TAX APPEALS COMMISSION

93TACD2021

THE APPELLANT

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The Appellant is one of 4 Appellants and it has been agreed between the parties that this Appellant would take the lead appeal.

2. The primary issue in this appeal concerns interest relief claimed by the Appellant in the tax years ending 31 December 2006 to 31st December 2011 inclusive pursuant to Taxes Consolidation Act 1997 (TCA), section 248 as extended by section 250 in respect of loans taken out in December 2005 to invest in two private unlimited companies, P and L. Claims for interest relief were made as follows:

   (a) Year Ended 31st December 2006 €285,753
   (b) Year Ended 31st December 2007 €325,858
   (c) Year Ended 31st December 2008 €314,632
   (d) Year Ended 31st December 2009 €280,250
   (e) Year Ended 31st December 2010 €314,632
   (f) Year Ended 31st December 2011 €186,421

3. The Respondent challenged the Appellant's interest relief claims based on the following statutory provisions, namely:

   (a) TCA, section 248;
   (b) TCA, section 250, and
   (c) TCA, section 817A;

4. The Respondent's principle objection to the Appellant's entitlement to a deduction for the interest paid on the monies borrowed to acquire shares in P and L is on the basis that the additional interest incurred by the Appellant on borrowings to acquire such shares was ameliorated by a circuitous arrangement involving Forward Currency Contracts between S and Bank and Financial Spread Bet Agreements entered into by the

Appellant's former spouse and S. In this regard, the Respondent argued that the Appellant enjoyed a disproportionate tax saving without the burden of the economic consequences as envisaged by the Oireachtas.

5. The Respondent therefore denied the relief by amending the notices of assessment for the years ended 31st December 2006 to 31st December 2011 inclusive.

6. At the hearing the parties identified the following six issues that required consideration:

(a) Is TCA, section 248(3) applicable to Section 250 TCA?
(b) If the Appellant satisfies the conditions for interest relief pursuant to TCA, section 250(2), is he also subject to the conditions in section 248(3)?
(c) Was the interest on the loans 'paid' within the meaning of TCA, section 248?
(d) Whether there were 'loan extensions' in 2007 or actually new loans, with the result that interest relief is not due for the years 2008-2011?
(e) In the year ended 31 December 2011, was L a company of the kind referred to in TCA, section 248(1)(a)(i) or (ii)?
(f) If the Appellant is entitled to relief under section 248 as extended by section 250, is the relief disallowed under section 817A?

Legislation

Taxes Consolidation Act

7. TCA, section 248 provides for a deduction for interest paid on a loan against total income in certain circumstances where, *inter alia*, the individual holds a material interest in the company and has worked for the greater part of his time in the management or conduct of the business of the company or a connected company from the application of the loan proceeds until the interest is paid. TCA, section 250 provides relief in circumstances where an individual was not fulltime employed or did not hold a material interest in the company.

8. During the period of the Appellant's investment, TCA, section 248 provided:

(1) This section shall apply to a loan to an individual to defray money applied –

(a) in acquiring any part of the ordinary share capital of –

(i) *a company which exists wholly or mainly for the purposes of carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D, or*

(ii) *a company whose business consists wholly or mainly of the holding of stocks, shares or securities of a company referred to in subparagraph (i),*

(b) *in lending to such a company referred to in paragraph (a) money which is used wholly and exclusively for the purposes of the trade or business of the company or of a connected company, or*

(c) *in paying off another loan where relief could have been obtained under this section for interest on that other loan if it had not been paid off (on the assumption, if the loan was free of interest, that it carried interest).*

(2) *Relief shall be given in respect of any payment of interest by the individual on the loan if –*

(a) *when the interest is paid the individual has a material interest in the company or in a connected company,*

(b) *during the period taken as a whole from the application of the proceeds of the loan until the interest was paid, the individual has worked for the greater part of his or her time in the actual management or conduct of the business of the company or of a connected company, and*

(c) *the individual shows that in the period referred to in paragraph (b) he or she has not recovered any capital from the company or from a connected company, apart from any amount taken into account under Section 249.*

(3) *Relief shall not be given in respect of any interest by an individual on a loan applied on or after the 24th day of April 1992, for any of the purposes specified in subsection (1) unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.*

(4) *Subsection (1) shall not apply to a loan unless it is made in connection with the application of the money and either on the occasion of its application or*

within what is in the circumstances a reasonable time from the application of the money, and that subsection shall not apply to a loan the proceeds of which are applied for some other purpose before being applied as described in that subsection.

(5) Interest eligible for relief under this section shall be deducted from or set off against the income of the borrower for the year of assessment in which the interest is paid and tax shall be discharged or repaid accordingly …"

9. TCA, section 250 provides the rules regarding extension of relief under TCA, section 248 to certain individuals in relation to loans applied in acquiring interest in certain companies and provides:

(1) In this section –

"90 per cent subsidiary" has the meaning assigned to it by section 9;

"full-time employee" and "full-time director", in relation to a company, mean an employee or director, as the case may be, who is required to devote substantially the whole of his or her time to the service of the company;

"holding company" has the same meaning as in section 411;

"part-time employee" and "part-time director", in relation to a company, mean an employee or director, as the case may be, who is not required to devote substantially the whole of his or her time to the service of the company;

"private company" has the meaning assigned to it by section 33 of the Companies Act, 1963.

(2) Notwithstanding that an individual does not satisfy one or both of the conditions set out in paragraphs (a) and (b) of section 248(2), the individual shall be entitled to relief under section 248 for any interest paid on any loan to him or her for a purpose specified in Section 248(1) if –

(a) the company part of whose ordinary share capital is acquired or, as the case may be, to which the money is loaned is –

(i) both a company referred to in paragraph (a)(i) of section 248(1) and a company in relation to which the individual was a full-time employee, part-time employee, full-time director or part-time director during the period taken as a whole from the application of the proceeds of the loan until the interest was paid, or

(ii) both a company referred to in paragraph (a)(ii) of section 248(1) and a private company in relation to which, or in relation to any company which would be regarded as connected with it for the purposes of section 248, the individual was during that period a full-time director or a full-time employee,

and

(b) the company or any person connected with the company has not, during the period specified in paragraph (a)(i), made any loans or advanced any money to the individual or a person connected with the individual other than a loan made or money advanced in the ordinary course of a business which included the lending of money, being business carried on by the company or, as the case may be, by the person connected with the company.

(3) In relation to any payment or payments of interest on any loan or loans applied–

(a) in acquiring any part of the ordinary share capital of a company other than a private company,

(b) in lending money to such a company, or

(c) in paying off any other loan or loans applied for a purpose specified in paragraphs (a) and (b),

no relief shall be given for any year of assessment by virtue of this section other than to a full-time employee or full-time director of the company and no such relief shall be given to such employee or director on the excess of that payment, or the aggregate amount of those payments, for that year of assessment over €3,050.

(4) Where relief is given by virtue of this section to an individual and any loan made or money advanced to the individual or to a person connected with the individual is, in accordance with paragraph(c) of subsection (5) and by virtue of subparagraph (ii), (iii), (iv) or (v) of that paragraph, subsequently regarded as not having been made or advanced in the ordinary course of a business, any relief so given, which would not have been given if, at the time the relief was given, the loan or money advanced had been so regarded, shall be withdrawn and there shall be made all such assessments or additional assessments as are necessary to give effect to this subsection.

(5) For the purposes of this section –

(a) any question whether a person is connected with another person shall be determined in accordance with section 10 (as it applies for the purposes of the Tax Acts) and paragraph (b),

(b) a person shall be connected with any other person to whom such person has, otherwise than in the ordinary course of a business carried on by such person which includes the lending of money, made any loans or advanced any money, and with any person to whom that other person has so made any loan or advanced any money and so on,

(c) a loan shall not be regarded as having been made, or money shall not be regarded as having been advanced, in the ordinary course of a business if –

(i) the loan is made or the money is advanced on terms which are not reasonably comparable with the terms which would have been applied in respect of that loan or the advance of that money on the basis that the negotiations for the loan or the advance of the money had been at arm's length,

(ii) at the time the loan was made or the money was advanced the terms were such that subparagraph (i) did not apply, those terms are subsequently altered and the terms as so altered are such that if they had applied at the time the loan was made or the money was advanced subparagraph (i) would have applied,

(iii) any interest payable on the loan or on the money advanced is waived,

(iv) any interest payable on the loan or on the money advanced is not paid within 12 months from the date on which it became payable, or

(v) the loan or the money advanced or any part of the loan or money advanced is not repaid within 12 months of the date on which it becomes repayable,

(d) the cases in which any person is to be regarded as making a loan to any other person include a case where –

(i) that other person incurs a debt to that person, or

(ii) a debt due from that other person to a third party is assigned to that person;

but subparagraph (i) shall not apply to a debt incurred for the supply by that person of goods or services in the ordinary course of that person's trade or business unless the period for which credit is given exceeds 6 months or is longer than normally given by that person,

(e) a company other than a private company shall be deemed to be a company referred to in section 248(1)(a)(i) if it is a holding company and is resident in the State, and

(f) an individual shall be deemed to be a full-time employee or full-time director of a company referred to in paragraph (e) if the individual is a full-time employee or full-time director of any company which is a 90 per cent subsidiary of that company.

10. TCA, section 817A is an anti-avoidance provision which seeks to deny relief for interest paid on a loan where a scheme has been effected or arrangements have been made such that the sole or main benefit expected to accrue to the borrower from the transaction under which the interest is paid is a reduction in liability to tax. TCA, section 817A(1) provides:

    "Relief shall not be given to any person under Part 8 in respect of any payment of interest, including interest treated as a charge on income, if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid is the obtaining of a reduction in tax liability by means of such relief."

Material Findings of Fact - Appellant

Overview

11. The Appellant is a businessman who devoted much of his free time to investing in the projects and assisting in their development. Since the late 1990s he was an active investor in activities that included:

    - Trade B
    - Trade A

12. The Appellant also made many other direct and indirect investments.

13. The funds raised from the P and L loans financed:

    - A property
    - B property
    - Trade A
    - Release of funds for deployment which gave the Appellant the seed capital for his Trade B projects
    - Funds for the C deal which was subsequently abandoned for commercial reasons
    - A war chest / fighting funds for future transactions

14. The Appellant also embarked in the following endeavours:

    - Made various attempts to expand Trade A
    - Made increased investments in Trade B projects

15. The Appellant continued to hold the B property, his share in the A property, his share in the Trade A business and his interest in the Trade B.

16. A variety of methods have been used to fund the projects. The Bank loans drawn down on which interest relief is claimed formed part of the pool of funds for these activities i.e. monies used to fund one project freed up other funds for other projects. In late 2005 two loans were due to be repaid. It was agreed to draw down three new loans from Bank that, in addition to forming part of the overall pool of funding for the Appellant's business activities, had the immediate purposes set out below.

17. The Appellant's claim for interest relief relates to two separate loans used to purchase shares in two companies, P and L.

18. Up to 5th December 2005 the Appellant obtained a series of Turkish Lira (TRY) loans which he used to fund the acquisition of shares in P and L. During that period as a loan matured, it was repaid through the redemption of shares in P / L respectively with the Appellant then drawing down another loan and re-subscribing for shares.

Investment in P

19. The Appellant borrowed TRY 230,620X to subscribe for new shares in P on 6th December 2005. Three other individuals also entered into similar arrangements, under which they borrowed TRY from Bank, and used these funds to subscribe for shares in P, in the combined amount of TRY 769,380X resulting in a total new share subscription, including that of the Appellant into P of TRY 1,000,000X. Thereafter P then swapped the TRY 1,000,000X into €625,000X through a spot transaction with Bank.

20. The Appellant held a material interest, a 25% shareholding in P, a private unlimited company incorporated in the State for the purposes of section 248(2) TCA since [redacted] December 2005.

21. The Appellant was a part-time director of P for the purposes of TCA, section 250(2)(a)(i) and a direct shareholder in P, having been an indirect shareholder through H, a private unlimited company incorporated under the laws of the State, prior to that.

22. P had a 100% subsidiary PAH, a limited liability company incorporated in the United States.

23. At all material times, there were three other shareholders ('the other investors') in P.

24. For the years 2005-2011 inclusive, P was a company whose income consisted wholly or mainly of profits or gains chargeable under Case V of Schedule D for the purposes of section 248(1)(a)(i).

December 2005: the loan

25. The Appellant entered into a loan facility dated 6th December 2005 ('the P loan') with Bank. Bank agreed to make available to the Appellant a facility for a maximum amount of TRY 230,620X ´to assist with a subscription for shares'. The Facility Letter stated that

TAX APPEALS COMMISSION

the facility would be available for a maximum of two years from the date of initial drawdown. As security, Bank required pursuant to Clause 6:

(i) a Guarantee from S in the sum of TRY 310,655X supported by a charge from S over its funds held with [Bank] from time to time; and
(ii) [a]ny other security as determined by [Bank] from time to time.

26. The Facility Letter further provided, at Clause 7, that interest would accrue on the balance outstanding from day to day and would be payable on 6th December 2006 and 6th December 2007. The rate of interest was to be 17.47862% for the period to 6th December 2006 and 16.75% for the remaining period of the loan. Interest was to be charged to the Appellant's account with Bank.

Security and guarantee arrangements

27. Bank issued a second letter also dated 6th December 2005 to the Appellant in relation to security. That letter required several additional forms of security for the facility:

- a guarantee from the Appellant in the sum of €151,527X supporting the obligations of S under a forward foreign exchange contract entered into between S and Bank;
- a guarantee from PAH in favour of Bank covering the Appellant's liabilities and obligations with Bank;
- a guarantee from LAH in favour of Bank covering the Appellant's liabilities and obligations with Bank; and
- a guarantee from Bank 2 in favour of Bank in the sum of €69,686X covering the Appellant's liabilities and obligations with Bank.

28. On 6th December 2005 the Appellant entered into a general guarantee agreement with Bank in respect of the liabilities of S to Bank, amount guaranteed limited to €151,629X.

29. On 6th December 2005 PAH entered into a general and unlimited guarantee agreement with Bank in respect of the Appellant's liabilities to Bank.

30. On 6th December 2005 PAH entered into a security interest agreement with Bank under which PAH assigned as security to Bank all monies held by it in Sister Bank .

31. Bank 2 issued a letter dated 5th December 2005 to the Appellant and the other investors confirming its willingness to make available to them a joint and several guarantee facility

TAX APPEALS COMMISSION

of up to €126,539X to include an existing facility of €85,499X 'for the purpose of increasing a guarantee in favour of Bank'.

32. The Bank 2 guarantee facility was subject to the following security:

- a guarantee and indemnity from PAH supported by first legal charge the A Property;
- an assignment over the FRI lease attaching to the A property; and
- a Deed of Counter Indemnity from the Appellant and the other shareholders in favour of Bank 2 in respect of its liability to Bank.

33. A professional valuation of the A property carried out in December 2005, valuing the property at €158,174X, was provided to Bank 2 for the purposes of their guarantee.

34. On 5th December 2005 Bank 2 wrote to Bank and confirmed that it guaranteed an amount of €86,354X valid up to and including 5 December 2007 as security for credit facilities and any other liabilities, actual or contingent that Bank might incur on behalf of The Appellant.

35. On 6th December 2005 S entered into a general guarantee with Bank in respect of the Appellant's liabilities to Bank. The maximum amount guaranteed was TRY 310,655X equivalent to the total due by the Appellant on foot of interest and principal on the P loan.

36. On 6th December 2005 S agreed with Bank a charge and release over deposits held by S in two designated bank accounts held with Bank as security for any obligations S might incur to Bank.

Forex/hedging transactions

37. On 6th December 2005 Bank and S entered into a Forward Foreign Exchange Contract whereby Bank agreed to sell TRY to S on 6th December 2006 and 6th December 2007. The TRY amounts were matched to those due to Bank from the Appellant in respect of interest and principal under the P loan facility of 6th December 2005. The Forward Contracts and Financial Spread Bet Extension Agreement dated 4th December 2007 provided that the forward exchange rates were derived from a TRY interest rate of 17% and a euro rate of 3.9%.

38. On the same day the Appellant's then wife (Former Spouse) entered into two financial spread bets with S, to be settled in euro on 6th December 2006 and 6th December 2007

respectively. Depending on movements in the TRY / euro exchange rate, each of the financial spread bets would result in one party paying the other. Mathematically, the gains / losses on those bets for the Former Spouse would be equal and opposite to the foreign exchange gains / losses made by the Appellant on the P loan. The obligations of either party to the financial spread bets were limited to unstipulated amounts held by them in specified accounts with Bank. The euro benchmark rates, €0.545448 & €0.479028 were, when expressed as €1/TRY, equal to the exchange rates agreed under the forward foreign exchange contract.

December 2005: the investment

39. On 6th December 2005 the Board of P resolved to issue new shares to all four shareholders, including 144,137X shares with a total par value of €144,137X to the Appellant. The minutes of the board meeting for 6th December 2005 noted that consideration of TRY 231,060X was received from the Appellant and was accepted as market value for the shares issued. P issued a share certificate dated 6th December 2005 stating that the Appellant was the registered proprietor of 144,137X 'B' shares.

40. A letter dated 6th December 2005 from the Appellant to Bank directed that bank to draw down his TRY facility and make an onward transfer to account number [] with Bank in the name of P. The funds drawn down under the TRY facility were used by the Appellant to subscribe for ordinary share capital in P.

The use of the monies by P

41. On receipt of the consideration for the new shares issued to the four investors on 6th December 2005, P converted the TRY funds to €625,000X.

42. P used €129,959X to repay to Bank an overnight loan taken out the previous day to assist in the redemption of share capital on 5th December 2005 to each of the four shareholders in the total amount of €191,474X (i.e. €47,869X each). Up to 5th December 2005, the Appellant held his shares in P through H and thus the redemption proceeds were paid to H rather than to him personally.

43. The balance of €495,041X of the €625,000X received on the subscription for shares on 6th December 2005 was used by P to subscribe for capital in its wholly owned subsidiary, PAH.

44. On 7th December 2005 the sum of €495,041X was transferred to a call deposit held by PAH with Sister Bank. €330,882X of that amount was immediately transferred into a

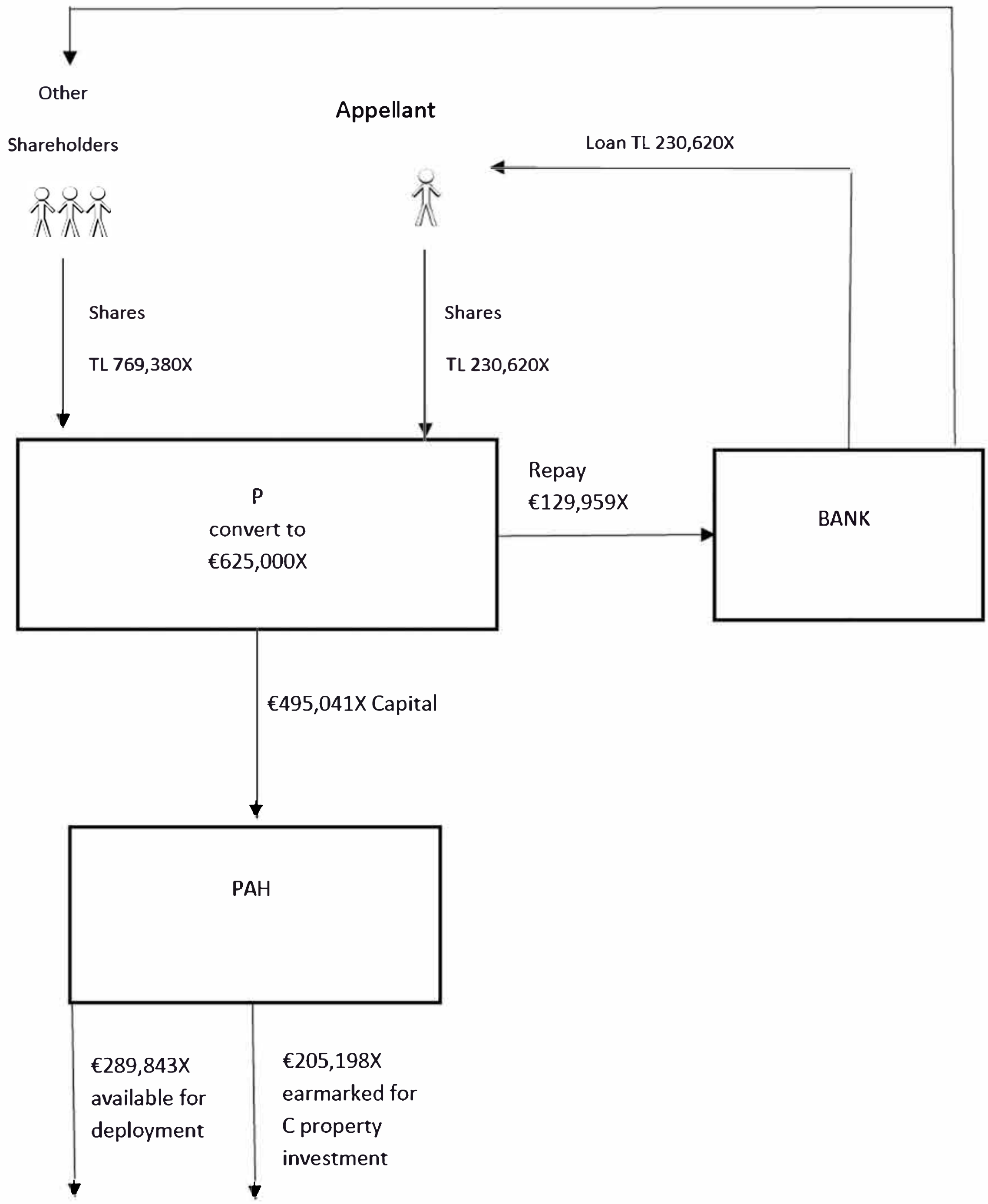
fixed term deposit account with an interest rate of 2.7%, which matured on 6 December 2006. On maturity in December 2006, the money in the account was reinvested in a fixed deposit account at 2.7% for a further 12 months. On maturity in 2007, it was reinvested for a further year at 4.35%, and so on each year until the deposit matured on 30 November 2011.

45. The Appellant and his associates took a decision to raise more funds than was immediately required for the purposes of reducing the administration and time required for any future deals by having the funds already in place.

46. In August 2006, the Appellant attempted to sell his primary residence but took it off the market in January 2007. As a consequence, the Appellant became concerned about the residential market and informed the other investors of his reluctance to proceed with the purchase of property C for €circa €205kX which was leased to a corporate entity.

47. In 2008, there were changes in the personal circumstances of all four of the individuals involved in P as the three other shareholders all lost their jobs in the recession. The Appellant also suffered a substantial reduction in his income of approximately [ ]% and was also going through a marriage separation which resulted in a further [ ]% reduction in his income. As a consequence all the shareholders were under financial pressure. Furthermore, the banks, Bank and Bank 2 did not consider that the Appellant and his associates had sufficiently good credit ratings in 2008. It was also relevant that Bank 2 was not lending and was not prepared to release the guarantees and Bank was not prepared to accept a Bank 2 guarantee. Therefore it was not possible to access the monies held on deposit notwithstanding the Appellant's view that there was good value in the property market after the financial and property and financial crisis.

48. The flow of funds in P was as follows:



December 2007: the loan 'extension'

49. The Appellant and the three other investors subsequently entered into a Loan Extension Agreement dated 4th December 2007 with Bank. Bank thereby agreed to 'extend' the term of the loan of TRY 230,620X granted to the Appellant and the respective loans to them on 5th December 2005 to 30th November 2011, at an increased interest rate of 19.2% plus an amount required to compensate Bank for any costs incurred on the transaction, with interest to be payable annually on 30 November.

50. On the same date, the Appellant and the other investors agreed to provide security to Bank for the combined euro amount at risk to Bank from:

- the TRY loan 'extended' under the agreement;
- overdrafts taken out with Bank; and
- forward contracts entered into by Bank with S to hedge their position under the TRY loans back to euro.

51. The amount secured was covered by security granted over a combination of deposits which PAH held with Bank and by guarantees from Bank 2.

52. Also on 4th December 2007, the Former Spouse entered into a Forward Contract and Financial Spread Bet Extension Agreement with Bank and S. The extended agreements, based on the same notional principal as before maturing on 30th November 2011 and interest maturing annually on 30 November 2008-11, also provided that the underlying interest rates would be based on a TRY rate of 19.2% and a euro rate of 4.35%. The same security arrangements as before were maintained.

53. On 31st August 2009 Bank 2 wrote to the Appellant and the other investors advising them that the Bank was willing to make available to them a joint and several guarantee facility of €126,539X available until 31st January 2012.

November/December 2011: unwinding the investment and repaying the loan

54. On or about 30th November 2011 PAH's one-year fixed deposit with Sister Bank matured, and the monies including interest were transferred to PAH's Call Deposit account.

55. On 2nd December 2011 P received funds of €601,794X. These funds had been transferred from PAH to P. This equated to more than 96% of the amount which the shareholders had subscribed for new shares in December 2005.

56. On 12th December 2011 P resolved to repay share capital of €622,314X to its shareholders. The resolution provides for €601,794X of this amount to be paid in cash and the balance of €20,520X in specie by the transfer of properties in A, and in Z. The cash transferred to the Appellant was €138,786X.

57. On 6th December 2011 Bank 2 transferred €31,635X, 25% of the €126,539X guarantee, to the Appellant on foot of the guarantee provided in relation to his loan.

58. The Appellant used the funds of €170,421X received from the repayment of capital by P, €138,786X and the guarantee from Bank 2 €31,635X, to part clear the amount due on his euro call deposit account with Bank, which was 'overdrawn' as a result of interest and capital charges debited to the account in the period 2006 to 2011.

Interest claim

59. For the tax years 2006 to 2011 inclusive the Appellant claimed interest relief on his Turkish Lira loan. The Appellant provided interest certificates from Bank which showed the following amounts of interest: TRY 40,869X (for 2006), TRY 39,165X (for 2007), TRY 44,033X (for 2008), and TRY 45,140X (for 2009). The Appellant also claimed interest for 2010 and 2011 of TRY 44,894X and TRY 44,894X respectively. The Appellant claimed interest relief under TCA, section 248 as extended by section 250 for the euro equivalents of these amounts. The aggregate euro value of the claims is estimated to be circa €126,539X based on the Central Bank spot rates at the time interest was due to accrue.

60. For the purposes of the tax appeals of the other 3 investors, the issues and facts of their cases are materially identical to the Appellant in respect of the P arrangements, save that in the case of one of them the figures are different.

Balance Sheet

61. The Balance Sheet P as at 31st December 2005 which was produced in evidence reflected the following position:

[redacted]

62. The Balance Sheet PAH as at 31st December 2005 was produced in evidence reflected the following position:

[redacted]

Investment in L

63. The L transactions largely mirror those in P, save that the Appellant is the sole investor and shareholder in L.

64. L was a private unlimited company incorporated under the laws of the State.

65. The Appellant wholly owned the share capital in L and thus had a material interest in L for the purposes of TCA, section 248(2) TCA save for one share held by the Former Spouse.

66. L had a wholly-owned subsidiary, LAH, a limited liability company incorporated in the United States.

67. The Appellant was a part-time director of L for the purposes of TCA, section 250(2)(a)(i) TCA.

68. L had a 100% subsidiary, H, which was a private unlimited company incorporated under the laws of the State.

69. For the years 2005-2010 inclusive, L was a company whose income consisted wholly or mainly of profits or gains chargeable under Case V of Schedule D.

70. For 2011, L had net Case V rental income of €1,553X on which it paid €388X of tax. It also received a dividend from a subsidiary of €47,025X.

December 2005: the loan

71. By letter dated 6th December 2006 (sic – it appears that the correct date is 2005), Bank agreed to make available to the Appellant a loan facility ('the L loan') for up to TRY306,977X. As with the P loan, the facility was to be available for a maximum of two years from the initial drawdown. The provisions in relation to security were also similar to those in the P Facility Letter and interest was payable on the same dates. The interest rate was 17.0137% until 6 December 2006 and 16.75% for the remaining period of the loan. As security, Bank required under clause 6 of the above letter:

(i) a Guarantee from S in the sum of TRY 412,063X supported by a charge from S over its funds held with [Bank] from time to time; and
(ii) any other security as determined by [Bank] from time to time.

72. A second letter of the same date issued by Bank requiring additional forms of security.

Security and guarantee arrangements

73. In a similar way to the P loan, the borrowings were guaranteed by Bank 2. There was a guarantee for a maximum €54,720X inclusive of an existing facility of €25,308X. The security for that guarantee included a charge over Property, B and an assignment over the FRI lease on it. A professional valuation of the B property carried out in December 2005, valuing the property at €68,399X, was provided to Bank 2 for the purposes of their guarantee.

74. On 20th December 2005 Bank 2 provided the Appellant with a further guarantee of €44,460X supplemental to the previous amount of €54,720X, bringing the total guaranteed to €99,179X. The security for that supplemental guarantee included a charge over the Trade A property.

75. In addition, LAH gave an unlimited guarantee dated 6th December 2005 in respect of the Appellant's liabilities to Bank.

76. Also on 6th December 2005, LAH entered into a security interest agreement with Bank under which LAH assigned as security to Bank all monies held by LAH in Sister Bank.

77. On the same day, the Appellant entered into a general guarantee agreement with Bank in respect of S' liabilities to Bank, limited to €201,715X which was the euro equivalent of S' obligations under the forward foreign exchange contract.

78. On the same day, S entered into a general guarantee limited to TRY 412,063X with Bank in respect of the Appellant's liabilities to Bank.

Forex/hedging transactions

79. On 6th December 2005 S entered into a forward foreign exchange contract with Bank. This contract set fixed exchange rates for 6th December 2006 and 6th December 2007 between euro and TRY such that S could acquire from Bank amounts in TRY equal to the Appellant's obligations under his L TRY facility interest and capital. The forward exchange rates were derived from a TRY interest rate of 17% and a euro rate of 3.9%.

80. On 6th December 2005 the Appellant's Former Spouse, entered into two Financial Spread Bets with S, the first settling on 6th December 2006 and the second on 6th December 2007. Depending on movements in the TRY / euro exchange rate, each of the financial spread bets would result in one party paying the other. Mathematically, the gains/ losses on those bets for the Former Spouse would be equal and opposite to the foreign exchange gains/ losses made by the Appellant on the L loan. The obligations of either party to the financial spread bets were limited to unstipulated amounts held by them in specified accounts with Bank. The euro benchmark rates of €0.547641 & €0.480954 were, when expressed as €1/TRY, equal to the exchange rates agreed under the forward foreign exchange contract.

December 2005: the investment

81. The Appellant drew down the loan facility and used the funds to subscribe for ordinary share capital in L. L issued a share certificate dated 6th December 2005 certifying that the Appellant was the registered proprietor of 151,102X shares of IR£1 each in the capital of the company.

The use of the monies by L

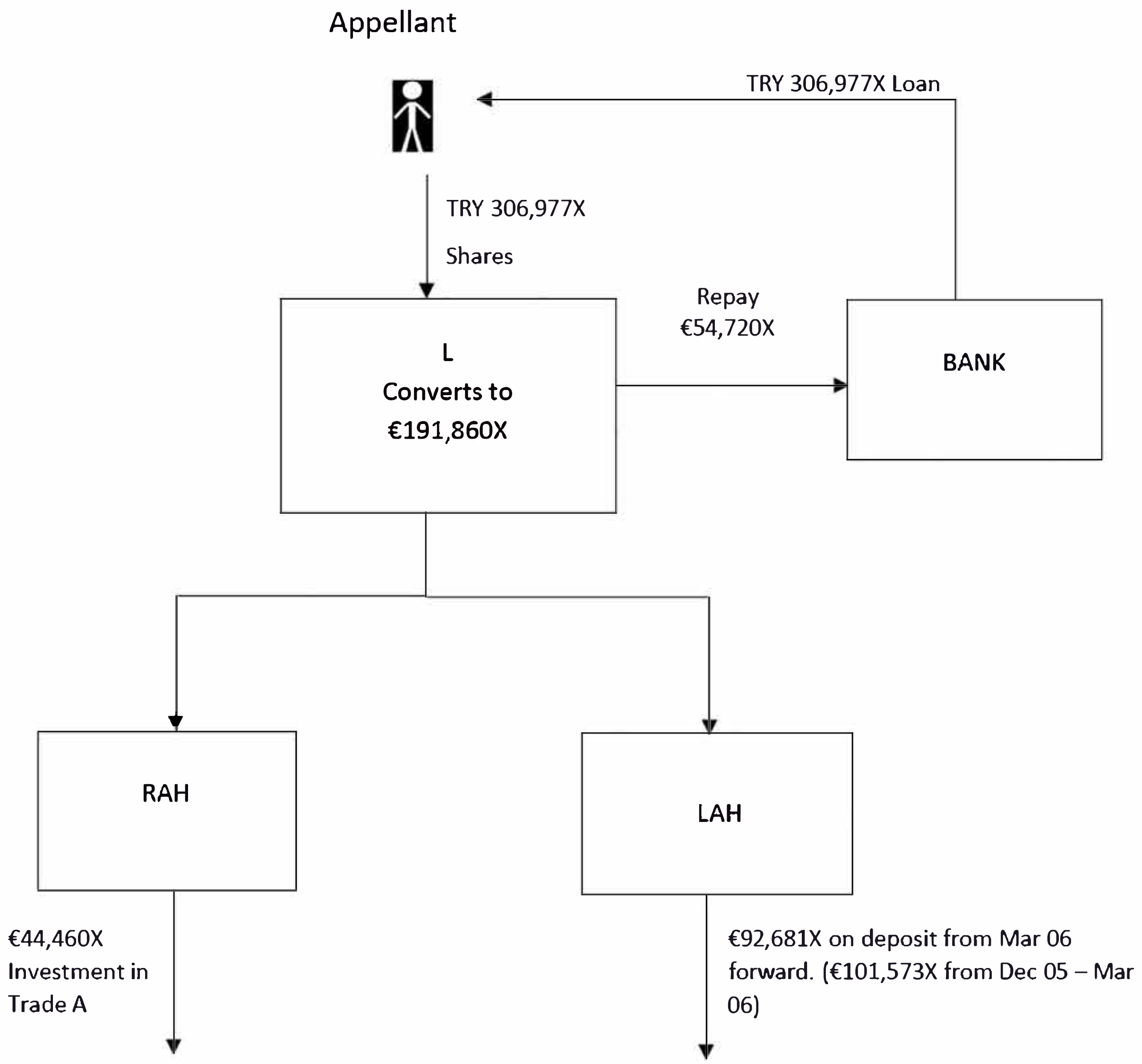
82. On receipt of the consideration for the new shares on 6th December 2005, L converted the TRY funds to €191,860X. L used €54,720X of the monies subscribed for the shares to repay to Bank an overnight loan taken out the previous day to redeem share capital of the same class to the Appellant,

83. L transferred the balance of €137,141X to its wholly-owned subsidiary, LAH. On 7th December 2005 bank statements for L showed €137,141X was transferred to a call deposit account held by LAH with Sister Bank. LAH immediately transferred €101,573X into a fixed term deposit account with an interest rate of 2.7%.

84. That deposit was broken in March 2006 when €44,470X of the €137,141X was transferred to solicitors to allow R AH to purchase the leasehold interest in the Trade A Property.

85. The remaining €92,681X of the €137,141X was put into a fixed term deposit account which matured on 6th December 2006. A series of one-year fixed deposit contracts followed, the last of which matured on or about 30th November 2011.

86. The flow of funds in L was as follows:



TAX APPEALS COMMISSION

87. In 2007, the Appellant was unsuccessful in his offer of circa 205kX to acquire Trade A potential investment 3. The Appellant also made an unsuccessful approach to the owner of the Trade A property for the purpose of acquiring the freehold interest.

88. In 2008, the Appellant wrote enclosing an expression of interest in relation to Trade A potential investment 4 but was unsuccessful.

December 2007: the loan 'extension'

89. On 4th December 2007 the Appellant agreed to 'extend' his L loan until 30th November 2011 at an interest rate of 19.2%, with the interest to be payable annually on 30th November each year.

90. Also on 4th December 2007 the Appellant agreed to provide security to Bank for the combined euro amount at risk to Bank from:

- the extended TRY loans;
- overdrafts taken out with Bank to fund payments of interest on the TRY loans;
- forward contracts entered into by Bank with S to hedge their position under the TRY loans back to euro.

91. 100% of the amount secured by the Appellant was covered by security granted over a combination of deposits which LAH held with Bank and guarantees from Bank 2.

92. On or about 4th December 2007, there was with an agreed extension of the forward contract between S and Bank. On the same day the Former Spouse agreed to extend the financial spread bets to 30th November subject to the continuation of the same security as had been in place for the original agreements. The extension agreement also provided that the underlying interest rates would be based on a TRY rate of 19.2% and a euro rate of 4.35%.

93. On 31st August 2009 Bank 2 wrote to the Appellant advising him that the Bank was willing to make available to him two guarantee facilities amounting to €99,179X available until 31st January 2012, this facility being subject to security outlined in the letter.

November/December 2011: unwinding the investment and repaying the loan

94. On or about 30th November 2011 LAH's one-year fixed deposit with Sister Bank matured, and the monies (including interest) were transferred to LAH's Call Deposit account.

95. On 12th December 2011 L approved the repayment of capital of €125,147X to the Appellant, being €116,597X in cash and €8,550X by way of a transfer in specie of Property B. Like P, L had available, in cash, at that date, a substantial portion of the original amount subscribed for new shares on 6 December 2005.

96. On 5th December 2011 Bank 2 transferred €99,179X to the Appellant on foot of the guarantee provided in August 2009 in relation to his loan. The Appellant used the cash received from L and Bank 2 to clear the balance on his call deposit account with Bank, which was 'overdrawn' as a result of interest charges debited to the account.

Interest claim

97. For the tax years 2006 to 2011 inclusive the Appellant claimed interest relief on his Turkish Lira loan. The Appellant has provided interest certificates from Bank which show the following amounts of interest: TRY 52,954X (for 2006), TRY 52,133X (for 2007), TRY 58,612X (for 2008), and TRY 60,086X (for 2009). The Appellant has also claimed interest for 2010 and 2011 of circa TRY 59,758X and TRY 59,758X respectively. The Appellant claimed interest relief under TCA, section 248, as extended by TCA, section 250, for the euro equivalents of these amounts. The euro value of the claims is estimated to be circa €167,579X based on the Central Bank spot rates at the time interest was due to accrue.

98. The Balance Sheet L as at 31st December 2005 which was produced in evidence reflected the following position:

[redacted]

Material Findings of Fact - Expert Witness for the Respondent - Mr [redacted]

99. Mr [redacted] is a chartered accountant having qualified in [redacted]. He was a director with [redacted] and at [redacted] which was an investment bank having specialised in structured financing. Since he left banking, he was a non-executive director of a number of quoted companies. He said he was currently chairman of [redacted] which was involved in drilling and exploring in the North Sea.

100. He had acted as an expert witness having done work for various banks and governments in relation to complicated transactions.

Transactions

101. On 6th December 2005, the Appellant drew down two TRY denominated loans from Bank. One of these loans of TRY 230,620X was used to subscribe for new share capital in P, an unlimited company incorporated in Ireland, in which the Appellant had a 25% shareholder interest. The other loan, of TRY 305,977X, was used to subscribe for new share capital in L, also an unlimited company incorporated in Ireland, in which the Appellant owned 100% of the share capital.

102. The loans were initially for a two-year period, although both were subsequently extended through to 30th November 2011, at which point they were repaid. The initial interest rate on the TRY loans was 17.47862%, for P and 17.0137% for L reflecting the relatively high TRY interest rates at that time, as compared to Euro ("EUR") rates of approximately 2.8%.

103. The Appellant claimed a tax deduction on the EUR equivalent amounts referred to above, in each of his tax returns for the tax years 2006 through to 2011, and it is these interest deductions which are in dispute.

104. The day before the L and P arrangements were put in place, and taking L by way of example, funds were paid into L by way of share redemptions from subsidiaries of L and an overnight loan from Bank to L. L then redeemed all of its share capital and thereby paid €110,783X to the Appellant. By far the larger amount of the funds received from this share redemption were used by the Appellant to repay what was referred to as the "2003 loans", being earlier loans made by Bank to the Appellant, which had become due for repayment.

105. Notwithstanding that the documentation relating to the 2003 loans was not produced to Mr [redacted], it was not clear as to why the Appellant did not use part of the 6th December 2005 borrowings from Bank of TRY 305,977X to repay the earlier 2003 TRY loans of the EUR equivalent amount of €99,201X, which would have avoided:

(i) L redeeming 100% of the share capital held by the Appellant and then, on the following day, the Appellant subscribing for new share capital
(ii) having to make the various share redemptions from subsidiaries of LAH to L in order to put L in funds to do this, and
(iii) having to fund the difference by way of an overnight loan from Bank for which it would be expected Bank would charge a fee.

106. It was not clear, at the L level, the effect of the share redemptions from its subsidiaries where funds moved from LAH and H, into R, which then used the funds to invest in Trade A. However, this could have been achieved without L redeeming its own share capital, or L taking out an overnight loan from Bank.

107. The same comments apply, *mutatis mutandis*, to the P transaction where €191,476X of P's share capital being effectively all of its share capital, bar a few ordinary shares was redeemed on 5th December 2005 followed by a subscription of new share capital of €625,000X on 6th December 2005.

The Involvement of the Appellant' spouse

108. On 6th December 2005, the Appellant' spouse entered into a series of financial spread bets with S.

109. Taking the L transaction by way of example, on 6th December 2005, one of the financial spread bets, referred to as Financial Spread Bet (1), was designed to hedge out the TRY risk attaching to the first year's interest on the L loan, amounting to TRY 52,953X.

110. The conventional way to do this would have been for the Appellant, who was the individual paying the TRY interest, to enter into a hedging transaction with a bank under which the Appellant would agree to purchase the said TRY 52,953X for a fixed amount of EUR, on the relevant interest payment date in this case one year later on 6th December 2006.

111. In the present case, the Appellant' spouse entered into Financial Spread Bet (1) under which:

(i) For every Euro 0.000001 that one Turkish Lira on the Relevant Date was, translated at the then Spot Rate, worth more than EUR 0.547641 the Appellant's spouse was to receive EUR 0.30967233 from S,

(ii) For every Euro 0.000001 that one Turkish Lira on the Relevant Date was, translated at the then Spot Rate, worth less than EUR 0.547641 the Appellant's spouse was to receive EUR 0.30967233 from S.

112. This agreement would result in a profit or loss to the Former Spouse depending on whether the closing EUR/TRY exchange rate was above or below 1.82601366. Similarly, the actual interest payable by the Appellant, expressed in EUR would also vary, depending on the EUR/TRY exchange rate on 6th December 2006, when the interest was paid. The effect of the hedge taken out by the Appellant's spouse ensured that, on a combined basis, the interest payable, in EUR is fixed at all future levels of the EUR/TRY exchange rate - in this case at an amount of EUR 28,999X.

Settling the Cash Flows

113. As such, the Appellant paid variable EUR amounts in respect of the fixed amounts of TRY interest due, depending on the EUR/TRY exchange rate when the interest is paid. At the same time the Appellant's spouse would make a profit or loss which, when combined with the Appellant's EUR payments, would net out to a fixed EUR outgoing of, in the example above, €28,999X. To put this hedge into effect, in cash terms one would expect the Appellant to pay the TRY interest, by purchasing the required TRY for EUR, at whatever the EUR/TRY rate was at the time the interest was paid, and for the Appellant' spouse to pay, or receive, amounts to/from the Appellant, equal to the profits/losses on the Appellant' spouse's financial spread bets. In this way, following the example above, the Appellant's outgoings would be fixed at TRY 28,999X.

114. In the event this was not necessary, since Bank would, instead of debiting the Appellant´s EUR overdraft account with, say TRY 52,953X at the relevant EUR/TRY rate, would do so at the forward currency rates explicit in the S/Bank currency transaction and implicit in the Appellant' spouse's financial spread bets transaction. In this way, amounts payable/receivable under the Appellant' spouse's financial spread bets were effectively transferred over to the Appellant.

The Involvement of S

115. Continuing with the L arrangements by way of example, in addition to the financial spread bets taken out between the Appellant' spouse and S, S also entered into two forward currency transactions with Bank. The first of these was for S to buy TRY 52,953X for €28,999X on 6th December 2006, being the same date as formed the basis for the Appellant' spouse's financial spread bets with S. The underlying forward rate used in this forward currency transaction was 1.826013, being the same as the breakeven point in the financial spread bet.

116. Having purchased TRY 52,953X, S would be expected to sell these TRY in the market at the available EUR/TRY spot rate, on 5th December 2006. As a result, S would make a profit, or loss, in EUR, since it would have purchased the TRY 52,953X for a fixed amount of €52,953X and sold it for a variable amount which will vary depending on the EUR/TRY spot rate at that time.

117. By comparing the payment that S was required to pay the Former Spouse under the Financial Spread Bet (1), with the payments due to/from S from Bank, S' position netted out to zero at all levels of the EUR/TRY spot exchange rate on 6th December 2006 and neither made a profit nor loss on its involvement in these arrangements. Given this zero profit profile, it is difficult to discern the reason for S standing in between the Former Spouse and Bank.

118. The reason for this was that in setting the terms of, say, Financial Bet 1, the EUR benchmark rate of €0.547641 was the inverse of the forward rate of 1.826013 used in the forward currency contract. Another reason was that the incremental amounts due under Financial Bet (1), of €0.30967233 per 0.0000001 of currency movement, are the amount of Forward TRY used in the forward currency contract of TRY 52,953X, divided by 1,000,000.

The Effect of the Hedging Arrangements on the Tax Deductible Interest

119. The net effect of paying the interest in TRY and the hedging transactions taken out by the Former Spouse, was that at the pre-tax level a net EUR payment of €28,999X was paid at all levels of the EUR/TRY exchange rate. Nonetheless, the EUR equivalent of the TYR 52,953X interest payment made by the Appellant varied, depending on the spot rate when the interest was paid on 6th December 2006. This in turn meant that the size of the EUR equivalent tax deduction, based on the TRY interest amount converted at the then spot rate, also varied.

120. Thus, although the Appellant had a 100% hedge at the pre-tax level, once the hedging arrangements were broken down into their component parts for tax purposes, the actual size of the tax deduction varied, given that the currency profits/losses on repayment of the TRY loan were treated as non-taxable and the financial spread bets undertaken by the Appellant' spouse were not brought within the charge to tax.

The Role of Turkish Lira in the Arrangements

121. As regards the TRY Loans, one could expect the Appellant to have taken out a foreign currency loan where the Appellant acquired TRY assets, in which case the TRY borrowing would provide a currency hedge against the TRY asset. However in both the L and P arrangements, there does not appear to be any TRY assets being acquired by the Appellant, nor by the companies in which he had an interest.

122. Allied to the above, once either L or P acquired the TRY funds from the Appellant and the other Appellants, both companies immediately converted 100% of the TRY received into EUR.

123. By the Former Spouse taking out the currency hedges via the financial spread bets, and the benefit of this being taken through the Appellant's bank account, the Appellant had removed the associated TRY currency exposure. The economic effect of this was that the Appellant had turned what were TRY loans, carrying a relatively high interest rate, into EUR loans, carrying a much lower interest rate.

124. Thus, while a purpose of the Appellant borrowing to fund his property investments in L and P, in EUR, the TRY currency had no economic functionality in the arrangements and it cannot be seen to be a commercial purpose for the Appellant borrowing in TRY. Furthermore there was a cost associated with the Appellant entering into these TRY arrangements with Bank.

The Investment of Funds into Property

125. Taking the L transaction by way of example, it received TRY 306,977X through issuing shares to the Appellant and then immediately converted this into €191,860X.

126. Taken at face value, as at 5th December 2005, LAH owned the B property, which had been valued, at that time at €68,399X. Also, at or about that time, LAH acquired a leasehold interest in the Trade A Property for €44,460X. These two valuations combine to a total of €112,859X and would imply property based funding of €112,859X based on

existing property valuations and an additional €92,681X for future property deals, being 90% of the then property valuations of €112,859X, which combine to €205,540X – which is very near to the € equivalent amount actually lent to the Appellant, of €191,860X.

127. As regards the P transaction, the A properties, then owned by PAH were valued in December 2005 at €158,174X. The Appellant also explained that, at that time, €205,198X was earmarked for the acquisition of a property in C.

128. Adding the A valuation of €158,174X and the potential C acquisition at €205,540X results in a property based loan of €363,372X based on these property valuations and would also imply additional funding of €327,035X for future property deals being 90% of the then property valuations of €363,372X.

129. In turn this would imply that a combined funding of €690,407X was to be made available i.e. € 363,372X plus €327,035X which equals €690,407X – which was near to the € equivalent amount actually lent to the Appellant, of €625,000X or at least near enough so as to be broadly consistent with the lending principles explained by the Appellant.

130. In summary therefore, for every €100 to be lent into these arrangements, 53% was to be lent based on properties already acquired, or potentially about to be acquired, and 47% (being 90% of 53%) was to be placed on deposit with Sister Bank, as an additional investment float for future property deals.

131. In terms of the transaction structure, this would mean that 47% of the funds borrowed by the Appellant would be placed on deposit whilst, at the same time, the Appellant would be seeking tax deductions for 100% of the borrowing costs incurred.

Amounts Placed on Fixed Deposit

132. Combining the L and P transactions, the amounts actually deposited with Sister Bank in December 2005 were as follows:

LAH	€137,141X
PAH	<u>€495,041X</u>
	<u>€587,722X (sic)</u>

133. The Appellant explained that €205,198X in PAH was earmarked for the potential C acquisition, which did not take place.

134. As regards LAH, the Sister Bank deposit most probably reduced down to €92,681X after the acquisition of the Trade A business for €44,460X and this almost ties into an amount of €101,573X being initially being placed on a one year fixed term deposit, as explained by the Respondent, in that one would do this if there was no foreseeable need for these funds in the coming year.

135. In a similar vein, of the €495,041X that PAH had at its disposal, some €330,882X was also placed on a one year fixed term deposit account which may be after allocating some or all of the €205,198X earmarked for the C acquisition.

136. It was these amounts, not used to acquire property interests, which the Appellant refers to as an "*investment float*", a "*fighting fund*" and/or a "*war chest*".

The Nature of the Investment Float

137. In Mr [redacted]'s experience, banks will typically only provide term loans for defined purposes. Thus, he did not see that Bank, or more particularly Bank 2, would give LAH or PAH a blanket approval to deploy the investment float, as represented by amounts placed on deposit as, say, the Appellant saw fit.

138. Thus, as regards future property investments, the Appellant and the funding banks had two choices either:

(i) they wait until the Appellant identified a specific property and the Appellant sought to persuade Bank 2 of its suitability against which to lend, via Bank, by way of a guarantee from Bank 2 to Bank, or

TAX APPEALS COMMISSION

(ii) Bank agreed to provide funds on 6th December 2005, which are placed on deposit with Sister Bank until a suitable property was identified, on which Bank 2 would provide a guarantee to Bank, but always at the discretion of Bank 2.

139. Either way, the funds placed on deposit with Sister Bank, which were termed an investment float, were not investments in property. However, regard should be had to a property investment as taking place once the funds had been withdrawn and used to acquire a specific property, on which Bank 2 had agreed to lend.

The Role of Bank

140. The two Bank entities involved in these arrangements were Bank and Sister Bank, and in terms of cash movements their respective functions were as follows:

(i) Bank to advance TRY funds to the Appellant to invest in L and P,
(ii) Bank to enter into EUR/TRY hedging transactions with S,
(iii) Bank to swap the TRY funds received by L and P into EUR,
(iv) Sister Bank to receive EUR deposits from LAH and PAH.

The Role of Bank 2

141. Bank 2 did not have any initial cash outgoings, in that it provided a guarantee to Bank although Bank 2 did have an outgoing at the end of the arrangements when the Bank 2 guarantee was called. The cost of this guarantee facility, payable by the Appellant, was 1% per annum. In addition to this, the Appellant would also be bearing fees charged by Bank.

Security Arrangements

142. There were a number of documents relating to the security to be provided to Bank and Bank 2. The effect of this is that Banks' credit exposure was secured by:

(i) cash that had been placed on deposit with Sister Bank, which is essentially risk free, and
(ii) a guarantee from Bank 2.

143. By contrast, the security for Bank 2's guarantee to Bank, as regards the L transaction, was comprised of:

(i) a guarantee and indemnity from LAH, supported by a first charge over Property B,
(ii) an assignment over the existing lease on Property B, and
(iii) a deed of counter indemnity from the Appellant.

144. Under these security arrangements, therefore, Bank was not taking credit risk on Irish property which was being taken by Bank 2, under the terms of its guarantee, and, Bank's credit exposure was more of a financial one, being the "risk" attaching to the cash held on deposit at Sister Bank, essentially risk free in banking terms, and Bank's assessment of the financial standing of Bank 2, as a banking entity.

145. Absent the TRY arrangements, it would have been relatively straightforward for Bank 2 to have lent directly to the Appellant, in EUR, at EUR interest rates, taking the same security as it did under the actual structure, being:

(i) a charge over the properties held by LAH, and
(ii) a guarantee from The Appellant.

146. It would therefore seem that the role of Bank was to put into effect a financial arrangement under which the Appellant would be able to:

(i) borrow in TRY, and
(ii) enter into hedging arrangements, via the Appellant's spouse, such that, economically the Appellant was borrowing funds at a EUR rate of interest, but at the same time obtaining a tax deduction for the high rate of TRY interest being paid by the Appellant.

147. This is reflective of Mr [redacted]'s experience of structured finance transactions generally where, within financial markets, it was well known that Bank and certain other firms have an expertise for transactions such as these, which are relatively complex but also have a tax advantage.

The Cost of Overlaying a EUR loan with Turkish Lira

148. It would have been very straightforward for Bank 2 to provide EUR funding to the Appellant, at the lower EUR interest rate. The role of Bank was to restructure what would otherwise be a Bank 2 EUR loan as a TRY loan, together with associated hedging arrangements back into EUR, with Bank not taking any Irish property risk, but in a way that gave the Appellant a tax deduction for the relatively higher TRY interest rate.

149. Bank would have required a fee for doing this and although no documentation was produced reflecting the terms of such a fee, it was often the case that such fees are charged by way of adjusting the price of one of the transaction legs rather than by way of, say, a separate fee note.

150. As regards the L and P arrangements, it would appear that this was put into effect through the pricing of the forward currency contract, the terms of which were backed into the financial spread bets entered into by the Appellant' Former Spouse. This demonstrates that the amount of the Bank fee was approximately 1.1% per annum of the funds provided by Bank.

151. Taking L as the indicative template of the Appellant's investment strategy, the following arrangements were put in place:

(a) The Appellant borrowed TRY 306,977X from Bank at an initial interest rate of 17%;
(b) The Appellant subscribed for TRY 306,977X of new share capital into L, which then immediately converted the TRY 306,977X it has received into €191,860X;
(c) An unconnected company, S entered into a Forward Currency Contract with Bank, and
(d) The Appellant's spouse entered into 2 Financial Spread Bet Agreements with S

152. The TRY currency had no economic function in these arrangements, it was therefore difficult to see why the Appellant would incur such a fee, which would increase his borrowing costs, other than by virtue of the sought after tax benefits.

153. When pressed by Counsel for the Appellant on whether a mortgage interest payment due on a mortgage account funded by an overdrawn current account held in the same bank liability, Mr [redacted] responded as follows:

> *"But you brought up some examples of interest being paid off mortgage accounts and current accounts … I haven't been asked as to what my view is as to whether the interest was paid or not, it's not part of my instructions so I'm sort of responding to this off-the-cuff."*

154. Finally during the hearing Mr [redacted], confirmed that he considered that the Appellant was granted a loan extension in 2007 as "*having looked at it to me it looks like a loan extension ….. it looks like a loan extension to me, looks like one, smells like one, walks like one.*"

Submissions - Appellant

Issue 1

Is TCA, section 248(3) applicable to TCA, Section 250?

155. From a statutory interpretation point of view, TCA, section 248(3) does not apply where claims are made for interest relief under TCA, section 250. Secondly, without prejudice to the foregoing and in the alternative, even if TCA, section 248(3) were to apply to TCA, section 250 claims, then, from a substantive point of view, the arrangements in the present case could not be said to be "not bona fide commercial"/ mainly for tax avoidance.

156. The Appellant submitted:

(a) the same arguments as the taxpayer made in case 47TACD2019 as summarised at paragraph 40 and paragraphs 83-92 of that determination;

(b) the test set out in TCA, section 248(3) is not applicable as the Appellant claimed relief by virtue of TCA section 250 which confers an absolute right to relief where the conditions set out in TCA section 250 are met.

(c) TCA, section 250 then lays out a series of additional conditions which have been met. Significantly TCA, section 250 includes its own extensive anti avoidance rules (see Subsections (2)(b), (4) and (5)). These rules seem designed to disallow relief where funds are provided to the taxpayer by the investee group or related entities and as such the Appellant does not fall foul of these anti avoidance rules.

(d) TCA, section 248(3) does not specify the relief being denied. One could argue that because TCA, section 248(3) does not refer to any relief arising under any particular provision that the subsection is completely ineffective. However it was submitted that a reasonable attempt must be made to make sense of the subsection;

(e) TCA, section 248(3) is not a stand-alone section but rather a subsection of TCA, section 248. Therefore TCA, section 248(3) is not referring to relief granted by virtue of TCA, section 250. As a matter of construction and of grammar, the most logical answer is that the word "Relief" in TCA, section 248(3) refers to the most immediate preceding use of that word which is in TCA, section 248(2). However TCA, section 250 specifically grants relief to transactions falling outside TCA, section 248(2);

(f) TCA, section 250 specifically provides that the purpose condition in TCA, 248(1) must be met in order for TCA, section 250 relief to apply i.e.:

*"**Notwithstanding that an individual does not satisfy one or both of the conditions set out in paragraphs (a) and (b) of Section 248(2),** the individual shall be entitled to relief under Section 248 for any interest paid on any loan to him applied for a purpose specified in Section 248(1) if…" [emphasis added]*

(g) It does not similarly provide that the purpose condition in TCA, section 248(3) must be met. There would be no need to import the TCA, section 248(1) purpose test if the purpose tests could be taken as applying without being specified in TCA, section 250 itself.

(h) In contrast with TCA, section 250A(2) where interest relief is denied in certain circumstances:

"**Notwithstanding anything in the specified provisions**…" [emphasis added]

(i) TCA, section 250A(1) provides that "specified provisions" means TCA, section 248 and that section as extended by TCA, section 250. This is precisely the type of language one would expect if one wished to override the clear and uncaveated granting of relief under TCA, section 250(2) where the detailed conditions set out in TCA, section 250 are met.

(j) To the extent that the unspecific, vague and unclear denial of relief in TCA, section 248(3) could be said to conflict with the clear and uncaveated granting of relief under TCA, section 250(2) where the detailed conditions set out in TCA, section 250 are met then the more specific and clearer provisions should prevail.

(k) Notwithstanding the above, if there is any ambiguity in the interpretation, it must be resolved in favour of the taxpayer.

157. The ordinary meaning of the words used in TCA, section 250 is clear and unambiguous. The Appellant agrees with the earlier decision of the Appeal Commissioner where at paragraphs 83-92 of 47 TACD 2019 it was held that the language was clear and unambiguous, that TCA, section 250 operates on a standalone basis and the conditions for TCA, section 250 relief are clearly set out explicitly in TCA, section 250 itself and that there is no mandate to import words into TCA, section 250.

158. In the circumstances, where that meaning is clear and unambiguous pursuant to the primary literal rule, there is no mandate and it is plainly wrong of the Respondent to suggest that one should then proceed to violate that meaning, create ambiguity where none exists, and then seek a strained and improbable interpretation of TCA, section 250. The plain fact is that TCA, section 248(3), on the clear and unambiguous words of the statute, does not apply to TCA, section 250. There the matter rests and further review and investigation is not mandated, nor is it appropriate.

159. At the hearing, the Respondents incorrectly tried to invoke "purpose" and suggest that it could not be the case that the Oireachtas intended the anti-avoidance provision to apply to one class of investors, but not another. However, the Respondent now agreed that TCA, section 248(3) does not apply to TCA, section 247 investors and, thus, their argument at the hearing that it would be implausible for TCA, section 248(3) to apply to one type of investors but not another is fatally undermined. Based on the clear words of both TCAs sections 250 and 247 respectively, it is manifest that TCA, section 248(3) does not apply to either TCA, section 250 investors or to TCA, section 247 investors.

160. It seems that the Respondent has now realised its error and that its purpose argument is flawed as TCA, section 248(3) plainly does not apply to TCA, section 247 investors which the Respondent now admits and so there is no reason at all why it should have a "purpose" of applying to investors other than TCA, section 248 investors. It is clear that there are different classes of investors in TCA sections 247, 248 and 250 respectively. It is clear that TCA section 248(3) applies only to TCA, section 248 investors and not to either TCA section 247 investors or to TCA, section 250 investors.

The Respondents' volte face

161. As a consequence, the Respondents now seem to have ditched entirely their short-lived "purpose" argument made at the recent hearing and have now performed a volte face after the hearing. At this stage it seems that they now, yet again, impermissibly seek to ignore the clear and unambiguous meaning of the words of TCA section 250 and impermissibly seek to advance a further new and self-contradictory argument based on a different secondary aid to interpretation (comparison with historical pre-consolidation legislation). Their new argument, like their earlier short-lived "purpose" argument (now seemingly abandoned) is not only wrong on its own merits, but, like the "purpose" argument fails *in limine* as it is simply wrong to seek to rely on secondary aids when the meaning of TCA, section 250 is clear and unambiguous from the ordinary meaning of the words used in that section.

The Respondents' new pre-consolidation argument also fails in limine

162. It is very important to note that the legislation under consideration in the present case is TCA, section 250 and TCA, section 248 and not their statutory antecedents. Indeed, in that regard, the extract from Dodd attached to the Respondents' post hearing submission, itself states at paragraph [8.65]

> *"…on the mind of Lord Wilberforce when he said 'it is quite wrong that in every case where a consolidation Act is under consideration, one should automatically look back through the history of its various provisions, and the cases decided upon them and minutely trace the language from Act to Act'. He held that recourse to antecedents of consolidating statutes should only be had w[h]ere 'a real and substantial difficulty or ambiguity arises which classical methods of construction cannot resolve' [Farrell v Alexander [1977] AC 5]" at 72H and 73B-C.*

163. Furthermore, in that same case of *Farrell v Alexander*, Lord Simon said at 82C-D:

"Construction of consolidation Acts

> *All consolidation Acts are designed to bring together in a more convenient, lucid and economical form a number of enactments related in subject matter (and often by cross-reference) previously scattered over the statute book. All such previous enactments are repealed in the repeal Schedule of the consolidation Act. It follows that, once a consolidation Act has been passed which is relevant to a factual situation before a court, the "intention" of Parliament as to the legal consequences of that factual situation is to be collected from the consolidation Act, and not from the repealed enactments. It is the relevant provision of the consolidation Act, and not the corresponding provision of the repealed Act, which falls for interpretation. It is not legitimate to construe the provision of the consolidation Act as if it were still contained in the repealed Act - first, because Parliament has provided for the latter's abrogation; and secondly, because to do so would nullify much of the purpose of passing a consolidation Act."*

164. Furthermore, in that same case of *Farrell v Alexander*, Lord Edmund-Davies said at 97B-C:

> *"But, however correct it is to describe as "patchwork" the legislative history before 1968, it has culminated in a consolidating statute which must initially be regarded as standing on its own feet. On the decided cases, only if its wording is ambiguous and its ambit obscure is one permitted to consider its legislative ancestry."*

165. Dodd makes the same point again at paragraph [8.60] that the presumption applies where there is doubt: "*In… a doubt was raised as to the meaning of "fixed engine*"…". Similarly, in referencing the same extract from Dodd and the same issue, Breslin and Corcoran Banking Law 4th Ed. 2019, dealing with the Companies Act 2014 (a consolidating Act) state at 13-04 "*First, there is what may loosely be described as a rebuttable presumption that a consolidating Act does not change the existing law. More particularly, in cases of ambiguity, an interpretation of a statutory term contained in a consolidating Act which maintains the law as before is to be preferred over one which would alter the previous law. References to pre-existing law include statute and 'authoritative decisions of the courts'.*"

166. What the Respondent has sought to do at the recent hearing, and yet again now by further written submission (abandoning their submission at the hearing), is to do exactly what Lord Wilberforce, Lord Simon and Lord Edmund Davies said one cannot do and what both *Bookfinders* and *Dunnes Stores* also repeated cannot be done (i.e. one cannot resort to secondary aids in defiance of / in substitute for the clear and unambiguous meaning from the primary rule). As such, the Respondent:

(i) Ignores the fact that the primary literal rule gives a clear and unambiguous answer, i.e. TCA, section 248(3) does not apply to TCA section 250 based on the ordinary meaning of the words;
(ii) Ignores the mandates from case law that where the primary literal rule gives a clear answer, it is impermissible to resort to secondary aids to interpretation;
(iii) then tries to introduce ambiguity where none exists (which O'Donnell J cautioned against that in *Bookfinders*);
(iv) then tries to reverse the clear and unambiguous mean interpretation based on the ordinary meaning of the words of TCA, section 250;
(v) simply ignores the words used in the relevant provisions of the TCA which are in issue (section 250); and
(vi) misconstrues the earlier legislation.

167. As above and per the decisions of Lord Wilberforce, Lord Simon and Lord Edmund Davies and paragraph 8.65 and 8.60 of Dodd, it is simply impermissible to rely on secondary aids to interpretation where the meaning of TCA, section 250, based on the primary literal rule, is clear and unambiguous as found the Tax Appeals Commission's determination, 47 TACD 2019. That is the end of the matter and one should not consider the pre-consolidation provisions any further as it is impermissible and wrong in principle.

168. Without prejudice to the foregoing, if it is considered that TCA, section 250 is ambiguous, which is denied, it is therefore necessary to look beyond the primary rule of statutory interpretation, to consider purpose and the pre-consolidation provisions.

Pre-consolidation and purpose

169. Nothing in the Respondent's post hearing submission strengthens its case. In fact, it strengthens the Appellant's case to the extent:

- Firstly, it confirms that there is a stronger linkage between TCA, sections 248 and 247 than there is between TCA, sections 248 and 250. TCA, sections 248 and 247 were companion pieces brought in side by side in the same Finance Act (sections 33 and 34 of the Finance 1974 with materially identical conditions) and governed by the same recovery of capital rules (section 35 of the Finance Act 1974). By contrast, TCA, section 250 was introduced at a different time (Finance Act 1978), with its own recovery of capital rules, and very importantly as a standalone provision in FA 1978 and not as an insertion into FA 74. Therefore, if one thought that TCA, section 248(3) (section 14 FA 92) was "intended" to apply to any other provision then it would most logically apply to TCA, section 247 (section 33 FA 1974) before it applied to TCA, section 250 (section 8 FA 1978) – but no-one argues this as the Respondent now concedes this point.

- Secondly, it confirms that TCA, section 250 (section 8 FA 1978) has always been in a self-contained section. It was never inserted into TCA, section 248 (section 34 FA 1974), but always existed as a separate section in a separate Act pre-consolidation, and in a separate section post consolidation.

- Thirdly, it confirms that from the moment of its introduction as section 8 FA 1978, TCA, section 250 contained its own extensive anti avoidance provisions in what is now subsections (2)(b), (4) and (5) as well as other restrictions that were not in section 248 (e.g. a cap on interest relief of £2,000 where the investment was in a non-private company).

- Fourthly, it confirms that from the moment of its introduction in 1978 to the present day, relief was always conferred in TCA, section 250 by "virtue of" section 250 (see subsection (3) of section 8 FA 1978 – now subsection (4) of TCA, section 250) – and that the conferral of relief by TCA, section 250 was always absolute if the conditions of TCA, section 250 were met, the words "*shall be entitled to relief under section 248*" were always there.

- Fifthly, it confirms that from the moment of its introduction and to the present day, both pre consolidation and post consolidation, TCA, section 248(3) has only ever been located or "sat" in TCA, section 248 itself and its predecessor, section 34 FA 1974– it has never sat in any other section nor has the wording ever changed at all since its insertion into TCA, section 248, and into TCA, section 248 only, in 1992. The wording of TCA, section 248(3) has never physically appeared in TCA, section 250 or its statutory antecedent, section 8 FA 1978. If the intention of the Oireachtas was that TCA, section 248(3) were to apply to TCA, section 250 or its antecedent, it would have been a straightforward matter for the Oireachtas either to

  (i) locate TCA, section 250 relief within TCA section 248 and have TCA section 248(3) apply to both, or else
  (ii) have the wording of TCA, section 248(3) inserted into both TCA, section 248 and TCA, section 250 or be explicitly cross-referenced.

170. Of course, the Oireachtas did none of those things. In fact, it did quite the opposite. TCA, section 250 and its antecedent were always in a separate section to TCA, section 248 and its antecedent, and the later introduction of TCA, section 248(3) originally by FA 1992 was manifestly inserted only into TCA, section 248 TCA / section 34 FA 1974 and not into TCA, section 250 TCA / section 8 FA 1978.

171. It seems that the Respondent seeks to make something from the fact that section 14 FA 1992, which amongst several other things inserted subsection (3) into the antecedent of TCA, section 248 (but not into Section 250), referred to TCA, section 248 (then section 34 FA 1974) as having been "amended" by TCA, section 250 (then section 8 FA 1978). Of course, the word "amend" includes any one of a variety of possible statutory changes such as introductions, extensions, deletions, changes in wording etc. It is likely that the Oireachtas referred to TCA, section 248 (section 34 FA 1974) as being amended by TCA, section 250 (section 8 FA 1978) because where relief was claimed "by virtue of" TCA, section 250 it was stated that the taxpayer "shall be entitled to relief under TCA, section 248" and thus TCA, section 250 was applying the mechanism of relief under TCA, section 248 to the standalone conditions of TCA, section 250.

172. The simple and undeniable fact that the Respondent seems to wish to evade in every argument they make is that subsection (3) was only inserted into, and has only ever existed in, TCA, section 248 (section 34 FA 1974) and not into/ in any other section – including not into TCA, section 250 (section 8 FA 1978) which always stated that a taxpayer "shall be entitled" to relief under section 248 "by virtue of" TCA, section 250 if they met the conditions of TCA, section 250.

173. The Respondents' post hearing submission also contains a series of arresting *non sequiturs*, e.g.:

(i) the Respondent stated that because of the reference in section 14 FA 1992 to TCA, section 248 (section 34 FA 1974) as having been amended by TCA, section 250 (section 8 FA 1978) it is "manifestly intended" that subsection (3) should apply to TCA, Section 250. Such does not follow at all. As stated above, subsection (3) was inserted into TCA, section 248 only. TCA, section 250 is, and always has been since 1978, a standalone section. TCA, section 248(3) has since 1992 never been inserted into or applied to section 250 just as it has never applied to TCA, section 247. TCA, section 248(3) has never since 1992 been explicitly cross-referenced as a necessary condition for TCA, section 250 relief. The anti-avoidance section applies to the section in which it sits. The mandatory relief in TCA, section 250 ("shall") apply where the conditions of TCA, section 250 are met (and there is no condition in TCA, section 250 that the TCA, section 248(3) tests be addressed). The clear and unambiguous terms of TCA, section 250 are that relief applies where the conditions of TCA, section 250 are met- there is no mandate to import other language or conditions (see 47 TACD 2019). The textual and contextual analysis contained in the Appellant's written and oral submissions and in the Commissioner's decision in 47 TACD 2019, not repeated here but relied on, all support this.

(ii) the Respondents' post hearing submissions state that, based upon a general presumption that consolidation provisions are not intended to change the law it should be assumed that TCA, section 248(3) applies to TCA, section 250. That begs the question as to where is the authority which says that pre-consolidation TCA, section 248(3) (then section 34(3) FA 1974) applied to TCA, section 250 (then section 8 FA 1978) investors? The answer is "Nowhere". There is no such authority.

(iii) the operative provision of the anti- avoidance was explicitly inserted into TCA, section 248 (section 34 FA 74). That is where it is and always has been located. That plain fact cannot be ignored or reversed, as the Respondents seek to do.

(iv) It is also worth noting that the words "as amended" in section 14 FA 1992, as apparently relied on by the Respondent, do not themselves, of course, appear anywhere in sections 33 and 34 FA 1974 or section 8 FA 1978 which were the only sections consolidated into TCA, sections 247, 248 and 250. Section 14 FA 1992 was not consolidated as, having inserted the anti-avoidance provision into section 34 FA 1974 and not into the standalone section 8 FA 1992, section 14 FA 1974 then itself expired. The operative statutory language which was consolidated is only sections 33 and 34 FA 1974 and section 8 FA 1978. Section 14 FA 1992 had, immediately after its enactment, expired and ceased to have any relevance or effect and was not itself consolidated.

174. The over-riding point in all of the above, which the Respondent repeatedly seeks to ignore, is that TCA, section 250 is and always has been since its introduction in 1978 a standalone provision in a separate section. TCA, section 248(3) is and always has been since its introduction in 1992 physically located only in TCA, section 248 and was never inserted or explicitly cross-referenced to TCA, section 250. The operative provisions are clear and unambiguous. There is no mandate to refer to pre-consolidation provisions, but even if one did so refer, those antecedent provisions only lend further support to the difference between TCA, sections 248 and 250.

175. Similarly, to the point that dealt with at above, it seems the Respondents seek to make something of the fact that TCA, section 252 refers to TCA, section 248 as having been "extended by" TCA, section 250. The relevance of this argument has been previously considered and dismissed both in 47 TACD 2019 and in the present appeal. As we know, where relief is claimed "by virtue of" TCA, section 250 the taxpayer shall be "entitled to relief" under TCA, section 248 – this likely explains the use of the words "extended by". The point is irrelevant anyway as subsection (3) is in TCA, section 248 but not in TCA, section 250 , a separate section with its own conditions and rules and where those conditions and rules are met then "by virtue of" TCA, section 250 the taxpayer shall be "entitled to relief" under TCA, section 248.

Conclusion

176. As the provisions of TCA, section 250 are themselves clear and unambiguous pursuant to the primary literal rule, it is impermissible and wrong in principle to seek to rely on secondary arguments such as:

(i) purposive interpretation (*Bookfinders* and *Dunnes Stores*);
(ii) implausible superficial meaning (*Bookfinders* –); or
(iii) pre-consolidation provisions (see Lord Wilberforce in Farrell v Alexander and Dodd).

177. The Respondents post hearing submission is thus misconceived and fails *in limine*.

178. However, if it is considered that decision in 47 TACD 2019 was incorrect and the Appellant's submissions in this appeal that TCA, section 250 is clear and unambiguous based on the primary literal rule, then any invocation of secondary aids to interpretation

involves a misunderstanding by the Respondent of the *Bookfinder*s decision, a misunderstanding by the Respondent of the statutory provisions of sections 250, 248 and 247 and a mis-reading by the Respondent of the pre-consolidation operative tax provisions.

179. There is nothing in Respondent's latest submission that supports its argument. Its latest arguments involve self-contradictions, apparent abandonment of their "purpose" argument first made and an arresting *volte face*. An examination of the provisions confirms that at all times TCA, section 250 (and its antecedent) has always been a standalone provision conferring an absolute and unequivocal ("shall be entitled") entitlement to relief where the conditions of the section are met "*by virtue of*" the section itself. Nothing in any of the Respondent's submissions approaches a sustainable argument to deny this very unequivocal language of TCA, section 250 and the clear and unambiguous ordinary meaning of the words used in the section.

Issue 2

If the Appellant satisfies the conditions for interest relief pursuant to TCA, section 250(2), is he also subject to the conditions in TCA, section 248(3)?

180. Without prejudice to the foregoing position on the non-application of TCA, section 248(3) to TCA, section 250 interest, the Appellant submitted that he passes the substantive test in TCA, section 248(3) anyway in respect of each of the loans, such that interest relief is not denied.

181. TCA, section 248(3) seeks to deny relief where the loan is not applied for *bona fide* commercial purposes and there is a scheme involving tax avoidance as main purpose. In order for this restriction, which is itself contained within a tax relieving section, to have meaning in context, it cannot apply where

    (i) the transactions would likely have occurred anyway, and
    (ii) where the loans are reasonably regarded as falling within the intention of the section.

182. The transactions undertaken by the Appellant meet both (i) and (ii) above. However, it is important to note that meeting either (i) or (ii) means there is no denial of relief.

183. It must be the position that (i) or (ii) mean that the restriction does not apply, or else the sub-section would subvert in its entirety the whole purpose and meaning of the whole relieving section.

184. There could be no denial of relief in the first example - (i) above - as it is obvious in such circumstances that the transactions are commercial and not for the purposes of avoidance; there simply could not be a main purpose of avoidance.

185. There could be no denial of relief in the second example - (ii) above - as a denial would rob the relieving provision of its clearly intended effect. For example, by analogy, a very similar restriction is contained in the EIIS legislation in TCA, section 500. It is common sense and common knowledge that many persons would not make such investments but for the relief and thus (i) above would not apply. Therefore, in order for relief to be available, which is the obvious and undeniable intended application of the EIIS legislation, it must be the case that relief is not denied by TCA, section 500 because (ii) above applies. In brief, an intended use of the relief cannot be denied as it is a plainly a use of the relief that genuinely complies with the conditions for relief.

186. This brings one logically and coherently to a consideration of the *Challenge Corporation* decision and the *Willoughby decision*. Those cases are to the effect that avoidance (impermissible) involves a scheme which is a scheme designed to conflict with the evident intention of Parliament/ the legislature, whereas mitigation (permissible) involves the use of a relief in a genuine commercial context. It is submitted that it cannot be realistically argued by the Respondent that there has been some abuse of the intention of the Oireachtas. The transactions were genuine, occurred over a long period of time as opposed to immediately self-cancelling and involved real commercial endeavour and risk. It is clear from the case law if transactions are genuine, rather than merely involving bare formal/ documentary compliance, that they cannot be impugned by TCA, section 248(3) so as to deny their true effect in correctly affording tax relief.

187. Further, although not necessary to invoke, it is clear that the relieving provisions clearly envisaged the investee company potentially retaining deposits.

188. TCA, section 248(3) cannot be invoked in wider circumstances as it would be unduly broad and nullify the whole basis of the relief. Were the Respondents to suggest (incorrectly) a wider interpretation and application, then there is a real ambiguity in the provision, the provision is a restriction on a tax relief which, following *Doorley* (1933) V ITR 539, can only apply where the taxpayer is clearly brought within the letter of the law. If there were genuine doubt about the restriction on the tax relief been granted, the

principle against doubtful penalisation applies so as to prevent a fresh and unfair imposition of liability.

189. It goes without saying that the legal effect of the transactions must be respected. It seems, perhaps, that the Respondents suggested, albeit with some diffidence, that the loans in the present case were not applied for *bona fide* commercial purposes. The Appellant submitted that such an assertion simply cannot be advanced with any conviction, being incorrect and flatly contradicting the whole thrust of the evidence. There was simply no evidence to suggest that the loans were not applied for *bona fide* commercial reasons or were not entered into for *bona fide* commercial purposes – we rely in part on the evidence.

190. The fact that hedging arrangements, involving a financial spread bet (and forward contracts between third parties) were entered into, emphasises all the more that the arrangements were commercial. Indeed, the limiting of exposure to foreign exchange risk by the Appellant was, of its essence, commercial because it reduced risk. This could hardly be objectionable in any way.

191. In *Clark* (1978) 52 TC 482, the question arose as to whether a sale of shares fell within the transactions in securities legislation. At page 494 Fox J considered a similar test to the Irish TCA, section 248(3):

> *…"this section merely requires that the transaction must be 'carried out for bona fide commercial reasons'. The language is entirely at large. If the taxpayer could prove that the transaction was carried out for bona fide commercial reasons he satisfies the requirement of the section."*

192. As regards the question of "purpose" in TCA, section 248(3), the Appellant submitted that the question of purpose is necessarily subjective. However, regardless of whether or not there is a subjective/ objective test or element to the test, the Appellant clearly satisfied the requirement for relief on any reading.

193. In *Brebner* (1967) 43 TC 705, which concerned a similar test as regards the "main purpose", Lord Pearce in the House of Lords said at page 715:

> *"the 'object' which has to be considered is a subjective matter of intention…. Admittedly, an object of the carrying out of the broad scheme by way of the resolutions was a tax advantage. But what had to be ascertained was the object (not the effect) of each interrelated transaction in its actual context, and not the isolated object of each part regardless of the others."*

194. Lord Upjohn famously said at page 718:

"I agree the question whether one of the main objects is to obtain the tax advantage is subjective… is considered, the fact that there are two ways of carrying it out – one by paying the maximum amount of tax, the other by paying no, or much less, tax – it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of this section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved."

195. In *Mallalieu* [1983] STC 665 the question of the purpose of expenditure on barrister's clothing was considered. Lord Brightman said at page 668:

"To ascertain whether the money was expanded to serve the purposes of the taxpayer's business it is necessary to discover the tax as "object" in making the expenditure… At the taxpayer's object in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the general commissioners need to look into the taxpayer's mind at the moment when the expenditure is made. After events are irrelevant to the application of S.130 except as a reflection of the taxpayer's state of mind at the time of the expenditure.…"

196. The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business, but may have a private advantage. The existence of the private advantage does not necessarily preclude the exclusivity of the business purpose."

197. In *Challenge Corporation* [1986] STC 548 the Privy Council distinguished between "*tax mitigation*" and "*tax avoidance*". Lord Templeman said at page 554/5:

"*the material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words… in IRC v e Duke of Westminster… "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be' …*

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax

TAX APPEALS COMMISSION

advantage is not derived from an "arrangement" but from the reduction of income which he accepts or the expenditure which he incurs.…

Section 99 does not apply to tax mitigation where a taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had…

In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax."

198. In *Willoughby* (1997) 70 TC 57 which concerned the UK transfer of assets abroad legislation where in the Court of Appeal, Morritt LJ stated at page 108:

"… It does not [amount to tax avoidance] because, as Lord Templeman pointed out in Challenge, in such a case the taxpayer hasn't genuinely paid the premium and complied with all the other conditions on which these advantages are available. In my judgment, the Special Commissioner was right on this point as well. The genuine application of the taxpayer's money in the acquisition of a species of property for which Parliament has determined a special tax regime does not amount to tax avoidance merely on the ground that the taxpayer might have chosen a different application which would have subjected him to less favourable tax treatment. Although said in a different context, like the Special Commissioner, I would refer to the dictum of Lord Upjohn in IRC v Brebner… "

199. In the House of Lords, Lord Nolan said at page 116 et seq.:

"In order to understand the line thus drawn, submitted Mr Henderson, it was essential to understand what was meant by "tax avoidance" for the purposes of s 741. Tax avoidance was to be distinguished from tax mitigation. The hallmark of

tax avoidance is the taxpayer reduces liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option…

In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because clearly freedom from tax was one of the main attractions. But it would be absurd in the context of S 741 to describe as tax avoidances the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of S 741 is a course of action designed to conflict with or defeat the evident intention of Parliament. In saying this I am attempting to summarise, I hope accurately, the essence of Mr Henderson's submissions, which I accept."

200. *Beneficiary v Inland Revenue* [1999] STC (SCD) 134 provides a neat summary of the principles and case law on the meaning of tax avoidance and how to measure the purpose of a transaction in that context. It was held that purpose was distinct from effect and that it is essential to look into the mind of the taxpayer to discover the purpose. Further, reference was made to *IRC v Brebner* where Lord Pearce said "the 'object' which has to be ascertained is a subjective matter of intention." Again, the *Challenge Corporation* decision was referenced as well as Willoughby.

201. In *Carvill* [2000] STC 143, the taxpayer moved the strategic centre of his business to Bermuda. This resulted in a saving of UK corporation tax. The Inland Revenue had sought to invoke the UK transfer of assets abroad legislation. Again, it was held that the purpose test was subjective and the purpose was commercial. The Special Commissioner relied on authority and also on the ordinary meaning of the purpose test as being subjective. Again, in considering the concept of avoidance, the question was whether there was a *"conflict with the evident intention of Parliament."*

202. In *Ebsworth* [2009] UK FTT 199, a summary of the principles concerning purpose and tax avoidance was set out. Again, reference was made to the statement by Lord Upjohn in *Brebner* as regards carrying out a genuine commercial transaction in two different ways, one involving a tax benefit.

203. *Lloyds TSB Equipment Leasing* [2014] STC 191 concerned the availability of a 25% capital allowance. In the Upper Tribunal, Newey J at paragraph [92] approved of the earlier statement by the FTT at paragraph [427]:

> *"… Overall, it is the case that the main objective of the transactions… was to achieve a commercial benefit distinct from, but not dependent upon, obtaining capital allowances. The capital allowances were a route to reduced cost of funds for the financing of transactions already decided upon. The parties knew this to be the case if the capital allowances been proved to be available, and they wanted to obtain the benefit of such allowances, by ensuring that, in carrying out their commercial objectives, they would comply with the necessary conditions upon which the capital allowances were dependent. In terms of priority or hierarchy, that was subservient to, or of lesser importance than, achieving the commercial purposes of the relevant transactions."*

204. In the present case the evidence establishes that the loans were applied for a commercial purpose and that there was no objectionable tax avoidance scheme.

Foreign currency borrowing

205. It seems to the Appellant that the Respondent may be unduly fixated on the fact that the commercial borrowings at issue were drawn down in Turkish lira, rather than, say, euro.

206. The Appellant submitted that the mere fact that the loans in question were drawn down in Turkish lira, with the hope of an enhanced interest relief, cannot convert a commercial arrangement involving application of loan proceeds into a dubious tax avoidance scheme. The reasons for that are:

- The arrangements, of themselves, are commercial and, based on the evidence;
- The fact that gains in foreign currency liabilities held by individuals are not taxable has been well known in tax and legal circles for over 30 years and the Oireachtas has chosen not to legislate to make such gains taxable;
- It is the overall arrangement which is to be considered rather than the choice to take a loan denominated in Turkish lira, as opposed to, say, Euro;
- The evidence clearly establishes that the Appellant would have undertaken the borrowings regardless of the currency (euro or lira);
- The hoped-for enhancement to the tax relief was relatively minor in the overall context;

- Two cases from the Supreme Court and Tax Court of Canada support this analysis.

207. As regards the underlying commerciality of the arrangements, this is clearly established by the evidence.

208. It is well-known that capital gains/ losses made by individuals on foreign currency liabilities are not taxable, as in *Beauchamp v Woolworth* [1989 STC 510].

209. It is manifestly the case under TCA, section 248(3) that it is the overall scheme of arrangement whose purpose is to be tested. The Appellant gave clear evidence that the loans would have been consummated whether or not interest relief was available and the currency of the loan was Turkish lira and that any hoped for tax relief was immaterial to the decision to proceed.

210. In *Shell Canada* [1999] 3 SCR 622, the Supreme Court held that interest on foreign currency borrowings at a high interest rate was allowable even though, like the present case, the foreign currency borrowing was immediately converted to US dollars and the taxpayer entered into hedging arrangements to eliminate exposure to foreign currency movements. In that case Shell borrowed NZ$ 150 million and immediately converted it into US$ 100 million. The Canadian Revenue challenged the transaction on a number of grounds including the general prohibition on unduly or artificially reducing income (by higher interest relief). The court concluded that the interest deduction was not contrary to the object and spirit of the statutory provision which was to encourage borrowings for the accumulation of capital intended to produce income; that the transactions were in accordance with normal business practice; and that there was a bona fide business purpose for the transactions. The Appellant submitted that the present case is on all fours.

211. In *Canadian Pacific* [2000] Can LII 265 (TCC), the facts were similar except in that case the borrowing was in Australian dollars. The Tax Court of Canada (Bonner TCJ) noted (paragraph 10) that the Appellant chose to satisfy its need for capital by borrowing money and that it made a second choice, namely, to achieve that objective by means of a foreign currency borrowing. The court found that unobjectionable. Further, at paragraph 14, the judge noted that the Revenue had argued that the purpose of borrowing (assuming that was in Canadian dollars) did not assist the taxpayer as there was an additional benefit by the foreign currency aspects of the borrowing. Again, that argument was dismissed by the court.

212. Both of these cases emphasise that denomination of a borrowing in a high interest foreign currency, with the benefit of a tax-free gain on the liability (borrowing), is not per se objectionable and that the choice of currency must be viewed in the context of the overall arrangement. By parity of reasoning, the same applies to the case of the Appellant in the present case.

213. Further, *in Kleinwort Benson* (1968) 45 TC 369, the taxpayer obtained a favourable tax treatment on the payment of accrued interest, because it was engaged in the securities trading business. It was able to buy debentures with large arrears of interest which, on payment, would escape tax. The tax benefit was not available to persons other than dealers in securities and the taxpayer would have made a loss on buying the securities were it not for this tax benefit to it. In the High Court, Cross J said at page 382:

> *"… In the same way I do not think that you can fairly say that the object of a charity or a dealer in shares who buys a security with arrears of interest accruing on it is to obtain a tax advantage, simply because the charity or the dealer in calculating the price which they are prepared to pay proceed on the footing that they will have the right which the law gives them either to recover the tax or to exclude the interest, as the case may be."*

214. Consequently, even if it were argued in the present case that there were extra charges associated with the Turkish lira aspect of the borrowing (which is denied, but even if there were, they were minimal), that cannot impugn the claim for tax relief for interest on that borrowing.

Money on deposit- Fighting fund/ war chest

215. Some of the money subscribed for shares in the companies was put on deposit by L and P. Mr [redacted], witness for the Respondent recorded a split of 53% invested in property/ 47% put on deposit. The Appellant submits that (i) there is nothing objectionable about having a "war chest" from raising capital, the section even envisages it, and it is not unusual in any event; and (ii) there was an intention to invest the moneys in projects, but that did not happen because of lack of availability of property and of the later national/ international financial crisis.

216. From the outset a majority of the L loan proceeds was invested in commercial projects and, as regards P, as well as the A property the evidence is clear of an intention to purchase the C property . The Appellant, in his evidence, explained the commercial reasons for the abandonment of the C deal which was attributable in large part to

increasing nervousness about the sustainability of Irish residential property prices as 2006 progressed.

217. It had been intended that the funds that were to be on deposit at the outset (the minority of funds) would be available as a fighting fund / war chest for future deals. Bank had agreed that the funds would be released from the deposits for transactions, subject to them being satisfied with the security for the transactions, and Bank 2 had indicated that generally they would provide a guarantee for at least 80% of the value of any Irish property. the Appellant gave evidence of his intention to do further transactions. However, after the Irish property market crashed, Bank were unwilling to take any risk whatsoever in the Irish market and wanted all their funds back. The willingness of Bank to continue may have been damaged by the continuous, which he considered unnecessary, Revenue queries.

218. The reason for raising more funds than was immediately required was to reduce the administration / time required for any future deals. The Appellant gave evidence of the enormous time commitment required in order to get all the documentation etc. drafted and executed and the desirability therefore of making any future investments as simple as possible - by having the funds already raised the only thing that would be required by Bank in order to allow a new deal to happen would be a security document. Having the cash on deposit would also allow one to move quickly on investment opportunities that might be fleeting and to have proof of availability of funds to enhance ability to deal with vendors.

219. It was well understood that not having to start, or minimising, negotiations with a lender shortens the time to do a deal e.g. see quote from [redacted] Solicitors website on commercial property transactions:

> *"How long will it take to complete the transaction?*
>
> *A standard transaction will take 4 to 6 weeks from the time that the booking deposit is paid to the estate agent. If you are borrowing money from a bank then it can take up to 12 weeks to complete. All documentation has to be run past and approved by the bank solicitors and this slows down the pace of the transaction considerably."*

220. A war chest has been defined as the cash set aside to deal with unexpected changes in a business environment or to take advantage of a sudden opportunity. Raising fighting funds / war chests is quite common with the Appellant describing two unconnected investments he made being returned by the fund organisers without them applying the funds in actual subsequent investment. Companies often hold vast amounts of cash for

very long periods. Sometimes these get deployed, sometimes they do not - it depends upon market circumstances at any point in time. Various examples from publicly available sources are:

- Kerry group amassing €25m war chest for possible acquisitions.
- Green REIT raising €400m to fund future deals.
- Hibernia secures €286m war chest for new deals.
- DCC has acquisitions war chest of up to €1bn says CEO.
- Apple now has €210.6 billion in cash on hand.
- Kingspan amasses €750m war chest to fund acquisitions.
- Warren Buffet sitting on a record €128bn in cash.
- Companies building up cash war chest in uncertain times.
- China's Hedge Funds building up Cash War Chests in March 2020.
- Exxon borrows $9.5bn joining rush of companies building up cash war chests.
- Government of Queensland raises $4bn war chest.
- Tesla has €20bn war chest.

221. As noted above it can take a very long time for war chests to be deployed and sometimes even funds are returned without ever being deployed. Reference was previously made to the Appellant having funds returned to him by third parties in unconnected transactions – a public example would be Berkshire Hathaway's $9bn share buy in Q4 2020. Where funds are deployed it can take a very long time to do so – see quote from Kingspan's chief executive:

> *"Mr Murtagh also stressed that Kingspan would approach transactions conservatively. "We had a healthy pipe this time last year, but we only managed to do one sizeable acquisition," he pointed out.*
>
> *That deal was 85 per cent of French insulation panel distributor, Group Bacacier, for which Kingspan paid €122 million in the autumn. Smaller acquisitions brought total spending to €142 million.*
>
> *"Believe it or not, the average gestation period for any of our acquisitions is eight years," Mr Murtagh said, adding that Kingspan was always very familiar with any company that it bought."*

222. Similarly, Mr. Leonard Ryan, one of the founders of Setanta Sports, commented on their diversification into the restaurant business:

"The project has been on the boil for four years, according to Mr Ryan. "It just took a long time to find a site," he said."

223. Separately and consistently with the above, TCA, section 248(1) itself quite clearly envisages fighting funds / war chests being raised through the issue of shares with the investor still qualifying for interest relief. The Finance Act 2005 version of subsection (1) is below:

"This section shall apply to a loan to an individual to defray money applied—

(a) in acquiring any part of the ordinary share capital of

(i) a company which exists wholly or mainly for the purpose of carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D, or

(ii) company whose business consists wholly or mainly of the holding of stocks, shares or securities of a company referred to in subparagraph (i),

(b) in lending to a company referred to in paragraph (a) money which is used wholly and exclusively for the purpose of the trade or business of the company or of a connected company, or

(c) in paying off another loan where relief could have been obtained under this section for interest on that other loan if it had not been paid off (on the assumption, if the loan was free of interest, that it carried interest)."

224. There is an important difference in the language used for the scenario in (1)(a)(i) – the present case- where the funds borrowed by the individual are invested in share capital and the scenario in (1)(a)(ii) where the funds borrowed by the individual are lent to the company. In the latter scenario the company, must use the money for the purpose of its trade or business. However, in the former scenario (a share investment in the company, which is the present case) there is no such requirement, i.e. the funds can go on deposit provided the company issuing the shares remains a wholly or mainly Case I or Case V company. Given the distinction between a share issue and raising a loan, this difference in the requirements of TCA, section 248(1) between the two cases makes commercial sense.

225. Where a company issues shares it has no ongoing payment obligations to the shareholders and so can place the funds on deposit pending a suitable investment

opportunity arising. That would be considerably more difficult as a practical matter if the company borrowed funds - in that case, investment returns would have to be found in a reasonably short time frame in order to fund repayments. Therefore, the distinction in the requirements of the TCA between the two cases makes sense.

226. The Appellant submitted that it is very important that TCA, section 248 itself explicitly envisages that in the case of a share issue the funds may not be immediately deployed in the trade or business. The Appellant gave ample evidence of the genuine commercial nature of the fighting funds raised by L and P, of his genuine commercial desire to deploy the funds, of the reasons why the banks hardened their position and would not release the funds and of his various failed attempts to raise funds from banks during the period.

Extracts of evidence as to commerciality and tax mitigation

227. The Appellant sets out below some of the relevant pieces of evidence as to commerciality and tax mitigation. The Appellant submitted that it was clear that relief cannot be denied by TCA, section 248(3) or TCA, section 817A in the circumstances. The Appellant relied on the entirety of his oral evidence but would point in particular to:

- The extensive nature of the Appellant's personal investments and businesses;
- Evidence as to the Appellant's particular expertise, interest and activity in investment, his desire to build personal wealth through investment and his belief that there was a particular opportunity in long term leases with upward only rent reviews and good tenants in what was in late 1990s / early 2000s an economy he believed had very good prospects .
- Evidence as to the use of the funds raised to invest in the A property, the B property, the Trade A business, the Trade B businesses, other investments and potentially in C.
- Evidence as to the desire to start the Trade A business.
- Evidence of his desire and attempts after doing the first Trade A deal to do further ones and to deploy the fighting funds / war chests for this purpose.
- Evidence that the Appellant had a great appetite to raise and invest cash during the period and was even willing to pay a euro 12% interest rate but he could not get any bank to release funds.

- Evidence as to the difficulty of getting deals done in the market in 2006-2011 initially because it was so difficult to get reasonable terms from sellers in a boom market and subsequent to the crash because the banks lost any interest in or capacity to fund deals.

- Evidence of the very substantial returns made on the Trade B business funded by the loans far exceeding any tax benefit.

- Evidence of the genuine intention to execute the C deal including the payment of a guarantee fee in respect of the transaction to Bank 2 in May 2006.

- Evidence as to the substance of the Trade A business including there being employees in the years 2006 – 2008.

- Evidence that the A and B properties and Trade A and substantial Trade B assets remain owned by the Appellant to this day notwithstanding the fact that interest relief ended in 2011 and that the availability of interest relief was not a factor in the Appellant making these investments.

- Evidence that it was not certain that borrowing in Turkish lira would give a higher tax deduction than borrowing in euro.

- Evidence of the release of cash as a result of the refinancing in 2005 which freed cash for investment in the Trade B projects.

- Evidence that real commercial risk was taken by the Appellant with significant consequences for him.

- Evidence that the investments acquired would have been acquired absent any interest relief.

- Evidence that the release of surplus funds in 2005 added to the general pool of funds available to the Appellant to invest which post 2005 was mostly in Trade Bs.

Summary

228. The Appellant is unaware of what assertions the Respondent makes as regards the purported application of TCA, section 248(3). The Respondent has failed to set out its case in any detail. The Appellant apprehends that the Respondent appears to have difficulty with two issues (which difficulty is based on a misreading of the evidence and facts and/ or a misunderstanding of the law):

- The fact that a portion of the funds subscribed for shares in L and in P were put on deposit. However, as it is the purpose (subjective) of the arrangements and as there is clear evidence of an intention/ plan to invest the monies when suitable opportunities arose, the objection of the Respondent is ill founded.

- The fact that the borrowings were in Turkish lira. However, as, again, it is the purpose (subjective) of the entire arrangements, and as there is clear evidence that the Appellant would have drawn down the loans in Euro in any event, and as the hoped-for saving associated with the Turkish lira element was relatively minor in the overall circumstances, it simply cannot be the case that the choice of currency of the loans renders the entire commercial arrangements unacceptable from a tax perspective. Consequently, again, the objection of the Respondent is ill founded.

229. The Appellant submits that, on the facts, TCA, section 248(3) does not apply nor can section 817A apply.

230. As noted above, it seems that the Respondent sought to make two further contentions:

(i) Was any of the money borrowed to invest in P applied for a commercial purpose?

(ii) Was part of the moneys obtained by L from the 2005 share issue used to acquire Trade A through R?

231. The Appellant is unaware of the relevance of these contentions as there is no specific statutory condition for interest relief which relates to these points. The only possible relevance is oblique as part of the overall test in TCA, section 248(3). In any event it was very clear from the evidence that some of the moneys invested in P moneys were applied for a commercial purpose including A, Trade Bs and providing a fighting fund and that some of the moneys invested in L were used to acquire Trade A . The Appellant submitted that the contention made by the Respondent is hollow.

Issue 3

Was the interest on the loans 'paid' within the meaning of TCA, section 248?

232. It is manifest from the bank accounts and the various bank documentation issued that interest was paid. Further, the Appellant relies on the following to support the clear fact that the interest was paid.

Common sense and case law

233. The Respondent asserted that it is not possible to pay interest on a bank loan from an overdraft from the same bank. That argument defies common sense and the common understanding of what payment means. To pay interest on a loan is to discharge the liability to that interest. If the interest was not paid, it would mean it would still be owed, which is a nonsense.

234. When Mr. [redacted], the Respondent's own expert, was questioned by the Appellant's Counsel on this matter it became all the clearer that an attempt to argue that the interest was not paid strains all credibility. Mr [redacted] says at one point:

> *"I can't see the money moving from [the Appellant] to [Bank]"*

235. With respect, the Appellant considers that is an absurd way of looking at the matter. Payments on loans are generally not made in cash. They are generally made by moving funds from one bank account to another. Bank accounts that are in surplus do not represent cash held in a vault in the bank – rather a surplus bank account is a record in the bank's accounting system of amounts owed to the customer and an overdrawn bank account is a record of the amount owing by the customer to the bank. Debits and credits to these accounts on the bank's accounting system represent payments in and out – there are generally not wheelbarrows of cash being moved around.

236. It is common for people to have multiple accounts with the same bank. One may have, for example:

- A current account which may at times be in surplus and may at other times be overdrawn.
- A home mortgage.
- A car loan.

237. Based on the Respondent's logic, movements between these accounts are nothing legally and from a tax viewpoint. With respect, such a view is a nonsense and completely incompatible with how modern banking and movements of funds work. It would*, inter alia*, mean that anyone that had paid mortgage interest from an overdraft in the past would not have been entitled to mortgage interest relief (at one time a very commonly claimed relief) and indeed that the borrowers would have been in default on their mortgages.

238. It is also noteworthy in this case that the interest payments being made were in Turkish lira while the overdraft taken out to fund that was in euro i.e. euro amounts were borrowed to buy Turkish lira which was then used to pay the interest. This makes it even harder for Revenue to attempt to argue that the transactions were a "nothing" as clearly the Appellant was increasing a euro liability (the overdraft) while discharging a Turkish lira liability (the interest).

239. In the *Westmoreland* case a company, WIL, had a large accrued interest liability to pension fund trustees which was of no tax benefit to it unless it actually paid the interest. The only way to achieve such payment was by means of a loan from the trustees themselves. Such a loan was duly made, and the accrued interest liability was paid. It was held that the interest had been paid and that tax relief was due.

Bank statements

240. The original statements from the bank showed the interest was paid. The original statements that the bank's system produced were in a form that may not be familiar to people who have only seen statements from retail banks to personal customers but the statements were explained in detail and it was clear that they showed the interest was paid.

241. The tailor-made bank statements were requested from the bank as in the course of discussions and correspondence on this case as the Respondent said that they wanted to see bank statements in what they regarded as a more conventional format – these also showed that the interest was paid.

242. If the Respondent was correct, the bank would have falsely certified the interest as being paid. There was no evidence whatsoever that the bank is dishonest and one would expect that a bank would understand when it has or has not received payment of interest.

243. The confirmation was provided by the bank of interest payments to the UK Inland Revenue when the Irish Revenue took the unusual step of contacting the Inland Revenue under the exchange of information provisions in the Ireland / UK tax treaty. It is reasonable to assume that the bank would take such a request very seriously and there is no evidence whatsoever that the bank provided false information to the Inland Revenue.

244. The Appellant's oral evidence as well as the documents opened and referenced by the Appellant's Counsel during that evidence confirmed that the interest was paid.

Case law distinguished

245. The fundamental difference with the *Paton* case was that the interest element due by the Appellant was not added to the indebtedness as they were in *Paton*. In the *Paton* case, the monies were rolled up into the same account. Therefore the interest in the *Paton* was not paid, it was simply added up with the principal in the same account and it was compounded at the same rate.

246. The *Minsham* case also opened by the Respondent and is no different from the *Paton* case. In that case all that happened was that the accrued interest was added to the principal with the result that it was compounded accordingly and the interest was not paid. So the accrued interest was added to the principal with the result that it was compounded. So they are merged into the same figure and compounded. That situation is different to the Appellant's case.

247. It was also observed in *Minsham* at page 586:

> *"In the absence of any express agreement to the contrary if a banker holds an amount on deposit account the crediting of interest to the customer's current account will constitute payment."*

248. The third case to which the Respondent referred was the *Leeds Design* case, where the interest and principal were both rolled together and then put into a new facility. As such the interest was not paid as it was a variation of compounding into the one account.

249. The Appellant in evidence and the bank in written documentary evidence admitted as part of the hearing confirmed that the interest was paid. The interest was debited to a separate account in a separate currency and in a separate amount. As such, it is beyond doubt that the interest was paid in the present case.

Issue 4

Whether there were 'loan extensions' in 2007 or actually new loans, with the result that interest relief is not due for the years 2008-2011?

250. It is clear there was not a new loan in 2007, rather the 2005 loan was extended for a further four years as:

(i) the legal documents clearly describe and constitute a loan extension. In the correspondence between Bank and HMRC;

(ii) the Appellant's oral evidence.

(iii) The Respondent's expert, Mr. [redacted] said:

> *"having looked at it to me it looks like a loan extension ….. it looks like a loan extension to me, looks like one, smells like one, walks like one."*

(iv) The confirmation given by Bank to the UK Inland Revenue on foot of enquiries made by the Irish Revenue under the exchange of information provisions in the UK Ireland tax treaty that the loans were outstanding for the full six years.

(v) all aspects of the loan remained intact, including the parties, the principal, the security and that the only change was the interest rate to reflect prevailing market rates.

251. On any normal meaning of a new loan, money would be advanced. However the Appellant confirmed in evidence that there was no repayment of the monies or re-advance of the monies.

252. The spread bets were not part of the loan advance but the same arrangement continued on from 2007 onwards. There were new documents in total amounting to three pages, three pages in for each loan, one in December -- one for P in December 2007 and one for L in 2007 and the arrangements rolled back to 2005 with over 50 pages in respect of each loan agreement. So it was clearly a much easier way to proceed and as the Appellant said in evidence that he wanted to proceed on that basis.

253. The judgment in *Redfern* opened by the Respondent was distinguished from the facts in this appeal as there was no recession in the loan agreement. There was a change in the interest rate but that change was to follow the market rates as they were before.

254. In all the circumstances, it cannot be seriously contended by the Respondent that the loans were not extended in 2007.

Issue 5

In the year ended 31 December 2011, was L a company of the kind referred to in TCA, section 248(1)(a)(i) or (ii)?

255. The Respondent contended that L's income did not consist wholly or mainly of Case V income in 2011 and that therefore interest relief was not due in respect of the L loan in that year.

256. The relevant language in the 2005 Finance Act version of TCA, section 248(1) – which was still the relevant provision for this loan in 2011 as the loan was "grandfathered" from the removal of relief on 7 December 2005 is:

"This section shall apply to a loan to an individual to defray money applied—

(a) in acquiring any part of the ordinary share capital of—

(i) a company which exists wholly or mainly for the purpose of carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D, or…"

257. The measure of income for the purpose of the Case V test set out in TCA, section 248(1)(a)(i) is the tax measure of income. This is clear from the fact that Case V is itself a tax provision. TCA, section 248 is a tax provision in the Taxes Acts.

258. TCA, section 129 states that:

"Except where otherwise provided by the Corporation Tax Acts, corporation tax shall not be chargeable on dividends and other distributions of a company resident in the State, nor shall any such dividends or distributions be taken into account in computing income for corporation tax.

259. It will be noted that TCA, section 129 provides that dividends or distributions shall not be taken into account in computing income for corporation tax and it may be pointed out that TCA, section 248 is an income tax provision. However, it is an income tax provision that applies an income measurement test to a company – in this case L – that is subject to corporation tax and not to income tax. The only sensible measure of L's income in this context is the measure of L's income for the purpose of the tax to which is subject and TCA, section 129 makes it clear that that measurement excludes dividends of distributions from other Irish resident companies.

260. The Appellant further submits that the foregoing analysis is supported by the fact that TCA, section 248 is a companion piece to TCA, section 247 and that latter provision in TCA, section 247(2)(a)(ii) contains an identically worded income measurement test where a company, rather than an individual as in TCA, section 248, is borrowing to invest in a Case V company. In TCA, section 247 there could be no question but that it is the corporation tax measurement of the investee company's income that is relevant. It would be very odd indeed if the two sections, which were clearly drafted side by side to give companies and individuals interest relief for investing in the same kinds of investee companies, were to have two different income measurement tests for the investee company thereby giving a different interest relief answer depending on whether the investor was a company or an individual. The Appellant submitted that it is much more coherent and consistent with the structure of the two provisions that the income measurement test in both cases is based on the tax status of the investee company in which case it is clear that TCA, section 129 removes the dividend from L's measurement of income.

261. Separately, it must be noted that the Case V test contained in TCA, section 248(1)(a)(i) is to be applied at the time the shares are acquired. There is no requirement for the investee company to continue to meet the Case V test. It is not disputed that L was a Case V company in 2005 when the loan was made.

262. The Case V test can be contrasted with:

(a) The "material interest" test in TCA, section 248(2)(a) which explicitly must be met *"when the interest is paid"*.

(b) The "working in the management of the company" test in TCA, section 248(2)(b) which explicitly must be met *"during the period taken as a whole from the application of the proceeds of the loan until the interest is paid".*

(c) The “recovery of capital” test in TCA, section 248(2)(c) which explicitly must be met during the period set out at (b) above i.e. *“during the period taken as a whole from the application of the proceeds of the loan until the interest is paid”.*

263. It would have been a very simple matter for the Oireachtas to qualify the Case V test in a similar way as was done with the three other tests noted above. There are good reasons why this was not done. An investor can be expected to know when he invests in a company what its income position is, but he does not have a crystal ball regarding the future – things might change – commercial circumstances could turn a Case V profit into a Case V loss etc. Consequently, it might be considered unfair that an investor would lose interest relief in such circumstances and that would explain the rationale for the absence of the requirement for the investee company to remain a Case V company. In any event, whatever the rationale for there being no such requirement, there is no such requirement and that which is not there cannot be read in.

264. The Appellant submitted that the position was all the clearer where, as in this case, relief was claimed by virtue of TCA, section 250(2) which states:

“Notwithstanding that an individual does not satisfy one or both of the conditions set out in paragraphs (a) and (b) of section 248(2), the individual shall be entitled to relief under section 248 for any interest paid on any loan to him or her applied for a purpose specified in section 248(1) if—

(a) *the company part of whose ordinary share capital is acquired or, as the case may be, to which the money is loaned is—*

(i)both a company referred to in paragraph (a)(i) of section 248(1) and a company in relation to which the individual was a full-time employee, part-time employee, full-time director or part-time director during the period taken as a whole from the application of the proceeds of the loan until the interest was paid, or

(ii)both a company referred to in paragraph (a)(ii) of section 248(1) and a private company in relation to which, or in relation to any company which would be regarded as connected with it for the purposes of section 248, the individual was during that period a full-time director or a full-time employee,”

265. In TCA, section 250, the Case V test and the director test are included in the same sentence but it is very clear that only the “director” test must continue to be met for the duration of the loan – note the otherwise redundant second use of the words “a company”.

266. Furthermore, it can be seen, by contrast, that the “loan back” test in TCA, section 250(2)(b) is explicitly stated to be for an extended period and, also, the “public company full time work” test in TCA, section 250(2)(c) is explicitly stated to be a year-by-year test.

267. Without prejudice to the above and in the alternative, the Appellant submits that L in 2011, in any event, met the alternative test set out in Section 248(1)(a)(ii):

“(ii) a company whose business consists wholly or mainly of the holding of stocks, shares or securities of a company referred to in subparagraph (i)”

268. By far L’s most valuable asset in 2011 was its shareholding via H in O which was an active Trade B development group. L had also funded the active Trade A business belonging to the Appellant and his partner through R.

269. The fact shareholding in O was held via intermediate holding companies does not cause the test in (ii) set out above to be failed – the requirement is the “holding of” and not the “direct holding of” qualifying investments. To copper-fasten this interpretation, it should be noted that it has been the Respondent’s practice, and certainly was in 2011, to recognise indirect holdings for the purpose of Section 247 and 248:

270. The minutes of the TALC meeting of 4 June 2004 record:

INTEREST RELIEF - S247 AND S248 TCA 1997

In response to queries from a number of members, the Institute wrote to Revenue querying whether interest relief under S247 and S248 TCA 1997 would be available if the company structure in question is made up of three layers, being a holding company which holds shares in an intermediate holding company, which in turn holds shares in a trading company.

A typical case arises where a company, or individual, borrows funds in order to acquire shares in the top holding company. Although this top company does derive its value from its trading subsidiaries, there is another holding company interposed between the two levels.

Revenue have confirmed that they take a broad interpretation in relation to this particular issue. They have confirmed that the company structure outlined above will qualify for the reliefs set out in S247 and S248, subject to all the other requirements of the sections being satisfied."

The Revenue Tax and Duty Manual Part 08-02-01a records:

> *"Section 24 of Finance Act 2017 amended section 247 to allow relief for interest on a loan used to acquire, or in certain circumstances lend to, a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies. This applies for loans made on or after 19 October 2017 and reflects an administrative practice that was previously operated by Revenue."*

271. In all of the circumstances, it is clear that L met the conditions of an investee company for the purposes of section 248(1).

Issue 6

If the Appellant is entitled to relief under TCA, section 248 as extended by TCA, section 250, is the relief disallowed under TCA, section 817A?

Background to section 817A

272. In the UK, section 38 of their Finance Act 1976 was introduced to address a particular scheme where all loan interest and principal was paid/defeased within a matter of days. The background to its original enactment is clear from the Hansard report of the comments in Parliament on its introduction:

> *"Mr. Denzil Davies (Treasury Minister of State) "The Inland Revenue is aware of recent attempts at tax avoidance by what purport to be payments of interest in advance on large artificial borrowings. Tax relief is claimed on this interest.*
>
> *The Inland Revenue is challenging these schemes under the existing law. But assuming that the matter goes to appeal, it could be some years before a final ruling is obtained. It appears that there are a considerable number of these schemes, and in view of their wholly artificial nature, it is unacceptable that substantial amounts of tax should remain at risk. To put the matter beyond doubt, therefore, legislation will*

be introduced at the Report stage of the Finance Bill to counter artificial devices for exploiting the provisions which allow tax relief for interest paid."

273. The scheme, "*the Rossminster scheme*", eventually came to court at the UK Court of Appeal in 1982 in *Cairns v MacDiarmid (Inspector of Taxes)* [1983] STC 178. The scheme involved all the loan interest and principal being prepaid/defeased in a matter of days – none of the money borrowed was on-lent or invested.

274. The background explains the unusual wording of the section which, on a plain reading, can have only relatively narrow application. This narrow application was confirmed by the UK Inland Revenue in their own manuals where they stated:

> "*Although this appears to be a far reaching section which could be used against many avoidance schemes, its usefulness is somewhat restricted. The provision was introduced to counteract a specific domestic avoidance scheme to get relief on `manufactured' interest by paying interest in advance on a borrowing which was effectively immediately repaid. It is necessary to distinguish between an out-and-out avoidance scheme and a judiciously arranged borrowing scheme. The section is not, therefore, easily invoked but it may still be legitimate to use it in some cases involving intra-group funding transactions."*
>
> And
>
> *"Ordinary borrowings involving funds, which are genuinely invested or re-lent, are not affected because the tax relief on the interest paid is incidental to the transaction"*

275. When the UK provision (later section 787 ICTA 1988) was copied into Irish law as TCA, section 817A, it was also intended to deal with pre-payments.

The Statutory language and the case law

276. A close analysis of the wording of TCA, section 817A confirms its narrow application i.e.:

> "*Relief shall not be given… in respect of any payment of interest…if… the sole or main benefit that might be expected to accrue...from the transaction under which the interest is paid was the obtaining a reduction in tax liability by means of any such relief."*

277. One analysis is that the "*transaction under which the interest is paid*" is the payment of interest itself. Clearly, the main benefit that might be expected to arise from the payment of interest itself is the reduction in liability to the lender and this reduction will always exceed the benefit of any tax relief for the interest, unless the tax rate is greater than 100%. Another way of saying the same thing is that the cost of paying the interest is always greater than the tax relief for that interest (again unless the tax rate exceeds 100%) and, therefore, the net benefit (i.e. taking account of its cost) of the interest relief is always negative (again unless the tax rate exceeds 100%). So one analysis of the section is that it is never applicable unless the tax rate exceeds 100%.

278. If the legislature had enacted, in this case copied, a provision that has rare application based on the clear meaning of the words used, it is not the role of the courts to insert words or alter their meaning in order to artificially expand the scope of the provision. It is for the legislature to clearly impose a tax charge and, if not imposed that is the end of the matter, but if there were ambiguity, that should be interpreted in favour of the taxpayer [*O'Flynn Construction* at para 61].

279. On the other hand, if one is minded to give the provision wider application, as the UK courts have done, then the Appellant submitted that the only rational interpretation of the provision is that set out in *Curran* [2012] UKFTT 517 (TC). In that case, important general principles of interpretation of TCA, section 817A were set-out, and the Appellant submitted that there can be no distinction in the present appeal which calls for disapplication of those general principles.

280. *Curran* concerned circumstances where there were loans made for investment in property development companies and there were interest prepayments. It was decided *inter alia,* that the interest payments were genuine and did not fall foul of the UK equivalent of TCA, section 817A. Judge Berner set-out clear principles of general application on the interpretation and application of the test in weighing up tax benefits and other benefits in the following paragraphs:

> *"217.*
>
> *The first question we consider in this connection is what, in the context of the facts of this case, is the transaction under which the interest was paid. To assist us to answer this question we were taken to MacNiven v Westmoreland Investments Ltd [1998] STC 1132 in the Court of Appeal. In that case a company, WIL, had a large accrued interest liability to pension fund trustees which was of no benefit to it unless it actually paid the interest. The only way to achieve such payment was by means of a*

loan from the trustees themselves. Such a loan was duly made, and the accrued interest liability was paid. The Court of Appeal held that on its natural construction s 787 did not require an examination of the circumstances surrounding each interest payment. The Special Commissioners had been correct to conclude that the transaction under which WIL paid the interest was the transaction giving rise to WIL's original borrowing from the trustees under which the accrued interest became payable, and that the main benefit of that transaction had been to reduce WIL's shorter term liabilities.

218.

This approach was approved by Lord Hoffman in the House of Lords [2001] STC 237 (at p 260) where he said:

> *"In my opinion it is plain that the 'transaction under which the interest was paid' is the original loan and not the arrangements which enabled WIL to pay it."*

…

222.

What this means is that we have to consider the benefit of the interest relief obtained by Mr Curran from the Payments as against the benefits of the original Loans, including the investments made by Mr Curran using the proceeds of those Loans. In doing so we shall take into account the benefit to Mr Curran of receiving interest relief sooner than he would otherwise have done under the original Loans, and the non-tax benefits to him of making the Payments as opposed to paying interest over the terms of the Loans. We regard this as the proper approach, not only because in our view this represents the transaction under which the interest was paid, but also because we are required by s 787 to consider arrangements which may impact upon the benefits of the transaction.

223.

In order to ascertain the benefits flowing from the relevant transaction, it is necessary to consider the position of the taxpayer before and after the transaction. If *the position, properly analysed, is that the taxpayer has not received any enhancement of his existing position, or any material such enhancement, apart from the obtaining of interest relief, s 787 will prevent the relief from being obtained. That was the position in Lancaster v IRC [2000] STC (SCD) 138, where arrangements entered into for inheritance planning purposes involved a circular flow of funds. The taxpayer withdrew an amount of capital from a partnership account, and made a gift of that amount to his wife. His wife then made him a loan, and the money was credited to the taxpayer's partnership account. Relief for interest paid on the loan was refused, and the Special Commissioner dismissed the taxpayer's appeal. There was no financial benefit to the taxpayer in the entire arrangement apart from the interest relief. The taxpayer's position at the outset, owning partnership capital, was essentially the same as his position after the loan transaction.*

224.

The circumstances that arose in Lancaster are not replicated in this case. In relation to each of the Loans, Mr Curran obtained the benefit of his investment in the Loan Notes. In the case of the 2002 Loan, he was also enabled, by satisfying the contingency that he take up the 2002 Loan Notes, to obtain an equity interest in SOP. Comparing the position before and after the loan transactions, therefore, Mr Curran obtained certain benefits, as well as the interest relief on the making of the Payments, in contrast to a position of the taxpayer in Lancaster whose benefits were essentially the same after the transaction as they were before. It is therefore necessary to compare the benefit of the interest relief with the other benefits accruing to Mr Curran.

225.

Whilst it is not necessary for every benefit to be capable of valuation in money terms in order that it be taken into account, where benefits are susceptible to such valuation the resultant values fall to be taken into account and compared. The question arises in this connection as to what is the appropriate comparison to make. On the one hand there is the benefit of interest relief; on the other benefits that the taxpayer derives from the relevant transaction. Any comparison made must be done on a consistent basis. Like must be compared with like.

226.

Section 787 refers to the benefit of interest relief. In order for that to be a benefit, it is axiomatic that its value must be taken without regard to the cost of obtaining it. Except where arrangements may be made to eliminate such cost, the cost of making the interest payment will generally (if not always) exceed the benefit of tax relief on those payments. If such costs were to be taken into account no benefit in net terms could be said to have arisen. As that would defeat the evident purpose of s 787, the reference to benefit must be taken to mean the gross benefit of the tax relief that would arise.

227.

For comparison purposes, therefore, regard must be had to the gross benefits flowing from the relevant transaction. The amount of the borrowing is not for this purpose netted off against the benefit. So, for example, the fact that an investment funded by a loan yields the same, or a lower return, than the cost of the corresponding borrowing does not mean that there is no benefit to be taken into account in respect of the investment. The benefit is the gross value of the investment.

…….
237.

In our view HMRC's table falls into the error of seeking to compare a gross benefit in the form of the tax relief on interest, with the net "gain" or benefit obtained by Mr Curran from making the Payments. The benefit of the interest relief must necessarily be calculated without regard to the cost, namely the amount of the Payment in each case. It is wrong to apply a different method of calculation when determining the other benefits accruing to Mr Curran…"

281. It is clear that the key principle in *Curran* is that one must compare the gross benefit of the tax relief for interest with all other gross benefits of the loan. The Appellant submits it is manifest that Judge Berner was correct in holding that like should be compared with like. That principle was followed in the later *Brain Disorders Research Ltd Partnership and another v Revenue and Customs Commissioners* [2015] UKFTT 325 (TC) and is consistent with the compelling logic of the UK Inland Revenue's comment that *"Ordinary borrowings involving funds, which are genuinely invested or re-lent, are not affected"* by TCA, section 817A. That is so because, in circumstances where the money is on-lent or invested, the gross value of the assets acquired and the potential investment returns on

those assets will usually exceed the gross value of any tax relief for interest. That is also entirely consistent with the limited application of the section, as set-out in the various extracts above.

TAX APPEALS COMMISSION

The comparison of benefits

282. The Appellant submitted and gave evidence on detailed tables applying the *Curran* analysis to both the L and the P loan as detailed below:

SUMMARY OF L LOAN UNDER APPEAL (TWO YEARS)

	Benefits of Loan from Bank to Appellant	Gross Benefit	Gross (Cost)	Net Benefit / (Cost)
A1	*Tax Deduction for Interest paid to Bank*	€22,917X	(€55,260X)	(€32,343X)
A	**Total Benefit(s) of Interest Deduction(s)**	**€22,917X**	**(€55,260X)**	**(€32,343X)**
B1	*Shares in L*	€191,860X	(€191,860X)	0
B	**Expected Benefit(s) based on assets acquired**	**€191,860X**	**(€191,860X)**	**0**
C1	*Projected increase in B property*	€27,392X	0	€27,392X
C2	*Projected increase in Trade A property*	€17,805X	0	€17,805X
C3	*Net rental income on B property*	€3,348X	0	€3,348X
C4	*Salary for the Appellant´s Spouse*	€7,455X	0	€7,455X
C5	*Trade A trading profits*	€17,100X	0	€17,100X
C6	*Projected increase of investment of cash released*	€94,386X	0	€94,386X
C7	*FX Gain on Repayment of Loan*	€40,982X	0	€40,982X
C8	*Projected increase in value of 'fighting fund'*	€23,463X	0	€23,463X
C	**Expected Benefit(s) based on profits of investment other than Interest Deduction(s)**	**€231,931X**	**0**	**€231,931X**
	A > B (i.e. does benefit(s) of interest deduction(s) exceed value of assets acquired)?	No	n/a	No
	A > C (i.e. does benefit(s) of the interest deduction(s) exceed expected profits of investments	No	n/a	No

(a) The transaction under which the interest was paid based on envisaged 2 year loan.

(b) Cost of the two years interest payments based on interest rate in the facility agreement converted to Euro using the forward rate using the relevant Euro and TL interest rates (i.e. TL 52,766X./1.80389 + TL 52,911X / 2.03437).
(c) Irish marginal income tax in 2006 and 2007 were 42% and 41% respectively (i.e. the income tax saving by entering into the scheme). The associated interest relief would be (41% x €29,251X) + (42% x €26,008X) = €11,993X + €10,924X = €22,917X.
(d) Assuming continued compound increase of 18% per annum (i.e. compound increase from €24,901X purchase price in 2000 and 2005 valuation).
(e) Assuming increase in value similar to B property.
(f) Gross rental income of €4,446X (i.e. €2,223X per annum) less rental expenses for 2006 and 2007 of €1,098X per L profit and loss account for the year ended 31 December 2007 (and 2006 comparatives).
(g) Salary per H accounts for the year ended 31 December 2007 (and 2006 comparatives). She was employed by H and the salary costs recharged to R Investments.
(h) First year trading profits supported management fees to H of €14kX, which employed the Appellant´s Spouse. Net of the employment cost, this results in a circa€9kX of profits per annum based on the first year of trading.
(i) Per cash flow diagrams for 5 and 6 December 2005, the 2005 financing released funds of €32,019X (€20,232X related to the L refinancing) to the Appellant, €16,746X to H and €3,531X to L. Circa €42,750X was invested in O. The actual return was in circa 13x investment (€547kX received on exit on €43kX invested) over 10 years. Using a 3.33x return for 2 years and 10x for 6 years results in expected returns of €94,386X and €364,580X respectively.
(j) FX gain of €40,982X. (i.e. Euro equivalent of TL principle on drawdown of €191,860X – Euro cost of repaying principle at two year forward rate of 2.03437 = €150,878X (i.e. TL 306,943X / 2,0347). This gain was not subject to Irish capital gains tax and offers an additional financial and tax benefit separate to the S817A test of the tax benefit of a tax deduction for prepaid interest.
(k) Where 90% of the 'fighting fund' had managed to be invested in commercial property yielding similar return to B property as intended, projected increase would have been (90% x €92,681X x 1.182) – €92,681X = €23,463X.

SUMMARY OF P LOAN UNDER APPEAL (TWO YEARS)

Benefits of Loan from Bank to Appellant	Gross Benefit	Gross (Cost)	Net Benefit / (Cost)
Tax Deduction for Interest paid to Bank	€17,241X	(€41,514X)	(€24,273X)
Total Benefit(s) of Interest Deduction(s)	**€17,241X**	**(€41,514X)**	**(€24,273X)**
Shares in P	€144,137X	(€144,137X)	0
Expected Benefit(s) based on assets acquired	**€144,137X**	**(€144,137X)**	**0**
Share (i.e. 23%) of projected increase in A property	€10,538X	0	€10,538X
Share (i.e. 23%) of Increase in C Property	€7,887X	0	€7,887X
Share (i.e. 23%) of net rental income on A property	€2,944X	0	€2,944X
Share (i.e. 23% of gross rental income on C property	€2,549X	0	€2,549X
Projected increase of investment of cash released	€27,464X	0	€27,464X
FX Gain on Repayment of Loan	€30,775X	0	€30,775X
Projected increase in value of 'fighting fund'	€11,309X	0	€11,309X
Expected Benefit(s) based on profits of investment other than Interest Deduction(s)	€93,466X	**0**	**€93,466X**
A > B (i.e. does benefit(s) of interest deduction(s) exceed value of assets acquired)?	No	n/a	No
A > C (i.e. does benefit(s) of the interest deduction(s) exceed expected profits of investments	No	n/a	No

(a) The transaction under which the interest was paid based on envisaged 2 year loan.

(b) Cost of the two years interest payments based on interest rate in the facility agreement converted to Euro using the forward rate using the relevant Euro and TL interest rates (i.e. TL 36,641X / 1.80389 + TL 39,750X / 2.03437).

(c) Irish marginal income tax in 2006 and 2007 were 42% and 41% respectively (i.e. the income tax saving by entering into the scheme).

(d) Assuming continued compound increase of 14% per annum (i.e. compound increase from €94,362X purchase price in 2001 and 2005 valuation).
(e) Assuming increase in value similar to the actual change from 2005 to 2007 in property value.
(f) Gross rental income of €16,480X (per P profit and loss accounts for 2006 and 2007) less costs for 2006 and 2007 of €3,681X per P profit and loss account for 2006 and 2007.
(g) Per the valuation, there was a corporate tenant for 3 years from August 2005 at €5,540X a year and assuming no incremental costs for P on its administration fees of receiving rental income and accounting for it.
(h) Per cash flow diagrams for 5 and 6 December 2005, the 2005 financing released funds of €32,019X to the Appellant. €11,787X related to the P refinancing. Circa €42,750X was invested in O. The actual return was in circa 13x investment (€547kX received on exit on €42,750X invested) over 10 years. Using a 3.33x return for 2 years and 10x for 6 years results in expected returns of €27,464X and €106,085X respectively.
(i) FX gain of €30,775X. (i.e. Euro equivalent of TL principle on drawdown of €144,137X – Euro cost of repaying principle at six year forward rate of 2.03437 = €113,362X (i.e. TL 230,620X / 2.03437). This gain was not subject to Irish capital gains tax and offers an additional financial and tax benefit separate to the S817A test of the tax benefit of a tax deduction for prepaid interest.
(j) Where 90% of the 'fighting fund' had managed to be invested in commercial property yielding similar return to A property as intended, 23% share of projected increase would have been (23% x 90% x €289,843X x 1.142) – (23% x €289,843X) = €11,309X.

283. It was submitted that, no matter how one analyses it, the gross benefit to the Appellant of tax relief for interest is exceeded by the gross other expected benefits of the loan. The value of other benefits has been analysed by:

(a) Calculating the expected value of the other benefits as the amount invested being a reasonable estimate of their market value.
(b) Calculating the expected value of the other benefits based on the projected returns.
(c) Doing the calculations on a 2 year time horizon because when the loans were first drawn down in 2005 the loan term agreed was 2 years.
(d) Doing the calculations on a longer time horizon, following the loan extension in 2007.

(e) Comparing gross benefits to gross benefits and comparing net benefits to net benefits.

284. No matter what way one analyses the position in the present appeal, the benefit of hoped-for tax relief on interest paid is far exceeded by the other expected benefits. It should be noted that for TCA, section 817A purposes any expected tax-free foreign exchange gain on repayment of the loan and any tax benefits, other than the tax benefit of interest relief, are ”good” benefits.

285. In *Rossminster,* the taxpayer received a loan, prepaid all the interest on the same day and defeased the full principal within a week. The court found that the arrangements lacked reality and the taxpayer’s financial position was precisely the same before and afterwards (involving in total only a few days). It goes without saying that such a case is vastly different from the present appeal.

286. The *Brain Disorders* case involved enormous amounts of prepayment / defeasance and the transactions were held to be artificial/ a sham. Again, it goes without saying that such a case is vastly different from the present appeal where there are no prepayments / defeasance and no element of sham, rather there being substantial genuine commercial activity over a number of years, supported by the funds raised.

287. Further, the present appeal is very different from the earlier TAC decision in Appeal 47TACD2019 for a number of reasons including:

(i) In the present appeal, there is a great deal more genuine commercial activity supported by the amounts borrowed in this case as compared to the earlier appeal, including a Trade A business, very substantial Trade B developments and consideration of other commercial proposals.

(ii) In the present appeal, there are tables and supporting oral evidence demonstrating that the benefit of tax relief for interest is far exceeded by the other expected benefits, while such was not the case in the earlier appeal.

(iii) In the present appeal, the evidence of the relative benefits and the fact patterns which was made available at the hearing is the antithesis of the earlier appeal where there seemed to be a prospectus indicating that the tax benefit of interest relief was of paramount concern.

(iv) In the present appeal, there is detailed and compelling analysis set-out above of TCA, section 817A which follows the history and the English case law. It was noted that in the previous appeal of a different appellant, the review of the authorities was not ventilated by the parties.

Reasonable expectations - realised

288. As stated above, the expected other benefits to the Appellant from the loans clearly exceeded the value of expected interest relief and it is relevant to note that in reality overall these expectations were realised and indeed exceeded which demonstrated that they were realistic expectations. L ultimately generated returns of circa €600kX from Trade B investments the funding of which was facilitated by the cash released from the 2005 loans.

289. The Appellant submitted that on the facts of this appeal, TCA, section 817A does not apply.

Respondent's Submissions

Issue 1

Is TCA, section 248(3) applicable to TCA, section 250?

290. The Appellant contended that, if he meets the conditions of TCA, section 250, he is not also required to meet those of TCA, section 248, including TCA, section 248(3). The Respondent disagrees.

291. In the Determination 47TAC2019, the Appeal Commissioner held that TCA, section 250 was a stand-alone provision, and that an appellant who met the conditions of TCA, section 250(2) was not required to satisfy TCA, section 248(3).

292. Since that determination, the Supreme Court has given judgment in *Bookfinders v Revenue Commissioners* [2020] IESC 60. O'Donnell J's judgment is a clear and authoritative statement of the principles applicable to the interpretation of tax statutes. The Respondent submits that a correct application of those principles indicates that TCA, section 250 is not a stand-alone provision.

293. O'Donnell J emphasises (para 39, page 15)

> *"…that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation."*

294. The purpose of a provision is relevant to its construction (paragraphs 47-52), as is its context:

> *"It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible." [paragraph 52.]*

295. At paragraph 53 (page 23), O'Donnell J cites with agreement the decision of McKechnie J in *Dunnes Stores v the Revenue Commissioners* [2019] IESC 50. At paragraph 63 of that judgment, McKechnie J stated that:

"…the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament?...context is critical: both critical and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that."

296. This is echoed by O'Donnell J. in paragraph 54 of *Bookfinders*:

"…it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision."

297. In the present case, if the Appellant was right, it would mean that the legislature intended to prohibit relief under TCA, section 248 where a loan to a full-time employee or director with a material interest in the company was not applied for *bona fide* commercial purposes, or where it was applied as part of a scheme or arrangement which had as its main purpose, or one of its main purposes, the avoidance of tax, but to allow relief where the investor was a part-time director or employee or did not have a material interest in the company, regardless of the purposes for which the loan was applied. It makes no sense whatsoever that the legislature should intend such a result. Such a reading is, in O'Donnell J's words, unlikely and implausible.

298. It is clear from *Dunnes Stores* and *Bookfinders*, as well as from many of the earlier decisions cited there, that a statutory provision should be construed in its statutory context. The context of TCA, section 250(2) includes the other provisions of TCA, section 250, and also the provisions of Chapter 3 of Part 8 generally, including in particular TCA, section 248.

299. TCA, section 250 is clearly intended to be read together with TCA, section 248. TCA, section 250 does not provide an independent test for interest relief, but an alternative set of conditions to that set out in TCA, section 248(2)(a) and (b). This is supported by the following:

(a) First, the title to TCA, section 250 ("Extension of relief under TCA, section 248 to certain individuals in relation to loans applied in acquiring interest in certain companies") puts beyond doubt that TCA, section 250 was intended to extend TCA, section 248. Satisfaction of TCA, section 248 is therefore necessary unless otherwise stated (as it is with respect to TCA, section 248(2)(a) and (b)).

(b) Secondly, TCA, section 250(2) itself refers to an entitlement to 'relief under TCA, section 248'. Although relief may be given by virtue of TCA, section 250, it is given 'under' TCA, section 248. This indicates that all the provisions of TCA, section 248 are engaged, other than those which are specifically disapplied.

(c) Thirdly, TCA, section 252(1) identifies TCA, section 248 as the "principal section" and TCA, section 250 as an extension. That is inconsistent with TCA, section 250 being a free-standing provision.

(d) Fourthly, it would be odd for the legislation to exclude the operation of TCA, section 248(2)(a) and (b) were it the case that TCA, section 248, more generally, was irrelevant. A more natural reference to TCA, section 248, or alternatively no reference to TCA, section 248, would have been adopted were TCA, section 250 to have the effect suggested by the Appellant.

(e) Further, on the Appellant's case, presumably TCA, section 248(2)(c), as well as TCA, section 248(3), would be disapplied simply because the taxpayer did not work for the company, such that the taxpayer would be free to extract capital while still claiming relief, in breach of TCA, section 248(2)(c) on the basis that entitlement to relief was made unconditional by the wording of TCA, section 250(2). That is absurd.

300. For these reasons, the interpretation for which the Appellant argues cannot be right. The correct analysis is that TCA, section 248(3), like TCA, section 248(4) and succeeding provisions, operates as a qualification of TCA, section 248(1). Entitlement to relief is conditional and only ever subject to meeting the requirements of TCA, section 248, apart from those expressly disapplied by TCA, section 250, namely TCA, section 248(2)(a) and (b).

301. It is therefore incumbent on the Appellant to show that TCA, section 248(3) is met.

302. The Appellant's submission is groundless. It is clear from the legislative history that the absence of such a provision in TCA, section 247 has no implications for the interpretation of TCA, sections 248 and 250.

303. The provisions of TCA, sections 247, 248 and 250 which are in issue were originally enacted in three stages, in the Finance Acts of 1974, 1978 and 1992.

Finance Act 1974: forerunners of TCA, sections 247 and 248 TCA

304. The forerunners of TCA, sections 247 and 248 TCA are sections 33 and 34, Finance Act ('FA') 1974. Thus the two provisions were introduced simultaneously. Interest relief under section 33 applied to companies which borrowed to invest in other companies, and relief under section 34 to individual investors.

305. Certain definitions are common to both sections (see section 33(1), FA 1974, now TCA, section 247(1) TCA) but otherwise each section stands alone. Section 33(3) provided that *'relief shall be given in respect of any payment of the interest by the investing company on the loan'* provided the requirements of that section are met. Section 34(2) likewise provides that '*relief shall be given in respect of any payment of the interest by the individual on the loan*' provided the conditions in that section are met. The conditions for relief under sections 33(2) and 34(2) are of course different, as the conditions in section 33 are appropriate to an investor which is a company, and those under section 34 to an individual investor.

306. Section 35 FA 1974 enacted provisions in relation to recovery of capital, applicable to both corporate and individual borrowers. Section 35 FA 1974 is now consolidated as TCA, section 249. Section 35 did not affect the essential stand-alone nature of each of sections 33 and 34 FA 1974.

307. Although the legislative provisions now consolidated in TCA, sections 247 and 248 were enacted together, each of those provisions subsequently developed separately. For example, section 9 Finance Act 2006 provided that an individual investor could no longer obtain interest relief on a loan taken out to invest in a Case V company, but relief on such an investment continued to be available under TCA, section 247 to a corporate investor.

308. Section 34 FA 1974 as originally enacted did not contain the anti-avoidance provision now consolidated as TCA, section 248(3).

Finance Act 1978: forerunner of TCA, section 250

309. The provisions now contained in TCA, section 250 were originally enacted by section 8 FA 1978. Section 8(1) Finance Act 1978, now TCA, section 250(2), TCA makes it clear that the relief it provides for is 'relief under section 34 of the Finance Act, 1974'.

310. Note that section 8 Finance Act 1978 did not alter the text of section 34 Finance Act 1974.

Finance Act 1992: forerunner of TCA, section 248(3) TCA

311. The provision now contained in TCA, section 248(3) was first enacted by section 14, Finance Act 1992. Section 14(1) defines "the principal section" to mean:

> *"section 34 of the Finance Act, 1974, as amended by section 8 of the Finance Act, 1978*.

312. Clearly the Oireachtas considered section 8 Finance Act 1978 (the forerunner of TCA, section 250 TCA) to have "amended" section 34 Finance Act 1974 (the forerunner of TCA, section 248 TCA), notwithstanding that the 1978 provision did not alter the text of the 1974 provision.

313. Section 14(4) Finance Act 1992 amended section 34 Finance Act 1974 to include a new subsection (3) in the terms now found in TCA, section 248(3) TCA:

> *"The principal section is hereby amended by the addition after subsection (2) of the following subsection:*
>
> > *"(3) Relief shall not be given in respect of any payment of interest by an individual on a loan applied on or after the 24th day of April, 1992, for any of the purposes specified in subsection (1) unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax."."*

314. As this is expressed to be an amendment to "the principal section" i.e. section 34 Finance Act 1974 "as amended by" section 8 Finance Act 1978, it is manifestly intended to apply to those claiming relief under section 34 Finance Act 1974 "by virtue of" section 8 FA 1978, as well as those claiming under section 34 Finance Act 1974 simpliciter. In short, it applies to investors who are part-time employees/directors as well as to those who are full-time.

315. It is clear from the definitions of "specified provisions" in TCA, section 250A(1) TCA and "the principal section" in TCA, section 252(1) TCA that TCA, section 248 is now the "principal section" and that TCA, section 250 extends it.

316. While Finance Act 1992 did not amend section 33 Finance Act 1974, it did not alter the conditions for interest relief for companies. The Oireachtas clearly chose to introduce an anti-avoidance provision for individual investors but not for corporate investors.

Anti-avoidance provisions in TCA, section 247

317. It should not be assumed that, because TCA, section 247 does not contain a specific provision in the same terms as TCA, section 248(3), relief under that section is not subject to anti-avoidance rules. TCA, section 247 contains its own detailed anti-avoidance/restrictive provisions, including subsections (2A) and (4A)-(4G). These provisions were introduced by the Finance Acts of 2006 (subsection (4A)), 2009 (subsections (4B)-(4D)) and 2011 (subsections (2A), (4E)-(4G)).

Consolidation

318. The provisions of the Finance Acts 1974, 1978 and 1992 referred to above were consolidated in TCA, sections 247, 248 and 250. At common law, it is to be presumed that consolidation statutes are not intended to change the law that existed before the consolidation. It follows that TCA, section 248(3) applies to part-time directors or employees, such as the Appellant, who claim interest relief by virtue of TCA, section 250, just as section 34(3) Finance Act 1974 (as amended) applied to individuals who were part-time directors or employees and who claimed relief under that section by virtue of section 8 Finance Act 1978.

Issue 2

If the Appellant satisfies the conditions for interest relief pursuant to TCA, section 250(2), is he also subject to the conditions in TCA, section 248(3)?

319. Relief shall not be given in respect of any payment of interest by an individual on a loan applied on or after the 24th day of April, 1992, for any of the purposes specified in subsection (1) unless the loan is applied for *bona fide* commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes is the avoidance of tax.

320. TCA, section 248(3) imposes a two-part test:

(a) Is the loan applied for bona fide commercial purposes?, and
(b) Is the loan applied otherwise than as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax?

Relief applies only if a taxpayer can show that both parts of the test are satisfied.

321. The Respondent accepted that the loans to the Appellant were applied for *bona fide* commercial purposes, at least to the extent that P and L used the funds to refinance their existing property holdings or to acquire new properties. The Respondent does not accept that placing almost 50% of the funds on long-term deposit was an application for bona fide commercial purposes.

322. The Respondent also disputes that the Appellant meets the second part of the test in TCA, section 248(3). It believes that the loans were applied as part of a scheme or arrangement one of the main purposes of which was the avoidance of tax.

'Scheme or arrangement'

323. There can be no doubt that the application of the loan proceeds by the Appellant was part of a 'scheme or arrangement' within the meaning of TCA, section 248(3). There is a considerable body of law on the meaning of 'scheme' and 'arrangement' in a tax context. The UK Courts have interpreted the terms liberally. In *Bird v The Commissioners for Her Majesty's Revenue and Customs* [2009] STC (SCD) 81, Special Commissioner Sir Stephen Oliver held that:

> *'Arrangement' has the ordinary meaning of 'a structure or combination of things for a purpose (see the Shorter Oxford English Dictionary) or 'a number of things arranged or combined in a particular way' (see The New Shorter Oxford English Dictionary).*

324. In *Snell v R&C Commissioners* [2007] STC 1279 at 1300 (paragraph 28), Morritt J held:

> *"The ordinary meaning of the word 'scheme' is a 'plan of action devised in order to attain some end'. Similarly an arrangement is a 'structure or combination of things for a purpose, see for both meanings the Shorter Oxford English Dictionary."*

325. TCA, section 248(3) clearly envisages that a '*scheme or arrangement'* may have more than one 'main purpose': this is obvious from the wording of the provision itself.

326. The Appellant, in the written submissions relied on *Brebner* [1967] 43 TC 705, contended that the 'purposes' of the transaction are to be determined subjectively, by reference to what was in the Appellant's mind. But in more recent cases, the Courts have moved away from an entirely subjective approach. See *Seven Individuals v HMRC* [2017] STC 874 at 910-11 (paragraph 104), where Nugee J said:

"I have not found this entirely easy but I am inclined, despite what was said in these cases, and despite the high authority of Brebner, to accept Mr Davey's submission and hold that in considering what the object of a set of arrangements are, one can look more widely than what was in the taxpayer's own mind…It does seem to me that when the statutory question is whether the main purpose, or one of the main purposes of the arrangements, is the obtaining of reduction in tax liability by means of sideways relief, it would be surprising if that question were intended to be answered by looking at the intentions, motives or purposes of the individual taxpayer alone without regard to the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work, and the way in which they were promoted to potential participants."

327. It is precisely the 'wider context' referred to here that the Respondent invites the Appeal Commissioner to have regard to what the main purposes or objects of the arrangements in this case are. The Respondent submitted that, in seeking to identify those purposes, the Appeal Commissioner is not confined to the considering the Appellant's oral evidence, but should also consider the arrangement itself, the documentary evidence and Mr. [redacted]s expert evidence.

328. The Respondent accepts that the courts have distinguished between tax avoidance and tax mitigation, but contends that the present case involves avoidance rather than mere mitigation.

329. The scheme or arrangement in this case has a number of features which point to its having as one of its main objects the avoidance of tax. These include the following:

(a) The use of Turkish lira;
(b) The borrowing of almost double the amount required to fund P/L's activities;
(c) The hedging arrangements.

Use of Turkish lira

330. Neither P nor L, nor any of their subsidiaries, had any dealings in Turkish lira other than exchanging the TRY which the Appellants subscribed for shares for euro, which both companies did immediately on receipt of the TRY funds in December 2005. The companies' share capital was denominated in euro, their accounts were prepared in euro, and the euro was their operating currency. The Appellant had no investments in

Turkey and no commercial need for TRY. He acknowledged that borrowing in TRY rather than euro added to the complexity of the arrangements and the time and effort required taken to put them in place. Had the Appellant chosen to borrow in euro, he could have dealt with one bank probably Bank 2, which he stated was keen to lend rather than Bank 2 being the second, and would have had no need to enter into hedging arrangements.

331. The Appellant acknowledged that the obvious reason to effect the transaction in a more complex and time-consuming way was to obtain a tax deduction for the TRY interest amount, that he hoped to do better on a post-tax basis by borrowing in TRY rather than euro, and that he thought it probable he would do. In fact, over the term of the loans, the Appellant's aggregate interest cost was circa €170kX more than if he had borrowed in euro, so that his potential after-tax saving, should his claim for relief succeed, was circa €70kX.

332. The Appellant did not identify any non-tax reason for borrowing in TRY rather than euro.

333. The Appellant cites a number of cases, including two Canadian cases, *Shell Canada Ltd v Canad*a [1999] 2 ITLR 241 and *Canadian Pacific Ltd -v- R* [2000] 3 ILTR 238, which deal with borrowing in high-rate foreign currencies. Each of these cases involved a company borrowing in a high-interest foreign currency, immediately converting the borrowed monies to its own operating currency ($Can in one case and $US in the other) and entering into a hedging transaction to manage its exposure to movements in the currency market. To that extent there is a parallel with the present case. But the similarity ends there. There are major factual and legal differences between the Canadian cases and this appeal. Firstly, it was clear in each of the Canadian cases that the borrowing was required for the company's business, so that the existence of *a bona fide* commercial purpose was not in question. Secondly, the Canadian legislation in issue was not in the same terms as either TCA sections 248(3) and 817A(1).

Funds kept on deposit

334. Of the amounts borrowed by the Appellant to invest in P and L, almost 50% was invested by P and L in capital of their wholly-owned subsidiaries, PAH in the case of P and LAH in the case of L. In each case, the subsidiary placed the funds (which were denominated in euro) on a fixed-rate deposit with Sister Bank and the funds remained on deposit throughout the period of the borrowing. The Appellant described these funds as a 'fighting fund' and 'a war chest' intended to be used for future property acquisitions by P /L. He stated in evidence that there was an advantage for the companies in having the

funds already in place rather than identifying an investment opportunity first and borrowing afterwards.

335. The Respondent does not dispute that the general concept of a war chest or fighting fund exists, but it does dispute that the funds on deposit were in fact such a fund.

336. The Appellant gave evidence that, following the banking crisis which began in September 2008, Bank was no longer willing to allow the funds in the PAH and LAH deposits to be released for property acquisitions and that accessing those funds was 'next to impossible'. By September 2008, the Appellant's borrowings had been in place for 2 years and 9 months. In other words, the Appellant was almost half-way into the six-year period 2006-2011 for which he has claimed interest relief. On the Appellant's own evidence, the property market was buoyant in the earlier years of this period and Bank was willing to release the funds, subject to Bank 2 giving a guarantee which, according to the Appellant, it was willing to do, subject to a property valuation.

337. However, none of the funds were ever used for such a purpose, notwithstanding that the Appellant has not suggested that there were any difficulties in accessing the funds on deposit prior to the banking crisis in September 2008. Indeed, the Appellant gave no evidence that either PAH or LAH ever sought the release of any of the sums on deposit.

338. Although the Appellant stated that he made numerous property investments over the period of the loans, he did not use the funds on deposit in P or L for those investments with the limited exceptions discussed below. The only new property investment by P over the period of the loans was its 2006 investment in Z property syndicates.

339. The Appellant claimed that, in the period 2006-2008, P/L considered a number of potential investments which did not proceed:

P:

(i) Property C;

L:

(i) Trade A potential investment 2;
(ii) Trade A potential investment 3;
(iii) Trade A potential investment 4.

340. In relation to Propety C, the Appellant pointed to the minute of a P board meeting, apparently held on 5 December 2005, which authorised the payment of a deposit to the shareholder/director who owned Property C. The terms of the minute indicate a lack of

TAX APPEALS COMMISSION

certainty that the purchase would succeed. The Appellant was unable to produce any evidence that the deposit was paid, and the alleged payment was not reflected in the company accounts which the Appellant himself prepared.

341. In support of the claim re potential investments by L, the following documentation was produced:

- Copy of details Trade A potential investment 2 by the estate agent, printed 31 January 2006 ;
- Copy of details of Trade A potential investment 3 issued by estate agent, undated;
- Copy of expression of interest in Trade A potential investment 4 dated 7 April 2008 in the name of R

342. The Respondent submitted that this constitutes very thin evidence of an intention to invest in property. The Respondent accepts that L funded RAH´s investment of €44,463X in Trade A in 2006, but this transaction was already in train before the loan to the Appellant was drawn down in December 2005.

343. The Respondent accepted that the investment in Trade B was owned partly by L (via H) and partly by the Appellant personally.

344. Although the Appellant stated in evidence that he was interested in a number of Trade B investments, he put forward no evidence that he intended to make these investments via L. The Appellant stated expressly that he did not intend to involve the other shareholders in P in Trade B projects.

345. There was no evidence that either Bank 2 or Bank would have been prepared to allow the L funds to be used for Trade B investments, which was one of the main types of investment that the Appellant said he was interested in.

Hedging arrangements

346. Mr [redacted]'s expert report explained that the combined effect of the borrowing and the hedging arrangements was that, in economic terms, and on a pre-tax basis, the loans were equivalent to euro loans at a much lower rate, a matter accepted by the Appellant.

347. The hedging arrangements have a number of features which the Respondent submits are indicative of a scheme whose purpose is not a normal commercial one.

348. The simplest form of hedge would have been a hedging contract between the Appellant and Bank e.g. a forward currency contract. Instead, the Appellant put in place two series of contracts:

- A series of financial spread bets between his wife and S and
- A series of forward contracts between S and Bank.

349. Bank paid S a fee for its participation in the hedging arrangements.

350. The obligations of either party to the financial spread bets were limited to unstipulated amounts held by them in specified accounts with Bank. For much of the period, the Appellant's spouse specified account contained no money which could have satisfied the liabilities.

351. The Appellant was aware that the financial spread bets were not enforceable in Irish law.

352. The Appellant gave evidence that, in calculating the euro equivalent of the interest due on the loans, Bank used an exchange rate based on the hedging arrangements rather than the spot rate.

353. The Respondent submitted that the cumulative effect of these factors pointed to the existence of a scheme or arrangement which had as one of its main purposes the avoidance of tax.

Issue 3

Was the interest on the loans 'paid' within the meaning of TCA, section 248?

354. TCA, section 248(2) grants relief on 'a payment of interest'. The Respondent does not accept that the interest was in fact paid in each of the years.

355. In relation to the loans used to purchase shares in P and L, for the tax years 2006 to 2011 inclusive, the Appellant claimed interest relief on his Turkish Lira loan under TCA, section 248 for the euro equivalents of these amounts. The aggregate euro value of the claims is estimated to be circa €126,539X in respect of the P loan and €167,579X in respect of the L loan, based on the Central Bank spot rates at the time interest was due to accrue.

356. The Appellant provided interest certificates from Bank which show the following amounts of interest:

Year	Interest claimed - P	Interest claimed - L
2006	TRY 40,869X	TRY 52,954X
2007	TRY 39,165X	TRY 52,133X
2008	TRY 44,033X	TRY 58,612X
2009	TRY 45,140X	TRY 60,086X
2010	TRY 44,894X	TRY 59,758X
2011	TRY 44,894X	TRY 59,758X

357. The euro liabilities matched the TRY amounts of interest due on the P loan and was debited to the Appellant's euro call deposit account (by way of an overdraft facility), and that those liabilities continued to accrue from year to year until discharged by transfers from P in December 2011, when P repaid substantial amounts of share capital. As such, the interest remained a debt due and owing to Bank and in those circumstances it was submitted that the interest was not 'paid' to Bank where the sum in effect remained due and owing to Bank.

358. In *Minsham Properties Ltd v Price* [1990] STC 718 it was held that it is not always the case that an entry in books of account crediting an amount as due to a payee will constitute payment. In *Minsham*, the interest due by the borrower to the lender had been debited to the borrower's account and added to the principal due. While the interest had been credited to the loan account in the books of the borrower, in the books of the lender all that had happened was that the accrued interest had been added to principal with the result that the loan amount had increased, compounded and thereafter itself bore interest. The interest in such circumstances was not held to have been "paid".

359. The UK Revenue in *Minsham* relied on the decision of *Paton (as Fenton's Trustee) v IRC* 21 TC 625 whereby the bank debited the account at the end of each half year with the interest which was due. The House of Lords in *Paton* at p. 656 considered the question to be asked as follows:

*"whether, when the charges are added to the existing indebtedness at the end of one half- year, and the whole sum brought down is a debit item at the beginning of the next half-year so that interest is charged on the last half-year's interest, the charges have been paid. The ordinary man would, **I think, say that so far from being paid; they are added to the ordinary indebtedness because they are not paid**; and I can see no reason why the law should say anything different. It is obvious that the system adopted by banks, which seems to have been common practice in Lord Eldon's time, is for the purpose of giving them compound interest without perhaps flaunting that fact before their customers. [Emphasis added.]*

360. In *Paton*, Mr Fenton borrowed from a bank on the security of certain property. At the material date Mr Fenton had paid nothing on the account in reduction of principal or interest, the bank debiting the account each half-year with the interest thereon, and carrying forward the accumulated amount. The taxpayer argued that the bank's practice of adding the interest each half-year to the amount advanced meant that the interest had been paid. This argument is analogous to the argument being made by the Appellant in this case whereby he claimed to have paid interest annually in spite of remaining indebted to the bank in the same sum, by means of an overdraft.

361. In *Paton*, the House of Lords held that the debiting by the bank did not constitute a sum having been "paid to the bank" such as to entitle the taxpayer, Mr Fenton, to a repayment of income tax. The House of Lords considered it *"a legal fiction that the interest … can be said to have been paid. After, as before, the striking of the balance the same sum remains due, no longer, it may be, as interest, but still due as part of the principal debt*." The taxpayer may not have owed the bank the interest "*qua interest*" but this did not mean that the interest had been paid:

"What happened was that Mr. Fenton did not pay the interest due by him at 30th June and 31st December, 1920, and it was because he did not pay it that it was debited to his loan account on each half-yearly occasion and the accumulated sum carried forward to the next half-year. The effect of this method of accounting between Mr. Fenton and the bank, it is suggested, was that when the interest was debited to the loan account Mr. Fenton ceased to owe it to the bank qua interest and it became transmuted into an addition to the principal loan."

362. In *Leeds Design Innovation Centre Ltd and others v Revenue and Customs Commissioners*, the parties' debts had been refinanced with no reduction in their liabilities to the debtor, but merely a change in form. It was held that the loans had in fact rolled over and the debt had not been discharged. In the present case, the interest was not paid but discharged by way of an overdraft facility extended by the same

creditor and which was not ultimately discharged with that creditor until December 2011:

> *[34] We have concluded from this evidence that the taxpayers did not suffer any actual cost as a result of the refinancing, which from their perspective was very similar to a 'book entry' as their debts were rolled over into the new refinancing agreement. Taking HMRC's reference to Minsham Properties, we agree that in these circumstances [the taxpayers] cannot be treated as having paid the interest since it has not actually, from their perspective, been discharged. We take from Minsham Properties that if interest is added to existing outstanding indebtedness, that will not generally be treated as a payment. Here the interest payments were not 'placed at the disposal of any other person' but actually remained outstanding and due, although under the terms of a new agreement...while there might have been a notional settlement of the interest or discount as a result of it being rolled up into the new loans, in no sense has there been any reduction in the liabilities of the payers, the debt obligation (the discount payment) has merely changed in form*
>
> *[35] In approaching the question of when interest should be treated as paid, the courts have tended to avoid an over legalistic approach and preferred to ask whether by reference to ordinary language and taking account of commercial common sense and practice, a payment should be treated as having been made. For example in Paton (as Fenton's Trustee) v IRC (1935) 21 TC 625, [1938] AC 341 Lord Atkin observed ((1935) 21 TC 625 at 659, [1938] AC 341 at 351) that to treat capitalised interest as having been paid would be 'a travesty of the actual facts … the interest is not capitalized because it is in fact paid, but because in fact it has not been paid'. Equally here, while there might have been a notional settlement of the interest or discount as a result of it being rolled up into the new loans, in no sense has there been any reduction in the liabilities of the payers, the debt obligation (the discount payment) has merely changed in form.*
>
> *[36] We do not think that McNiven, to which Mr Thornhill referred, answers this point and we agree with HMRC that other than the new loan agreements being signed, the refinancing had no other commercial or legal consequences for the taxpayers. In McNiven, it was accepted that the interest payments had been discharged for the purposes of s 338 Taxes Act 1988 (the trustees had received a cash payment and withholding tax had been paid on that payment). The court was asking not whether the payment should be treated as having been discharged, but whether the fact that the cash to make those payments had been provided as part of a circular flow of cash with the intention to create tax losses coloured the tax treatment of the payment. In fact the court stressed that the question of whether payment had been made was a*

question of fact, and one which had to be determined by reference to commercial concepts."

363. The Respondent submitted that the onus is on the Appellant to show that the interest was in fact 'paid' i.e. that his indebtedness to Bank in respect of the interest arising was actually paid and not simply re-packaged as a different kind of debt, which is the effect of the Appellant discharging the interest by means of an overdraft facility advanced by Bank. It is important to note that the overdraft in this instance had no other purpose but to service the interest arising on the loan. For example, the overdraft account was never in credit. Moreover, as with the analogy given by Counsel for the Appellant of a mortgage being serviced by an overdrawn current account, without sight of the mortgage or current account documents, or in this case, the terms and conditions of the Appellant's overdraft account, it cannot be definitively said that payment from the Bank overdraft account equates with the payment of interest in the Bank loan account.

364. In the Respondent's submission, the situation in this appeal is similar to that in *Paton*, the only difference being that there are two bank accounts rather than one: rather than the interest being added to the amount outstanding on the TRY loan account, it is added to the amount outstanding on the Euro overdraft account. But the amount remains owing by the Appellant to Bank. The interest cannot be treated as having been paid because, from the Appellant's perspective, it had not actually been discharged.

365. Mr [redacted] agreed with this proposition in his evidence when asked by Counsel for the Appellant:

> *"…clearly the Turkish lira account was debited and then credited with the interest that was due, and to that extent the interest has been cleared out of that account. Now, I think there may be -- this may be more of a legal matter rather than a banking matter, but intuitively I am afraid I would say that although the you have debited and credited the Turkish lira account, you have just then built up an overdraft account of the interest and just from a banking perspective I would say that no money has passed from [the Appellant] to [Bank]…In this transaction I just can't see money passing from t[the Appellant] to [Bank]."*

Issue 4

Whether there were 'loan extensions' in 2007 or actually new loans, with the result that interest relief is not due for the years 2008-2011?

366. Without prejudice to the Respondent's submission that interest was not paid, the Respondent submitted that the 'loan extension' agreements entered into in December 2007 in relation to both the P and the L loans constituted new loans made in 2007, with the result that the interest thereafter cannot qualify for relief under section 248.

367. The 6th December 2005 loans were granted for a two-year term. The Loan Extension Agreement dated 4th December 2007 provided for the term to be extended by approximately 4 years, to 30th November 2011.

368. In addition, the 'loan extension' was to be at a new and increased interest rate. The interest rates under the 6th December 2005 loans provided for interest rates of 17.47862% for the period to 6th December 2006 and 16.75% for the remaining period of the loan for the P Loan and interest rates of 17.0137% until 6th December 2006 and 16.75% for the remaining period of the loan for the L loan. The interest rate for the new loans was 19.2%.

369. The Respondent submitted that these changes in the terms of the loans are material and fundamental alterations which went to the very root of the contracts, with the effect that the original loan agreement was rescinded and replaced. It could not be said that these were minor amendments. The December 2007 loan cannot therefore be classified as "a loan made [before] 7th December 2005". Accordingly, the December 2007 loan falls outside of the scope of the relief by reason of TCA, section 248(1A).

370. The new contractual arrangements in December 2007 went beyond the Loan Extension Agreements and included the Security Agreement of 4th December 2007, the Forward Contracts and Financial Spread Bet Extension Agreements of 4th December 2007 between Bank, S and the investors' spouses, and a new guarantee from Bank 2.

371. The new Security Agreements required the Appellant and the other investors to provide new security over deposits held by PAH/LAH with Bank and guarantees from Bank 2.

372. The Forward Contracts and Financial Spread Bet Extension Agreements between Bank, S and the investors' spouses, though described as 'Extension' Agreements, in fact provide for a series of four further Forex contracts and Financial Spread Bets maturing on 30th November 2008, 2009, 2010 and 2011 respectively. The previous agreements had provided for two Forex/Spread Bet transactions, for settlement on 6th December 2006 and 6th December 2007 respectively. What these contracts have in common with the original Forward Contracts and Financial Spread Bet Agreements is that they are based on the same notional principal. However, it is not possible legally to describe the new agreements as a mere 'extension' of the earlier ones: they are in fact completely new

TAX APPEALS COMMISSION

contracts which provide for a series of currency purchases and bets not envisaged in the agreements of 6th December 2005.

373. In submitting that the Appellant entered into a new loan agreement with Bank, the Respondent relied on the following passage of the judgment in *Redfern Ltd v O'Mahony and others* [2010] IEHC 253, where at para 77, McGovern J. referred to the following extract in Chitty on Contracts, 29th ed at para 22-028,

> *"A rescission of the contract will also be implied where the parties have effected such an alteration of its terms as to substitute a new contract in its place. The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it."*

374. The Respondent argued that the first loan came to an end by its ordinary means and that in 2007 a new loan was made. Furthermore it is irrelevant that the parties described the arrangement as an "extension". It was argued that the 2005 loan simply expired and the 2007 loan was a new loan. In the alternative there was an implied rescission of the 2005 loan based on the judgment in *Redfern*.

375. The changes to the 2005 loans were so fundamental that it went to the root of the 2005 loans such that there were new loans in 2007. There was:

(a) a new term for the loan, originally two years and then for a period between 2007 and 2011;
(b) a new increased interest rate;
(c) a new interest payment date;
(d) new forward contracts;
(e) new spread bets and
(f) new security, being security over the deposits held by either PAH or LAH which were with Bank

376. In light of these fundamental changes to the entire contractual framework, the Respondent submitted that Bank made new loans to the Appellant in December 2007, and that TCA, sections 248(1) (as amended) and 248(1A) should apply accordingly.

Issue 5

In the year ended 31 December 2011, was L a company of the kind referred to in section 248(1)(a)(i) or (ii)?

377. In the year ended 31st December 2011, L's income consisted of (gross) rental income of €2,408X and a dividend of €47,025X from H. The dividend forms part of L's income for the year, so that in 2011 L was not 'a *company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D'*.

378. It is clear from TCA, section 248(1) that its purpose is to grant relief for interest paid on money borrowed to invest in:

(a) trading companies;
(b) Case V companies, and
(c) companies whose business consists wholly or mainly of the holding of stocks, shares or securities of a trading company or a Case V company ('holding companies').

379. Where relief is claimed in respect of an investment in a trading company or a holding company, eligibility depends on whether the business of the company consists wholly or mainly of the statutory activity. Where relief is claimed in respect of an investment in a Case V company, the test is by reference to its income.

380. The Appellant contends that, because the dividend was 'franked investment income' on which L was not liable to corporation tax, it should not be considered part of L's income for the purposes of TCA, section 248(1). This is clearly incorrect.

381. A dividend paid by an Irish resident company is Schedule F income. TCA, section 20(2) provides:

> *"Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax, and* ***for the purposes of income tax all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient****."* [Emphasis added.]

382. TCA, section 129 provides:

> *"Except where otherwise provided by the Corporation Tax Acts, corporation tax shall not be chargeable on dividends and other distributions of a company resident in the State, nor shall any such dividends or distributions be taken into account in computing income for corporation tax."*

383. The effect of TCA, section 129 is that corporation tax was not chargeable on the dividend received by L from H in 2011, nor was that dividend taken into account in computing L's income for corporation tax. But the scope of TCA, section 129 is limited to defining what is to be included in a company's income for the purposes of computing its liability to corporation tax. It does not prevent a dividend from constituting 'income' for the purposes of the test in TCA, section 248(1)(a)(i).

384. The Appellant seeks to rely on the use of similar wording in TCA, section 247(2)(a)(i) but does not cite any authority for his submission that 'income' in that provision excludes Schedule F income.

385. The principles of statutory construction requires a consideration of the intention of the legislature in enacting TCA, section 248(1)(a). If the Appellant's interpretation were correct, it would mean that a company with enormous dividend income could constitute a Case V company for the purposes of relief under TCA, section 248 (or section 247), provided it had a nominal amount of Case V income. It was clearly not the intention of the Oireachtas to provide for relief in such a case. Had that been its intention, it would have provided that a company whose business consisted of holding shares in other Irish resident companies was a company within TCA, section 248(1)(a). In fact the provision in relation to holding companies in TCA, section 248(1)(a)(ii) is much more restrictive.

386. The Respondent rejects the Appellant's submissions that, if a company meets the test in TCA, section 248(1)(a) at the date the shares are issued, interest relief continues to be available even after the company ceases to meet that test. Entitlement to relief is determined for a year of assessment, and the conditions for relief must be met in that year of assessment, under the legislation in force for that year of assessment. This means that the Appellant's investment was required to meet, *inter alia*, the conditions in TCA, section 248(1)(a) in each of the years under appeal, including 2011.

387. The Appellant sought to rely on TCA, section 248(2). What subsection (2) says is that certain of the conditions for relief must be met for what is potentially a longer period than a year of assessment i.e. 'during the period from the application of the proceeds of

the loan until the interest is paid'. If interest is paid on the loan over several years, the taxpayer must meet the conditions as to working time and non-recovery of capital throughout that period. Subsection (2) does not provide that the other conditions for relief need not be met in the year for which relief is claimed. Rather, it imposes a more onerous requirement in relation to the conditions in paragraphs (b) and (c).

Was L a company within paragraph (ii) of section 248(1)(a)?

388. A company comes within paragraph (ii) of section 248(1)(a) if its business consists wholly or mainly of the holding of stocks, shares or securities of

- A company which exists wholly or mainly for the purpose of carrying on a trade or trades or
- A company whose income consists wholly or mainly of Case V income.

389. The Appellant now asserts that L's business in 2011 consisted wholly or mainly of the holding of shares in one or more trading companies, namely H and (indirectly) O. The Respondent notes that, in 2011, L also held a 100% membership interest in LAH. LAH was plainly not a company within TCA, section 248(1)(a)(i). It did not trade and had no Case V income. It was however a valuable asset in the hands of L, as it held substantial funds on deposit with Bank. If the Appellant now contends that L in 2011 was a company within section 248(1)(a)(ii), the onus is on him to show that its business consisted 'wholly or mainly' of holding shares etc in companies within paragraph (i) of section 248(1)(a), and that the L holding was not its main business. To date the Appellant has not put forward evidence to this effect. A mere assertion that L's most valuable asset was its interest in H does not suffice.

Issue 6

If the Appellant is entitled to relief under TCA section 248 as extended by TCA, section 250, is the relief disallowed under TCA, section 817A?

390. If relief is allowable under TCA, sections 248/250, it is disallowed by TCA, section 817A(1) which provides:

> *"Relief shall not be given to any person under Part 8 in respect of any payment of interest, including interest treated as a charge on income, if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid is the obtaining of a reduction in tax liability by means of any such relief*.

The transactions under which the interest is paid

391. The Appellant identified the two TRY loans dated 6th December 2005 from Bank, which the Appellant used to subscribe for shares in P and L, as the transaction(s) under which the interest was paid. The Respondent agrees that these are the relevant 'transactions' for the purposes of section 817A.

Application of the 'sole or main benefit test'

392. The correct application of the test set out in TCA, section 817A was set out in *Garrett Paul Curran v HMRC* [2012] UKFTT 517 (TC) in the context of the UK's s787 Income and Corporation Taxes Act 1988. This was summarised by the First-tier Tribunal, upheld on appeal at [2017] STC 1170, in *The Brain Disorders Research Limited Partnership, Neil Hockin -v- The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 325 (TC) at [138]:

> *"The Appellants' counsel claimed that section 787 was a provision of very narrow scope. He also contended, in reliance on Judge Berners' decision in Garrett Paul Curran v HMRC UKFTT 517 (TC), a decision that we were told that HMRC were not going to seek to overturn on appeal, that the right approach was that we should put onto scales the tax benefit on one side of the scales and the other benefits on the other side, and see which were the greater benefits. Only if the tax benefits outweighed any other benefits would section 787 then disallow the interest."*

393. The Appellant submitted that "*one must compare the gross benefit of the tax relief for interest with all other gross benefits of the loan*". Although Judge Berners referred in

Curran to '*the gross benefits flowing from the relevant transaction*', what he meant was that the costs of the borrowing (including interest costs) were not to be netted off against the benefit:

> *"227.*
>
> *For comparison purposes, therefore, regard must be had to the gross benefits flowing from the relevant transaction. The amount of the borrowing is not for this purpose netted off against the benefit. So, for example, the fact that an investment funded by a loan yields the same, or a lower return, than the cost of the corresponding borrowing does not mean that there is no benefit to be taken into account in respect of the investment. The benefit is the gross value of the investment.*
>
> *228.*
>
> *On the other hand, if a benefit is indirectly obtained, such as in this case the equity investment in SOP, which was financed separately by Mr Curran, but which he would not have been able to make but for his acquisition of the 2002 Loan Notes, any benefit can only be ascertained by taking into account the separate cost of obtaining that benefit. It is the net benefit, such as the profit potential taking into account the financing cost, of such an investment that falls to be included in the comparison required to be made."*

394. Judge Berners also stated at paragraph 225 that:

> *"Any comparison must be done on a consistent basis. Like must be compared with like.*

395. The Respondent submitted that comparing 'like with like' clearly involves weighing the after-tax benefit of the tax deduction against the after-tax benefits from the investment.

396. In Determination 47TACD2019 (at paragraphs 97-99), the Appeal Commissioner compared the benefit of the tax deduction with the expected after-tax return on the investment funded by the loan, and concluded, on the basis of that comparison, that section 817A applied. The Respondent submits that the Commissioner's approach was entirely correct.

397. The Respondent also agrees that the non-tax benefits to be considered are the benefits to be expected at the date the loans were made.

Tables submitted by the Appellant

398. The Appellant submitted his evidence as to the benefit of the scheme in tabular form in for L and P. The Respondent accepts the principle of such a comparison, but not the Appellant's analysis.

399. Firstly, the Commissioner should disregard the expected returns on the investments over a 6-year period. The loans which the Appellant took out in December 2005 were for a 2-year period. No evidence has been adduced that a six-year term was agreed in 2005. The correct comparison is therefore between the benefit of the tax and non-tax benefits to be expected over a 2-year period.

400. The Respondent took issue with the figures in L Table for the 2 year projections on the following grounds:

(a) The Respondent is prepared to accept the inclusion of figures for the projected increases in the B property, but on a net of capital gains tax basis.
(b) The company which owns the Trade A property is not a subsidiary of L, so any uplift in value is not reflected in the value of the shares in L.
(c) The Respondent is prepared to accept the net rental income for the B property, but on an after-tax basis.
(d) The Appellant´s Spouse´s salary is not a benefit to L, as admitted by the Appellant in his evidence
(e) The company which ran Trade A is not a subsidiary of L and its profits do not enhance the value of the Appellant's shares in L.
(f) The projected increase in the value of the cash released to the Appellant should not be included. No specifics have been given as to how these monies were applied.
(g) FX gain on repayment of loan: the FX gain arises from the hedging arrangements and is part of the mechanism by which the Appellant reduced his overall borrowing cost to that of a euro-denominated loan. It is incorrect to include it as a benefit from the investment of the loan proceeds.
(h) The Respondent believed that it was always the intention to leave these funds on deposit with Bank, and that the correct figure to include here is the after-tax return on the deposit.

401. The Respondent also took issue with the P figures for the 2 year projections as follows:

(a) While the Respondent was prepared to accept the inclusion of figures for the projected increases in the A property, but on a net of capital gains tax basis; the tax adjusted figure would be €7,603X and not €10,538X.

(b) The Respondent was not prepared to accept the inclusion of the projected increase in the C property, or the projected rental income, as the Appellant failed to show that the company ever agreed to acquire it. The Appellant put forward no proof of any funds being paid in respect of the C property and there was no evidence of payment in the company's accounts, which were prepared by the Appellant personally.

(c) The Respondent was prepared to accept the net rental income for the A property, but on an after-tax basis; the correct figure is €2,229X, not €2,944X.

(d) The projected increase in the value of the cash released to the Appellant should not be included. No specifics have been given as to how these monies were applied.

(e) FX gain on repayment of loan: the FX gain arises from the hedging arrangements and is part of the mechanism by which the Appellant reduced his overall borrowing cost to that of a euro-denominated loan. It is incorrect to include it as a benefit from the investment of the loan proceeds.

(f) The Respondent believed that it was always the intention to leave these funds on deposit with Bank, and that the correct figure to include here is the after-tax return on the deposit. The interest rate on the deposit was 2.7% throughout the two year period.

402. The Respondent submitted that it was reasonable to conclude that the main benefit that could be expected to result from the transaction in question is the availability of interest relief. TCA, section 817A is therefore on point and relief under TCA, section 248, as extended by TCA, section 250, is accordingly unavailable.

Conclusion

403. For the reasons set out above, the Respondent submits that the Appellant is not entitled to a deduction in respect of the interest on the loans in question.

Matters in Dispute

404. The parties in the appeal raised the following 6 distinct issues:

Issue 1: *Is TCA, section 248(3) applicable to TCA, section 250*?

Issue 2: *If the Appellant satisfies the conditions for interest relief pursuant to TCA, section 250(2), must he also satisfy the conditions in TCA, section 248(3)?*

Issue 3: *Was the interest on the loans 'paid' within the meaning of TCA, section 248?*

Issue 4: *Whether there were 'loan extensions' in 2007 or actually new loans, with the result that interest relief is not due for the years 2008-2011*?

Issue 5: *In the year ended 31 December 2011, was L a company of the kind referred to in TCA, section 248(1)(a)(i) or (ii)?*

Issue 6: *If the Appellant is entitled to relief under TCA, section 248 as extended by TCA, section 250, is the relief disallowed under TCA, section 817A?*

Analysis

Issue 1:

Is TCA, section 248(3) applicable to TCA, section 250?

405. In the recent judgment in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552, McDonald J., from his review of the most up to date jurisprudence, summarised the fundamental principles of statutory interpretation at paragraph 74:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

(a) *If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*

(b) *Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*

(c) *Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*

(d) *Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*

(e) *In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*

(f) *Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*

(g) *Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of*

exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

406. In light of such principles, the entitlement of the Appellant to relief pursuant to TCA, sections 248 as extended by TCA, section 250 can now be considered.

Background

407. TCA, sections 247 and 248 were introduced by the Finance Act 1974, sections 33 and 34 to provide interest relief to companies and individual investors respectively on monies borrowed to invest in statutorily prescribed companies. Those sections were governed by the same recovery of capital rules in section 35 of the Finance Act 1974, now TCA, and section 249. By contrast, TCA, section 250 was originally introduced by section 8 Finance Act 1978, with its own recovery of capital rules, as a standalone provision. Furthermore section 8 Finance Act 1978 did not alter the text of section 34 Finance Act 1974.

408. Thereafter section 14(4), Finance Act 1992, introduced what are now the *bona fide* commercial and tax avoidance tests now contained within TCA, section 248(3). Section 14(1), Finance Act 1992 provided that "*the principal section*" to be amended was *"section 34 of the Finance Act, 1974, as amended by section 8 of the Finance Act, 1978"* . As such, the Respondent submitted that it was "manifestly intended" that TCA, section 248(3) should apply to TCA, Section 250.

409. However as the parties agreed, section 14 Finance Act 1992 made no amendment to section 8 Finance Act 1978 now TCA, section 250. Furthermore, after amending section 34 of the Finance Act 1974, section 14 Finance Act 1992 immediately expired and ceased to have any relevance or effect and was not itself consolidated. The only statutory provisions that were consolidated were sections 33 and 34 Finance Act 1974 and section 8 Finance Act 1978.

Interpretation

410. The application of the provisions of TCA, sections 248 in respect of the years under appeal, provided relief to an individual in respect of, *inter alia*, the interest paid on a loan to acquire shares in an Irish rental company where that individual held an interest of more than 5% of the ordinary share capital of the company and had worked for the

greater part of his or her time in the management or conduct of the business. The relief also applied to monies borrowed to make a loan to such companies.

411. To secure the TCA, section 248 relief, the following conditions must also be satisfied:

(i) during the investment period, the individual could not recover capital from the company or from a connected company,

(ii) the loan must be applied for *bona fide* commercial purposes and not part of a tax avoidance scheme.

412. TCA, section 248(2)(c) governs any recovery of capital by an individual with corresponding restrictions imposed by TCA, section 247 on corporate investors. Both sections are further augmented by TCA, section 249.

413. TCA, section 250, on the other hand, extends the entitlement to interest relief, *inter alia*, to part-time employees and part-time directors and removed the requirement to hold more than 5% of the ordinary share capital. Subsection 2 provides that:

> *"….the individual shall be entitled to relief under section 248 for any interest paid on any loan to him or her applied for a purpose specified in section 248(1) …".*

414. The following explicit statutory conditions within TCA, section 250 must also be satisfied:

(i) the company in which the shares issued or money lent must have been engaged in carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D; (TCA, section 250(2)(a)(i));

(ii) the individual must be an employee or director of the company, whether full-time or part-time, throughout the period from the purchase of the shares in, or the lending of the money to the company until the interest is paid; (TCA, section 250(2)(a)(i));

(iii) the company, other than a lending institution, whose shares are bought or to which the money is lent or any person connected with that company must not have made any loans or advanced any money to the individual, or to any person connected with the individual during the period until the interest is paid, (TCA, section 250(2)(b)), and

(iv) a loan shall not be regarded as having been made, or money shall not be regarded as having been advanced, in the ordinary course of a business if –

(a) the loan was made on terms incompatible with an arm's length transaction, (TCA, section 250(5)(c)(i));

(b) the terms on which a loan made under arm's length conditions were subsequently altered to non-arm's length conditions, (TCA, section 250(2)(c)(ii));

(c) interest on the loan was waived, (TCA, section 250(2)(c)(iii));

(d) interest on the loan was not paid within 12 months from the due date, (TCA, section 250(2)(c)(iv)), or

(e) the loan was to be repaid within 12 months from the date for repayment. (TCA, section 250(2)(c)(v)).

415. Therefore, other than the conditions above, there are no further explicit statutory obligations to be satisfied.

416. As such, the relief in TCA, section 250(2) "*shall*" apply where the conditions in that section are met and there is no condition in TCA, section 250 that imposes compliance with the tests in TCA, section 248(3). Therefore the clear and unambiguous terms of TCA, section 250 are that relief applies where the conditions of TCA, section 250 are met. As such, there is no mandate to import other language or conditions.

417. It is also significant that TCA, section 248(3) is not explicitly cross-referenced as a necessary condition for TCA, section 250 relief and as such I agree with the Appellant that the anti-avoidance subsection only applies to the TCA, section 248, in which it sits.

418. It is also clear from a consideration of section TCA, section 250 that where the section intends to import wording, conditions or definitions from TCA, section 248, it does so to the extent that TCA, section 250(2) provides that the loan must be "*applied for a purpose specified in TCA, section 248(1)",* thus importing the purposes set out in that subsection into TCA, section 250.

419. It is also relevant that specific provisions of TCA, section 248 which are required for the operation of TCA, section 250 are explicitly repeated in TCA, section 250. All other provisions in TCA, section 248 are ignored. In this context TCA, sections 250(3) and (4)

specifically refer to relief being given "*by virtue of this section*". It is also apparent that if there is compliance with the requirements of TCA, section 250, to the extent that if the conditions specified therein are met, the entitlement to relief is mandatory.

420. As such, TCA, section 250 is unambiguous and complete on a standalone basis in that it sets out the detailed conditions as follows:

(i) the company is defined at subsections (1) and (2);

(ii) the individual is defined at subsections (1) and (3);

(iii) recovery of capital provisions are contained in subsection (2)(b) and further expanded at subsection (5)(d), and

(iv) the definition of connected parties is set out in subsection (5)(a).

421. Therefore, as TCA, section 250 has its own specific anti-avoidance and recovery of capital provisions, there is no mandate, by implication or otherwise to import provisions of TCA 248 into TCA, section 250 without the express statutory authority. In this regard, the tests set out in TCA, section 248(3) are not applicable as the Appellant claimed relief by virtue of TCA section 250 which confers an absolute right to relief once the conditions set out in that section are satisfied.

422. Furthermore, the parties also accepted that TCA sections 247, 248 and 250 apply to 3 different categories of investors, namely:

(a) Corporate bodies, (section 247);

(b) Individuals holding more than 5% of the ordinary share capital of the company and had worked for the greater part of his or her time in the management or conduct of the business and (section 248), and

(c) part-time employees and part-time directors and holding less than 5% of the ordinary share capital (section 250).

423. The Respondent argued that the Oireachtas could not have intended to prohibit relief in accordance with TCA, section 248(3) on a loan to a fulltime employed individual holding a material interest but to allow relief to an investor who was a part-time director or employee or did not have a material interest in the company, regardless of the purposes for which the loan was applied. However based on my conclusions above, the anti-

avoidance provisions in TCA, section 248(3) only applies to individuals qualifying for relief under TCA, section 248(2) and not the category of taxpayer claiming relief by virtue of TCA, section 250.

424. It is also relevant that while the legislation facilitates the investment in qualifying companies by different category of individuals holding material and immaterial interests in the ordinary share capital in the same company, it is unlikely that an individual with a material interest and subject to the anti-avoidance provision of TCA, section 248(3) would jeopardise his or her entitlement to relief to facilitate individuals who qualify for relief under TCA, section 250.

425. I am therefore of the view that the intention Oireachtas, as discerned from the words deployed in the TCA, section 248, only intended to target individuals with the power and ability to control the manner in which the company's funds were applied. Therefore other than my observations on part-time employees and directors considered below, individuals whose relief was governed by TCA, section 250 could not have had any influence in the manner in which the funds were utilised in companies controlled by individuals holding material interests.

426. Furthermore, if as the Respondent submitted, that it was the intention of the Oireachtas that TCA, section 248(3) was to apply to TCA, section 250 or its antecedent, it would have been a straightforward matter for the Oireachtas to have:

(i) located the TCA, section 250 relief within TCA section 248 and have TCA section 248(3) apply to both, or
(ii) inserted the wording of TCA, section 248(3) into both TCA, section 248 and TCA, section 250, or
(iii) cross-referenced TCA, section 248(3) in TCA, section 250.

427. I am therefore of the view that the Appellant's entitlement to relief is not restricted or indeed extinguished by TCA, section 248(3) as to interpret otherwise would involve importing the wording from TCA, section 248 into TCA, section 250. Furthermore, as observed by Finlay CJ in *McGrath v McDermott* [1988] IR 258 at page 566, the interpretation of:

> *"a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be*

construed with it. The courts have not got a function to add to or delete from express statutory provision so as to achieve objectives which to the courts appear desirable"

428. I am also of the view that the Oireachtas, when introducing *bona fide* commercial and test avoidance tests now contained in TCA, section 248(3) could not have envisaged the elaborate tax avoidance scheme orchestrated by the Appellant that involved borrowing in a high interest rate currency hedged by forward contracts and a spread bet, the gain from which was exempt from tax. The scheme was in effect ingenious as it is highly inconceivable that a commercial minded person would incur over €1 million more in interest payments to acquire shares in an Irish rental company. However the scheme devised by the Appellant involved complex financial arrangements that ameliorated the additional interest exposure by a tax free gain on the spread bet. As such, a tax deduction was procured without an overall economic cost, a matter considered below.

429. Furthermore and as observed by O'Donnell J in *The Revenue Commissioners -v- O'Flynn Construction Company Limited, John O'Flynn and Michael O'Flynn* [2013] 3 IR 533 at paragraph 74:

"The idea that any particular scheme can produce a result that the Oireachtas did not intend, is much more easily expressed than applied in practice. The legal intent of the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction which are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all, the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. In some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the constitutional scheme.

430. While the Appellant held a material interest in L, his entitlement to relief under TCA, section 250 was determined with reference to his status as a part-time director. However as determined above, the absence of a specific tax avoidance test in TCA, section 250 restricts the Respondent's right to withdraw relief on such grounds. Furthermore, as discussed above, I am of the view that the very intricate tax avoidance scheme devised by the Appellant could not have been envisaged by the Oireachtas in 1978.

431. Having reviewed the parties' submissions, I agree with those of the Appellant that TCA, section 250 is, and always has been since 1978, a standalone section. It is also relevant

that TCA, section 248(3) since its enactment in 1992 neither inserted nor applied to section 250 and correspondingly was not applied to TCA, section 247 in respect of corporate investors.

432. In light of this analysis, I am satisfied that the factors restricting the entitlement to relief under TCA, section 250 are specifically contained within that section and there is no wording in that section to deny the Appellant's relief as he had fully conformed with all of its requirements.

Issue 2

If the Appellant satisfies the conditions for interest relief pursuant to TCA, section 250(2), is he also subject to the conditions in TCA, section 248(3)?

433. If I am incorrect in my conclusion that TCA, section 250 is a stand-alone provision and the Appellant's entitlement to relief was not restricted or indeed extinguished by TCA, section 248(3), it is necessary to determine whether the provisions of TCA, section 248(3) apply to the loans acquired by the Appellant in acquiring interests in P and L.

TCA, section 248(3) Tests

434. As such TCA, section 248(3) provides:

> *"Relief shall not be given in respect of any interest by an individual on a loan applied on or after the 24th day of April 1992, for any of the purposes specified in subsection (1) unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax."*

435. As noted by the Respondent, relief only applies if a taxpayer can show that following tests in TCA, section 248(3) are satisfied:

(a) the loan was applied for *bona fide* commercial purposes, (*bona fide test*) and
(b) the loan was not part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax (*tax avoidance test*)

Bona fide test

436. The Respondent accepted that the loans taken out by the Appellant were applied for *bona fide* commercial purposes, at least to the extent that P and L used the funds to refinance their existing property holdings or to acquire new properties. However the Respondent did not accept that placing almost 50% of those funds on long-term deposit amounting to €96,681X and €330,882X for P and L respectively was an application of those funds for *bona fide* commercial purposes.

437. However and notwithstanding the Respondent's submissions, I am satisfied that the Appellant, as an astute businessman and in light of his own personal experience in failing to sell his own residential property in 2006, was concerned with the residential property market. I also accepted the Appellant's evidence of the intention of both his and the other 3 directors in P to initially invest and subsequently withdraw the offer to acquire Property C, the residential property in C for circa €205kX.

438. Furthermore the Appellant gave undisputed evidence that in 2008 there were changes in the personal circumstances of all four of the individuals involved in P. The Appellant suffered a reduction in his income of approximately [ ]% and was also going through a marriage separation which resulted in a further [ ]% reduction in his income while the three other shareholders all lost their jobs in the recession. As a consequence all the shareholders were under financial pressure.

439. I am also satisfied with the evidence that the banks, Bank and Bank 2 did not consider that the Appellant or his associates had sufficiently good credit ratings in 2008. Furthermore Bank 2 was not lending and was not prepared to release the guarantees and Bank was not prepared to accept a Bank 2 guarantee. Therefore I am satisfied that it was not possible to access the funds notwithstanding the Appellant's view that there was good value in the property market after the financial and property crisis. As such, due to circumstances beyond the control of the Appellant and the other 3 investors and directors in P, the ability to source and finance suitable projects was severely curtailed.

440. I am accepting the Appellant's evidence that as a director and investor in L, he attempted to expand the Trade A business activities in that company by making offers to acquire Trade A potential investment 3, to expand the Trade A business in the Trade A property and to execute Trade A potential investment 4.

441. As a consequence therefore, I am satisfied that the loans taken out to acquire shares in P and L were for the purposes of commercial Case V endeavours. The downturn in the

economy, the failure of the banks to lend and the deteriorating personal circumstances of the Appellant and indeed the other investors in P restricted investment opportunities.

442. I am also satisfied with the Appellant's evidence that the reason for raising more funds than were immediately required was to reduce the administration and time required for any future deals by having the funds already in place.

443. Furthermore and notwithstanding the above, I also agree with the Appellant's submission that there is a difference in the statutory wording in TCA, section 248(1) in respect of funds borrowed by the individual to invest in (a) share capital and (b) are lent to a company. TCA, section 248(1) stated :

> *"This section shall apply to a loan to an individual to defray money applied—*
>
> *(a) in acquiring any part of the ordinary share capital of*
>
> *(i) a company which exists wholly or mainly for the purpose of carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D, or*
> *(ii) …*
>
> *(b) in lending to a company referred to in paragraph (a) money which is used wholly and exclusively for the purpose of the trade or business of the company or of a connected company."*

444. As such the statutory wording in subparagraph (a) requires that the monies be defrayed in acquiring shares which exists for the purposes of carrying on a trade or a company whose primary income consists of Case V income. As such, the main source of income of P for all years under appeal and the income of L for all years to 2010 consisted "*wholly or mainly of profits or gains chargeable under Case V of Schedule D*". However a consideration of L's position as a Case V company for the year 2011 is considered below.

445. In contrast however, where the monies borrowed are lent to a company as envisaged by subparagraph (b), that company must use the money for the purpose of its trade or business.

446. Therefore the distinction is clear to the extent that the interest relief applies under subparagraph (a) to the money borrowed to acquire shares in a company whose main income is derived from a Case V source notwithstanding that all monies at the company's disposal are not immediately used.

447. Therefore based on statutory interpretation and the evidence adduced, I am satisfied P existed as a company *"whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D"* for the years 2006 to 2011 inclusive. I am also satisfied L existed as a company *"whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D"* for the years 2006 to 2010 inclusive.

Tax Avoidance Test

448. The tax avoidance test in TCA, section 248(3) mandates that the claim for relief must be *"not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax."*

449. As observed by Mr [redacted], the expert witness for the Respondent, the Appellant claimed interest relief based on complex investments involving numerous parties, transaction agreements and cash flows together with sophisticated foreign exchange transactions. Mr [redacted] also opined that the transaction parties and steps were so many, and so detailed, that it was very easy to lose sight of the underlying banking and financial characteristics of the arrangements. Furthermore the underlying principles of foreign currency hedging techniques demonstrated that a foreign currency loan in TRY, when 100% hedged back into euro, at market rates, is economically equivalent to a euro loan, at euro interest rates.

450. Taking L as the indicative template of the Appellant's investment strategy, the following arrangements were put in place:

(e) The Appellant borrowed TRY 306,977X from Bank at an initial interest rate of 17%;
(f) The Appellant subscribed for TRY 306,977X of new share capital into L, which then immediately converted the TRY 306,977X it received into €191,861X;
(g) An unconnected company, S entered into a Forward Currency Contract with Bank, and
(h) The Appellant's spouse entered into 2 Financial Spread Bet Agreements with S

451. As explained by Mr [redacted], it would have been very straightforward for Bank 2 to provide euro funding to the Appellant, at the lower euro interest rate. In Mr [redacted]'s view, the role of Bank was to restructure what would otherwise have been an Bank 2 euro loan as a TRY loan, together with associated hedging arrangements back into euro, with Bank not taking any Irish property risk, but in a way that gave the Appellant a tax deduction for the relatively higher TRY interest rate.

452. Furthermore Bank would have required a fee which was more than likely charged by way of adjusting the price of one of the transaction legs rather than by way of separate fee note.

453. Mr [redacted] concluded that the TRY currency had no economic function and it was difficult to see why the Appellant would incur such a fee, which would increase his borrowing costs, other than by virtue of the sought after tax benefits.

454. The Respondent submitted that the Appellant had acknowledged that borrowing in TRY rather than euro added to the complexity of the arrangements and the time and effort required taken to put them in place. Had the Appellant chosen to borrow in euro, he could have dealt with one bank rather than two and would have had no need to enter into hedging arrangements.

455. The Respondent also referred to the Appellant's acknowledgement that the obvious reason to effect the transaction in a more complex and time-consuming way was to obtain a tax deduction for the TRY interest amount. Furthermore, the Appellant's aggregate interest cost was circa €170kX more than if he had borrowed in euro.

456. The Appellant, on other hand submitted that the mere fact that the loans in question were drawn down in TRY, with the hope of an enhanced interest relief, cannot convert a commercial arrangement involving application of loan proceeds into a dubious tax avoidance scheme as:

- The arrangements, of themselves, were commercial and, based on the evidence;
- The fact that gains in foreign currency liabilities held by individuals are not taxable has been well known in tax and legal circles for over 30 years and the Oireachtas chose not to legislate to make such gains taxable;
- It is the overall arrangement which is to be considered rather than the choice to take a loan denominated in Turkish lira, as opposed to, say, Euro;
- The evidence clearly established that the Appellant would have undertaken the borrowings regardless of the currency (euro or lira);
- The hoped-for enhancement to the tax relief was relatively minor in the overall context;
- Two cases from the Supreme Court and Tax Court of Canada support this analysis.

457. The Appellant also argued that there were differences between tax avoidance and tax mitigated and cited numerous cases in particular, *Willoughby (1997)* 70 TC 57 in which Lord Nolan said at page 116:

> *"Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is the taxpayer reduces liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option…"*

458. Therefore the essence of tax mitigation envisages*, inter alia*, an investment in a statutorily prescribed relieving provision by which the person endures the cost associated with making such an investment. Therefore had the Appellant borrowed in euro to subscribe for shares in the Case V companies, he would have paid an interest rate of 2.5% on funds borrowed, claimed a statutory entitlement to claim interest relief on such borrowings with the anticipation that the income derived and capital appreciation of his investment would more than compensate for the cost of making the investment. In the words of Lord Nolan in *Willoughby*, "*the economic consequences that Parliament intended to be suffered by those taking advantage of the option"* would have been borne for the purposes of taking "*advantage of a fiscally attractive option afforded to him by the tax legislation".*

459. However a composite view must be taken of the Appellant's investments. As noted by the Respondent, the Appellant incurred an additional circa €170kX in interest payments that gave rise to a tax saving of circa €68kX as a result of engaging in a highly orchestrated and extremely complicated arrangement involving very complex financial transactions. As such, the additional interest cost of circa €170kX was ameliorated by the circuitous route involving Forward Currency Contracts between S and Bank and the Financial Spread Bet Agreements entered into by the Appellant's former spouse and S. In this regard, the Appellant enjoyed a disproportionate tax saving without the burden of the economic consequences as envisaged by the Oireachtas in enacting TCA, section 250.

460. The Appellant relied on *Shell Canada Ltd. V Canada* [1999] 3 S.C.R 622 and *Canadian Pacific* v the Queen, [2000] Can LII 265 (TCC), to argue that the denomination of a borrowing in a high interest foreign currency, with the benefit of a tax-free gain on the liability (borrowing), is not *per se* objectionable and that the choice of currency must be

viewed in the context of the overall arrangement. By parity of reasoning, the Appellant argued that the same principle applies in the present appeal.

461. However and notwithstanding that those judgments are not binding in this jurisdiction, the context of each of those cases must be considered. In *Shell Canada Ltd,* the Canadian Court considered whether borrowings drawn down in a high interest rate currency would fall foul of specific anti avoidance rules in Canada's tax code. In that case, Shell Canada required approximately US$100m for general corporate purposes and borrowed NZ$150m which it then used to acquire US$100m at a time when the NZ$ interest rate was higher than the US$ interest rate. Shell Canada entered into forward contracts which enabled it to acquire the NZ$ for future loan repayments at a fixed exchange rate to the US$.

462. The Canadian Revenue sought to disallow some of the interest expense on the grounds that the interest payment failed at least one of the following statutory tests:

(i) A "*reasonableness*" test in the interest deductibility section (Income Tax Act , section 20(1)(c))
(ii) A general reasonableness test in the Tax Act (Income Tax Act, section 67)
(iii) A general prohibition on "unduly or artificially" reducing income (Income Tax Act, section 245)

463. The *Canadian Pacific* case considered similar issues however under the more modern general anti avoidance law which had been introduced in Canada and which was not applicable in the *Shell Canada* case. The general anti avoidance provision at issue was section 245 of the Income Tax Act and does not apply where the transaction, or series of transactions concerned:

(i) "may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit, or
(ii) where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole."

464. However the Canadian cases can be distinguished as in those cases the borrowings were required for the company's business, so that the existence of a *bona fide* commercial purpose was not in question. Furthermore and notwithstanding the Canadian general anti-avoidance legislation is similar to TCA, section 248(3) in seeking to deny a tax benefit where it is considered to be "*part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax",* the Appellant accepted, in

his evidence, the tax driven motive for borrowing in a high interest currency which he described as a tax mitigation exercise. However for the reasons discussed above, I am not satisfied that the Appellant bore or indeed intended to bear the overall economic consequences of the interest cost due to the correlation between interest rates and currency movements as explained by Mr [redacted] as follows:

> *"So if the exchange rate goes up you make a profit on your repayment of loan principal but you make a loss on the foreign exchange contract. If it goes the other way, you make a loss on the repayment of treasury principal but you make a profit on the foreign exchange contract. So either way there is, there is a gain at the end of the transaction which brings your 17 and a half percent right back down to 2.8, the same. I mean that's again a mechanical way of how it moves, and in case one goes into further detail I think that's helpful to bear in mind that's the mechanics of it."*

465. The tax avoidance test in TCA, section 248(3) provides:

> *"Relief shall not be given in respect of any interest by an individual on a loan applied on or after the 24th day of April 1992, for any of the purposes specified in subsection (1) unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.*

466. It was not made clear to me the basis in law that excludes a charge to tax on the gain from the spread bet. Obviously TCA, section 613(2) excludes winnings from betting from a charge to capital gains tax however there is no similar provision in respect of income tax. In Mr [redacted]'s unchallenged evidence, he opined:

> *"the only reason I could see is that [the Former Spouse] seeks the tax treatment attaching to a financial spread bet rather than the tax treatment attaching to a forward currency transaction should she have dealt directly with Bank. And as I understand it in Ireland, financial spread bets are exempt from tax whether you make a profit or loss, and I think the taxation of forward currency contracts is not the same. So, I can imagine that Bank wouldn't be particularly keen to enter into a financial spread bet for a number of reasons. So, S, if you like, would solve that problem."*

467. In this regard, I am unable to satisfy myself that the Appellant engaged in tax mitigation by availing of some prescribed statutory relief. As confirmed by Lord Nolan in Willoughby at page 116:

"The hallmark of tax mitigation, on the other hand, is the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option…"

468. Furthermore and as noted by the Respondent, neither P nor L, nor any of their subsidiaries, had any dealings in TRY (other than exchanging the TRY which the Appellants subscribed for shares for euro, which both companies did immediately on receipt of the TRY funds in December 2005). The companies' share capital was denominated in euro, their accounts were prepared in euro, and the euro was the operating currency. The Appellant had no investments in Turkey and no commercial need for TRY. The Appellant acknowledged that borrowing in TRY rather than euro added to the complexity of the arrangements and the time and effort required taken to put them in place. Had the Appellant chosen to borrow in euro, he could have dealt with one bank probably Bank 2, which he stated was keen to lend rather than two Bank being the second, and would have had no need to enter into hedging arrangements.

469. Therefore based on the submissions and the evidence, I am satisfied that the Appellant engaged in a "*scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax."* However, this finding can only apply in the event that I am incorrect in my interpretation that the commercial and anti-avoidance provisions in TCA, section 248(3) do not apply to the Appellant.

Issue 3:

Was the interest on the loans 'paid' within the meaning of TCA, section 248?

470. The Appellant held a euro call deposit account and a TRY call deposit account both with Bank. The Appellant used the euro account to purchase TRY which was then transferred to the loan account. The euro liabilities matched the TRY amounts of interest due on the loans and were debited to the Appellant's euro call deposit account by way of an overdraft facility, and that those liabilities continued to accrue from year to year until discharged in December 2011. As such, the interest remained a debt due and owing to Bank and in those circumstances it was submitted by the Respondent that the interest was not 'paid' to Bank where the sum in effect remained due and owing to Bank.

471. The Respondent submitted that the onus was on the Appellant to show that the interest was in fact 'paid' and that the indebtedness to Bank in respect of the interest arising was actually paid and not simply re-packaged as a different kind of debt, which was in effect

the Appellant discharging the interest by means of an overdraft facility advanced by Bank. In support of its 'interest paid' argument, the Respondent relied on jurisprudence from the English Courts namely *Paton, Minsham Properties* and *Leeds Design*.

472. However as observed by the Appellant, *Paton* can be distinguished as in that case no interest was paid but instead the interest was added to the principal sum and compound interest was charged accordingly. As such the taxpayer sought a repayment of tax on that interest which was denied as it was held that the interest was not paid.

473. Correspondingly in *Minsham Properties*, no deduction was allowed for the interest that was not paid but added to the principal sum and a consequence loss relief was denied with a corresponding denial of the entitlement to surrender group losses.

474. The facts in *Leeds Design* also differs to the factual position in this appeal. In *Leeds Design*, the issue was whether the benefit of loans granted to employees and directors under discount loan agreements should be taxed as emoluments as no interest was paid for the relevant years of assessment, or whether the fact that a sum described as a discount was due at the end of the term took the arrangements outside the charge to tax. The loans to the two directors had been refinanced during the year of assessment and effectively continued beyond the original term. Applying the principles in *Minsham Properties*, the tribunal held that interest added to existing outstanding indebtedness should not be treated as paid. The directors did not suffer any actual costs as a result of the refinancing as their debts were rolled over into the new refinancing agreement. In its deliberations the tribunal confirmed at paragraph 35:

> *"In approaching the question of when interest should be treated as paid, the courts have tended to avoid an over legalistic approach and preferred to ask whether by reference to ordinary language and taking account of commercial common sense and practice, a payment should be treated as having been made."*

475. However, all of the cases relied upon by the Respondent relate to situations where no interest payments were made but instead the interest was rolled up and added to the principal sum.

476. It is also relevant that the expert for the Respondent, Mr [redacted], was not particularly convincing when pressed by Counsel for the Appellant on whether a mortgage interest payment made to a mortgage account was considered to be paid when funded by an overdrawn current account held in the same bank responded as follows:

"But you brought up some examples of interest being paid off mortgage accounts and current accounts … I haven't been asked as to what my view is as to whether the interest was paid or not, it's not part of my instructions so I'm sort of responding to this off-the-cuff."

477. Having considered the submissions, I am of the view that the implications of the Respondent's argument infers that any liability financed by way of debt should not be considered to have been paid. As such and accordingly to the Respondent's logic a mortgage interest liability funded by an overdrawn current account held in the same bank would not be considered to be paid. This would adversely affect many domestic and indeed commercial transactions. Furthermore such a submission fails to consider "*whether by reference to ordinary language and taking account of commercial common sense and practice, a payment should be treated as having been made"* as espoused in *Leeds Design* at paragraph 35.

478. The Oxford English Dictionary defines 'payment' as "*the act of paying somebody or something or of being paid*". Furthermore in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* - [2001] STC 237, Lord Hoffman stated at page 258:

"My Lords, payment of a debt such as interest ordinarily means an act, such as the transfer of money, which discharges the debt."

479. There is no doubt that the interest on the TRY loan was discharged with funds borrowed from a separate overdrawn account. The bank statements and certificates of interest were produced in evidence confirming that the interest was charged in the TRY accounts and paid with funds provided by a separate euro overdraft account. As such, the Appellant was increasing a euro liability (the overdraft) while discharging a Turkish lira liability (the interest). I am therefore of the view that the Appellant paid interest on the loans to acquire shares in P and L as there was "*an act, such as the transfer of money, which discharges the debt."*

TAX APPEALS COMMISSION

Issue 4:

Whether there were 'loan extensions' in 2007 or actually new loans, with the result that interest relief is not due for the years 2008-2011?

480. On relying on the documents opened at the hearing, specifically a letter dated 6th December 2005, Bank offered the Appellant a loan facility of TRY 230,620X and imposed an obligation on PAH to provide a guarantee "*over its funds held with the Bank*" and "*covering your liabilities/obligation with the Bank supported by an assignment … covering the* [sic] *all monies held in an account with Bank"*. Thereafter the loan extension agreement dated 4th December 2007 provided for the same principal sum of TRY 230,620X and required that the loan amount *"be covered by security granted over a combination of deposits which [PAH] holds*". The Appellant was also required to provide a security over the "Forward Contracts". On 4th December 2007, Bank also issued the Forward Contracts and Financial Spread Bets Extension agreements to, *inter alia*, the Appellant's spouse, in respect of the same principal sum of TRY 230,620X.

481. On 21st February 2013 Bank confirmed with the Appellant that *"on the 06 December 2005 under the Loan Facility Agreement, Bank granted the customer a loan facility of up to 230,620X Turkish Lira. This facility was extended to the 30 November 2011 in accordance with the loan Extension Agreement dated 04 December 2007."*

482. The Respondent argued that new contractual arrangements which were made in December 2007 went beyond the Loan Extension Agreements as there were:

(a) new terms for the loan, originally two years and then for a period between 2007 and 2011;
(b) new increased interest rates;
(c) new interest payment dates;
(d) new forward contracts;
(e) new spread bets and
(f) new security, being security over the deposits held by either P or L which were with Bank

TAX APPEALS COMMISSION

483. The Respondent submitted that these changes were material and fundamental alterations which went to the very root of the contracts, with the effect that the original loan agreement was rescinded and replaced. The Respondent also relied on *Redfern* to argue that there was rescission of a contract in respect of the 2005 loan and a new one in 2007. Accordingly, the December 2007 loan falls outside of the scope of the relief by reason of TCA, section 248(1A).

484. In his reference to Chitty on Contracts, McGovern J. in *Redfern,* observed at para 77:

> *"The question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. Rescission will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it."*

485. It is clear from the evidence and the documentation produced that both the Appellant and Bank intended to extend the period of the loan from 2007 to 2011. The fact that there was an extension of the term of the loan, a new increase in interest rates and payment dates are merely incidental to the loan extension. The security for the loan appeared to be the same, notwithstanding the variation in wording, to provide security over the deposits held with Bank. Furthermore as noted by the Appellant, the forward contract and spread bets were not part of the loan advance. Finally the opinion of the Respondent's own expert, Mr [redacted], confirmed that "*having looked at it to me it looks like a loan extension ….. it looks like a loan extension to me, looks like one, smells like one, walks like one.*"

486. Therefore and contrary to the Respondent's submission, I am satisfied the Appellant was granted a loan extension in 2007 for a period of four years and as a consequence the December 2007 loan extension did not fall outside of the scope of the relief by reason of TCA, section 248(1A).

Issue 5

In the year ended 31 December 2011, was L a company of the kind referred to in TCA, section 248(1)(a)(i) or (ii)?

487. It was not disputed that L was a Case V company in 2005 when the loan was made and the shares in that company were subsequently acquired. However in the year ended 31 December 2011, L's income consisted of gross rental income of €2,408X and a dividend of €47,025X from H. The Respondent asserted that the dividend formed part of L's income for the year, so that in 2011 L was not 'a *company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D".*

488. In 2005, TCA, section 248(1) stated:

"This section shall apply to a loan to an individual to defray money applied—

(a) in acquiring any part of the ordinary share capital of—

(i) a company which exists wholly or mainly for the purpose of carrying on a trade or trades or a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D, or…"

489. The Respondent argued that the entitlement to the relief is determined for a year of assessment, and the conditions for relief must be met in that year of assessment. As such, the Appellant's investment was required to meet, *inter alia*, the conditions in TCA, section 248(1)(a) in each of the years under appeal, including 2011.

490. While it is clear that the relief applied to loans to acquire shares in a company "*whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D"*, the use of the present tense of the verb "*consists*" and the lack of any statutory obligation to continue to derive a Case V source as its main source of income could suggest that it is the status of the company at the time when the loan was made and the shares acquired and therefore no continuing evaluation of the nature of a company's income is statutorily envisaged.

491. It is also clear from an assortment of subsections in TCA, sections 248 and 250, that certain conditions must be satisfied throughout the entire period of the investment such as:

(a) The obligation to retain a "*material interest*" in the investee company in TCA, section 248(2)(a) is satisfied *"when the interest is paid"*.

(b) The requirement to work "*in the management of the company*" test in TCA, section 248(2)(b) is met *"during the period taken as a whole from the application of the proceeds of the loan until the interest is paid".*

(c) Conformance with the "*recovery of capital*" test in TCA, section 248(2)(c) is required *"during the period taken as a whole from the application of the proceeds of the loan until the interest is paid".*

(d) where, relief is claimed by virtue of TCA, section 250, the individual must have been "*a full-time employee, part-time employee, full-time director or part-time director during the period taken as a whole from the application of the proceeds of the loan until the interest was paid"*

(e) the "loan back" test in TCA, section 250(2)(b) is explicitly stated to be for an extended period and, also, the "*public company full time work*" test in TCA, section 250(2)(c) is explicitly stated to be a year-by-year test.

492. However and notwithstanding the absence of a specific provision to evaluate the nature and source of a company's income in the post investment years, it would be contrary to the intention of the Oireachtas to facilitate an ongoing statutory relief where the main source of a company's income during the investment period changes from Case V to a non-qualifying source of income. Therefore in accordance with the approach to statutory interpretation as espoused by McDonald J. in *Perrigo* at paragraph 74:

(f) *"Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected."*

493. As such the relief envisaged by TCA, section 248 as extend by TCA, section 250 contemplates an ongoing requirement to retain a Case V income as the company's primary source of income. Therefore it is necessary to correlate the interest paid with the entitlement to the tax relief in a specific tax year. It would be absurd if relief was permitted for a non-qualifying purpose such as a fundamental change of a company's primary source of income from Case V to a Case III or Case IV source.

494. In his submissions asserting that the holding of substantial sums on deposit does not prejudice an individual's entitlement to interest relief, the Appellant tacitly accepted the ongoing requirement to retaining Case V income as the company's primary source of income when stating that "*the funds can go on deposit provided the company issuing the shares <u>remains a wholly or mainly</u> Case I or Case V company*".[Emphasis added]

495. The Appellant also submitted that TCA, section 129 provides that dividends or distributions shall not be taken into account in computing income for corporation tax and that the measure of L's income for the purpose of the tax to which is subject and TCA, section 129 makes it clear that that measurement excludes dividends of distributions from other Irish resident companies for the purposes of TCA, section 248(1)(a)(i).

496. The Respondent argued that the principles of statutory construction requires a consideration of the intention of the legislature in enacting TCA, section 248(1)(a). If the Appellant's interpretation were correct, it would mean that a company with enormous dividend income could constitute a Case V company for the purposes of relief under TCA, section 248 (or section 247), provided it had a nominal amount of Case V income. It was also the Respondent's view that it was not the intention of the Oireachtas to provide for relief in such a case. Had that been its intention, it would have provided that a company whose business consisted of holding shares in other Irish resident companies was a company within TCA, section 248(1)(a).

497. Having considered the parties' submissions, I prefer those of the Respondent. TCA, section 248(1)(a)(i) explicitly states that the relief applies to an investment made in "*a company whose <u>income</u> consists wholly or mainly of profits or gains chargeable under Case V of Schedule D"* [Emphasis added] . As such, it is the company's income as opposed to its chargeable or taxable income that must be considered in determining whether the company is a Case V company. As observed by the Respondent, to determine otherwise would mean that a company with enormous dividend income could constitute a Case V company for the purposes of relief under TCA, section 248 provided it had a nominal amount of Case V income.

498. The Appellant put forward an alternative argument that in 2011, L was "*a company whose business consists wholly or mainly of the holding of stocks, shares or securities of a company".* The Respondent argued that if the Appellant is now contending that L in 2011 was a company within section 248(1)(a)(ii), it bore the onus of proof to show that its business consisted '*wholly or mainly*' of holding shares in companies within paragraph (i) of section 248(1)(a). The Respondent argued that the Appellant did not put forward evidence to this effect.

499. I have a difficulty with the Appellant's alternative submissions that L was a holding company as it undermines the Appellant's principal argument that L was a company "*whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D".*

500. Therefore on the basis that the main source of L's income for the year 2011 consisted of dividend income, no relief can be allowed for the interest paid by the Appellant in respect of the interest paid on the loan to acquire shares in that company for the year 2011.

Issue 6:

If the Appellant is entitled to relief under TCA, section 248 as extended by TCA, section 250, is the relief disallowed under TCA, section 817A?

501. On 6th December 2005, the Appellant borrowed TRY 306,977X from Bank to acquire new share capital in L. L then swapped the TRY 306,977X into €191,860X through a spot transaction with Bank.

502. The Appellant also borrowed TRY 230,620X on 6th December 2005 to subscribe for new shares in P. Three other individuals also entered into similar arrangements, under which they borrowed TRY from Bank, and used these funds to subscribe for shares in P, in the combined amount of TRY 769,380X resulting in a total new share subscription, including that of the Appellant, into TRY 1,000,000X. On 6th December 2005 the Board of P resolved to issue new shares to all four shareholders, including 144,137X shares with a total par value of €144,137X to the Appellant. Thereafter P swapped the TRY 1,000,000X into €625,000X through a spot transaction with Bank.

503. TCA, section 817A(1) is an anti-avoidance provision and provides:

> "*Relief shall not be given to any person under Part 8 in respect of any payment of interest, including interest treated as a charge on income, if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid is the obtaining of a reduction in tax liability by means of such relief.*"

504. As identified by the Appellant, TCA, section 817A involves a dual process of initially determining the transaction under which the interest is paid and thereafter establishing the benefits of interest relief against all other benefits.

505. One analysis of the application of that section is that the "*transaction under which the interest is paid*" is the payment of interest itself. Clearly, the main benefit that might be expected to arise from the payment of interest itself is the reduction in liability to the lender and this reduction will always exceed the benefit of any tax relief for the interest, unless the tax rate is greater than 100%. Therefore such an analysis is not practical as TCA, section 817A can never apply unless the tax rates are above 100%.

506. The second alternative is that the transaction under which the interest is paid is the loan. However by definition, a loan is not a benefit, it is a liability and therefore TCA, section 817A could have no application.

507. The third and most logical option is the comparison of the tax benefit of the interest paid on the loan with the value of the asset acquired by that loan. This type of approach was also considered in *Brain Disorders Research Limited Partnership*, *Neil Hockin -v- The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 325 (TC), a decision involving a consideration of the corresponding UK provision to TCA, section 817A, where the following the test was formulated at paragraph 138:

> *"the right approach was that we should put onto scales the tax benefit on one side of the scales and the other benefits on the other side, and see which were the greater benefits."*

508. In adopting such an analysis, it is clear that the Appellant borrowed equivalent to €191,861X to acquire the shares in L, obligated to pay interest of €55,260X and procured tax relief of €22,917X. Therefore with the benefit of the loan, the Appellant acquired an asset valued at €191,861X and the tax benefit of €22,917X was approximately 12% of the value of the asset. As such, the immediate benefit of the loan was the acquisition of asset in L.

509. I am also satisfied with the Appellant's evidence that there was an expected benefit "*to accrue … from the transaction"* and therefore there was an increase over and above the immediate benefit based on the calculations provided by the Appellant. As a consequence, the tax relief could not be considered to have been the main benefit of the transaction and therefore TCA, section 817A could have no application.

510. Correspondingly for the Appellant's acquisition of the shares in P, the Appellant borrowed equivalent to €144,137X to acquire the shares in that company and obligated to pay interest of €41,515X and claimed tax relief of €17,241X. Therefore the value of asset which was financed by that loan exceeded the expected benefit of the tax relief

and similarly TCA, section 817A could have no application to the Appellant's investment in P.

511. As noted by the Appellant, TCA, section 817A is an extremely complex provision and could only have limited application. One such application was that identified by Berners J. in *Curran* in considering the corresponding UK provision at paragraph 223:

> *"That was the position in Lancaster v IRC [2000] STC (SCD) 138, where arrangements entered into for inheritance planning purposes involved a circular flow of funds. The taxpayer withdrew an amount of capital from a partnership account, and made a gift of that amount to his wife. His wife then made him a loan, and the money was credited to the taxpayer's partnership account. Relief for interest paid on the loan was refused, and the Special Commissioner dismissed the taxpayer's appeal. There was no financial benefit to the taxpayer in the entire arrangement apart from the interest relief. The taxpayer's position at the outset, owning partnership capital, was essentially the same as his position after the loan transaction."*

512. Therefore unlike the Appellant, no asset was acquired by Mr Lancaster. On the contrary Mr Lancaster engaged in a circular transaction which involved his wife and an accountancy practice in which he was a partner where the purpose of the arrangement was designed to generate a tax deduction for him, leaving interest being routed to his wife which was covered by her personal allowance and that there "*was no financial benefit to the taxpayer in the entire arrangement apart from the interest relief*." Therefore as concluded above, TCA, section 817A could not be applied to the Appellant as the immediate and indeed expected benefit of the assets acquired far outweigh the benefit of the tax deduction procured.

Determination

513. Having considered the evidence and the submissions of the parties, I have found that:

a) The absence of a specific tax avoidance test in TCA, section 250 restricts the Respondent's right to withdraw relief by invoking TCA, section 248(3). I am therefore satisfied that the factors restricting the entitlement to TCA, section 250 are specifically contained within that section and there is no wording in that section to deny the Appellant relief as he has fully conformed with all of its requirements.

b) Based on the submissions and the evidence, I have found that the Appellant engaged in a "*scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax*." However, this finding can only apply in the event that I am incorrect in my interpretation that the anti-avoidance provisions in TCA, section 248(3) does not apply to the Appellant.

c) There is no doubt that the interest on the TRY loan was discharged with funds borrowed from a separate overdrawn account. The bank statements and certificates of interest were produced in evidence confirming that the interest was charged in the TRY accounts and paid with funds provided by a separate euro overdraft account. As such, the Appellant was increasing a euro liability (the overdraft) while discharging a Turkish lira liability (the interest). Furthermore I cannot accept the Respondent's argument that any liability financed by way of debt should not be considered to have been paid. I am therefore of the view that the Appellant paid interest on the loans to acquire shares in P and L as there was "*an act, such as the transfer of money, which discharges the debt.*"

d) As confirmed by the Respondent's own expert witness, I am satisfied the Appellant was granted a loan extension in 2007 for a period of four years and as a consequence the December 2007 loan extension did not fall outside of the scope of the relief by reason of TCA, section 248(1A).

e) The company's income as opposed to its chargeable or taxable income must be considered in determining whether the company is a Case V company. As observed by the Respondent, to determine otherwise would mean that a company with enormous dividend income could constitute a Case V company for the purposes of relief under TCA, section 248 provided it had a nominal amount of Case V income. Therefore on the basis that the main source of L's income for the year 2011 consisted of dividend income, no relief can be allowed for the interest paid by the Appellant in respect of the interest paid on the loan to acquire the shares in that company for the year 2011.

f) The Appellant borrowed equivalent to €191,860X to acquire the shares in L, paid interest of €55,260X and procured tax relief of €22,917X. Therefore with the benefit of the loan, the Appellant acquired an asset valued at €191,860X and the tax benefit of €22,917X was approximatwely 12% of the value of the acquired asset. As such, the immediate benefit of the loan was the acquisition of asset in L. I am also satisfied with the Appellant's evidence that there was an expected benefit "*to accrue … from the transaction*" and therefore an increase over and above the immediate benefit. As a consequence the tax relief could not be considered to have been the main benefit of the transaction and therefore TCA, section 817A could have no application.

g) Correspondingly for the Appellant's investment in P, the tax relief could not be considered to have been the main benefit of the transaction and therefore TCA, section 817A could have no application.

514. In this regard and in accordance with TCA, section 949AK:

(a) the amended assessments raised on the Appellant for the years 2006 to 2010 inclusive be amended to allow relief for the interest paid by the Appellant on monies borrowed to acquire shares in P;

(b) The amended assessments raised on the Appellant for the years 2006 to 2010 inclusive be amended to allow relief for the interest paid by the Appellant on monies borrowed to acquire shares in L, and

(c) The amended assessments raised on the Appellant for the year 2011 be amended to allow relief for the interest paid by the Appellant on monies borrowed to acquire shares in P only.

Conor Kennedy
Appeal Commissioner
30th April 2021

While the Tax Appeals Commission had been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997, those requests have now been withdrawn.