52TACD2022

BETWEEN/

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondents

DETERMINATION

Introduction

1. This is an appeal against an amended notice of assessment to corporation tax in the sum of €25,614,160.50, raised on the Appellant company on 29 November, 2018, in respect of the year ended 31 December, 2013.

2. The notice of assessment raises a charge to corporation tax in respect of a loan waiver in the sum of US$264,991,232 by [redacted] a company that was a member of the same corporate group as the Appellant.

3. The Respondents raised the assessment on the basis that the sum representing the loan waiver constituted profits or gains of the trade and was a taxable receipt for corporation tax purposes. The Appellant contended that the loan was capital and that the subsequent waiver of the debt was a capital transaction and did not give rise to corporation tax. The Appellant appealed on this basis seeking that the assessment be reduced to nil.

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Background

4. The Appellant is an Irish incorporated and resident company. The Appellant is a subsidiary of [redacted] which is a company incorporated under the laws of [redacted] and which had inexcess of twenty subsidiaries internationally at the relevant time.

5. The Appellant is the treasury company for the [redacted] and is based in [redacted] The [redacted] manufactures [redacted] for use in various industries. As the treasury company, the Appellant's function is to provide centralised cash pooling and treasury services for the group. A cash pooling and intra group loan agreement was executed as between the Appellant and six other group entities on 1 January, 2011.

6. On 16 March, 2011, the Appellant succeeded to the business of the [redacted] by means of a deed of assignment and assumption thereby becoming the treasury company for the [redacted]. Prior to March 2011, the treasury function of the [redacted] had been undertaken by a company in [redacted]

[redacted] and this company was incorporated and resident in [redacted]. The deed of assignment and assumption resulted in a net payment from the Appellant to [redacted] of US$1,266,156.29.

7. One of the liabilities of the [redacted] company was indebtedness to [redacted] arising from a loan that [redacted] had made to it of US$264,991,232. The transfer of this loan was formally documented by way of an interest bearing promissory note to [redacted] dated 19 September, 2011, in the sum of US$264,991,232. The promissory note provided that the loan was repayable on demand.

8. However the parent company, [redacted], assured the Appellant neither it nor any other group company would seek repayment of the loan in a manner which would impact the company's ability to meet its obligations as they fell due for at least twelve months from the date of approval of the financial statements.

9. Note 7 to the Appellant's 2011 accounts provided: *'Amounts owed to fellow subsidiary undertakings are unsecured, interest bearing and have no set repayment date. The parent company has indicated that neither it nor any other group company will seek repayment of amounts owed to other group companies in a manner which would impact the company's ability to meet its obligations as they fall due for at least 12 months from the date of approval of the financial statements.'*

10. In 2013, [redacted] was identified for liquidation as part of a group reorganisation. [redacted] main asset at that time was the debt owed to it by the Appellant.

11. On 5 July, 2013, the Appellant's memorandum of association was amended as follows; *'The company is authorised to accept gifts and other contributions to the company and its funds, any gift or contribution may be dealt with by the Company in any manner considered appropriate including the crediting of same to any distributable reserves of the Company.'*

12. On 16 July 2013, [redacted] executed a deed of waiver of debt and irrevocably waived its right to repayment of the debt from [redacted] The waiver of US$264,991,323 due by the Appellant was included as non-operating income in the Appellant's profit and loss account in its 2013 financial statements.

13. The Appellant's 2013 financial statement reflect a profit on ordinary activities before tax of US$254.9m. The waiver of the loan was reflected as non-operating income in the profit and loss account in the 2013 financial statements, in accordance with financial reporting standards and the correct accounting treatment. The deed of waiver provided that the creditor's rights in and to the repayment of the indebtedness were extinguished '*forever'* and written down to zero. The notes to the accounts state that the non-operating income of US$264,991,323 arises as part of the rationalisation of the [redacted] group structure and the decision of [redacted] to waive the right to a receivable from the Appellant. The commercial rationale for the loan waiver was to avoid the need for large cash movements intra group and to maintain the solvency of the Appellant which, at the end of 2012, had a shareholder deficit of $4.5m on its balance sheet. In addition, the waiver enabled cash to be consolidated within the Appellant as the Appellant was the main treasury vehicle for the group.

14. The interest that accrued on the [redacted] loan to the Appellant over the course of 2011-2013 (up to 16 July, 2013) was paid to [redacted] The Appellant did not take a deduction for the principal amount of the [redacted] loan of US$264,991,323.

15. The corporation tax computation for the 2013 period deducted the sum of approximately US$265m under the description *'Non-taxable capital gain arising on the waiver of the loan from* [redacted]*'* in arriving at the Appellant's tax adjusted loss for the 2013 period.

16. In the Respondents' 2013 notice of assessment dated 29 November, 2018, the waiver amount of $264,991.232 is treated as taxable (*i.e.* its euro equivalent, based on average US$/€ exchange rates for 2013, of €199,526,565) is included in arriving at the amount assessed.

Legislation

17. The relevant legislation contained in the Taxes Consolidation Act 1997, as amended, ('TCA 1997') is as follows;

- Section 18 TCA 1997 - Schedule D
- Section 26 TCA 1997 – General Scheme of Corporation Tax
- Section 76A TCA 1997 - Computation of profits or gains of a company – accounting standards
- Section 87 TCA 1997 (Debts set off against profits and subsequently released) was referred to in submission however, the Appellant did not take a deduction in respect of the [redacted] loan and this fact was undisputed. Thus, section 87 TCA 1997 did not apply.

Submissions in brief

Appellant's submissions

18. The Appellant submitted that the [redacted] loan of US$264,991,232 was fixed capital used in the business to fund the Appellant's loan book, from which the Appellant derived income in the form of interest. Correspondingly, in view of the Appellant, the waiver of the loan by [redacted] was a capital item.

19. The Appellant's position was that the write off of the loan principal was not part of the '*profits or gains of the trade*' in accordance with section 76A TCA 1997. On behalf of the Appellant it was submitted that it had established a basis for section 76A exclusion because the waiver of the loan was not a trading transaction, the loan itself was a capital item and the waiver was a capital advance to the Appellant company and was not a trading receipt. The Appellant submitted that the loan did not arise from profits and the waiver of the loan did not generate trading profits.

20. On the matter of dividends, the Appellant submitted that the entry in the profit in loss account flowed through giving rise to a distributable profit because of the accretion in the net assets of the company. The Appellant's position was that distributable profits may be used and were used in this case for dividends and distributions.

Respondents' submissions

21. The Respondents submitted that the loan waiver arose as part of the Appellant's trade of treasury services, was not capital in nature and was taxable as schedule D case I income arising in 2013. The Respondents submitted that the waiver generated a profit which was distributed by way of dividend.

22. The Respondents relied on the fact that the promissory note was repayable on demand and was accounted for within creditors (amounts falling due within one year). The Respondents submitted that section 76A TCA 1997 establishes the basic rule that taxable trading profits of a company will be based on the profits according to the company's financial statements. The Respondents submitted that the Appellant had not established a basis for excluding the non-operating income of US$264,991,232 as an exception to the rule.

23. The Respondents' submitted that the loan from [redacted] Limited was advanced for the purposes of the Appellant's trade and was not capital in nature.

Evidence

24. A significant amount of documentation was furnished in addition to financial statements, corporation tax returns and correspondence including *inter alia*, the cash pooling and intra-group loan agreement dated 1 January, 2011, the promissory note dated 19 September, 2011, the deed of waiver dated 16 July, 2013, the deed of assignment and assumption executed 16 March, 2011 and the facility agreement in relation to the multicurrency revolving credit facility.

25. Witness evidence was provided by [redacted] and [redacted] on behalf of the Appellant company. The Respondent did not call evidence.

[redacted]

26. [redacted] confirmed that her role in the Appellant company was as [redacted] financial controller with responsibility for all Irish companies in the group. She confirmed that she was a director of the Appellant company, having been appointed in April 2016 and that she had joined the Appellant company as a financial accountant in May 2010.

27. She stated that prior to cash pooling, all payments were made manually so for example, if a subsidiary needed to borrow money from the Appellant, a specific payment had to be made whereas in cash pooling, balances were automatically swept to zero overnight and if a company needed to make a payment the money would automatically transfer from the Appellant's bank account and vice versa.

28. [redacted] confirmed that the original treasury company was registered in [redacted] but that in 2010, a project had commenced to move the treasury operations to Ireland.

29. [redacted] stated that [redacted] treasury company had a number of different loan balances (receivables and payables) with a number of different intercompany balances with other subsidiaries in the [redacted]. It had a large balance payable to [redacted] of approximately $265m, this was far larger than other balances and the next largest balance was approximately $1m. The Irish company acquired [redacted] in in March 2011, which included acquisition of its loan balances (receivables and payables) and included the [redacted] loan which was novated to the Irish treasury company in March 2011. In September 2011, a promissory note was executed between the Irish treasury company and [redacted] (which provided for repayment on demand of the [redacted] loan) and the loan was placed into a separate account in the Appellant company and was accounted for differently because of the promissory note. In this regard the witness referred to an extract from the accounts, contained in the book of evidence. [redacted] stated that the other loans would have had movement in them but this balance was static other than the interest which accrued on the balance to the date of waiver of the loan. [redacted] described the [redacted] loan as a long term loan that the company had that was static in nature. She stated that there were no other comparable loans of similar magnitude in the Appellant company.

30. She referred to the deed of assignment and to schedule 1 to that deed containing the receivables and payables and described it as a snapshot of all the balances that were in [redacted] company's balance sheet on the date of the novation and whether those balances were receivable balances or payable balances in [redacted] company's accounts. She stated that these balances were assigned to the Appellant company on the effective date.

31. The witness stated that in 2010, [redacted] disposed of a subsidiary and put the funds on deposit with [redacted] company in the form of a loan. She stated that the funds would have been loaned out in the course of the treasury business but that there were no specific entries in the accounts showing where the monies went.

32. The witness was directed to a note in the 2011 accounts which provided: *'The principal activity of the company is to provide centralised cash pooling and treasury services for* [redacted] *and all* [redacted] *subsidiary undertakings.'* The witness stated that [redacted] was not part of the cash pooling, that it was a separate loan and that [redacted] was not a party to the cash pooling agreement nor had any requirement for cash pooling. The companies that were party to the cash pooling agreement were manufacturing and sales companies whose balances would fluctuate on a daily basis, whereas, the [redacted] balance was static but for the accrual of interest.

33. In relation to treasury services, the witness stated that the Appellant company also provided a foreign currency service for the group and managed foreign exchange risk. In addition, the Appellant company had external borrowings with a syndicate of banks in the form of a revolving credit facility ('RCF').

34. The [redacted] loan was included in note 7 to the 2011 accounts under '*Creditors – amounts falling due within one year*' on the advice of the auditors. [redacted] stated that this was because the promissory note provided for the loan to be repayable on demand. Note 7 provided: *'The parent company has indicated that neither it nor any other group company will seek repayment of amounts owed to other group companies in a manner which would impact the company's ability to meet its obligations as they fell due for at least 12 months from the date of approval of the financial statements.'*

35. [redacted] stated that her understanding as regards the rational for the waiver was to simplify the group structure. She stated that the role of [redacted] in the group was no longer required. One of the reasons for this was that [redacted] no longer held any subsidiaries. It was decided that waiver of the loan was an efficient means of dealing with the large balance from a group perspective and in liquidating [redacted]

36. In 2021, the Appellant company had a net liabilities position of $4.5m. Post loan waiver, on the balance sheet for 2013, shareholders' funds totalled $225m. The witness stated that the waiver helped shore up the balance sheet of the Appellant company such that it no longer needed a letter of support from its parent company in 2013.

37. The loan waiver, being a material transaction, was reflected in the profit and loss account as non-operating income on the advice of the auditors and in accordance with accounting standards. The waiver was a waiver of the loan principal however, the interest which had accrued was paid and was not waived.

38. [redacted] said that if you look at the accounts in 2011, the Appellant did not have the ability to repay the [redacted] loan. The net assets of the company were less than half its called up share capital. She stated that the Appellant company did not have the ability to repay the [redacted] loan if it had been called in and that from a group perspective, it was not considered short term but that in reality, it was longer term in nature.

39. [redacted] confirmed that in 2010 [redacted] disposed of its shareholding in [redacted] company and that the proceeds of that sale together with $71m capital reserves together totalled the sum loaned to [redacted] of US$264,991,232.

40. She confirmed that she was a member of the implementation team for the transfer of the balances from [redacted] to Ireland. She confirmed that the deed of assignment dated March, 2011, recorded the balances that were assigned on that date. She confirmed, as per the cash pooling agreement, that [redacted] was not a party to the cash pooling agreement and that [redacted] had no requirement for cash pooling. She stated that the parties to the cash pooling agreement were the group's manufacturing companies and sales offices and that the cash pooling facility was a daily source of funding for them.

41. In relation to the promissory note, the witness stated that regard should be had to the letter of comfort particularly in relation to the *'on demand'* stipulation in the promissory note. The witness confirmed that the [redacted] loan was reclassified on foot of the promissory note on the basis that the [redacted] loan needed to be kept separate on the Appellant's accounting system because it was covered by this

promissory note and was different to other loans. The balance in March was reclassified in September on execution of the promissory note.

42. The witness was asked why the description 'working capital' was used in the schedule (page 74 of the supplemental book of the Respondent) in relation to the [redacted] loan and the witness stated that it was a generic term but was not referring to the actual loan balance which had been repaid at that time. She stated that it was not possible to trace precisely where in the loan book the [redacted] funds went, that there was no like for like, one for one balance.

43. She confirmed in 2013, that the company generated a profit before taxation in the accounts after the waiver of the [redacted] loan and the balance sheet changed from a net liabilities position in 2012 to a net assets position in 2013. [redacted] also confirmed that the company made a profit of approximately $1.4m in 2014 and paid a dividend of $121m in that year, leaving shareholders' funds of $105m which, the witness confirmed, comprised the balance of the [redacted] monies and the profits it generated that year.

44. [redacted] stated that the company's balance sheet for 2015 showed shareholders' funds of $36m and that the company was still therefore in a stronger position than it was before the waiver when it was in a net liabilities position. She accepted that the '*lion's share'* of the [redacted] monies was distributed in dividends but a portion of it was retained in the company.

[redacted]

45. [redacted] stated that he was a director and corporate finance manager of the Appellant company and a qualified chartered accountant by profession. He joined the Appellant company in April 2011. He confirmed that he was a witness to the promissory note and had signed it in that capacity.

46. He stated that as the balances from [redacted] treasury company were subsumed into the Appellant company in 2011, the company had therefore an established balance sheet of loans and deposits at the time he joined the company.

TAX APPEALS COMMISSION

47. He stated that at the close of business each day, all cash in the pooling group was swept up into the master bank account of the treasury company automatically, and it was that that enabled the centralised view of cash to be taken and that was how liquidity could be managed on a day to day basis. Cash rich participants in the pooling agreement had their cash swept up (from their secondary account) to the master account and this happened automatically. However, if a secondary account had a zero balance or insufficient funds to meet its obligations, that account would be credited from the treasury account. He stated that cash pooling was an efficient way to manage cash by having it centralised in the Appellant's bank accounts and recorded through intercompany loan deposit balances between the Appellant company and the counterparties. Interest was charged and paid in relation to cash pooling.

48. [redacted] stated that the revolving credit facility ('RCF') was an external financing facility for the [redacted] group of $225m which allowed certain companies within the group, one of which was the Appellant company, to draw down on the facility usually for 30 day periods which would be rolled over on a monthly basis. The Appellant used the RCF facility for short term borrowings and to supplement cash deficit situations. In the period 2011 to 2013 he stated that borrowings on this facility would be approximately $100m so that the Appellant would be 50% drawn on the facility as a whole. [redacted] stated that in addition to the RCF, there was an overdraft facility within the Appellant company which was linked to the cash pooling facility.

49. He stated that the treasury company would not have been able to pay the [redacted] loan on demand because it did not have that liquidity and that is apparent from the accounts in 2011 and 2012. He said there would have to have been a capital injection to be able to make a repayment. [redacted] stated that the Appellant company had a balance sheet deficit of $2 million in 2011 and approximately $4m in 2012.

50. He stated that cashpooling balances fluctuated on a daily basis whereas the [redacted] loan was longer term in nature and in fact was on the books for over two years. He stated that the [redacted] loan was far in excess of other debts that the Appellant company had as payables on its balance sheet at that time. He stated that while the [redacted] debt was $265m, the other loans were each less than $1m.

51. He stated that [redacted] was not a party to the cash pooling agreement which was signed on 1 January, 2011, and that the [redacted] loan was not a cash pooling

balance. He stated that cash pooling balances reflected cash flows in and out of the Appellant company as a function of the operating site's daily operations for example, payment runs, customers, etc. He stated that by contrast, the [redacted] balance did not move and that the only movement was the capitalisation of the interest. He stated that the [redacted] loan was a longer term balance which was repayable in the balance sheet of the company. He confirmed that interest on the [redacted] loan was calculated based on a six-month US dollar LIBID less 10 basis points.

52. When asked whether he could identify what the [redacted] loan was used for, he stated that the deposit was lent out to other group companies before it was received into the Irish (Appellant) company. He stated that as it was already lent out to other group companies, it was reflected in the receivables schedule, namely the appendix to the deed of assignment and assumption. He stated that because of the different currencies used, he was unable to add up loans out by [redacted] treasury company and was unable to identify which specific loans constituted a lending out of the [redacted] monies.

53. He was asked about the schedule at page 74 of the Respondents' booklet which contained a column where loans were described as 'working capital'. He stated that at that time in 2013, the [redacted] loan had been waived and the balance was zero. He stated that the expression was a generic term to cover the concept of intercompany funding, which allows a company to use those funds for its operations. He stated that he did not know why the [redacted] loan was described as 'working capital' when it had a zero balance. He stated that it could have been an error.

54. He described the [redacted] loan as a long term loan. He stated that he was not involved in the policy or decision making in relation to the waiver. He stated that the Appellant treasury company at the time would not have been able to repay the loan on demand because it did not have $265m of liquidity. He stated that the RCF of $225m had a drawn balance of approximately $100m so there would not have been sufficient liquidity to repay the [redacted] loan. The funds were already lent out to other group companies. He stated that as the Appellant company and [redacted] were owned by the same parent company, it would be unlikely that that loan would have been called in.

55. He stated that the loan waiver occurred and that the interest accrued was physically paid. He stated that in 2011 the Appellant company had a balance sheet deficit of approximately $2m and in 2012, a balance sheet deficit of approximately $4m. He stated that the loan waiver was a significant boost to the treasury company as it increased the net assets of the company to in excess of $200m. He stated that the improvement in the balance sheet allowed the company to obtain better overdraft facilities from banks, better pricing on the RCF and to put an ISDA in place. He confirmed that dividends were paid to the parent company, [redacted] in 2013, 2014 and 2015.

56. In a letter from the Appellant's agent to the Respondents dated 21 September 2020, the following statement is made: *'Given that* [redacted] *only activity was conducting its treasury trade during the period the* [redacted] *loan was in existence, it was not unreasonable for* [redacted] *loan funds to have been available primarily for that purpose. Given the fungibility of cash, it is also to be expected that part of the* [redacted] *loan funds would have been used to fund ongoing operational costs but it is not possible to track funds in this manner.'* [redacted] was asked about this statement during cross examination and he stated that he agreed with the statement.

57. Senior Counsel for the Respondents stated that the dividend paid in 2014 exceeded the profits made by the Appellant in that year. He put it to [redacted] that dividends were nonetheless paid from profits. [redacted] stated that he was involved merely in the execution of the transaction.

Material findings of fact

58. The [redacted] loan to [redacted] was immediately lent out to other group companies and thus increased [redacted] loan book. No part of the [redacted] loan was held on bank deposit or investment by [redacted] I am satisfied on the evidence that the [redacted] monies formed part of and funded substantially the loan book of [redacted] (and subsequently of the Appellant), that the monies were not used in cash pooling and did not comprise a cash pooling balance.. I find as a material fact that the [redacted] loan enabled [redacted] to increase its lending book.

59. [redacted] was not a party to the cash pooling agreement which was signed on 1 January, 2011. [redacted] was not a company in need of cash pooling services as [redacted] was inactive, having sold its business. I find as a material fact on the evidence, that [redacted] did not avail of cash pooling services from the Appellant and was not involved in cash pooling.

ANALYSIS

60. A company is chargeable to corporation tax on its profits wherever arising in a financial year (section 26 TCA 1997). A company's profits are its income and chargeable gains (section 4(1) TCA 1997). The amount of any income is computed in accordance with income tax principles. (s.76(1) TCA)

61. The charge to tax pursuant to Case 1 of Schedule D is in respect of the annual profits or gains arising or accruing to any person residing in the State from any kind of property whether situate in the State or elsewhere. The Appellant is a trading company and its profits from that trade are subject to corporation tax.

62. The function and business of a group treasury company is to take in cash deposits or loans from group companies on which interest is paid, and to loan out those monies at higher interest rates to other group companies with the margin representing the profit for the treasury company.

63. The income of treasury companies comes from the difference between the cost of the deposits and the interest earned by lending (the interest being brought into the charge to tax). The profit of a treasury company in broad terms, is the difference between interest paid and interest received. The interest generated on lending money comprises the turnover of the business and the basis of a Case I assessment to corporation tax.

64. The [redacted] loan, the largest loan on the Appellant's loan book, funded substantially the loan book of [redacted] treasury company (latterly the loan book of the Appellant). The deposits lodged with or loans made to the Appellant on the loan book represented liabilities of the company, those loans being repayable to the Appellant's lenders. The loans made by the Appellant to other group companies were assets of the company as they were owed back to the Appellant.

65. The assessment to corporation tax in respect of the sum of US$264,991,232 was raised by the Respondent in relation to the waiver of the loan by [redacted] to the Appellant company. The waiver of the loan occurred as part of the rationalisation of the structure of the group of which the Appellant company and [redacted] were group members. In the Appellant's profit and loss account for the financial year 2013, the sum of US$264,991,232 was reflected as non-operating income in accordance with Financial Reporting Standard no. 3, thus inflating the company's profit before tax for the year.

66. In addition to lending on its loan book, the Appellant company provided treasury services pursuant to a cash pooling agreement for a number of other group companies. [redacted] was not a party to the cash pooling agreement entered into on 1 January 2011, nor did [redacted] at that stage have any requirement for cash pooling as it was inactive, having sold its business. The participants in the cash pooling agreement were active companies with cash balances and daily cash requirements. Cash pooling met immediate cash requirements on a daily basis. The Respondents incorrectly suggested that the [redacted] loan was used in cash pooling This was not supported by the evidence and was not the case.

67. The [redacted] loan received by [redacted] company was immediately loaned out by [redacted] company to other group companies as part of [redacted] loan book and no part of the [redacted] loan was held on bank deposit or investment by [redacted] company. The interest generated on the loan book comprised part of [redacted] company's trading receipts.

68. The Appellant submitted that the waiver of these types of loans does not arise in the ordinary course of a treasury trade in that the day to day business of a treasury company is not to receive cash deposits or loans from group companies and expect to have the repayment of those monies waived. I accept this submission on behalf of the Appellant.

69. The loan was a liability of [redacted] and once [redacted] company was acquired by the Appellant, the loan became a liability of the Appellant and this was formalised by the promissory note dated 19 September, 2011. The question which arises is whether the waiver of this loan gave rise to a taxable receipt of the Appellant's treasury trade.

Section 76A TCA 1997

70. In accordance with FRS 3, the loan from [redacted] was reflected in '*creditors falling due within one year*' in the Appellant's balance sheet on the basis that the promissory note provided that the loan was repayable on demand. [redacted] confirmed in evidence interest on the [redacted] loan was calculated based on a six-month US dollar LIBID less 10 basis points which was the lowest rate of long term funding the company had access to when compared to other payable balances of the company in the 2011 to 2013 period.

71. The evidence of both witnesses was that the quantum of the [redacted] loan at US$264,991,232 was such, that the company would not have been in a position to repay the loan had it been called in. The company did not possess the requisite level of liquidity and that is apparent from the accounts in 2011 and 2012. [redacted] in evidence stated there would have to have been a capital injection, for the Appellant company to be in a position to repay the loan had it been called in. In the circumstances, a letter of comfort which was reflected in note 7 to the 2012 accounts provided that the loan would not be called in at short notice. Note 7 provided: *'Amounts owed to fellow subsidiary undertakings are unsecured, interest bearing and have no set repayment date. The parent company has indicated that neither it nor any other group company will seek repayment of accounts owed to other group companies in a manner which would impact the Company's ability to meet its obligations as they fall due for at least 12 months from the date of approval of the financial statements'.*

72. The [redacted] loan of US$264,991,232 was waived on 16 July, 2013. This reduced the indebtedness of the Appellant company and immediately strengthened the balance sheet by increasing net assets. Until the debt was waived, the debt to [redacted] was static namely, what was owed to [redacted] at the beginning remained owing to [redacted] at the time of the waiver.

73. The evidence was that the decision to waive the [redacted] Loan in 2013, was made as part of a wider restructuring in the [redacted] Group in 2013. [redacted] was identified for elimination as part of the restructuring and the waiver route was chosen on the basis that it avoided the need for large cash movements intra group, maintained the solvency of the Appellant company and enabled cash to be

consolidated within the Appellant, the main treasury vehicle for the [redacted] Group.

74. The consequence of FRS 3 was that all exceptional items were required to be recorded in the profit and loss account and disclosed in the financial statements. Accordingly the waiver of the [redacted] loan was required to be disclosed as an exceptional item on the face of the profit and loss account in the 2013 financial statements of the Appellant company. The auditors were satisfied that the accounting treatment was correct and appropriate and an unqualified audit certificate was provided by them.

75. There was no dispute between the parties in relation to the accounting treatment insofar as both parties agreed that the correct accounting treatment required the loan waiver to be reflected in the profit and loss as non-operating income. The Respondents placed very significance reliance on the provisions of section 76A TCA 1997 which provides: *'For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.'*

76. Section 4 TCA 1997 defines *'generally accepted accounting practice'* as:
    (a) In relation to the affairs of a company or other entity that prepares accounts (in this section referred to as "IAS accounts") in accordance with international accounting standards generally accepted accounting practice with respect to such accounts.
    (b) In any other case, Irish generally accepted accounting practice

77. The Respondent's position was that what appears in the accounts as a profit is a profit and falls to be taxed as profit. The Respondents' position was that there was no basis for deviating from the accounting treatment. In short, the Respondents' case was that the accounting treatment indicated that the loan waiver was profit, therefore in view of the Respondent, it fell within the charge to corporation tax on the basis that it was profit.

78. The Respondent referred to the dividends paid in 2013, 2014 and 2015 and submitted that the loan waiver monies were distributed as profit and thus were profit. The position in relation to dividends is that one cannot distribute equity capital

of a company. However, accretions to the capital of a company can give rise to distributable profits. Capital can, for company law, be a distributable profit and often is because of accretion to assets. The available distributable profits enable a dividend to be paid by virtue of that fact. In support of this submission, Senior Counsel for the Appellant opened the following passage from Mr. Justice Clarke, as he then was, in *Re Irish Life & Permanent plc* [2010] 3 IR 513, as follows;

> ***'[34]*** *It is correct, as was noted by counsel for the notice party, that none of the case law deals with circumstances which are, in any real way, similar to the situation with which I was faced in these proceedings. However, it does seem that certain general principles can be gleaned from the authorities.*
>
> ***[35]*** *These principles seem to me to be the following:-*
>
> > *a. the current assets of a commercial entity (and in principle, these comments would apply equally to a partnership or other trading entity as they would to a company) must, in logic, represent either the accumulated capital invested into the business or company (that is, all of the capital invested less any capital taken out) together with the accumulated net undistributed profits of the business (that is, all of the profits less all of the losses less any profits distributed, in whatever way might be appropriate, to the investors);*
> >
> > *b. in this context, the term profits includes both what might, for Revenue purposes, be described as capital gains or income;*
> >
> > *c. in principle, the term "profits" reflects a change in the assets of the entity concerned not explained by a movement in the capital invested in the entity. Obviously if further capital is invested, or if capital is returned to the investors, then that will explain a movement in the assets of the entity which does not derive from the entity having made profits. However, when any appropriate allowance is made for further investment or return of capital, then the remaining change in the assets of the entity must be its profits (or, in the case that there be a diminution, its losses);*

d. profits over any particular period (which will, of course, be most commonly calculated on a yearly basis) amount, therefore, to the change in the assets for the period in question which cannot be explained by a movement in the capital invested.

[36] *It seems to me to follow from the provisions of s 148 of the Act of 1963 that profits, for the purposes of a company incorporated under that Act, and, therefore, profits for the purposes of considering whether a distribution under s 45 can take place, must mean profits calculated in accordance with the relevant applicable accountancy standards. It follows, therefore, that it is movements in the assets of the company by reference to such standards that needs to be considered in the context of determining whether profits, within the meaning of the Act, can be said to have occurred.'*

79. In this appeal, once the loan indebtedness was extinguished, the correct accounting treatment required the loan waiver sum to be included as non-operating income in the profit and loss account. There was no dispute in relation to the accounting treatment. The entry in the profit and loss account flowed through giving rise to a distributable profit because of the accretion in the net assets of the company. Distributable profits may be used and were used in this case for dividends and distributions.

80. The question in this appeal is whether the loan waiver sum is capital or income for corporation tax purposes. The Appellant stated that the net asset accretion was profit for the purposes of company law but not a taxable profit for the purposes of tax law because it was capital in nature.

81. The Appellant submitted that the accounting treatment of the loan waiver did not determine the tax treatment of same because the loan waiver was not part of the company's profits or gains from its trade and therefore not subject to corporation tax. It was submitted by Senior Counsel for the Appellant, that the Appellant came within the exception to section 76A on the basis that the loan waiver monies were capital in nature and could not be regarded as representing a trading receipt, trading income

or a sum in substitution of interest. In this regard the Appellant relied *inter alia* on the fact that the [redacted] loan prior to waiver, was a liability of the company which was used to fund the loan book and which was capital in nature.

82. The Appellant's position was that the loan waiver which extinguished the indebtedness, increased the capital of the company and significantly improved and strengthened the net asset position of the company. The Appellant's position was that the accounting treatment, while required by the FRS, was not reflective of the true nature of the loan waiver sum of US$264,991,232 which, in view of the Appellant, was capital in nature.

83. Section 76A requires that company profits be computed for Case I *'in accordance with generally accepted accounting practice'* however, that principle is qualified by being '*subject to any adjustments required or authorised by law in computing such profits or gains for those purposes*'.

84. Thus, the fact that the correct accounting treatment for an item is to credit it to the profit and loss account, does not make it taxable if on tax principles the expenditure is not of a revenue nature. The accounting treatment, while a relevant consideration, does not determine whether a receipt is capital or revenue in nature.

85. Accordingly, whether a receipt is a capital receipt or a revenue receipt will not necessarily be determined by where the receipt appears in the accounts if the legal analysis is at variance with this. The issue of whether the receipt is capital or income must be ascertained regardless of where it appears in a company's accounts as only a revenue receipt forms part of the computation of income for corporation tax purposes. The fundamental point is that the accounting treatment must be in conformity with tax law if the treatment is to be followed for tax purposes. If it is not then it must be adjusted in the tax computation.

86. The Appellant's position was that the write off of the loan principal was not part of the '*profits or gains of the trade*'. The Appellant's position was that they had established a basis for section 76A exclusion because the waiver of the loan was not a trading transaction, the loan itself was a capital item and the waiver was a capital advance to the Appellant company and was not a trading receipt.

Capital v Revenue

87. The Supreme Court case of *Dolan (Inspector of Taxes) v AB Co Ltd. [1969] IR 282,* concerned the issue of whether lump sum payments made by wholesalers of petrol and oil regarding the sale of petrol, were capital or revenue in nature.

88. In *Dolan*, Budd J. addressed the *Atherton* 'enduring benefit' test and stated as follows;

> *"Lord Cave's words have, however, been considered and analysed in Anglo Persian Oil Co Ltd v Dale* [1931] 16 TC 253. *Rowlatt J pointed out that there was a fallacy in the way it was sought to use the word "enduring" in that case. He says (page 262):*
>
> > *What Lord Cave is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures, not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment.*
>
> *… The end of that sentence has a relevance in the present case. It can forcibly be said that a payment made in respect of several years under an exclusivity agreement relieves the appellant company of a revenue payment for several years, in that otherwise, in the appellant's business, expenditure would have to be made either annually by way of rebate or payment akin to rebate, or by paying travellers monthly or yearly salaries to secure business. Rowlatt J continues:*
>
> *It means a thing that endures in the way that fixed capital endures. It is not always an actual asset, but it endures in the way that getting rid of a lease or getting rid of onerous capital assets or something of that sort as we have had in the cases, endures.*
>
> *He goes on to say that he thinks that the Commissioners had been misled by the way in which they had taken "enduring" to mean merely something that extends over a number of years. Romer LJ agreed with Mr Justice Rowlatt that by "enduring" is meant "enduring in the way that fixed capital endures". He adds at page 274:*
>
> > *An expenditure in acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date.*

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

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

89. In *Dolan*, Budd J. drew a distinction between the profit earning structure of the company and the outlay *i.e.* the costs of the company's profit earning activities. The Respondents submitted that the loan from [redacted] was advanced for the purposes of the Appellant's trade of treasury services and was not capital in nature while the Appellant's position was that the [redacted] loan was capital to begin with, in the form of a repayable liability on the loan book of [redacted] company.

90. As regards the correct legal test to be applied I am bound by the Irish Supreme Court authority of *Dolan* and in particular the dicta of Budd J. affirming the dicta of Rowlatt J. in *Anglo-Persian* which clarified the scope of the *Atherton* enduring benefit test.

91. On foot of the loan waiver, the debt to [redacted] of US$264,991,232 was permanently removed. This gave rise to a substantial strengthening of the balance sheet of the Appellant.

92. There are many indicia to assist a legal analysis which seeks to ascertain whether a receipt or an item of expenditure is capital or revenue in nature. In the Supreme Court authority of *Dolan,* O'Dálaigh C.J. stated as follows:

> *'There is no statutory definition of "capital" or "revenue," and the problem which faces the Court is therefore one of characterisation or classification. In the absence of parliamentary wisdom and guidance in this field, the most the courts have been able to do has been to commend an analysis of the transactions in question and to indicate a number of heads under which the transactions might be usefully examined. These heads, however, are "essentially descriptive rather than definitive"—per Lord Radcliffe in Commissioner of Taxes v Nchanga Consolidated Copper Mines Ltd. Lord Pearce, in delivering the advice of the Privy Council in BP Australia Ltd. v Commissioner of Taxation of the Commonwealth of*

Australia, said at p 264 of the report:—"The solution to the problem is not to be found by any rigid test or description." In the end one's task is to say whether, on a balance of all the relevant considerations, the scales appear to incline in favour of an expenditure being revenue or capital outgoings—see the BP Case at p 274. It may not be very satisfactory that the law governing taxation of incomes should be in this state but, by and large, the law must remain in such condition of clarity as parliament judges to be appropriate. One readily acknowledges that the difficulties of definition here are formidable and, perhaps, even daunting; but in the absence of definition the area of the penumbra in which the courts are left to grope is considerable. Counsel on both sides are in agreement that this case lies somewhere in the penumbra, though of course claiming that eventually it emerges into the light on their side of the broad division. Australia, like ourselves, is a beneficiary of the terminology which we find in the Income Tax Act, 1918; and the analysis which Dixon J (later CJ) applied in the Australian case of Sun Newspapers Ltd. v Federal Commissioner of Taxation has been commended as "a valuable guide to the traveller in these regions" by Lord Pearce in the BP Case at p 261. The question that Dixon J was discussing was the nature of certain sums spent in buying up the competition of a rival newspaper. He said at p 363 of the report:—"There are, I think, three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment." These three heads, character of the advantage sought, manner in which it is to be used and means adopted to obtain it, are as useful a framework of analysis as one can find anywhere in the large number of cases to which the Court was referred.

93. There are many authorities on the characterisation of monies in the context of a *capital v revenue* analysis and the parties furnished numerous authorities and opened some of those at hearing.

94. In *Davies v The Shell Company of Chain Ltd*. [1951] 32 TC 133(CA) agents' deposits against default were left with the taxpayer company which made a foreign exchange gain in respect of them. It was found by the Special Commissioners that the exchange

profit was a capital profit and not subject to income tax and this was upheld on appeal to both the High Court and the Court of Appeal. Jenkins L.J. said *'... I find nothing in the facts of this case to divest those deposits of the character which it seems to me they originally bore, that is to say the character of loans by the agents to the Company with a security but nevertheless loans. As loans it seems to me they must prima facie be loans on capital not revenue account, which perhaps is only another way of saying that they must prima facie be considered as part of the Company's fixed and not its circulating capital.'*

95. In *Beauchamp v FW Woolworth plc [1989] STC 510*, the tax treatment of foreign exchange losses on the repayment of loans was considered and a deduction for the losses was not allowed in computing table income because the borrowing was capital. Lord Templeman observed that *'in a rough way, it is not a bad criterion of what is a capital borrowing to say that capital borrowing is a thing that is going to be spent once and for all, and income borrowing is a thing that is going to recur every year.'*

96. Numerous other authorities were cited however, each case bears its own individual facts and what is required in legal analysis of this type is an application of the relevant legal principles to the facts of the case at issue in these proceedings, as follows;

97. *Purpose* – the Appellant commenced trading in 2011 and based on the evidence, the purpose of the loan from [redacted] was to maintain the capital structure of the company and to ensure that it had sufficient capital funding in place to enable it to conduct its treasury activities.

98. *Duration* – the Respondents submitted that the loan was repayable on demand and that this mitigated against it being capital in nature. However the Appellant's position, supported by the evidence was that there was no expectation that [redacted] would demand repayment of the loan and thus a letter of comfort was furnished which was reflected in note 7 to the 2012 accounts which provided that the loan would not be called in on demand. The loan was in existence on the Appellant's loan book for approximately two years prior to waiver.

99. *Temporary or fluctuating* – the [redacted] loan was neither temporary nor fluctuating in nature. The loan existed for approximately two years and formal assurance was given that it would not be repayable on demand which was reflected in note 7 to the

2012 accounts. Until the debt was waived, the debt to [redacted] was static namely, what was owed to [redacted] on commencement of the loan remained owing to [redacted] at the time of waiver.

100. *Quantum*, - at US$264,991,232 , the [redacted] loan was the largest loan on the Appellant's loan book and it substantially funded the loan book of [redacted] treasury company.

101. *Capacity to repay* – the [redacted] loan of US$264,991,232 was so significant in amount that the Appellant did not have capacity to repay the loan and would have required a substantial capital injection to do so. On the evidence, this was one of the reasons why the loan was waived when the group reorganisation took place.

102. *Net asset accretion* - the waiver of the Appellant's indebtedness to [redacted] provided additional capital to the company which increased the net assets of the company and strengthened the balance sheet. [redacted] evidence was that the strengthened balance sheet assisted the Appellant in obtaining credit from other third parties and banks and in the refinancing of the revolving credit facility. He stated that because the company had a stronger balance sheet they were able to achieve better pricing on the RCF in 2015, approximately 20 basis points across the margin grid as compared with the 2011 facility.

103. *Non-recurring item* – the waiver of the loan arose as part of a reorganisation of the group and was an exceptional item. It is clear based on the nature and quantum as well as the context in which it arose, that the waiver of this loan was of a non-recurring nature.

104. *Fixed in amount and permanent in nature* – the removal of the indebtedness by means of the loan waiver was fixed in amount namely US$264,991,232 and was not temporary but permanent in nature. The indebtedness was removed and the release of the liability meant that there was no longer a deposit used in the treasury company in respect of which a debt was due and the net assets increased accordingly.

Conclusion

105. It is clear from the evidence that the [redacted] loan was loan capital used to fund the loan book in order to generate profit in the form of interest. I am satisfied that the [redacted] loan, being substantial in quantum, was an integral part of the profit making apparatus and capital structure of the company. The interest generated on the loan book formed part of the profits of the trade (with any allowable deductions under Case I that could be made) and the charge to corporation tax related to that.

106. The Respondents submitted that the [redacted] loan was used in the trade of the Appellant and for this reason, it was revenue in nature. This submission was made in broad terms, in support of the Respondents' view that the [redacted] loan monies once waived, gave rise to a revenue receipt. However, the position at law is that deposits and loans on the Appellant's loan book while they were utilised in the Appellant's trade to generate interest, were liabilities of the Appellant. The Respondent submitted that the monies once waived, constituted a receipt subject to corporation tax but did not fully elaborate on how the character of the [redacted] loan (the largest liability on the loan book) was converted to a revenue item or a taxable receipt through the loan waiver. The answer in short, is that it was not. The [redacted] loan, a liability of the company, ceased to exist once the indebtedness was extinguished and the net assets of the company increased.

107. The loan waiver sum of US$264,991,232 was fixed in amount and permanent in nature and it resulted in substantial accretion to the Appellant company's net asset position and it strengthened the balance sheet. The loan waiver gave rise to long term implications for the company in terms of capital accretion. [redacted] in evidence stated that in 2021, the balance sheet of the Appellant company remained strong with approximately $30m in net assets and that there had been no further dividends since 2015.

108. In this appeal, for the reasons set out above and also, taking into account the significant quantum of this loan and the fact that the company would not have been in a position to repay it had it been called in, I am satisfied that the permanent removal of the debt by means of the loan waiver gave rise to an enduring capital benefit in the Appellant's treasury trade. The removal of the indebtedness by means of the loan

waiver did not convert the loan liability to trading income of the business nor to a sum in substitution of interest. Once the loan was waived, the net assets increased, that is capital.

Determination

109. The question for consideration in this case is whether the effect of the loan waiver is that the sum becomes a taxable receipt for corporation tax purposes.

110. I am satisfied that the loan waiver does not constitute profits or gains of the trade and is not a taxable receipt for corporation tax purposes and for the reasons set out above, I am satisfied that the Appellant has established a basis for treating the loan waiver transaction as an exception to section 76A TCA 1997 on the basis that the loan waiver was capital and not revenue in nature.

111. I determine that the euro equivalent of the waiver amount of US$264,991.232 falls outside the charge to corporation tax and that the sum assessed to corporation tax should be reduced by the euro equivalent amount. This appeal is hereby determined in accordance with sectin 949AK TCA 1997.

Lorna Gallagher

COMMISSIONER LORNA GALLAGHER

8th day of March 2022

This determination has not been appealed.