member States and the double taxation is regulated by the imputation in the Member State of residence of a tax credit of an amount corresponding to the tax paid in the State of the distributing company, a mechanism capping various direct taxes at a certain percentage of income received during a year does not take into account, or takes only partially into account, the tax paid in the State of the distributing company.”*

[79] In replying to the submissions on behalf of the Revenue Commissioners, the Appellant stated that the Revenue Commissioners did not raise the matter of an abusive exercise of EU law rights by the Appellant at any time prior to making submissions at the hearing. The Revenue Commissioners have not established why making an investment to acquire share capital in a company resident in Cyprus is abusive or why a company resident in Cyprus acquiring share capital in a company resident in Ireland is abusive. This is commonplace commercial activity. [REDACTED] was engaged in genuine economic activity. [REDACTED] sold shares to the Appellant, incurred expenses, opened bank accounts, purchased shares in [REDACTED] at a premium, obtained a loan from a shareholder, repaid the loan, received dividends from [REDACTED] and realised a profit on the disposal of the shares in [REDACTED]. This is genuine economic activity. This satisfies the objective of Article 63 TFEU. The microscopic examination of the Subscription and Shareholders Agreement and the Desktop Valuation Report by the Revenue Commissioners seeks to create an illusion that there was an abusive exercise of EU law rights. The agreement reflects standard safeguards and protections that would be expected having regard to the circumstances pertaining to [REDACTED] and the planned involvement of the Appellant in a pre-existing business established by [REDACTED]. This does not equate to the arrangement being abusive. National law may pursue an objective of tax avoidance, however it must be targeted and proportionate. The Revenue Commissioners have stated that ‘*at the time of the gain made by [REDACTED] section 590 TCA did not explicitly provide that a taxpayer could adduce evidence of bona fide commercial activity*’. The Revenue Commissioners have also stated regarding **European Commission -v- United Kingdom** that ‘*the problem with the provision was that it was not confined “specifically to targeting wholly artificial arrangements which do not reflect economic reality and are carried out for tax purposes alone, but also affects conduct whose economic reality cannot be disputed”*. This, coupled with the fact that it did not allow the taxpayer concerned to provide evidence to show the economic reality of their participation in the company in question, were the reasons why the CJEU in paragraph 29 found that Section 13 of the UK TCGA “went beyond what is necessary for achieving its objective”.’ The Appellant submits that the Revenue Commissioners are simply seeking to



side-step the ruling in *European Commissioner -v- United Kingdom* by contriving an alleged abusive exercise of EU law rights in circumstances where section 590 did not, at the material time, explicitly include an obligation to provide evidence of any commercial justification for the arrangement.

Submissions on behalf of the Revenue Commissioners

Section 590

[80] The Revenue Commissioners submit that as section 590 is an anti-avoidance provision a purposive interpretation can be considered. The purpose of section 590 is to look through a non-resident company to an Irish resident participator and assess the participator to capital gains tax on a notional measure of the gain made by the non-resident company. The Revenue Commissioners submit that for the purposes of the domestic provisions there is a distinction between the Appellant and [REDACTED], notwithstanding that for the purposes of the EU provisions there is no distinction between the Appellant and [REDACTED]

[81] The Revenue Commissioners submit that there are two statutory hypotheses involved in section 590. Firstly, the gain, which accrues to a non-resident close company on the disposal of an asset, is deemed to accrue to an Irish resident participator. The charge to tax is triggered by reference to a gain on a company which is not resident in the State and attributes the gain to a person who did not make the disposal. Secondly, the gain is computed as if the non-resident company was within the charge to corporation tax on capital gains. The Revenue Commissioners submit that section 590(15) requires, for the purposes of section 590, that the gain made by [REDACTED] is computed as if, hypothetically, [REDACTED] was a company resident in the State. The Revenue Commissioners submit that the words ‘as if’ in section 590(15) are for the purpose of establishing the notional measure of the gain to be attributed to the Appellant and not for the purpose of establishing whether or not the gain is a chargeable gain.

[82] The Revenue Commissioners submit that, having regard to section 545, section 590 operates on the basis that section 590(15) computes the amount of the gain accruing on the disposal of an asset and this computation represents the notional measure of the gain to be attributed to Appellant under section 590(4). There is no requirement to consider section 545(3), namely whether the gain is a chargeable gain.

[83] The Revenue Commissioners submit that the charge to tax under section 590 is not nullified by the operation of section 626B. Section 590 charges to tax the Irish resident participator, and not the non-resident company, and consequently section 626B cannot exempt a charge to tax that does not exist on the non-resident company. Section 590 comes within Part 19 of the Taxes Consolidation Act, 1997 which is headed '*Principal Provisions relating to Taxation of Chargeable Gains*'. Section 626B come within Part 20 of the Taxes Consolidation Act, 1997 which is headed '*Companies' Chargeable Gains*'. Section 626B applies to a resident company. The Appellant is not a company. [REDACTED] is not a resident company. It is the Appellant who has been charged to tax under section 590. It would be counter-intuitive if section 626B operated to exempt a charge to tax in circumstances where section 590 is an anti-avoidance provision with the purpose of looking through a non-resident company to an Irish resident participator and assess the participator to capital gains tax on a notional measure of a gain made by the non-resident company. Section 626B cannot apply to a non-resident company not within the charge to Irish tax as the exemption does not have extra-jurisdictional effect. The Revenue Commissioners submit that it is when the gain attributed to the participator is computed that other provisions of the Capital Gains Tax Acts are considered to establish if the participator can avail of exemptions or reliefs. Section 590 does not operate to determine the nature of the gain accruing to the non-resident company, as the non-resident company is not within the charge to Irish tax. Consequently, there is no requirement to examine other provisions of the Capital Gains Tax Acts including exemptions or reliefs.

[84] The Revenue Commissioners submit that section 626B(3A)(b), which was inserted by Finance Act, 2014 and which provides ‘*Notwithstanding any provision of section 590, the relevant treatment of a gain shall not apply for the purposes of section 590, but this is subject to paragraph (c)*’, simply declares the existing position that if a participator is an individual or a company then the treatment of a gain as not being a chargeable gain provided by section 626B does not apply for the purposes of section 590. This means that section 626B cannot operate to exempt a charge to tax under section 590. The change to the existing position is reflected in section 626B(3A)(c) which provides that ‘*The relevant treatment of a gain shall apply for the purposes of section 590 where the participator (within the meaning of that section) is a company*’. This means that section 626B can operate to exempt a charge to tax under section 590 if the participator is a company. It is the insertion made by Finance Act, 2014 which connects section 590 and section 626B for disposals on or after 18 November 2014.

[85] The Revenue Commissioners submit that, in any event, [REDACTED] does not satisfy the requirements in section 626B to be afforded the treatment of the gain not being a chargeable gain. The Revenue Commissioners submit that [REDACTED] (the investor company) was not a parent company of [REDACTED] (the investee company) within the meaning of section 626B as the requirements in section 626B(1)(b) have not been satisfied, more specifically section 626B(1)(b)(i)(II) [‘*is beneficially entitled to not less than 5 per cent of the profits available for distribution to equity holders of the company*’] and section 626B(1)(b)(i)(III) [‘*would be beneficially entitled on a winding up to not less than 5 per cent of the assets of the company available for distribution to equity holders*’]. The Revenue Commissioners referred to the Memorandum and Articles of Association of [REDACTED] adopted by special resolution on [REDACTED] 2009 wherein, in respect of the B ordinary shares, the following rights attached:

“(iii) [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]”

The Revenue Commissioners referred to a footnote which states “[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].”

The Revenue Commissioners submit that it was permissible for the shareholders of [REDACTED]
[REDACTED] to agree to distribute the assets on a winding up to the B ordinary shares.
[REDACTED] did not hold B ordinary shares. [REDACTED] held [REDACTED] ordinary
shares. This means, potentially, [REDACTED] would not have been beneficially
entitled on a winding up to not less than 5 per cent of the assets of [REDACTED]
Consequently, [REDACTED] does not satisfy the requirements in section 626B(1)(b)
to be considered a parent company of [REDACTED] to come within section 626B(2).

Double Taxation Agreement (DTA)

[86] The Revenue Commissioners submit that the charge to tax under section 590
pertains to the Appellant and not [REDACTED]. Under the DTA between Ireland and
Malta, the tax administration in Malta has exclusive taxing rights in respect of the gains of
[REDACTED] on the disposal in 2010. However, the Revenue Commissioners have
assessed the Appellant, who is an Irish resident participator of a non-resident company.
The ‘gains’ in Article 13(5) of the DTA between Ireland and Malta are different to the
‘chargeable gains’ in section 590. Section 590 is framed by hypotheses. The charge to tax
under section 590 attributes a notional measure of the gain to the Appellant. There is no



charge to tax on the gains of [REDACTED] by the Revenue Commissioners as the company is not within the charge to Irish tax. Section 590 may be triggered by the disposal by [REDACTED] of the [REDACTED] ordinary shares in [REDACTED] however, the DTA between Ireland and Malta is not relevant, as the assessment was made on the Appellant who is not subject to tax in Malta. There is no requirement to give effect to the principle that DTA provisions take precedence over domestic provisions as no conflict arises.

[87] The Revenue Commissioners referred to ***Bricom Holdings Limited -v- Inland Revenue Commissioners*** [1997] STC 1179 (25 July 1997) wherein, under the heading ‘*Stage 1: the ascertainment of Spinneys’ chargeable profits*’, the Court stated:

“The scope of a deeming provision is a question of construction and is not subject to any special rule. As on any other question of statutory construction, the court must attempt to ascertain the intention of Parliament from the words used in the light of the legislative purpose. A statutory hypothesis, no doubt, must not be carried further than the legislative purpose requires, but the extent to which it must be carried depends upon ascertaining what that purpose is.

In the present case the purpose for which the assumptions are required is self-evident. A controlled foreign company is ex hypothesi resident outside the United Kingdom. As a non-resident, it will not normally be subject to United Kingdom corporation tax and will have made no claim to relief from such tax. The computation of the profits on which corporation tax is chargeable, therefore, involves ascertaining a hypothetical amount, that is to say the amount which would have represented the amount of such profits if the controlled foreign company had been resident in the United Kingdom and had made all necessary claims for relief. The assumptions which Sch 24 requires are not additional assumptions to be made in combination with the actual facts. In relation to the matters which they cover they are substituted for the actual facts. Spinneys was resident outside the United Kingdom; this means that it had no profits actually chargeable to corporation tax; accordingly its

chargeable profits are to be ascertained on the footing that it was resident in the United Kingdom instead. It is as simple as that. There is no question of dual residence.

In my judgment the taxpayer company's new argument fails. The chargeable profits referred to in s 747(4)(a) must be ascertained without reference to the double taxation agreement and must be measured by reference to the total income of Spinneys inclusive of United Kingdom source interest."

[88] Under the heading 'Stages 2 and 3: the apportionment and charge to tax', the Court stated:

"The difficulty with this submission is that 'the chargeable profits' as defined by s 747(6)(a) are a purely notional sum. They do not represent any profits of Spinneys on which United Kingdom corporation tax is chargeable, for there are no such profits. Nor do they represent any actual payments or receipts of Spinneys, whether of interest or anything else. They are merely the product of a mathematical calculation made on a hypothetical basis and making counterfactual assumptions. The 'chargeable profits' which are defined by s 747(6)(a) exist only as a measure of imputation. What is apportioned to the taxpayer company and subjected to tax is not Spinneys' actual profits but a notional sum which is the product of an artificial calculation."

The Court concluded:

"The correct analysis is that the interest received by Spinneys is not included in the sum apportioned to the taxpayer company on which tax is chargeable. It merely provides a measure by which an element in a conventional or notional sum is calculated, and it is that conventional or notional sum which is apportioned to the taxpayer company and on which tax is charged."

[89] Similarly, in this appeal, the Revenue Commissioners submit that section 590 is not imposing a charge to tax on [REDACTED] as Malta has exclusive taxing rights in respect of the gains of [REDACTED] under the DTA between Ireland and Malta, but merely a notional measure of the gain is being attributed to the Appellant. Section 590(15) refers to the ‘gain’ accruing to the non-resident company which shows that the gains of [REDACTED] provide a measure by which the gain to be attributed to the Appellant is computed. This notional measure of the gain is then charged to tax on the Appellant. The deeming in section 590(15) does not extend beyond deeming [REDACTED] to be resident in Ireland for the purposes of computing the gain. It can be distinguished from *Lord Strathalmond -v- Inland Revenue Commissioners* [1972] 3 All ER 715 (23 June 1972) as it was the actual US income of Lady Strathalmond which was sought to be assessed on Lord Strathalmond. In this appeal, the statutory process under section 590 can be aligned to the three stages in *Bricom Holdings Limited*.

[90] In *R (on the application of Huitson) -v- HM Revenue and Customs* [2011] STC 1860 (25 July 2011), in affirming the decision of Parker J. in the High Court, the Court of Appeal referred to the incontrovertible propositions put forward by the High Court and, in selecting certain propositions with greatest impact in evaluating the proportionality and compatibility of the legislative amendments under consideration, stated with regard to double taxation agreements:

“34 Secondly, DTAs respect the principle of taxation by the State of residence. They aim to avoid the taxation of residents twice over on the same income. What DTAs do not aim to do is to facilitate the avoidance of tax, or its reduction below the level of tax ordinarily paid by residents. In those circumstances it is a legitimate aim of the public policy of the State in fiscal matters to ensure that DTAs relieve double taxation of residents rather than serve as an instrument used by taxpayers who choose to participate in artificial arrangements to avoid or reduce their level of taxation. In principle retrospective legislation may be justified for the purpose of implementing that policy.”

Treaty on the Functioning of the European Union (TFEU)

[91] The Revenue Commissioners submit that Murray J. in *Lee -v- The Revenue Commissioners* [2021] IECA 18 (28 January 2021) establishes that the principle that ‘*the Appeal Commissioners may be invited to disapply domestic legislation which they determine to be incompatible with European law... is only engaged where the Appeal Commissioners are dealing with an issue within their remit, whether in an appeal against an assessment to tax or otherwise*’. In those circumstances, it must be considered what matters are within the remit of an Appeal Commissioner. In that regard, Murray J. stated:

“20 The issue is, first and foremost, one of statutory construction. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation.

...

22 As explained by Lord Dunedin in *Whitney v. Inland Revenue Commissioners* [1926] AC 37, at p. 52 there are three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery. The liability is declared by statute, which determines what persons are liable in respect of which property. The assessment particularises the exact sum which a person has to pay in the light of the applicable statutory charge.

23 That essential structure is maintained in the TCA. For chargeable periods prior to 2013, Part 39 of the Act provides for the issuing, by the Inspector, of assessments either on foot of returns made by a taxpayer or in default thereof. These are directed to the sums the Inspector determines ‘ought to be charged’. The ‘charge’ together with the Inspector’s opinion thus described define the assessment. Section 12 declares that income tax shall, subject to the provisions of the Income Tax Acts, ‘be charged in respect of all property



profits or gains' described or comprised in the Schedules contained in the sections identified in the provision and in accordance with the provisions of the Income Tax Acts applicable to those Schedules. Section 15 uses similar language to specify the rate of tax, providing that the tax 'shall be charged for each year of assessment at the rate of tax specified' in the Table to the Act.

24 *A person so assessed has an entitlement to appeal, in default of which the assessment is 'final and conclusive'. (...)*

25 *These provisions dictate that the Appeal Commissioners are concerned properly with the 'amount or matter in' the assessment or amended assessment and that the only 'grounds' of appeal envisaged are directed to 'such matter'. Those limitations are reflected in the provisions enabling the Appeal Commissioners' ultimate orders on the appeal, and the preconditions to the making of the determinations that underlie them. (...)*

26 *The term 'overcharge' as used here is directly related to both the concept of a 'charge' to tax, and the process of assessment. Section 934(3), I stress, speaks not of an 'overcharge' simpliciter but of an overcharge 'by any assessment'. (...)*

27 *Accordingly, when the Appeal Commissioners decide that a person is 'overcharged by an assessment' they address themselves exclusively to the amount 'chargeable to income tax', when they decide that the appellant has been 'correctly charged by the assessment' their function is directed to ordering 'that the amount which is chargeable to income tax ... shall stand' and when they determine that the appellant ought to be charged more they are similarly required to 'charge the excess by increasing only the amount which is chargeable to income tax' (s. 934(5)). When the Appeal Commissioners determine those issues, their decision is 'final and conclusive' subject to the taxpayer's right of appeal or the right of either party to require a case to be stated to the High Court (s. 933(4)). Nothing here suggests a power to decide whether the liability underlying an assessment has been compromised: in fact s. 933(2) makes provision for agreements being entered into between*



Revenue and the taxpayer where an appeal is pending but before it is heard without providing anywhere for a jurisdiction on the part of the Appeal Commissioners to adjudicate upon or otherwise become involved in, that process.

...

31 While one can readily see both the basis for, and (as a matter of practicality) sense of such an argument, it depends on affording the terms ‘appeal’ and ‘overcharge’ a broad interpretation that sits uneasily with the thrust of the Act as a whole. In construing similar provisions in *Aspin v. v. Estill* [1987] STC 723, Donaldson MR (at p. 725) described the functions of the Special Commissioners in that case as being ‘to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes.’ Everything in the TCA from the definition of the appeal (‘against an assessment’), through to the grounds of appeal (‘amount or matter in the assessment ... with which the chargeable person is aggrieved’), the focus of the Appeal Commissioners on an appeal (‘overcharged by any assessment’), the orders they can make on an appeal (‘abate or reduce the assessment’) and the powers of compulsion conferred upon them (‘evidence as respects an assessment’) points to their jurisdiction being confined in precisely this way. Read together the provisions strongly suggest what is envisaged by s. 933 and the supporting legislative scheme is an appeal against an assessment alone directed solely to whether the Inspector has properly reflected the statutory charge to tax in the assessment itself, with the Appeal Commissioners abating, reducing, letting stand or indeed increasing the assessment as appropriate in the light of the facts and law found relevant to that inquiry. It is in my view impossible to avoid the conclusion that had the Oireachtas envisaged that the Commissioners would have a jurisdiction extending outside these parameters and capturing the enforceability of arrangements collateral to the assessment, these powers would have been crafted and defined quite differently.”

[92] The Revenue Commissioners submit that the remit of an Appeal Commissioner is framed by the notice of appeal and the statutory provisions applicable to the appeal. The jurisdiction of an Appeal Commissioner is confined to establishing whether the quantification of an assessment is correct and, where necessary, determine incidental



questions of law that may arise in respect of that quantification. This function is exercised on the basis that the assessment is a valid assessment. If there is a challenge directed at the lawfulness of the assessment, this is not a matter within the remit of the Appeal Commissioner. As stated in *Lee*, the Appeal Commissioner does not have ‘a general jurisdiction to enquire into the legal validity of any particular assessment’. In *Stanley -v- The Revenue Commissioners* [2019] 2 IR 218 (26 October 2017) the Court stated:

“34 The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue Commissioners’ statutory powers.

35 A lawful assessment is a prerequisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment.”

The Appellant submits that section 590 must be disapplied as the section is incompatible with EU law. This is directed at the lawfulness of the assessment – the assessment is not valid by reason of the alleged incompatibility with EU law. This is not a matter within the remit of the Appeal Commissioner. The Revenue Commissioners do not contradict the *obiter dicta* of the Court in *Lee* and acknowledge that an Appeal Commissioner may have jurisdiction to disapply national law but in limited circumstances.

[93] The Revenue Commissioners submit that, in any event, the Appellant has not endeavoured to achieve a conforming interpretation of section 590, which must precede any disapplication. An Appeal Commissioner is subject to the principle of conforming interpretation. It is impermissible to give national law an interpretation which is *contra legem*. The Revenue Commissioners submit that the Appellant could endeavour to achieve a conforming interpretation of section 590 by proceeding on the basis as if the amendments made by Finance Act, 2015 and Finance Act, 2017 were inferred in the section and provide



information to the Revenue Commissioners that the arrangements entered into by [REDACTED] were not artificial and reflected an economic reality whose sole and/or dominant purpose was not to avoid the tax normally payable on the profits or gains generated by activities carried out in the State.

[94] The Revenue Commissioners referred to *Pfeiffer -v- Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [Case C-397/01 to C-403/01] (5 October 2004) wherein the CJEU stated:

“114 The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it.

115 Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.

116 In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.”

[95] The Revenue Commissioners referred to *Environmental Protection Agency -v- Neiphin Trading Limited* [2011] 2 IR 575 (3 March 2011) wherein the Court stated:

“64 Article 10 TEC, and now article 4(3) TEU, has long been regarded as underpinning, and also as requiring, the application of the doctrine of consistent interpretation of European Community, now European Union, law by member states including their national courts. This doctrine is aimed at securing the efficacy and uniformity of European Union law. The best known and most commonly cited articulation and formulation of the doctrine is contained in the judgment of the European Court of Justice in Marleasing SA v. La Comercial Internacional de Alimentación (Case C- 106/89) [1990] ECR I-4135, at para. 8:- "[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter...”

65 It is important to note that the European Court of Justice has couched the requirement in terms of discretion. Consistent interpretation cannot be used to bring about a contra le gem interpretation of national law. Accordingly, the duty on a national court is to interpret national law in light of community law "as far as possible". This is a point of considerable importance in the circumstances of the present case and I will be returning to it later in this judgment.

66 Following Ireland's accession to the European Communities, Irish courts found themselves concerned, with ever increasing frequency, with having to construe national legislation in accordance with long established domestic canons of construction on the one hand, but also with due regard to the doctrine of consistent interpretation on the other. Sometimes it was relatively easy to reconcile the two. At other times it was profoundly difficult.

...

73 In considering how those principles could apply to the facts of the case then before him, Fennelly J. subsequently commented, at p. 43:-



"59. It is ... perfectly clear that the court is under an obligation to interpret national law, so far as possible, in the light of the Community law provisions it is designed to implement. The important qualification is: so far as possible. The European Court of Justice does not interpret national law. It is a fundamental principle that the Community law respects national procedural autonomy. The national court is subject to the obligation of 'conforming interpretation', as the court described it in its judgment in Criminal proceedings against Pupino (Case C- 105/03) [2005] E.C.R. I-5285. There are, however, limits to that obligation. Most recently, the European Court of Justice in its judgment in Adeneler v. Ellinkos Organismos Galaktos (Case C-212/04) [2006] I. R.L.R. 716 repeated at para. 110 that 'the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem.

60. The national court is not obliged so to interpret its national law in a way which would be incompatible with the relevant national legislation" (emphasis added by Fennelly J.)."

[96] Notwithstanding the foregoing submission on jurisdiction, if the Appeal Commissioner considers that Article 63 TFEU is relevant to the within appeal, the Revenue Commissioners submit that the Appellant is not entitled to rely on Article 63 TFEU. The Revenue Commissioners submit that it is incumbent on the Appellant, when seeking to rely on Article 63 TFEU before an Appeal Commissioner, to demonstrate that he is entitled so to do (if it were accepted as being within the remit of the Appeal Commissioner). The Revenue Commissioners submit that if there is an absence of economic reality to an arrangement flowing from the wholly artificial nature of the arrangement and the underlying predominant purpose of avoiding tax, this renders the arrangement abusive for the purposes of the general principle of EU law that prohibits the abusive exercise of EU law rights, and precludes the Appellant from relying on Article 63 TFEU.



[97] The Revenue Commissioners submit that the judgment of *European Commission -v- United Kingdom* [Case C-112/14] (13 November 2014) dealt with an anti-avoidance provision similar to section 590 at a level of abstraction and in circumstances where the defendant Member State did not defend, at that level of abstraction, its compatibility with Article 63 TFEU, as it had decided to amend the relevant provision. The provision was found to be incompatible with Article 63 TFEU insofar as it did not permit a participator to demonstrate that a disposal was made for bona fide commercial purposes and was not part of an arrangement the main, or one of the main purposes of which, was the avoidance of tax in the UK by the participator.

[98] The Revenue Commissioners submit that the mere fact that the CJEU has given a judgment under Article 258 TFEU against the UK with regard to a provision similar to section 590 (as it stood in 2010) does not, in and of itself, entitle the Appellant to rely on that judgment and assume that he may invoke Article 63 TFEU in this appeal to contest the assessment under appeal as being incompatible with Article 63 TFEU. The purpose of a judgment delivered by the CJEU under Article 258 TFEU is primarily to lay down the duties of the defendant Member State with regard to an allegation by the Commission that the Member State concerned has failed to fulfil its obligations under EU law. Accordingly, under Article 260(1) TFEU, a Member State found to have failed to fulfil its obligations, is required to ‘*take the necessary measures to comply with the judgment of the Court*’. This means that following the judgment in Case C-112/14, it was primarily a matter for the UK to comply therewith. The judgment does not render the section at issue or (by extension section 590) ‘illegal’. Similarly, the fact that the Oireachtas considered it appropriate, in Finance Act 2015 and then further in Finance Act, 2017, to make certain amendments to section 590, such that section 590(7)(aa) now provides that section 590 will not apply to “*a chargeable gain accruing on the disposal of an asset where it is shown in writing or otherwise to the satisfaction of the Revenue Commissioners that, at the time of the disposal, genuine economic activities are carried on by the company in a relevant Member State*”, does not permit the Appellant, where he has never endeavoured prior to the within appeal to suggest to the Revenue Commissioners that a genuine economic activity was being



carried out by [REDACTED] in the relevant period ([REDACTED] 2008 to [REDACTED] 2010), to challenge the assessment, by reference to a finding, based on Article 63 TFEU, made in the abstract by the CJEU with regard to section 13 of the Taxation of Chargeable Gains Act, 1992 in its judgment in Case C-112/14.

[99] The Revenue Commissioners submit that the arrangement entered into between the Appellant and [REDACTED] in 2008, if not wholly artificial, were dominated by the purpose of avoiding capital gains tax that would otherwise have arisen for the Appellant in Ireland had the [REDACTED] ordinary shares in [REDACTED], which were clearly intended to be allotted to him, not been allotted to [REDACTED] instead, even though that off-the-shelf company had no bank account, no funds of its own and no means of paying for the shares that were being allotted to it even at the extremely low and favourable valuation of €5,000. The Appellant states that he later made a payment to [REDACTED] for the shares allotted to [REDACTED] and submits that this was pursuant to a loan entered into with [REDACTED]. However, no evidence of any loan agreement or its terms has been put before the Appeal Commissioner. Furthermore, the date when the loan was repaid has not been established, as the Appellant also paid for expenses of [REDACTED] (such as secretarial expenses in unspecified amounts) even after [REDACTED] opened a bank account.

[100] The Revenue Commissioners submit that the arrangement involving the investment by the Appellant to acquire share capital in [REDACTED] prior to the allotment of the [REDACTED] ordinary shares in [REDACTED] to [REDACTED], and subsequent transfer of residence of [REDACTED] from Cyprus to Malta prior to the disposal of the shares in [REDACTED] did not reflect any economic reality and had, at least as its main purpose, the avoidance of capital gains tax that would otherwise have arisen for the Appellant in Ireland had the shares in [REDACTED] been allotted to him. Although section 590 (as it stood in 2010) may have had the potential to restrict the free movement of capital, it did not do so in this appeal, because there was no economic reality consistent with the objectives of Article 63 TFEU for interposing [REDACTED] as a holding



vehicle until the disposal of the shares in [REDACTED]. While the evidence of the Appellant was that [REDACTED] was established as a European investment platform, this evidence is not supported by the documentation. In the period [REDACTED] 2008 to [REDACTED] 2010, the activity of [REDACTED] was confined to holding the shares in [REDACTED]. Furthermore, it is clear from the evidence of the Appellant that, insofar as [REDACTED] ever became a European investment platform for the Appellant, this did not happen until after the disposal of the shares in [REDACTED]. The Revenue Commissioners submit that there is no economic or commercial justification for interposing [REDACTED] between the allotment of the shares in [REDACTED] and the Appellant, who was the real beneficiary of the shares. The Appellant cannot rely on the fact that [REDACTED] was allotted shares in [REDACTED] in 2008 in order to rely on Article 63 TFEU with regard to what, the Appellant submits, was an undocumented loan that he says he made to [REDACTED] when it is clear that the Appellant paid for the shares in [REDACTED]. The endeavour by the Appellant to rely on Article 63 TFEU with regard to his investment to acquire share capital in [REDACTED] prior to the allotment of the shares in [REDACTED] is an impermissible endeavour to rely abusively on Article 63 TFEU. Consequently, the Appeal Commissioner should not have regard to Article 63 TFEU in considering whether to confirm, increase, abate or otherwise reduce the assessment under appeal.

[101] The Revenue Commissioners submit that, in EU law, there is a general principle of law that EU law cannot be relied upon for abusive or fraudulent ends. The Revenue Commissioners submit that the Appellant may, in principle, be entitled to rely on a directly effective treaty provision like Article 63 TFEU, however, in seeking to rely on Article 63 TFEU the Appellant must comply with the general principle of law that such reliance must not be for an abusive end. In this appeal, the Appellant should not obtain the advantage in Article 63 TFEU regarding the arrangement of interposing [REDACTED] between the allotment of the shares in [REDACTED] and the Appellant, because the arrangement was for the predominant purpose of avoiding tax rather than the exercise of free movement of capital by the Appellant for genuine economic or commercial ends. The Revenue



Commissioners referred to ***Cadbury Schweppes Plc -v- Commissioners of Inland Revenue*** [Case C-196/04] (12 September 2006) wherein the CJEU stated:

“49 *In that respect, it is settled case-law that any advantage resulting from the low taxation to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject cannot by itself authorise that Member State to offset that advantage by less favourable tax treatment of the parent company (...). The need to prevent the reduction of tax revenue is not one of the grounds listed in Article 46(1) EC or a matter of overriding general interest which would justify a restriction on a freedom introduced by the Treaty (...).*

50 *It is also apparent from case-law that the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (...).*

51 *On the other hand, a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned (...).*

52 *It is necessary, in assessing the conduct of the taxable person, to take particular account of the objective pursued by the freedom of establishment (...).*

53 *That objective is to allow a national of a Member State to set up a secondary establishment in another Member State to carry on his activities there and thus assist economic and social interpenetration within the Community in the sphere of activities as self-employed persons (...). To that end, freedom of establishment is intended to allow a Community national to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom (...).*



54 *Having regard to that objective of integration in the host Member State, the concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period (...). Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there.”*

[102] The Revenue Commissioners referred to *Cussens, Jennings and Kingston -v- Brosnan* [Case C-251/16] (22 November 2017) wherein the CJEU stated:

“27 *By contrast, the principle that abusive practices are prohibited, as applied in the sphere of VAT by the case-law stemming from the judgment in Halifax, is not a rule established by a directive, but is based on the settled case-law, cited in paragraphs 68 and 69 of that judgment, that, first, EU law cannot be relied on for abusive or fraudulent ends (...) and, secondly, the application of EU legislation cannot be extended to cover abusive practices by economic operators (...).*

28 *Whilst the Court held, in paragraphs 70 and 71 of the judgment in Halifax, that the principle that abusive practices are prohibited also applies to the sphere of VAT, pointing out that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive, it does not follow that the application of that principle in that sphere is subject to a requirement of transposition, as the provisions of the Sixth Directive are.*

29 *In addition, it should be pointed out, first, that the case-law cited in paragraph 27 above has been formulated in various areas of EU law, such as company law (...), the common agricultural policy (...) and the sphere of VAT (...).*

30 *Secondly, it is apparent from the Court’s case-law that the principle that abusive practices are prohibited is applied to the rights and advantages provided for by EU law*



irrespective of whether those rights and advantages have their basis in the Treaties (...), in a regulation (...) or in a directive (...). It is thus apparent that that principle is not of the same nature as the rights and advantages to which it applies.

31 *The principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax, thus displays the general, comprehensive character which is naturally inherent in general principles of EU law (...).*

32 *It should also be added that, according to the Court's case-law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis (...).*

33 *Therefore, the principle that abusive practices are prohibited may be relied on against a taxable person to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (...).*"

[103] The Revenue Commissioners referred to *N Luxembourg 1, X Denmark A/S, C Denmark I (C-119/16) and Z Denmark ApS -v- Skatteministeriet* [Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16] (26 February 2019) wherein the CJEU stated:

"27 *In the four main actions, a Luxembourg company which has assumed the obligations of a Danish company (Case C-115/16) and three Danish companies (Cases C-118/16, C-119/16 and C-299/16) contest the decisions of SKAT (tax authority, Denmark) ('SKAT') that refused to grant them the exemption from corporation tax provided for by Directive 2003/49 in respect of interest paid to entities established in another Member State, on the ground that those entities were not the beneficial owners of the interest and were mere conduit companies.*

...

95 *The referring courts seek to ascertain whether, in order to combat an abuse of rights in the context of applying Directive 2003/49, a Member State must have adopted a specific domestic provision transposing that directive or whether it may refer to domestic or agreement-based anti-abuse principles or provisions.*

96 *It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends (...).*

97 *That general principle of law must be complied with by individuals. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (...).*

98 *It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.*

...

101 *As regards that last field, the Court has observed on a number of occasions that, whilst preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the principle that abusive practices are prohibited nonetheless constitutes a general principle of EU law which applies irrespective of whether the rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive (...).*

102 *It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules. The Court has thus held that that principle may be relied on against a taxable person in order*



to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (...).”

[104] The Revenue Commissioners submit that the Appeal Commissioner should reject the endeavour by the Appellant to rely on Article 63 TFEU by reference to the investment made by the Appellant to acquire share capital in [REDACTED] in [REDACTED] 2008 as the circumstances and documentation surrounding the allotment of the [REDACTED] ordinary shares in [REDACTED] to [REDACTED] show that the predominant purpose for the investment made by the Appellant was the avoidance of capital gains tax that would otherwise have arisen for the Appellant in Ireland had the shares in [REDACTED] been allotted to him rather than the exercise of free movement of capital by the Appellant for genuine economic or commercial ends. The Revenue Commissioners submit that, in this appeal, the relevant domestic provision permits the Member State to look through arrangements which are abusive and ensure that the appropriate level of tax, which would have arisen but for the arrangements which are abusive, is imposed.

[105] The Revenue Commissioners submit that the evidence shows that the Appellant interposed [REDACTED] in the allotment of the [REDACTED] ordinary shares in [REDACTED] [REDACTED] for the predominant purpose of avoiding capital gains tax that would otherwise arise for the Appellant in Ireland had the shares in [REDACTED] been allotted to him. In that regard, the Revenue Commissioners referred to:

(A) The Appellant is a party to the Subscription and Shareholders Agreement dated [REDACTED] [REDACTED] 2008 even though the Appellant is not a shareholder. The agreement reads coherently if the references to [REDACTED] are removed.

(B) Clause 3 of the Subscription and Shareholders Agreement refers to the appointment of the Appellant as Director of [REDACTED] even though the Appellant was appointed a Director of [REDACTED] with effect from [REDACTED] (which changed name to [REDACTED] on [REDACTED]).

(C) Clause 7 of the Subscription and Shareholders Agreement refers to [REDACTED] agreeing with the Appellant to provide a loan to [REDACTED]. It is remarkable that the Appellant is included in this clause given that the Appellant is not a shareholder.

(D) Clause 8 of the Subscription and Shareholders Agreement refers to a covenant between the Appellant, [REDACTED] and [REDACTED] not to create or issue any shares or equity securities in [REDACTED] without *‘the consent of both of them; and they shall each use their respective rights and powers as a director, shareholder or otherwise to procure so far as he is able that no such act is carried out unless such consent has been given’*. The words ‘both’ and ‘he’ show that it was originally planned that the Appellant would be the shareholder in [REDACTED].

(E) Clause 9 of the Subscription and Shareholders Agreement refers to a covenant between the Appellant and [REDACTED] that if the Appellant were to leave [REDACTED] for certain stated reasons then [REDACTED] had the right to purchase the [REDACTED] ordinary shares held by [REDACTED] which shows that the Appellant was the real beneficiary of the shares as [REDACTED] had no control over the shares and had no ability to prevent the purchase of the shares by [REDACTED] even though it would be the actions of the Appellant (and not [REDACTED]) that gave [REDACTED] the right to purchase the shares.

(F) Clause 11 of the Subscription and Shareholders Agreement refers to the Appellant, [REDACTED] and [REDACTED] agreeing that *‘neither [REDACTED] on the one hand nor [REDACTED] on the other hand may without the prior consent in writing of the other (and, for the avoidance of doubt, the prior consent of [REDACTED] may be provided by [REDACTED]) transfer any of their respective shares in the capital of [REDACTED] [REDACTED] (or any interest therein) to any other person’*. It is remarkable that the Appellant is included in this clause given that the Appellant is not a shareholder.

(G) Clause 11 of the Subscription and Shareholders Agreement refers to the Appellant, [REDACTED] and [REDACTED] agreeing to transfer the shares held by [REDACTED] on *‘the occurrence of any event or set of circumstances likely to cause serious economic and political instability in Cyprus, including, any military invasion, occupation*



or coup d'etat or any other political event likely to result in material adverse changes to legislation governing the ownership and operation of companies registered in Cyprus'. It is remarkable that the Appellant established a European investment platform in Cyprus given the necessity to include this clause particularly when assessed against the multiplicity of alternative options to establish a platform in another EU country which may not have required a similar clause.

(H) Clause 12 of the Subscription and Shareholders Agreement refers to the Appellant, [REDACTED] and [REDACTED] agreeing that [REDACTED] will not seek remuneration from [REDACTED]. It is remarkable that the Appellant is included in this clause given that the Appellant is not a shareholder.

(I) Clause 13 of the Subscription and Shareholders Agreement refers to the agreement being *'binding upon and run for the benefit of the parties, their successors and permitted assigns'*. It is remarkable that the Appellant secures the benefit of the agreement even though the Appellant is not a shareholder.

(J) Clause 13 of the Subscription and Shareholders Agreement refers to *'the sole business of [REDACTED] at the date of this Agreement is the holding of the shares allotted to [REDACTED] under this Agreement and that this will continue to be the case for the entire duration of this Agreement other than with the prior written consent of [REDACTED]'* which shows that [REDACTED] was not a European investment platform as the activity of the company was confined to holding the shares in [REDACTED].

(K) The Desktop Valuation Report refers to [REDACTED] and bears the date 31 December 2007 even though the company changed name on [REDACTED] to [REDACTED]. The valuation report refers to the *'value of the [REDACTED] % shareholding to be issued to [REDACTED] at same date'*. A reference to the Appellant and not [REDACTED]. The valuation report states *'It is proposed to put a shareholders agreement in place which defines the exit mechanism for any of the shareholders of the company'* which shows that the arrangements in the Subscription and Shareholders Agreement were contemplated at the time of the valuation report and planned as an allotment of shares to the Appellant. The valuation report states *'In the event of a sale the first € [REDACTED] of any proceeds will be split in the ratio [REDACTED] between [REDACTED] and [REDACTED]'*



respectively. [REDACTED] will not be entitled to any portion of the proceeds up to € [REDACTED]. It further states 'Proceeds of any sale of the company in excess of € [REDACTED] will be split in the ratio [REDACTED] between [REDACTED], [REDACTED] and [REDACTED] respectively'. A reference to the Appellant and not [REDACTED]. The valuation report refers to the 'ordinary shares to be issued to [REDACTED]'. A reference to the Appellant and not [REDACTED]. The assumptions used in valuation report include 'A shareholder agreement will be entered into by the proposed three shareholders – [REDACTED], [REDACTED] and [REDACTED] defining the rights of shareholders to participate in any sale proceeds of the company as set out in paragraph 2.1 subparagraph 2'. The valuation report refers to the sources of information as including 'discussions with and information supplied by [REDACTED]'.

[106] The Revenue Commissioners submit that an examination of the Subscription and Shareholders Agreement shows that the intended arrangement was for the shares in [REDACTED] to be allotted to the Appellant and that the Appellant belatedly interposed [REDACTED] for the predominant purpose of avoiding capital gains tax. This is corroborated by the Desktop Valuation Report. In the circumstances, having regard to the circumstances and documentation, the Revenue Commissioners submit that the abusive exercise of EU law rights by the Appellant was interposing [REDACTED] between the allotment of the shares in [REDACTED] and the Appellant. Consequently, the Appellant is not entitled to rely on Article 63 TFEU.

[107] The Revenue Commissioners submit that the Appeal Commissioner has jurisdiction to determine whether there has been an abusive exercise of EU law rights by the Appellant. If the Appeal Commissioner determines that there was an abusive exercise of EU law rights by the Appellant then the Appellant is not entitled to rely on Article 63 TFEU and there is no requirement for the Appeal Commissioner to consider the submissions on the jurisdiction or otherwise of the Appeal Commissioner to disapply section 590 as incompatible with Article 63 TFEU.

Analysis and Findings

Section 590

[108] This is an appeal against an Amended Notice of Assessment to Capital Gains Tax for the year 2010 dated 1 December 2015. The assessment provides:

Amount of chargeable gains arising in this period	€30,799,777
Less: allowable losses	€110,165
Less: amount not chargeable – section 601 TCA 1997	€1,270
Net amount chargeable to tax	€30,688,342
Capital gains tax thereon	€7,672,085

The ‘*amount of chargeable gains arising in this period*’ includes the sum of the initial consideration of €21,111,855 plus the earn-out of €7,969,402 received from [REDACTED] on the disposal of [REDACTED] ordinary shares in [REDACTED] less the base cost of the shares of €5,000. This is an amount of chargeable gains of €29,076,257.

[109] A Subscription and Shareholders Agreement dated [REDACTED] 2008 refers to the allotment of [REDACTED] ordinary shares in [REDACTED] to [REDACTED] for the sum of €5,000. A Form B5 for [REDACTED] shows an allotment of [REDACTED] ordinary shares to [REDACTED] on [REDACTED] 2008 for the sum of €5,000. A Share Purchase Agreement dated [REDACTED] 2010 describes the seller of [REDACTED] ordinary shares in [REDACTED] as [REDACTED]. A bank document dated [REDACTED] 2010 shows a payment of €21,111,855 to [REDACTED]. A Form B1 for [REDACTED] for the period 1 April 2010 to 31 March 2011 shows the transfer of [REDACTED] ordinary shares from [REDACTED] to [REDACTED].

[110] The amount of €29,076,257 has been attributed to the Appellant under section 590. Section 590(3) provides *‘This section shall apply as respects chargeable gains accruing to a company (a) which is not resident in the State, and (b) which would be a close company if it were resident in the State’*. Applying to the facts herein, section 590(3) applies as respects chargeable gains accruing to [REDACTED], which is a company not resident in the State and which would be a close company if it were resident in the State. Section 590(4) provides *‘Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person’*. Applying to the facts herein, as the Appellant was resident, ordinarily resident and domiciled in the State at the time when the chargeable gain accrued to [REDACTED], the Appellant is treated for capital gains tax purposes as if a part of the chargeable gain accrued to the Appellant. Section 590(15) provides *‘For the purposes of this section, the amount of the gain or loss accruing at any time to a company which is not resident in the State shall be computed (where it is not the case) as if the company were within the charge to corporation tax on capital gains’*. Applying to the facts herein, the amount of the gain accruing to [REDACTED] is computed as if [REDACTED] is within the charge to Irish tax.

[111] The Appellant submits that it must be established if a chargeable gain accrued to [REDACTED]. This requires a consideration of the provisions of the Capital Gains Tax Acts including those pertaining to exemptions, reliefs and quantification. Section 626B(2) provides *‘A gain accruing to a company (in this section referred to as the ‘investor company’) on a disposal of shares in another company (in this section referred to as the ‘investee company’) is not a chargeable gain if...’*. The Appellant submits that [REDACTED] (the investor company) disposed of the [REDACTED] ordinary shares in [REDACTED] (the investee company) in circumstances which satisfy the requirements in section 626B. Therefore, the gain accruing to [REDACTED] is not a chargeable gain. This means that no chargeable gain accrued to [REDACTED] and section 590 does not operate to



attribute the chargeable gain to the Appellant. The Revenue Commissioners submit that chargeable gains in section 590 could not represent chargeable gains of [REDACTED] as [REDACTED] is not resident in the State and not within the charge to Irish tax. In the circumstances, the gain accruing to [REDACTED] in section 590 is a notional sum. The assumption that [REDACTED] is within the charge to Irish tax is for the purpose of establishing the notional measure of the gain to be attributed to the Appellant and not for the purpose of establishing whether or not the gain is a chargeable gain. In any event, the Revenue Commissioners submit that [REDACTED] does not satisfy the requirements in section 626B.

[112] In my view, it is important to consider the nature and placement of the assumptions in section 590. Section 590(3) refers to ‘*chargeable gains accruing to a company (a) which is not resident in the State and (b) which would be a close company if it were resident in the State*’. [emphasis added] The relevant assumption in section 590(3) pertains to whether the non-resident company would be a close company. Applying to the facts herein, what are the chargeable gains accruing to [REDACTED] as a non-resident close company? Section 29(3) provides that a non-resident person ‘*shall be chargeable to capital gains tax for a year of assessment in respect of chargeable gains accruing to such person in that year*’ on the disposal of certain specified assets. Are these the chargeable gains accruing to [REDACTED] for the purposes of section 590? The parties agree that the [REDACTED] ordinary shares in [REDACTED] are not specified assets under section 29(3). In any event, section 590(7) provides ‘*This section shall not apply in relation to... (c) a chargeable gain in respect of which the company is chargeable to capital gains tax by virtue of section 29 or to corporation tax by virtue of section 25(2)(b)*’. Section 590(7) enumerates other chargeable gains to which section 590 does not apply. Section 590(4) provides ‘*Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the State, who, if an individual, is domiciled in the State, and who is a participator in the company, shall be treated for the purposes of the Capital Gains Tax Acts as if a part of the chargeable gain had accrued to that person*’. [emphasis added] The relevant assumption in section 590(4) pertains to the attribution of



the chargeable gain to a participator. Applying to the facts herein, what part of the chargeable gain accruing to [REDACTED] should be treated as accruing to the Appellant? Section 590(15) provides '*For the purposes of this section, the amount of the gain or loss accruing at any time to a company which is not resident in the State shall be computed (where it is not the case) as if the company were within the charge to corporation tax on capital gains*'. [emphasis added] The relevant assumption in section 590(15) pertains to the computation of the gain (or loss) accruing to the company which is not resident in the State. Applying to the facts herein, what is the amount of the gain accruing to [REDACTED] computed on the assumption that [REDACTED] is within the charge to Irish tax?

[113] The framework of the Capital Gains Tax Acts is centred on chargeable gains. Section 28 refers to capital gains tax being charged on chargeable gains. Section 29 refers to persons being chargeable to capital gains tax in respect of chargeable gains. Section 31 refers to capital gains tax being charged on the total amount of chargeable gains after deducting allowable losses. Section 545 is headed 'chargeable gains'. Section 545(2) provides '*The amount of the gain accruing on the disposal of an asset shall be computed in accordance with this Chapter, and subject to the other provisions of the Capital Gains Tax Acts*'. The reference in section 545(2) to 'this Chapter' is Chapter 2 of Part 19 which is headed 'computation of chargeable gains and allowable losses'. Section 545(3) provides '*Except where otherwise expressly provided by the Capital Gains Tax Acts, every gain shall be a chargeable gain*'. It is noted that section 545(2) includes '*and subject to the other provisions of the Capital Gains Tax Acts*' and section 545(3) includes '*except where otherwise expressly provided by the Capital Gains Tax Acts*'.

[114] Section 590(3) provides that the section applies to chargeable gains accruing to a company which is not resident in the State. Section 590(4) attributes to a participator the chargeable gains accruing to the company which is not resident in the State. Section 590(15) computes the amount of the gain accruing to the company which is not resident in the State on the assumption that the company is within the charge to Irish tax. Does this



assumption in section 590(15) equate to the computation of a notional measure of a gain to be attributed to the Appellant which necessarily prescribes the manner in which the other subsections in section 590 must be interpreted and frame the timing of the examination of the other provisions of the Capital Gains Tax Acts? How does section 590(15) interact with section 590(3) and section 590(4) and the wording therein? An examination of section 590 reveals that the words in section 590(3) refer to chargeable gains accruing to a company which is not resident in the State, the words in section 590(4) refer to the time when the chargeable gain accrues to the company and the words in section 590(15) refer to the gain accruing to a company which is not resident in the State. These words must be given meaning. In my view, having regard to the provisions of the Capital Gains Tax Acts, section 590 applies as respects chargeable gains accruing to [REDACTED] and in computing the amount of the gain accruing to [REDACTED] on the assumption that [REDACTED] is within the charge to Irish tax, then in accordance with the taxing statute including section 545, this computation is subject to the provisions of the Capital Gains Tax Acts operative at the material time. In the circumstances, having considered the facts and evidence in this appeal, I find that the gain accruing to [REDACTED] on the disposal of the [REDACTED] ordinary shares in [REDACTED] is not a chargeable gain as the requirements in section 626B have been satisfied. Consequently, I determine that section 590 does not operate to attribute chargeable gains to the Appellant. The Amended Notice of Assessment to Capital Gains Tax for the year 2010 dated 1 December 2015 should be reduced accordingly.

[115] The Revenue Commissioners submit that the insertion made by Finance Act, 2014 in section 626B(3A)(b) simply declares an existing position that if a participator of a non-resident close company is an individual or a company then the treatment of a gain as not being a chargeable gain provided by section 626B does not apply for the purposes of section 590. However, the Revenue Commissioners submit that the statutory process in section 590 is establishing the notional measure of a gain to be attributed to the Appellant and not establishing whether the gain is a chargeable gain. In those circumstances, section 626B would have no bearing on the application of section 590. These positions do not align. The



Revenue Commissioners submit that the insertion made by Finance Act, 2014 in section 626B(3A)(c) changed the existing position such that section 626B can operate to exempt a charge to tax under section 590 if the participator is a company. This means that for the purposes of section 626B the investor company would remain the non-resident company but for the purposes of section 590 the participator would be an Irish resident company (and not an Irish resident individual). However, the Revenue Commissioners submit that section 626B cannot apply to a non-resident company not within the charge to Irish tax as the exemption does not have extra-jurisdictional effect. These positions do not align.

[116] In light of the foregoing, there is no requirement to determine the appeal by reference to the other submissions of the parties. However, the parties require that I give my views on the merits of the other submissions for completeness in the event that the matter proceeds on a point of law to the High Court.

DTA between Ireland and Malta

[117] The Appellant submits that the taxing rights on the gain accruing to [REDACTED] on the disposal of the [REDACTED] ordinary shares in [REDACTED] are allocated to Malta under the DTA between Ireland and Malta. The Revenue Commissioners submit that there is no charge to tax on the gains of [REDACTED] by the Revenue Commissioners as the company is not within the charge to Irish tax. The correspondence from the Revenue Commissioners dated 17 July 2015 reflects that it was the absence of the transaction being taxed in Malta that was considered by the Revenue Commissioners in the context of section 590 wherein it is stated *‘Your contention that the supremacy of Double Taxation Agreements over domestic legislation is true, but in this case, it would appear that the gain on this transaction was not taxed in either jurisdiction and unless your client, as the sole owner of [REDACTED], can show that these gains were taxed in Malta, I am considering assessing him to Capital Gains Tax under the provision of Section 590 TCA 1997’*. It is a matter for the tax administration in Malta, and not the Revenue Commissioners, to consider the tax position of persons resident in Malta.

[118] Section 590(3) provides that the section applies to chargeable gains accruing to a company which is not resident in the State. Section 590(4) attributes to a participator the chargeable gains accruing to the company which is not resident in the State. Section 590(15) computes the amount of the gain accruing to the company which is not resident in the State on the assumption that the company is within the charge to Irish tax. Therefore, the gain accruing to [REDACTED] on the disposal of the [REDACTED] ordinary shares in [REDACTED] is being attributed to the Appellant and taxed in Ireland. Article 13(5) of the DTA between Ireland and Malta provides ‘*Gains from the alienation of any property other than that referred to in the preceding paragraphs of this Article shall be taxable only in the Contracting State of which the alienator is a resident*’. In the circumstances, the gain accruing to [REDACTED] on the disposal of the [REDACTED] ordinary shares in [REDACTED] is taxable only in Malta and, in my view, having regard to the wording of section 590, the Revenue Commissioners are attributing the gain accruing to [REDACTED] to the Appellant which is being taxed in Ireland, which should not prevail in light of the provisions of the DTA between Ireland and Malta.

Jurisdiction of Appeal Commissioner

[119] The Appellant submits that an Appeal Commissioner has jurisdiction to disapply national law which is incompatible with EU law. The Appellant submits that section 590 is incompatible with EU law and must be disapplied. The Revenue Commissioners submit that the jurisdiction of an Appeal Commissioner is confined to establishing whether the quantification of an assessment is correct, and, where necessary, determine incidental questions of law that may arise in respect of that quantification. This function is exercised on the basis that the assessment is a valid assessment. If there is a challenge directed at the lawfulness of the assessment, this is not a matter within the remit of an Appeal Commissioner. The Revenue Commissioners submit that the Appellant is challenging the lawfulness of the assessment as the Appellant submits that the assessment is not valid by reason of the incompatibility of section 590 with EU law.

[120] Can it be said that the Appellant is challenging the lawfulness of the assessment in this appeal? There is a difference between a national body disapplying a provision of national law because its applications in the circumstances of the case would be incompatible with EU law and the granting of a declaration that a provision of national law is incompatible with EU law. In ***Minister for Justice and Equality and Commissioner of An Garda Síochána -v- Workplace Relations Commission*** [Case C-378/17] (4 December 2018) the Court stated:

“33 In that regard, it should, first of all, be pointed out, as the Advocate General has noted in point 45 of his Opinion, that a distinction must be drawn between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that that provision is no longer valid for any purpose.”

[121] As regards the jurisdiction of an Appeal Commissioner, the Revenue Commissioners submit that an Appeal Commissioner does have jurisdiction to determine whether there has been an abusive exercise of EU law rights. Interestingly, in ***Lee -v- The Revenue Commissioners*** [2021] IECA 18 (28 January 2021) the Court stated:

“If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law.” [emphasis added]

[122] In this appeal, the Appellant contends that section 590 is incompatible with EU law. I must address that contention as it is relevant to the matter with which I am seised. The Appellant submits that section 590 constitutes a restriction on his free movement of capital which is prohibited by Article 63 TFEU and there is no justification for the restriction. In this appeal, the Revenue Commissioners contend that there was an abusive exercise of EU law rights by the Appellant. I must address that contention as it is relevant to the matter with which I am seised. The Revenue Commissioners submit that the Appellant is not entitled to rely on Article 63 TFEU as the investment by the Appellant to acquire share capital in [REDACTED] was for the predominant purpose of avoiding tax that would have arisen for the Appellant in Ireland had the shares in [REDACTED] been allotted to him rather than the exercise of free movement of capital by the Appellant for genuine economic or commercial ends. The submission made by the Revenue Commissioners on section 590 is on the basis that there is a distinction between the Appellant and [REDACTED]. However, the submission made by the Revenue Commissioners on Article 63 TFEU is on the basis that there is no distinction between the Appellant and [REDACTED] as the arrangement is artificial (two sides of the same coin). It is appreciated that the Revenue Commissioners may pursue a legal strategy which involves a tiered approach to submissions, however, when that approach requires opposing factual positions to make the submissions and can render the domestic provision grounding the assessment inapplicable, it can be challenging to untangle the coherency of the positions.

Disapplication of Section 590

[123] Is the application of section 590 in the circumstances of this appeal incompatible with EU law? In the first instance, having regard to the case-law and having considered the facts and evidence in this appeal, I find that there was a movement of capital between Member States when the Appellant made the investment to acquire share capital in [REDACTED] at a time when the Appellant was resident in the State and [REDACTED] was resident in another Member State.

[124] In my view, where Article 63 TFEU is *prima facie* engaged (there being a movement of capital between Member States), the relevant enquiry may be framed by reference to whether there are contrasted situations which are comparable to the circumstances pertaining to the Appellant; whether if they are comparable there is in fact a difference of treatment; and, if so, whether the restriction is justified and the measure consistent with the principle of proportionality. In ***European Commission -v- United Kingdom*** [Case C-112/14] (13 November 2014) the Court stated:

“18 According to settled case-law of the Court, the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State’s residents from doing so in other States.”

[125] The effect of section 590 is that the chargeable gain accruing to [REDACTED] (a non-resident close company resident in another Member State) is attributed to the Appellant (a participator resident in the State). The Appellant is charged to tax on the gain accruing to [REDACTED] whether or not the Appellant actually receives the gain. By contrast, if the Appellant was a participator of a resident close company, the Appellant would not be charged to tax on the chargeable gain accruing to the resident close company but could be charged to tax on any distribution of the gain made by the resident close company or if the Appellant disposed of his interest in the resident close company. The Appellant would be charged to tax on the amount actually received by him. These contrasted situations are comparable and disclose a difference of treatment.

[126] In ***European Commission -v- United Kingdom*** [Case C-112/14] (13 November 2014) the Court stated:

“23 According to settled case-law of the Court, the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned in Article 65 TFEU or by overriding reasons in the public interest as defined in the Court’s



case-law, to the extent that there are no harmonising measures at European Union level ensuring the protection of those interests.

24 *Thus the Court has repeatedly held that the objectives of combating tax evasion and tax avoidance may justify a restriction of the free movement of capital. That restriction must, however, be appropriate for attaining those objectives and not go beyond what is necessary for attaining them.*

25 *A national measure restricting the free movement of capital may thus be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose sole purpose is to avoid the tax normally payable on the profits generated by activities carried out on national territory.”*

[127] Section 590 (at the material time) does not specifically target ‘*wholly artificial arrangements which do not reflect economic reality and whose sole purpose is to avoid the tax normally payable on the profits generated by activities carried out on national territory*’. In ***European Commission -v- United Kingdom*** [Case C-112/14] (13 November 2014) the Court stated:

“28 *It is clear, however, that section 13 of the TCGA is not confined specifically to targeting wholly artificial arrangements which do not reflect economic reality and are carried out for tax purposes alone, but also affects conduct whose economic reality cannot be disputed. The section applies generally to gains made on the disposal of assets by companies not resident in the United Kingdom controlled by no more than five persons, in particular without taking into account whether or not the taxpayer resident in the United Kingdom to whom the gain resulting from such a disposal is to be attributed is one of those persons, with its application being excluded only in a few circumstances, such as the disposal of an asset used exclusively for the purposes of a trade carried on by that company outside the United Kingdom. Furthermore, the section does not allow the taxpayer*

concerned to provide evidence to show the economic reality of his participation in the company in question.

29 *It follows that section 13 of the TCGA goes beyond what is necessary for achieving its objective, as, moreover, is not contested by the United Kingdom.”*

[128] In my view, the question whether section 590 must be disapplied insofar as its application in the circumstances of this appeal is incompatible with EU law arises if no interpretation of section 590 in conformity with EU law proves possible. It is not an exercise of constructing a formula of words to render the domestic provision compatible with EU law. It is ascertaining the meaning of the words in section 590 at the material time. If there is an interpretation of section 590 which conforms with EU law, that interpretation should prevail over an interpretation of section 590 which does not conform with EU law. As regards the application of section 590 in the circumstances of this appeal I am satisfied that no interpretation of section 590 in conformity with EU law proves possible at the material time. Consequently, I determine that the application of section 590 in the circumstances of this appeal is incompatible with EU law and section 590 must be disapplied.

Abuse of Rights

[129] Can the Appellant rely on Article 63 TFEU? In *Cussens, Jennings and Kingston - v- Brosnan* [Case C-251/16] (22 November 2017) the Court stated:

“27 *By contrast, the principle that abusive practices are prohibited, as applied in the sphere of VAT by the case-law stemming from the judgment in Halifax, is not a rule established by a directive, but is based on the settled case-law, cited in paragraphs 68 and 69 of that judgment, that, first, EU law cannot be relied on for abusive or fraudulent ends (...) and, secondly, the application of EU legislation cannot be extended to cover abusive practices by economic operators (...).*”

[130] In *Cadbury Schweppes -v- Commissioners of Inland Revenue* [Case C-196/04] (12 September 2006) the Court stated:

“55 It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.”

[131] Having regard to the case-law, having considered the facts and evidence in this appeal, and having evaluated the credibility of the Appellant, I find that the Appellant has complied with the general principle of law that his reliance on Article 63 TFEU is not for an abusive end. Consequently, I determine that the Appellant is entitled to rely on Article 63 TFEU.

Determination

[132] Based on a review of the facts and a consideration of the evidence, submissions, legislation and case-law, I determine that the Amended Notice of Assessment to Capital Gains Tax for the year 2010 should be reduced. The amount of chargeable gains should be reduced by €29,076,257. This appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

21 SEPTEMBER 2021

