AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

122TACD2023

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") pursuant to section 933 of the Taxes Consolidation Act 1997, as amended ("TCA 1997"), against a notice of amended assessment to corporation tax raised by the Revenue Commissioners ("the Respondent") for the period of [redacted] ("the relevant period") in the amount of €8,901,633.00.

2. The appeal proceeded by way of an oral hearing over twelve days from 5 to 20 September 2022.

Background

3. The Appellant was a member of a group of companies, being a subsidiary of [redacted], which in turn was a subsidiary of [redacted]. Prior to [redacted] the principal shareholders of the group were [redacted]. On [redacted] acquired the group of companies.

4. The Appellant owned a commercial property in [redacted] known as [redacted]. On [redacted], it sold the property to [redacted] The net proceeds of sale was €9,489,243.

5. The Appellant's CT1 form for the relevant period showed *inter alia* a net loss of €51,977,169. Consequently, it showed that zero corporation tax was payable for the relevant period.

6. On 28 June 2018, the Respondent raised an amended notice of assessment for the relevant period. This was calculated on the basis of *inter alia* capital gains in the amount of €72,151,892, with the total deductions allowed being €1,203,030. Consequently, corporation tax at 12.5% was charged on €71,213,064, giving an assessed amount of €8,901,633.

7. On 26 July 2018 the Appellant appealed against the amended notice of assessment to the Commission. There were four issues in the appeal: (1) whether a capital contribution provided by the Appellant to [redacted] in [redacted] was allowable as enhancement expenditure; (2) whether a fee paid by the Appellant to [redacted] was allowable as an incidental cost of selling the property; (3) whether the sale of rights to dividends from [redacted] to the Appellant had the effect of transferring a base cost from [redacted] arising from its purchase of the shares of the Appellant, to the Appellant; (4) whether section 546A of the TCA 1997 operated to disallow the transactions.

8. The appeal was heard from twelve days from 5 to 20 September 2022 before Commissioner Gallagher. Commissioner Gallagher's term of office concluded as of 20 March 2023 when she vacated her office. She did not complete the determination of the appeal prior to her vacating office.

9. On 24 March 2023, the Commission issued a notice pursuant to sections 949AW and 949U of the TCA 1997 to the parties. Section 949AW provides that

   "(1) Where, in relation to an appeal –

   (a) a hearing has commenced but is not completed, or

   (b) a hearing has been completed but a determination has not been made,

   by the one or more Appeal Commissioners who presided over the hearing (and the omission to complete or do the foregoing thing is due to one or more Appeal Commissioners having vacated, in whatever circumstances, office), the appeal shall, as one or more other Appeal Commissioners decide, either –

   (i) be reheard by one or more other Appeal Commissioners as if the first hearing had not commenced or been completed, as the case may be, or

   (ii) instead of being reheard, be adjudicated on by one or more other Appeal Commissioners in accordance with section 949U."

10. The notice to the parties further stated that

   "*the Appeal Commissioners consider that this appeal is appropriate to be adjudicated upon without a further hearing, in accordance with section 949U of the TCA 1997. They intend to adjudicate the matter by way of consideration of the documentation submitted by the parties together with the transcripts of the hearing held in September 2022.*

   If you object to the Appeal Commissioners proceeding to adjudicate the appeal without holding a further hearing, you are required to notify us within 21 days after the date of this notice."

11. Neither party objected to the appeal being determined without a further hearing pursuant to section 949U. Consequently, the Commissioner is satisfied that it is appropriate to determine this appeal on the basis of the documentation submitted by the parties together with the transcripts of the hearing held in September 2022, and without a further oral hearing.

Legislation

12. Section 31 of the TCA 1997 states that:

> "*Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting –*
>
> *(a) any allowable losses accruing to that person in that year of assessment, and*
>
> *(b) in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75)*."

13. Section 78 of the TCA 1997 states *inter alia* that:

> *"(1) Subject to this section, the amount to be included in respect of chargeable gains in a company's total profits for any accounting period shall be determined in accordance with subsection (3) after taking into account subsection (2).*
>
> *(2) Where for an accounting period chargeable gains accrue to a company, an amount of capital gains tax shall be calculated as if, notwithstanding any provision to the contrary in the Corporation Tax Acts, capital gains tax were to be charged on the company in respect of those gains in accordance with the Capital Gains Tax Acts, and as if accounting periods were years of assessment; but, in calculating the amount of capital gains tax, section 31 shall apply as if the reference in that section to deducting allowable losses were a reference to deducting relevant allowable losses.*
>
> *(3) (a) The amount referred to in subsection (1) shall be an amount which, if (before making any deduction from the amount) it were charged to corporation tax as profits of the company arising in the accounting period at the rate specified in section 21(1), would produce an amount of corporation tax equal to the amount of capital gains tax calculated for that accounting period in accordance with subsection (2).*
>
> *[…]*
>
> *(4) In subsection (2)—*
>
> *"chargeable gains" does not include chargeable gains accruing on relevant disposals within the meaning of section 648;*
>
> *"relevant allowable losses" means any allowable losses accruing to the company in the accounting period and any allowable losses previously accruing to the company while it has been within the charge to corporation tax in so far as they have not been*

allowed as a deduction from chargeable gains accruing in any previous accounting period.

(5) Except where otherwise provided by the Corporation Tax Acts, chargeable gains and allowable losses shall for the purposes of corporation tax be computed in accordance with the principles applying for capital gains tax, all questions as to the amounts which are or are not to be taken into account as chargeable gains or as allowable losses, or in computing gains or losses, or charged to tax as a person's gain, or as to the time when any such amount is to be treated as accruing, being determined in accordance with the provisions relating to capital gains tax as if accounting periods were years of assessment…"

14. Section 546A of the TCA 1997 states that:

"(1) In this section—

"arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

"tax advantage" means—

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) the avoidance or reduction of a charge to tax or an assessment to tax, or

(d) the avoidance of a possible assessment to tax;

"tax" means capital gains tax or corporation tax on chargeable gains.

(2) For the purposes of the Capital Gains Tax Acts, a loss shall not be an allowable loss if—

(a) it accrues to the person directly or indirectly in consequence of, or otherwise in connection with, any arrangements, and

(b) the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage.

(3) For the purposes of subsection (2), it shall not be relevant—

(a) whether or not the loss accrues at a time when there are no chargeable gains from which it could otherwise have been deducted, or

(b) whether or not the tax advantage is secured for the person to whom the loss accrues or for any other person."

15. Section 547(1) of the TCA 1997 states that:

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

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

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

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

(i) for a consideration that cannot be valued,

(ii) in connection with the person's own or another person's loss of office or employment or diminution of emoluments, or

(iii) otherwise in consideration for or in recognition of the person's or another person's services or past services in any office or employment or of any other service rendered or to be rendered by the person or another person."

16. Section 548(4) of the TCA 1997 states that:

"*Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length*."

17. Section 549 of the TCA 1997 states *inter alia* that:

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

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

18. Section 552 of the TCA 1997 states *inter alia* that:

"(1) Subject to the Capital Gains Tax Acts, the sums allowable as a deduction from the consideration in the computation under this Chapter of the gain accruing to a person on the disposal of an asset shall be restricted to—

[…]

(b) the amount of any expenditure wholly and exclusively incurred on the asset by the person or on the person's behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by the person in establishing, preserving or defending the person's title to, or to a right over, the asset, and,

(c) the incidental costs to the person of making the disposal.

(2) For the purposes of the Capital Gains Tax Act as respects the person making the disposal, the incidental costs to the person of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by that person for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor, valuer, auctioneer, accountant, agent or legal advisor and costs of transfer or conveyance (including stamp duty), together with—

[…]

(b) in the case of a disposal, costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation under this Chapter of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by the Capital Gains Tax Acts."

19. Section 557 of the TCA 1997 states *inter alia* that:

"(1) Where a person disposes of an interest or rights in or over an asset and, generally wherever on the disposal of an asset, any description of property derived from that asset remains undisposed of, the sums which under paragraphs (a) and (b) of section

552(1) are attributable to the asset shall be apportioned both for the purposes of the computation under this Chapter of the gain accruing on the disposal and for the purpose of applying this Chapter in relation to the property which remains undisposed of.

(2) Such portion of the expenditure shall be allowable as a deduction in computing under this Chapter the amount of the gain accruing on the disposal as bears the same proportion to the total of those sums as the value of the consideration for the disposal bears to the aggregate of that value and the market value of the property which remains, and the balance of the expenditure shall be attributed to the property which remains undisposed of."

20. Section 617 of the TCA 1997 states *inter alia* that:

"(1) Notwithstanding any provision in the Capital Gains Tax Acts fixing the amount of the consideration deemed to be received on a disposal or given on an acquisition, where—

(a) a member of a group of companies disposes of an asset to another member of the group,

(b) the company making the disposal is resident in the State at the time of the disposal or the asset is a chargeable asset in relation to that company immediately before that time, and

(c) the other company—

(i) is resident in the State at the time of the disposal or the asset is a chargeable asset in relation to that company immediately after that time, and

(ii) is not—

(I) an authorised investment company (within the meaning of Part 24 of the Companies Act 2014) that is an investment undertaking (within the meaning of section 739B),

(II) a Real Estate Investment Trust (within the meaning of section 705A) or a member of a group Real Estate Investment Trust (within the meaning of section 705A), or

(III) an authorised ICAV (within the meaning of section 2 of the Irish Collective Asset-management Vehicles Act 2015 (No. 2 of 2015)),

both members shall, except where provided by subsections (2), (3) and (4), be treated, in so far as relates to corporation tax on chargeable gains, as if the asset acquired by the member to whom the disposal is made were acquired for a consideration of such amount as would secure that on the other member's disposal neither a gain nor a loss would accrue to that other member; but, where it is assumed for any purpose that a member of a group of companies has sold or acquired an asset, it shall be assumed also that it was not a sale to or acquisition from another member of the group.

(2) Subsection (1) shall not apply where the disposal is—

(a) a disposal of a debt from a member of a group of companies effected by satisfying the debt or part of it, or

(b) a disposal of redeemable shares in a company on the occasion of their redemption,

and the reference in that subsection to a member of a group of companies disposing of an asset shall not apply to anything which under section 583 is to be treated as a disposal of an interest in shares in a company in consideration for a capital distribution (within the meaning of that section) from that company, whether or not involving a reduction of capital."

21. Section 627(2) of the TCA 1997 states *inter alia* that

    "(2) For the purposes of the Capital Gains Tax Acts, a company shall be deemed to have disposed of the assets referred to in paragraph (a) or, as the case may be, (b) or, in the case of paragraph (c), to have disposed of all its assets (other than assets excepted from that paragraph by subsection (6)) and to have immediately reacquired the assets at their market value (at the time of the occurrence of the event concerned [or, in the case of paragraph (c), at the time specified in subsection (2A)]2) on the occurrence of any of the following events:

    […]

    (c) the company ceases to be resident in the State and becomes resident in another Member State or in a third country."

Evidence

Witness – [redacted]

22. The witness stated that he was the ultimate beneficial owner of the Appellant. [redacted] which he owned 100%, having acquired [redacted] and the Appellant on [redacted]

He became a director of the Appellant on [redacted] and resigned on [redacted] He stated that his business consisted of organising, arranging and structuring co-ownership investments, predominantly in property.

23. He stated that he was approached in [redacted] by a representative of the three companies. He was informed that the Appellant had a significant property (i.e. [redacted] "the property") which it had disposed of at a gain, and that the Appellant's accounting period was still unexpired. He was also informed that [redacted] had a significant cost base in its shareholding in the Appellant. He said it seemed obvious to him that the Appellant, prior to disposing of the property, should have disposed it first to [redacted] and have [redacted] sell it on to the third party. He was of the view that neither [redacted] nor the Appellant were trading companies.

24. He stated that he was informed that [redacted] base cost in the Appellant arose from [redacted] buying out a 46.67% shareholding in the Appellant from a third party [redacted] for €29m in [redacted] and it had also engaged in a transaction with [redacted] to acquire its shareholding in the Appellant at the same time. This latter acquisition was a connected party transaction. Therefore, the overall base cost in [redacted] was roughly €62m.

25. [redacted] paid €1 for the shares in [redacted] from the previous owners, [redacted]. Total consideration was €4.9m. The management accounts showed a total net book value in the group of companies of €1.7m. The witness stated that [redacted] was acquiring the net worth but also the base cost that [redacted] had in the Appellant, which had a premium of €3.2m.

26. Regarding [redacted] purchase of the Appellant's shares held by [redacted], the witness stated that [redacted] borrowed the €29m from [redacted] which was its immediate parent. The Appellant then borrowed €26m from [redacted], which it lent to [redacted] together with €3m of its (the Appellant's) own resources, which [redacted] used to repay [redacted]

27. The Appellant's loan to [redacted] was subsequently, in [redacted], converted into a capital contribution. The witness stated that he received advice from [redacted] that the Appellant may have received something in return for the capital contribution, such as an enhancement in value. He stated, having analysed the transactions, he came to the view that when the Appellant made the capital contribution, it was enhancing the shareholding that it held in [redacted] This was because [redacted] held a shareholding in the Appellant which, in his view, was effectively worthless at the time ([redacted]) due to the global financial crisis and the debt owed by [redacted] to the Appellant. The effect of the capital contribution was to convert the debt to capital, which enhanced the shareholding.

28. He was advised that it would be prudent for the Appellant to "*get something else*" for making the capital contribution to [redacted] The shareholding the Appellant held in [redacted] was [redacted] A ordinary shares, which just gave rights to capital on a liquidation; they had no rights to dividend or rights to vote. He stated that it was felt that by amending those rights it could further substantiate the deduction for the capital contribution as enhancement expenditure, and therefore the A share rights were amended accordingly.

29. The witness stated that there was a capital gain of [redacted] arising on the sale of the property. However, there was also a loss arising from the capital contribution. The witness argued that the capital contribution was the enhancement expenditure on the A shares, and the disposal of the A shares gave rise to a deductible loss which was greater than the capital gain arising on the disposal of the property. Therefore, the net position from a tax perspective was a loss.

30. He stated that in Ireland it is not possible to transfer capital losses within a group, but it is possible to transfer base costs. The way he planned to transfer the [redacted] base cost to the Appellant was to buy back part of the rights of the shares (being rights to dividends, "RTDs") that [redacted] held in it and then have the Appellant dispose of those rights, thereby realising the loss associated with the shares.

31. The witness stated that he was introduced to [redacted] in [redacted] by a mutual contact in [redacted] The witness stated that he told [redacted] that he was considering selling a stream of dividends and asking whether he [redacted], via his company [redacted] would be interested.

32. [redacted] came back with a draft offer letter regarding the RTDs. He also would require financial assistance so proposed a draft loan agreement for a non-recourse loan from a company called [redacted] was owned by the witness's wife. The offer was in the amount of €7m, and in return [redacted] would receive dividends in aggregate of approximately €7.8m.

33. The witness denied the Respondent's contention that there was no commercial rationale for the offer and that the only purpose was to establish a third party price for the RTDs. He stated that [redacted] would have earned a return from the RTDs over and above the cost of their acquisition.

34. The Appellant subsequently offered €7m to [redacted] to purchase the RTDs. The witness stated that the valuation was based on the reserves of the Appellant at the time. The purpose of the acquisition was to allow it to sell the RTDs to [redacted] The €7m to be received from [redacted] would then be transferred by the Appellant to [redacted] the witness stated that

the purpose of receiving the monies from [redacted] would be to raise finance for the group of companies. On [redacted] accepted the offer from the Appellant by depositing €100 in the Appellant's bank account.

35. However, the witness received advice from [redacted] that going ahead with the proposed transaction with a third-party such as [redacted] could result in the Appellant incurring a tax liability due to a share-for-share exchange with the other group companies in [redacted]. The transaction with [redacted] did not proceed.

36. While it was not documented at the time in the company minutes, the witness remembered that on [redacted] he resolved that the A shares should be granted the same class rights as the ordinary shares by way of consideration for the capital contribution. Following this, on [redacted] the witness resigned as director in the Appellant and the other two companies as he moved to [redacted] The new director of the companies was [redacted]. The witness stated that [redacted] was an obvious person to ask to take over the directorships because he had been engaged with the witness in respect of the RTDs.

37. The witness disagreed with the Respondent's view that the Appellant sought to generate capital losses. He stated that its intention was to realise losses that had already been incurred. On [redacted] a form B83 was filed at the CRO which stated that the Appellant had resolved to change its accounting period year end from [redacted] to [redacted] The witness stated that this was to give him greater comfort in making a solvency declaration for the purposes of a summary approval process ("SAP"), and he denied the Respondent's contention that it was to allow the Appellant additional time to generate a capital loss.

38. On [redacted] the Appellant transferred its tax residence from Ireland to [redacted] The witness stated that the purpose of this was, as it owned the RTDs at the time, the RTDs were deemed to be disposed as of the migration and this allowed the Appellant to realise the incurred loss from the RTDs, pursuant to section 627 of the TCA 1997.

39. On cross examination, the witness stated that the reason for the deferred consideration when purchasing the group of companies was to facilitate the SAP and the declaration of solvency; without the SAP the full consideration of €4.9m would have transferred on day one. He accepted that, from the perspective of the previous owners of the Appellant, the company had a CGT liability of €7.7m as set out in the management accounts.

40. He accepted that the Appellant received a net amount of approximately €9.85m on the sale of the property. He stated that he believed [redacted] held money in an account with

[redacted], and also that a firm of solicitors [redacted], acting on behalf of [redacted], held money on its behalf, and that the combination of these two accounts came to roughly €9m. He accepted that evidence of these monies was not before the Commission. He denied the suggestion that the only money paid by him for the three companies was €1, and reiterated that [redacted] paid €4.9m. He accepted that there was no bank transfer showing this.

41. He stated that €4.9m was paid on [redacted] by way of instruction to the solicitors to release funds for the benefit of [redacted]: "*So* [redacted] *had -* [redacted] *had to get the funds from somewhere and it get* [sic] *it from* [redacted] *by borrowing from it. That's why we engaged in the statutory or the summary approval process, a public document, it's there. On that date* [redacted] *was giving money to* [redacted] *to enable it to pay the consideration*." He did not accept counsel's suggestion that there was no rationale for the money to be borrowed given [redacted] had money in its bank account.

42. Regarding the purchase by [redacted] of the shares in the Appellant held by [redacted] the witness agreed that the Appellant discharged a loan due to [redacted] from [redacted] in the amount of approx. €27m. He disagreed that when the Appellant discharged the loan in [redacted] it wrote it off, but instead contended that there was a capital contribution used to repay the loan. He accepted that there were no strings attached to the discharge of the loan, but contended that ultimately the effect was to enhance the A ordinary shares.

43. He accepted that, even if it was an enhancement rather than a gift, it was not exclusive to the holders of the A shares and that the A shares constituted 5.16% of the total shareholding. He stated that it was his view that the increase in value of the shares constituted an enhancement of the shareholding. He agreed that [redacted] had expressed concerns that simply giving a capital contribution with no strings attached would not constitute an enhancement for the purposes of section 552. He agreed that the rationale for the decision to change the A shares was simply on foot of tax advice. He disagreed with counsel that, even if there was an enhancement, the maximum benefit would be the 5.16% of the capital contribution.

44. The witness agreed with counsel that the company accounts showed a number of intra-group loans that did not involve the transfer of cash. He agreed that the statement in the Appellant's accounts that "*During the year* [redacted] *advanced funds in the amount of 7 million"* was incorrect.

45. Regarding [redacted], the witness stated that he never knew him before [redacted] and had not done any work with him prior to his dealings in this matter. He disagreed that it

did not make sense to appoint [redacted] as the director of both the Appellant and [redacted] in the context of the negotiations about the RTDs. He agreed that the CT1 for [redacted] for [redacted] showed an income of €10,000 and shareholder funds of €8,750, but did not accept counsel's suggestion that this suggested it was not in a position to purchase the RTDs for €7m; he stated that he did not have access to the company accounts when [redacted] made the offer.

46. Counsel put it to him that the RTDs transactions did not make sense: "*for a parent to lend the subsidiary 7 million so that the subsidiary can give its parent 7 million doesn't make any sense?*" The witness replied "*it makes sense to me… the starting point is that* [redacted] *was entitled to sell the RTDs to anybody. It could easily have done that.*" He stated that the logic of the transaction for both the Appellant and [redacted] was "*initially, to raise money, bring money into the group and, second of all, to realise an already incurred loss commercially was there, to realise that from a tax perspective in [the Appellant].*"

47. On the second day of cross examination, it was put to the witness that he had co-signed, on behalf of his company, a guarantee in favour of [redacted] in [redacted] for approx. €500,000. He accepted he had signed it but stated he had no recollection of that guarantee when he stated he had not known [redacted] prior to [redacted] He stated that he did not know [redacted] when he co-signed the guarantee.

48. Regarding the offer from [redacted] to purchase the RTDs, he claimed that the offered amount of €7m was proposed by [redacted]. This sum was based on discounted cashflows; [redacted] had also proposed a schedule of payments going up to [redacted] but this schedule was not included in the agreement subsequently entered into between the Appellant and [redacted] The witness accepted that he wanted the Appellant to sell the RTDs to [redacted] rather than [redacted] in order to create (or realise) the loss in the Appellant, and he agreed that he directed [redacted] to direct the offer letter to the Appellant rather than [redacted] He accepted that the proposed transactions were for the benefit of [redacted] which he owned.

49. The Appellant agreed that the undertaking given in the agreement between the Appellant and [redacted] was different to that sought by [redacted] in its offer letter, as the undertaking in the agreement "*to vote the shares in such manner as is consistent with the ownership of the RTD by the offeror"* was specific to the Appellant holding the RTDs and therefore only existed as long as the Appellant owned the RTDs. He was asked therefore if the undertaking was of no benefit to a third party: "*No, no, it's given to [the Appellant]*, *correct*." When it was put to him that the Appellant had no need for cash at the time, he accepted

that it did not need cash but stated that it was not prohibited from raising cash. He accepted that it was not the intention to maintain the Appellant as a trading vehicle.

50. The witness stated that [redacted] which was to fund [redacted] purchase of the RTDs, became non-Irish tax resident on [redacted] because "*it was under my management and control*" and he moved to [redacted] At the time of the offer, [redacted] was also the sole director of the Appellant, and the witness agreed that [redacted] would therefore have full access to the advice received from the advisers of the Appellant in respect of the offer from [redacted] He agreed that this was "*unusual*" and a conflict of interest.

51. He stated that the sale of the RTDs would have promoted the success of the Appellant by raising finance for future investment purposes. He accepted that the group companies had not carried out any investments subsequently. [redacted] was also appointed director of [redacted] and the witness accepted that it was unusual that [redacted] was "*holding the reins*" in respect of all of the parties involved in the proposed sale of the RTDs.

52. [redacted] did not purchase the RTDs, as the witness stated that the Appellant had received advice that such a sale could have a de-grouping effect in respect of the Appellant. On [redacted] the Appellant entered into a loan with [redacted] for the purpose of purchasing the RTDs from [redacted] The witness agreed that the effect of this was that money moved from the Appellant to [redacted] He agreed that the Appellant got no cash benefit from the RTDs. He disagreed with counsel's suggestion that all of the various intra-group transactions were carried out for the purpose of extracting cash and avoiding tax.

Witness – [redacted]

53. The witness was a director of [redacted] at the time of the relevant transaction in [redacted] and the years leading up to it. [redacted] was a specialist property development company and asset management company. Its work was mainly for [redacted] property assets. In the period around [redacted], [redacted] was engaged in debt recovery projects and readying commercial properties for sale. This involved "*perfecting the building in its best possible light*", in every relevant aspect.

54. In [redacted] was involved in asset management for all of the properties in the [redacted]. Regarding the property at question in this appeal, [redacted], for which [redacted] were paid €3m plus VAT after its sale, the witness stated that he became aware in [redacted] that "*that this asset is going to be sold through some shape or form in the coming*

months/years, at the very least we needed to get ready for the refinancing of the loan in [redacted] *when the loan was expiring… this building needed to be got ready for sale in the event that the bank don't provide a refinance in* [redacted] The loan was from [redacted].

55. [redacted] work included trying to maximise rental income as well as involvement in planning applications. In [redacted], "*the only prospects at that time was a refinance… It was to try and convince all parties that it is not the right time to sell this building, that the actual best strategy is to delay the sale and delay the sale while the market recovers*." He stated that a refinance was "*almost like selling the building again to the bank*."

56. In [redacted] appointed a receiver over the property. The witness stated that this would have had a "*devastating*" impact on the prospects of sale. The receiver was removed in [redacted] following a loan agreement with [redacted]. The witness stated that getting this loan was effectively "*the same as selling to them [as] you have to go through the same process*." He stated that [redacted] had been doing substantial work in readying the building for sale by way of joint venture which then turned into due diligence for the new loan agreement. The loan with [redacted] was for a six-month term.

57. In [redacted] the Appellant entered into a two month exclusivity period with [redacted] during which the Appellant could not engage with any third party regarding the potential sale etc. of the property. The witness stated that "*we effectively brought the building to a sales agreement with that party, but they didn't sign it.*" As a result, [redacted] had "*time burgled*" the Appellant.

58. The Appellant had no staff so [redacted] carried out all of the functions for the Appellant in respect of selling the property or entering into an agreement with [redacted] to rent the property. He was brought to a document from [redacted] which he described as a sales and marketing pitch document from [redacted] for the sale of the property. It stated that [redacted] were of the view that the property could achieve a price in the region of [redacted]. The witness stated that [redacted] provided a "*marketing and sales service*", in comparison to [redacted] which carried out "*every other function that is required from the property - like I said, preparing the business plan. So we were doing the cost modelling for refurbishing the building, the design for refurbishing the building, speaking with a lot of the agents and architects and all of those in terms of, well, how are we going to present this building, how can we refurbish it…*"

59. Any information required by [redacted] was provided by [redacted] had brought the property to the point where [redacted] considered it ready for sale. If there were questions from lawyers or agents, these were dealt with by [redacted] "*So we would've been kind of very much*

managing the appointed sales agent." [redacted] had charged a fee of [redacted], and when asked why [redacted] fee was so much greater, the witness stated that [redacted] involvement had been for "[redacted] *years of readying the building for sale*". [redacted] was paid on a 'no foal no fee' basis so would have got nothing if there had been no sale.

60. [redacted] also got paid an ongoing relationship fee for administering the building, of approximately €100,000 per annum from [redacted]. There were no fees paid from [redacted] as the bank stopped paying them. Regarding the sales fee of €3m, the witness was adamant that it was justified: "*If you're on a typical asset management arrangement where you have fixed fees in your agreements, for a very difficult asset [the property] you could be as much as anywhere between* [redacted] *of the value of the asset, plus a disposal fee of between* [redacted] *in the year of disposal, on top of your* [redacted] *of your asset management fee for that year.*"

61. The witness stated that it was not unusual that there was no written agreement between [redacted] and the Appellant regarding the services, and that this was common amongst the [redacted].

62. On cross examination, the witness stated that he knew [redacted] was owned by [redacted], but he did not know that they owned [redacted] of the Appellant (prior to its sale). He was asked about the invoice from [redacted] to the Appellant dated [redacted]. He stated that he and his fellow director in [redacted] had agreed the figure between them, which was calculated by them on the basis of "*what we felt we had contributed to the property over years of working on the property and effecting a very, very successful outcome… and on the basis of opportunity lost on other projects.*"

63. Counsel brought the witness through the Appellant's accounts and stated that, ultimately, it would be left with €1.7m. He asked the witness if he considered it appropriate that [redacted] was to be paid €3m plus VAT. The witness stated that he considered the fee to be fair in the circumstances.

64. The witness was asked about a witness statement of [redacted] sworn on [redacted], in the context of proceedings between the Appellant and [redacted] wherein [redacted] stated that it had been the Appellant's intention to hold onto the property but that due to the conduct of [redacted] it was left with no option but to sell the property: "*Well, I said previously that it was the intention to hold on, or sell the building by way of joint venture.*" He denied that [redacted] statement contradicted his evidence that the intention was to sell the property. He said [redacted] instructions were "*readying the property for sale, making it a*

[1] The fee paid to [redacted] was ultimately agreed at [redacted]

saleable asset" and he could not answer to the Appellant's thinking in [redacted] The witness stated that the normal work of a property manager was different to the work [redacted] was doing "*in trying to position the building as a major investment opportunity from* [redacted] *and into* [redacted]

65. He was asked about his evidence in chief wherein he stated that [redacted] were not paid management fees for [redacted]. He accepted that he may have been mistaken: "*Yeah, we were paid fees from* [redacted]*. And if I made a mistake on* [redacted] *it probably should be* [redacted] There was a reference in [redacted] Defence to the Appellant's Statement of Claim to the payment "*to the Plaintiff of management expenses of €365,000 per annum.*" The witness stated that he did not know the context of that statement or the dates it related to. He was brought to a bank statement for [redacted] which showed a payment out on [redacted] to "[redacted]" in the amount of €314,031.64, and it was put to him that this seemed to be a management charge paid to [redacted] He stated that he could not recall.

66. Counsel put it to the witness that the Appellant's focus was on enhancing the building with a view to increasing its return as a going concern rather than enhancing it and then selling it immediately: "*One of. One of the actions in terms of extending the life with* [redacted] *was to go down that route.*"

67. The witness was asked about the appointment of [redacted] on [redacted] by the Appellant as "sole selling agent" for the property. He stated that he considered [redacted] to be the auctioneer for the property. He was asked about the letter appointing [redacted] which provided that [redacted] was the sole agent with the right to sell the property, and it was suggested that this contradicted his evidence: "*Not at all.*" The fee agreed with [redacted] was stated to be a base fee of [redacted] of the gross sale price up to [redacted], plus [redacted] of the amount in excess of [redacted], and it was suggested that this was "*completely out of kilter*" to the fee charged by [redacted] The witness stated that the roles of [redacted] and [redacted] were "*not relatable*", and that [redacted] role was to "*buy the building, refurbish it, rent it to* [redacted] *and sell it for* [redacted] *profit*."

68. The witness agreed that there was a significant spike in [redacted] turnover for [redacted] arising from the fee for the sale of the property, compared to the surrounding years (approximately €1.4m per year). It was put to him that [redacted] made far more than the Appellant for the sale of the property: "*as I said to you, we could have looked for 50% of the deal*." On re-examination, he reiterated that he considered the fee charged by [redacted]

[2] Ultimately [redacted] fee was reduced by [redacted] to [redacted]

for the property, which he described as an "*extremely difficult*" asset, "[redacted], to be reasonable and in line with the industry standard.

Witness – [redacted]

69. [redacted] was an accountant and had provided a valuation report on behalf of the Appellant in respect of the RTDs. He stated that he valued the RTDs from the acquisition of the RTDs by the Appellant from [redacted] as at [redacted]. He stated that he valued the RTDs on the basis that the Appellant had net assets of €7.8m at the time. He stated that there was a crystallisation of a tax loss on the balance sheet of the Appellant due to the change of residence on [redacted].

70. He stated that the RTDs were valued on the basis of the hypothetical willing purchaser who was availing of the same set of circumstances as the Appellant did when purchasing the RTDs. The RTDs were valued on the basis of the "dividend discount model". He discounted the net assets of €7.8m to arrive at a valuation of €7,029,899.

71. He stated that "*And as at* [redacted] *when I was valuing this right to dividend,* [redacted] *was the seller, was aware through common directorship, as also as a shareholder for* [redacted] *the intention of* [redacted] *to change its residency on* [redacted]*. And as such, I felt in my belief it's fundamental that that is taken into account when valuing the business*." He stated that a willing seller on the [redacted] would take into account the imminent events of the [redacted]

72. He stated that the fact that [redacted] was a common director to [redacted] and the Appellant gave a level of certainty to the transaction that dividends would be paid: "*So the company, it's buying a right to dividends and there's an undertaking underlying that purchase of the right to control them. So it does control them. There's nothing contingent in this, it has the control*." Furthermore, he stated that 100% of the Appellant's share value rested in the RTDs because of the undertaking.

73. On cross examination, he stated that for the purposes of the valuation he was provided with the Appellant's accounts as of [redacted]. He stated that the only difference between [redacted] and [redacted] was the change of residence, which crystallised the tax loss on the balance sheet. He stated it was known to all the parties on [redacted] that the Appellant would change its residence on [redacted], so he was not entitled to take it into account. However, it was not known that the [redacted] offer would lapse on [redacted] so he could not take that into account.

74. He stated that he valued the contract between the Appellant and [redacted] and did not value the potential transaction with [redacted] The transferability of the contract to [redacted] (or any other third party) had nothing to do with his valuation. He stated that the undertaking on the part of [redacted] to the Appellant that it would vote the shares in such manner as was consistent with the ownership of the RTDs by the Appellant was a "*very fundamental part*" of the valuation. He accepted that there was no income stream set out in the offer from the Appellant to [redacted] and that the income stream was set out instead in the offer from [redacted] He stated that he was not aware of the potential offer from [redacted] to purchase the RTDs for €7m when carrying out his valuation.

75. He was asked about the Appellant's minutes of [redacted] which referred to consideration of the proposed move to [redacted] but did not provide that a decision to relocate had been made. He agreed that the essential difference between his valuation and that carried out by the expert retained by the Respondent was the tax liability of €7m approx. He stated that the Appellant would have had a level of comfort regarding the proposed relocation because of its relationship with [redacted].

76. When pushed on the point that the Appellant's minute of [redacted], timed 3pm, talked about considering the proposed move to [redacted] the witness stated:

> "*I think based on minutes, I think in fairness to you, the way these minutes are drafted, that I couldn't say it with 100% certainty, absolutely not. But I think the reality of the transaction is that with common directors, between the two of them, they knew what was happening at the time*."

Witness – [redacted]

77. [redacted] was an accountant and retained by the Respondent to provide a valuation on the RTDs. He stated that the valuation was carried out as of [redacted], which was the date of the offer from the Appellant to [redacted] He stated that he accounted for the CGT liability in the Appellant's accounts, which left a net asset figure of €205,170. The CGT liability was included in the accounts to [redacted] but not included in the accounts dated [redacted]. The CGT liability was €7,667,568.

78. He stated that all the companies were connected so there was no arm's length basis to the valuations provided by the Appellant. He stated that a third party would do due diligence and see the CGT liability, and that therefore the offer from [redacted] was not credible. Regarding the net asset value, he stated that "*This was a company, [the Appellant], that was not trading, had sold its only asset and had no future cash flows. It had no distributable reserves to speak of, it had 200,000/205,000. So our valuation is based on*

the net asset valuation, which is literally just looking at the figures in the balance sheet as at the valuation date."

79. Regarding the method of valuation used by the Appellant's expert, he stated, "*In the discounted cashflow method, well, and again this is the main point of difference, but we don't see it, the company, as having sufficient distributable reserves to use the cashflow method of valuation. So we don't think it's relevant. We don't think it's appropriate*."

80. He stated that if there was no CGT liability, the valuation between the two experts would have been the same: "*So if there was an interested party looking at this company and they see, they look at the* [redacted] *management account, with nearly an 8 million CGT liability, before making an offer for a right to dividend, you'd want to be 100% satisfied how has this CGT liability dissipated? Where has it evaporated to? Was it paid? Why was it accounted for? And then I suppose, on* [redacted] *it's nil. So how did that occur and how comfortable would you be as a buyer with your tax warranties and indemnities in whatever agreement you're entering into, how sure are you that that CGT liability is actually nil?"*

81. He stated that, even if there were distributable reserves, the offer from the Appellant to [redacted] was from a related company, so he would fully discount it: "*I don't see any other third party making this offer… Because there is a CGT liability in the company as at that date and there's no distributable reserves to issue a dividend.*" Regarding the undertaking granted to the Appellant, he considered it conditional and not clear-cut.

82. Regarding the valuation carried out as per [redacted], and the Appellant's minute of the same date considering relocation to [redacted] he stated that "*you'd want to be looking at some documentation which is proving to the valuer that the tax residency is in Ireland or it's abroad on the date of your valuation… And the* [redacted] *offer is a connected party, it's not at arm's length and I don't believe that offer would have been made by any other commercial entity in the world*."

83. He did not agree with [redacted] that it was appropriate to assume a third party would have the same benefits as the Appellant: "*Because if they were totally unconnected parties, obviously there'd be full legal agreement, there'd be full legal due diligence, the actual payments that would have to be made would have been set out by* [redacted] *and [the Appellant], which was not done.*"

84. On cross examination, it was put to the witness that he had made numerous references to the Appellant having a CGT liability in its accounts, but that what the accounts provided for was a provision rather than a liability: "*Okay, provision for a liability*."

Submissions

Appellant

85. In written submissions, the Appellant stated that there were four issues in the case:

    i. whether a capital contribution provided by the Appellant to [redacted] was allowable as a deduction as enhancement expenditure, in accordance with the provisions of section 552(1)(b) of the TCA 1997, in calculating the capital gain or allowable loss arising on the disposal of the [redacted] "A" ordinary shares held in [redacted]

    ii. whether a professional fee paid by the Appellant to [redacted] was regarded as an incidental cost to the Appellant of making the disposal of the property and hence allowable as a deduction in calculating the chargeable gain arising on such disposal in accordance with section 552(1)(c);

    iii. determining the market value of the RTDs held by the Appellant, which would determine the amount allowable as a deduction in calculating the allowable loss arising on the disposal of the RTDs;

    iv. whether the provisions of section 546A applied and the loss was consequently not regarded as an allowable loss.

86. Regarding the first issue, it was clear that expenditure was incurred on the A ordinary shares. The capital contribution increased the shareholders' equity as shown in the [redacted] financial statements of [redacted] The expenditure incurred in respect of the capital contribution of €27,937,936 provided by the Appellant to [redacted] was expenditure incurred by the Appellant on the A ordinary shares; *FD Fenston Will Trusts v HMRC* [2007] STC (SCD) 316.

87. The Appellant was not seeking to apply a retrospective description or purpose to an act that occurred in [redacted] It was the Appellant's position that the capital contribution made in [redacted] enhanced the value of the asset and that therefore must have been the implied purpose of the capital contribution. Such a purpose was self-evident.

88. The test of whether the expenditure incurred on the capital contribution was reflected in the state or nature of the asset needed to be considered at a particular point in time being the time of the disposal. The capital contribution by the Appellant resulted in the rights attaching to the A ordinary shares being amended. The rights attaching to the A ordinary shares were amended such that they ranked *pari passu* with all other shares issued by [redacted] The A ordinary shares reflected these amended rights at the time of their disposal by the Appellant. If the capital contribution resulted in the issue of one new share or

resulted in an amendment to the rights attaching to the shares, the capital contribution would be regarded as being reflected in the state or nature of the shares; *FD Fenston Will Trusts v HMRC* [2007] STC (SCD) 316.

89. It was clear that the Respondent accepted that the amended rights were reflected in the A ordinary shares at the time of their disposal. In denying a deduction for the capital contribution and in calculating the alleged capital gain arising to the Appellant on the disposal of the A ordinary shares, the Respondent accepted and used the market value of the shares at the time of their disposal as the consideration in calculating the gain. Such market value reflected the amended rights attaching to the shares (i.e. ranking on a *pari passu* basis) which arose as a consequence of the capital contribution.

90. Regarding the second issue, it was clear that where a fee was paid in respect of professional services of an agent (i.e. [redacted] wholly and exclusively for the purposes of the disposal of an asset, that expenditure was deductible irrespective of the quantum of the amount paid provided that the payment satisfied the “wholly and exclusively” test by virtue of a commercial arm’s length arrangement. The inclusion of a wholly and exclusively test within section 552(2) dealt with the issue of the quantum of expenses by restricting the deductibility in the case of excessive payments which were not wholly and exclusively incurred in connection with the disposal. “Incidental” costs were costs which were related to the disposal, as specifically defined in section 552(2). The term “incidental” did not refer in any way to the quantum of the expenditure which was dealt with by the “wholly and exclusively” test; *JD Wetherspoon PLC v HMRC* [2012] STC 1450.

91. [redacted] acted as the Appellant’s professional agent in respect of the sale of the property, which included all aspects of the sale from identifying potential buyers to a failed open market tender process and completion of all property related due diligence and negotiation of legal contracts in respect of the ultimate sale. The fee was paid wholly and exclusively for the purposes of the disposal of the property.

92. Regarding the third issue, market value was determined by the provisions of section 548 and meant “*the price which those assets might reasonably be expected to fetch on a sale in the open market*”. A share comprised a bundle of rights and the RTDs formed part of that bundle. The Appellant had shareholders’ funds (and distributable reserves) of c. €7.8m at the valuation date being [redacted].

93. The statutory hypothesis for valuing shares assumed amongst other matters that the purchaser stood in the shoes of the vendor and would be subject to the restrictions, degree of influence and risk that the seller was bound by in the real world. A purchaser of the RTDs would therefore be in a position to influence the declaration and payment of

dividends in the same way as the vendor was in a position to influence. That was the basis on which the RTDs were sold. The terms of sale included a covenant by [redacted] to issue an undertaking "*to vote the Shares in such manner as is consistent with the ownership of the RTD by the Offeror*".

94. To support the market value of €7,000,000, the Appellant offered to acquire the RTDs for that amount and that offer was accepted by [redacted] Furthermore, [redacted] offered to purchase the RTDs from the Appellant for €7,000,000 on the basis of agreed schedule of minimum dividend payments over a number of years. The disposal of the RTDs by [redacted] gave rise to a capital receipt, and not an income receipt as contended by the Respondent.

95. Therefore, the consideration which the Appellant was treated as paying to [redacted] for the RTDs was €55,239,495, being €62,138,560 (the expenditure allowable as a deduction on a disposal of the [redacted] ordinary shares held in the Appellant) multiplied by the fraction €7,000,000 / €7,874,238. This was calculated on the basis of the market value of the RTDs at €7,000,000, with €7,878,234 representing shareholders' funds in the Appellant. This calculation resulted in an allowable loss of €48,239,495 arising for the Appellant on the deemed disposal of the RTDs on [redacted].

96. The Appellant submitted that the purpose of section 617 of the TCA 1997 was to enable assets to be transferred within a group at such consideration that ensured the base cost on the initial acquisition of an asset was available to the group member that ultimately disposed of the asset, and group members were free to transfer assets within a group such that the asset was disposed of by a company that could best use that base cost. Therefore, the Respondent was incorrect to state that the base cost in the RTDs was not available to the Appellant.

97. In respect of section 546A, the Appellant submitted that it did not apply to a company subject to corporation tax in respect of chargeable gains. Section 546A(2) stated "*For the purposes of the Capital Gains Tax Acts, a loss shall not be an allowable loss…*". It was clear that section 546A did not apply for the purposes of the Corporation Tax Acts. The Corporation Tax Acts was defined by section 1(1) as the "*the enactments relating to corporation tax in this Act….*" with "this Act" being the TCA 1997.

98. Section 21(3) provided that a company was not subject to capital gains tax in respect of gains accruing to it but was instead chargeable to corporation tax. Section 78 set out how chargeable gains were calculated for corporation tax purposes and the basis for calculating an amount to be included in a company's profits in respect or such gains for the purposes of calculating a company's corporation tax liability. Section 78 was a

provision of the Corporation Tax Acts as it was an enactment that related to corporation tax. As such, section 546A did not apply to the provisions set out in section 78.

99. In the alternative, the Appellant submitted that the transactions referred to by the Respondent did not constitute "arrangements" for the purposes of section 546A; if they did constitute arrangements, the capital loss arising from the disposal of the RTDs did not accrue to the Appellant as a consequence of such alleged arrangements; the Respondent had failed to identify a comparator arrangement; and/or the alleged arrangements did not have a main purpose of securing a tax advantage.

100. In oral submissions, counsel for the Appellant stated that, prior to the capital contribution, [redacted] balance sheet was worth nothing, and consequently the [redacted] shares held by the Appellant in [redacted] were worthless. After the capital contribution the [redacted] shares had a value, because the balance sheet of [redacted] was €1,000. This was a change in the state or nature of the shares.

101. There was no gain for the Appellant in relation to the transactions at issue. There was a chargeable gain o [redacted] on the property (not including the [redacted] fee) but against that was a capital contribution of €27.3m as well as a base cost of €62m in the [redacted] shares. The Appellant was unashamed about seeking to move that base cost into the Appellant by way of the RTDs. The Appellant could have sold the property to [redacted] who could have then offset the loss, and it was doubted that the Respondent would have objected to such a course of action.

102. Regarding the capital contribution, the contribution was on the shares because it resulted in an increase in the stockholders' equity. The irresistible inference must be that the expenditure was incurred with that purpose in mind (*FD Fenston Will Trusts v HMRC*). The Appellant was deemed to have disposed of the shares under section 627 for c. €406,000 on [redacted], and if there had been no capital contribution, it would not have received that sum; therefore the capital contribution was reflected in the state or nature of the shares at the date of disposal. The Respondent accepted the value of the shares at disposal, so therefore it accepted that the share rights had changed.

103. Regarding the [redacted] fee, the Respondent had misunderstood the work involved in the sale of a commercial building like the property in this appeal. [redacted] had set out in his evidence that a large amount of work was required over a number of years to get the property ready for sale. [redacted] was not involved in providing an administration service but was acting as a selling agent for the property. The fact that [redacted] was operating on a no foal no fee basis was also relevant. The quantum of the fee did not determine whether or not a fee was incidental to a sale, but rather the quality of the work was what was

important. The caselaw demonstrated that it was necessary to take a reasonable approach to the “wholly and exclusively” test in section 552.

104. Regarding the RTDs, the capital contribution by itself was sufficient to wipe out the gain arising on the sale of the property, and therefore it was only if the Commissioner did not agree with the Appellant on the effect of the capital contribution that it would then be necessary to go on to consider the RTDs. What had happened with the RTDs was entirely consistent with the provisions of section 617.

105. The Appellant made an offer to [redacted] on [redacted]. The offer was accepted by [redacted] on [redacted]. The Appellant became non-resident on [redacted], and therefore section 627 applied. The Respondent’s contention that the sale of the RTDs constituted an income payment was wrong; the RTDs were essentially the entirety of what was in the Appellant at the time.

106. What was important to consider was the transaction between the Appellant and [redacted] and any other hypothetical purchaser who would acquire the RTDs from [redacted] at that time. It was incorrect to look at any putative transaction subsequent to that. The hypothetical purchaser was engaging in a hypothetical purchase from [redacted] not from the Appellant.

107. Both of the valuers agreed that 100% of the value of the shares rested in the RTDs. Therefore, under section 557, 100% of the base cost transferred to the Appellant. Therefore, the valuation of the shares did not matter. In company law, a right to dividends was an enforceable right and directors had an obligation to pay a dividend where there were distributable profits. There was no reason why the undertaking given by [redacted] could not be assigned, albeit the Appellant considered this to be an irrelevant consideration.

108. Regarding the capital contribution, it was accepted that the Appellant’s accounts showed the investment in the [redacted] shares as written down to nil. But 5.18% of €1000 was c. €50 and it was an obvious and sensible conclusion that the €50 was not recognised in the accounts because it was immaterial. The [redacted] accounts from [redacted] onwards showed the €1000 every year. There was nothing in the capital contribution preventing [redacted] and [redacted] from changing [redacted] share rights. The question was whether the expenditure was wholly and exclusively on the asset, not wholly and exclusively for the purpose of enhancing the value of the asset.

109. Regarding the RTDs, the Respondent sought to focus on the commercial logic of the transactions, but that was not the test under the legislation. The Appellant’s offer was

accepted by [redacted] and therefore the base cost transferred to the Appellant. Whether or not the Appellant could dispose of the RTDs to a third party was irrelevant. All disposals of assets were *prima facie* chargeable gains for CGT and the Respondent was wrong to claim that the RTDs were income. There was an acquisition of an asset by the Appellant.

Respondent

110. In written submissions, the Respondent stated that while [redacted] may have had a base cost of c. €62m arising out of its acquisition of the shares in the Appellant, it was not the case that the base cost was available to the Appellant to create a loss on the capital gain arising on the disposal of the property.

111. The balance of corporation tax payable was broadly equal to the net proceeds of sale of the property to the Appellant. There was, therefore, a clear incentive for the Appellant to seek to shelter the capital gain so as to eliminate the tax otherwise arising on the disposal of the property. It might be noted that on [redacted] the Appellant paid the sum of €9,850,000 to [redacted] which at the time was wholly owned by [redacted].

112. The key issue with the RTDs was their valuation. The Respondent's view was that their maximum valuation was €205,170. Regarding the capital contribution, a retrospective "designation" in [redacted] of a capital contribution made by the Appellant to [redacted] [redacted] years previously in [redacted] was not effective to re-characterise that [redacted] capital contribution as enhancement expenditure for the purpose of calculating the capital gain/loss arising on the deemed disposal of the [redacted] A ordinary shares. If the Commissioner did not agree with the Respondent in respect of the RTDs and/or the capital contribution, the Respondent submitted that the capital losses were not allowable pursuant to section 546A of the TCA 1997.

113. Regarding the RTDs, their sale gave rise to an income receipt in the hands of [redacted] and consequently, there was no intra-group transfer of assets for CGT purposes and no requirement to deem such a transfer to be at market value under section 617 of the TCA 1997.

114. Regarding the capital contribution, a capital contribution which was not made as part of the terms for the issue of shares was not, in the absence of anything to indicate that the rights and privileges attaching to the shares have been enhanced, an allowable deduction (within the UK equivalent of section 552 TCA 1997) on the disposal of the shares in the company; *FD Fenston Will Trusts v HMRC* [2007] STC (SCD) 316. Section 552(1)(b) did not admit of a construction that allowed a purpose to be retrospectively ascribed to

expenditure by reference to an act undertaken many years after the date of the expenditure.

115. Regarding the fee paid to [redacted] section 552(1)(c) provided that the incidental costs to the person of making the disposal were allowable as a deduction from the consideration in computing the gain accruing to the person on disposal. The onus of proof was on the Appellant to establish that the fee was properly deductible.

116. In respect of section 546A, the CGT provisions contained in the Capital Gains Tax Act applied to companies. Section 78(7) provided that the Capital Gains Tax Acts as extended by section 78 should not be affected in their operation by the fact that capital gains and corporation tax were distinct taxes but, insofar as was consistent with the Corporation Tax Act, should apply in relation to capital gains tax and corporation tax on chargeable gains as if they were one tax. The Appellant's submission on this point was predicated on precisely the sort of "*highly restricted and artificial approach*" to statutory interpretation that was impermissible under *Bookfinders v Revenue Commissioners.*

117. It was only if the Commissioner determined that either the deemed disposal of the A shares or the deemed disposal of the RTDs actually generated a loss, that the need to consider section 546A of the TCA 1997 arose. The Respondent contended that the deemed disposal of the RTDs and [redacted] A ordinary shares amounted to an "arrangement" under section 546A. The capital losses allegedly arising were directly as a consequence of and in connection with this "arrangement." It was submitted that the main purpose or one of the main purposes of this "arrangement" was to secure a tax advantage in the form of these alleged capital losses and accordingly, the alleged capital losses were not allowable losses under section 546A(2) of the TCA 1997. The Respondent identified nine steps which it stated constituted the arrangement for the purposes of section 546A.

118. In written submissions, the Respondent also alleged that the Appellant did not effectively transfer its tax residence to [redacted] on [redacted]. However, following opening submissions from counsel for the Appellant at the hearing, the Respondent stated that it was no longer pursuing this argument. Therefore, the Commissioner has had no regard to the Respondent's submission on residence for the purposes of this Determination.

119. In oral submissions, counsel for the Respondent stated that the rationale of section 617 was to allow for no loss or gain on the transfer of an asset within a group. But in this instance, the property was held by the Appellant and sold by the Appellant, and the gain was in the hands of the Appellant. Whether it might have been open to the Appellant to transfer the property to [redacted] and thereafter sold was neither here nor there.

120. The management accounts for the Appellant had a provision for CGT arising from the chargeable gain. Then [redacted] through [redacted] purchased the three companies and sought to put a plan into effect with the intention of transferring the loss within [redacted] to the Appellant.

121. Regarding the capital contribution, it was noteworthy that the Appellant's accounts for [redacted] showed that the value of the A ordinary shares was written off. Therefore, at the material time, the capital contribution was not considered to be an enhancement, because if it had been it would have been reflected in the accounts and they would have had some form of value. This was also the case with the accounts for [redacted] and [redacted] but subsequently in the accounts for [redacted] the [redacted] shares were included as an investment.

122. Furthermore, the minutes of the Appellant's meeting of [redacted] were crystal clear that the capital contribution was unconditional, irrevocable, irredeemable and non-repayable. It was the material time that mattered, not when [redacted] was trying to reconstruct matters years later for his own benefit. The subsequent decision to give additional rights to the A ordinary shares was done on advice received, but it was not possible to rewrite the intentions at the material time. The Appellant had subsequently self-assessed the shares at €405,208, but to argue, as the Appellant did, that this meant the Respondent's inspector subsequently accepted that there had been a change to the rights of the A shares was without basis.

123. Regarding the [redacted] fee, there were two aspects to consider: (1) whether the costs were incurred wholly and exclusively for the sale of the property, and (2) were they reasonably incurred, particularly having regard to the fact that [redacted] was wholly owned by [redacted], who at the time owned [redacted] of the Appellant. It was not conceivable that a party would sell an asset and pay its agent far more than what it was going to obtain as net profit itself.

124. [redacted] evidence in respect of the [redacted] fee did not demonstrate that it was wholly and exclusively incidental to the sale of the property. He talked about refinancing the loan, two years after the engagement took place. The fall-back position was that if the bank did not provide a refinancing, it would be necessary to think about sale. To suggest that all of the plans allegedly carried out by [redacted] were purely with a view to disposing of the property was without basis. Furthermore, the witness statement of [redacted] in the litigation with [redacted] indicated that the Appellant wanted to keep the property. The activities carried out by [redacted] may well have enhanced the property, but they were not all carried

out for the purpose of selling the property. The question of apportionment did not arise; either everything that [redacted] did was incidental to the sale of the property or it was not.

125. In respect of the RTDs, [redacted] did not provide the Appellant with any schedule of payments. A genuine third party would want to know when it would receive its payments, and a schedule was included in the offer from [redacted] Additionally, [redacted] undertook to the Appellant to vote in accordance with the wishes of the Appellant, save and insofar as the Appellant owned the RTDs. This meant that the Appellant could not dispose of the RTDs, and no third party would pay €7m for such an agreement.

126. The Appellant's expert on valuation had been instructed on the basis of facts that were not actually facts on the date of valuation of [redacted]; the Appellant had not changed its residence as of that date, and the minutes stated that it was considering the proposal to move. The Respondent's expert view was that the Appellant did not have distributable reserves in excess of €7m because of the CGT provision, and he would have needed certainty about this before he could disregard it. His professional opinion was that nobody would purchase the RTDs.

127. The €7m was in effect an upfront payment of dividends, and consequently was income not capital in the hands of [redacted] had stated that part of the purpose of selling the RTDs was for investment purposes and to raise finance, which suggested it was "*the fruit of the tree*" rather than the tree itself, as per *IRC v John Lewis Properties Ltd* [2003] STC 117. [redacted] owned the Appellant and therefore, even if the Appellant held the RTDs, the value was still in [redacted] There was no commercial reality to the transaction which was simply an attempt to transfer losses.

Material Facts

128. It will be readily apparent from what has been set out above that this is a particularly complex case, in both the factual circumstances involved and the legal principles applying (and it should be noted that, in setting out the evidence and submissions herein, the Commissioner focused on those matters he considers relevant for the determination of the issues – a number of additional matters were canvassed by the parties which, in the interests of space and clarity, have not been included). It must be stated that the Commissioner's task has not been aided by the submission of multiple versions of some documents, including the Appellant's Statement of Facts. Additionally, while there was repeated reference at the hearing to the "agreed" Statement of Facts, it appears to the Commissioner that there is no such agreed Statement of Facts. Rather, there was a

Statement of Facts prepared by the Appellant, and a marked up version of that document responded to by the Respondent with certain comments on the mark-ups added thereto.

129. The Commissioner has worked from the "Comparison Statement of Facts between Appellant's Updated Statement of Facts dated 2 September 2022 and Respondent's Statement of Facts dated February 2021" included in the Supplemental Booklet dated 2 September 2022. The Commissioner takes it that those assertions in the Statement of Facts that have not been amended by the Respondent or subsequently challenged in the hearing are not in dispute.

130. Therefore, having regard to those Statements of Facts that are not in dispute and that the Commissioner considers relevant for the purposes of this Determination, and in additionally having read the documentation submitted, and having considered the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

Background Information

(1) [redacted] acquired its shareholding in the Appellant as follows:

Date	Shares	Value	Acquired from	Consideration
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted] ordinary shares of [redacted] each (being 100% of the share capital)	€62,138,560		

(2) [redacted] was an Irish tax resident Irish incorporated company that was incorporated in Ireland on [redacted]. On [redacted] the Directors

were [redacted]. On that date, the shareholders were [redacted]

(3) [redacted] was an Irish tax resident, Irish incorporated company that was incorporated in Ireland on [redacted]. On [redacted] the Directors were [redacted]. On that date, the shareholders were [redacted].

(4) The Appellant was an Irish incorporated company that was incorporated in Ireland on [redacted]. The Appellant was Irish tax resident for the period from incorporation up to [redacted], when it migrated its tax residence to [redacted]

(5) On [redacted] the Directors were [redacted]. On that date, the shareholder was [redacted] holding [redacted] ordinary shares.

(6) By way of contract dated [redacted] the Appellant sold a commercial property known as [redacted] ("the property") to [redacted] an unconnected party, for a total consideration of €[redacted] At the time of the sale of the property, the Appellant had an outstanding debt due to [redacted] of [redacted] The net proceeds received by the Appellant on the sale of the property (being sales proceeds from [redacted] less outstanding debt due to [redacted] with further adjustments for solicitor's fees and other amounts) was €9,489,243.

(7) On [redacted], a payment of €9,850,000 (€9,489,243 of which was proceeds from the sale net of all outgoings), was made from the Appellant to [redacted]

(8) On [redacted] acquired the [redacted] shares in from [redacted] for €726,564. The net amount due to [redacted] of €306,766 together with stamp duty of €7,265.64 was paid from [redacted] bank account on [redacted] after a Director's loan had been repaid.

(9) On [redacted] acquired the entire capital of [redacted] for €1. The Appellant contended that there was additional deferred consideration of €4,985,568 paid subsequently; however no documentary evidence of any such payment was provided to the Commission.

(10) On [redacted] the group ([redacted] and the Appellant) per its management accounts had bank balances of €9,288,451, and a provision for tax in the amount of €7,667,568. The net book value of the group per the management accounts

in the share purchase agreement, and the accounts upon which the auditor's opinion on the Solvency Statement was given, was €1,726,851.

(11) On [redacted] was the sole shareholder and sole director of [redacted] On [redacted] became the sole Director of each of [redacted] and the Appellant.

(12) On [redacted] made a loan of €5,054,600.76 to [redacted] to finance, amongst other matters, the deferred consideration amount of €4,985,568 payable by [redacted] on the acquisition of [redacted] from [redacted].

(13) On [redacted] and the Appellant executed a written loan agreement for €7,767,687, which stated it was effective from [redacted]. Under the terms of the loan agreement, the Appellant as lender could not demand repayment prior to [redacted]. The management accounts / accounts upon which the Solvency Statement was based showed that [redacted] owed the Appellant €7,767,687 as at [redacted].

(14) On [redacted] Form B83s were filed with the CRO changing the financial year end date for each of [redacted] (from [redacted]), [redacted] (from [redacted]) and the Appellant (from [redacted]) to [redacted].

(15) On [redacted] replaced [redacted] as a Director of each of [redacted] and the Appellant.

The Capital Contribution

(16) On [redacted], the Appellant was issued with [redacted] A ordinary shares of €1 each in the share capital of [redacted] (its 100% parent company). The A ordinary shares only provided the Appellant with a right to return of capital on a winding up of [redacted] (they did not provide a right to receive notice of nor to attend at nor to vote at general meetings, nor a right to distributions).

(17) On the issue of the "A" ordinary shares, the total number of shares in issue in the share capital of [redacted] was [redacted] being [redacted] "A" ordinary shares €1 each and [redacted] ordinary shares of €1 each.

(18) On [redacted], the Board of the Appellant resolved to convert an outstanding loan due from [redacted] in the amount of €27,397,936 at that time, to a capital contribution. The minutes stated that this was to be "*unconditional, irrevocable, irredeemable and non-repayable*". [redacted] abridged financial

statements recorded this amount as a capital reserve on the balance sheet. The Appellant's [redacted] abridged financial statements showed the amount as a new investment (which is an investment within the fixed assets) (Note 5) called "group capital loans", with notes 5.1 and 5.2 identifying the making of a capital contribution, and the impairment of that asset resulting in it being written down to nil.

(19) On [redacted] the rights attaching to the A ordinary shares held by the Appellant (being the only A ordinary shares in issue) were amended such that they ranked *pari passu* in all respects with the ordinary shares. The minutes stated that this was as consideration for the capital contribution provided by the Appellant in [redacted]

(20) The [redacted] A ordinary shares represented 5.16% approx. of the total shares in [redacted] The shareholder's funds as set out in the financial statements of [redacted] as at [redacted] were €7,875,231.

(21) The capital contribution by the Appellant in [redacted] was equivalent to a gift and had no strings attached. It was not stipulated to be solely on the A ordinary shares.

(22) There was no evidence to show that the purpose of the Appellant at the time of making the capital contribution was to enhance the value of the A ordinary shares in [redacted] The available evidence suggested the opposite – that there was no such purpose.

The [redacted] *fee*

(23) On [redacted] the property was valued on an existing use basis at [redacted], independent professional valuers. In [redacted] the property was valued on an existing use basis at [redacted].

(24) In [redacted] were engaged, and the property was offered for sale through [redacted] with a guide price of the region of €[redacted] On [redacted] a marketing fee of [redacted] paid to [redacted] On [redacted], a sales fee of [redacted] was paid to [redacted] Details state on invoice "*Agreed fee for the sale of [the property] at sale price €*[redacted]

(25) On [redacted] fees of [redacted] paid to [redacted] "*in connection with procuring vacant possession and sale of* [redacted] *through the* [redacted] *sales process*" and "*for legal services connected with re-financing the existing* [redacted] *loans and the sale of the property to* [redacted]*, including all associated agreements*" were settled.

(26) On [redacted], the Appellant received an invoice from [redacted] for services provided in relation to the sale ([redacted]) of the property. The invoice was for an amount of €3m plus VAT (€3,690,000). [redacted] paid this invoice on behalf of the Appellant.

(27) [redacted] was at the relevant time regulated by the Property Services Regulatory Authority to provide property services including the sale of property.

(28) At the time of the payment of the fee by the Appellant to [redacted] the directors of the Appellant were [redacted] while the directors of [redacted] were [redacted]. The ultimate shareholders of the Appellant were [redacted], while [redacted] was 100% owned by [redacted]

(29) Between [redacted] and [redacted] [redacted] had provided loan facilities to the Appellant in connection with the property. The Appellant provided [redacted] with a mortgage debenture over the property as security for the loan. On [redacted] appointed [redacted] as receiver to the Appellant with a view to selling the property.

(30) [redacted] provided the Appellant with a loan in the amount of [redacted] on [redacted] to enable the Appellant to repay the loan provided by [redacted] The [redacted] debts were settled. [redacted] vacated his role as receiver on [redacted]

(31) The work carried out by [redacted] on behalf of the Appellant was not wholly and exclusively for the purpose of disposing of the property. Part of the work was directed towards securing a refinancing of the [redacted] loan in [redacted]

(32) In a witness statement of [redacted], [redacted] stated that “*the long term intentions of [the Appellant] with respect to the Property was to keep possession of it, but due to the wrongful actions of [redacted] this became impossible.*” This contradicted the claim by the Appellant that [redacted] was retained during the period [redacted] for the purpose of selling the property.

(33) The only documentary evidence of the work carried out by [redacted] in respect of the property was the invoice dated [redacted], which simply stated, as a narrative, “*Professional fee: Sale of property*”.

The RTDs

(34) [redacted] was an Irish tax resident, [redacted] incorporated company. At all material times, the entire share capital of [redacted] was owned by [redacted] who was also its sole director.

(35) [redacted] a BVI incorporated Irish tax resident company, was owned by [redacted], the spouse of [redacted].

(36) On [redacted], the Appellant received an offer from [redacted] to acquire the right to dividends ("RTDs") in the aggregate amount of €7,800,000 payable in relation to the [redacted] ordinary shares of [redacted] each in the share capital of the Appellant. The proposed consideration for the purchase / sale of the RTDs was €7,000,000. The minutes of the Appellant's Board Meeting, of [redacted], noted that [redacted] was to fund the €7m by way of a loan from [redacted]

(37) The offer letter from [redacted] provided for a schedule of dividends to be paid annually from [redacted]; however the minimum cumulative dividends for each year from [redacted] were stated to be €7.8m. Therefore, the offer in reality provided for four years of dividend payments. The offer letter also included a proposed undertaking: "*The Offeree shall procure that the Offeror receives the full benefit of an undertaking from* [redacted] *inter alia, to vote the Shares in such manner as is consistent with the ownership of the RTD by the Offeror.*"

(38) On [redacted], the Appellant made an offer to [redacted] to acquire the RTDs for €7,000,000. The offer letter offered to purchase "*The rights to all dividends ("RTD") payable by the Offeror each year from the date of acceptance of the Offer by the Offeree until* [redacted] *(both dates inclusive), in respect of the* [redacted] *ordinary shares of* [redacted] *each (the "Shares") issued by the Offeror which are currently legally and beneficially owned by the Offeree*." No schedule of dividend payments was set out, and it is found that the same payment schedule as due under the [redacted] offer letter would apply; i.e. four years of dividend payments. The wording of the undertaking was "*The Offeree shall issue an undertaking to the Offeror to vote the Shares as is consistent with the ownership of the RTD by the Offeror.*"

(39) On [redacted], [redacted] accepted the offer for the RTDs from the Appellant and transferred the requisite €100. The proceeds were left outstanding and satisfied by way of a loan from [redacted] in the amount of €7,000,000 to the Appellant to enable the Appellant to fund the purchase price.

(40) On [redacted], [redacted] owned the entire share capital of the Appellant.

(41) On [redacted] at 3pm, the minutes of a meeting of the Appellant stated that the sole director, [redacted], resolved to obtain legal, regulatory, tax and accounting advice before migrating to [redacted] Therefore, as at 3pm on [redacted], the Appellant had not decided to migrate its residence to [redacted]

(42) The appropriate valuation of the RTDs on [redacted] was €205,170. The Appellant's accounts showed a provision for CGT in the amount of €7,667,568, and this could not be disregarded when assessing the true valuation, as any potential third party buyer would take it into account when making an offer for the RTDs. Consequently, the €7m offer from [redacted] was not credible.

(43) There were deficiencies in the undertaking given by [redacted] to the Appellant from the point of view of a third party purchaser, as any such purchaser would expect and require greater comfort that the dividend payments would be made to it as anticipated. However, there was value in the RTDs and it would not be appropriate to give them a nil value. No methodology for reducing the value for the deficiencies in the undertaking had been proposed, and therefore the fairer approach was to accept as correct the maximum value proposed by the expert retained by the Respondent, i.e. €205,170.

(44) On [redacted], the Appellant migrated its tax residence to [redacted] [redacted] [redacted] replaced as Director by [redacted].

(45) On [redacted], at a board meeting of the Appellant in [redacted] with [redacted] as the sole director, the Appellant noted that the [redacted] offer had lapsed.

Analysis

131. The starting point is that the burden of proof rests on the Appellant. In the High Court case of Menolly Homes Ltd v. Appeal Commissioners [2010] IEHC 49, Charleton J. stated at para. 22: "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*."

132. Bearing that in mind, the Commissioner will deal with the contested transactions in turn. The question of whether section 546A should apply to disallow the Appellant's claim for deductions is only relevant in the event that the Commissioner agrees with the Appellant in respect of some or all of (i) the capital contribution from the Appellant to [redacted] (ii) the

invoice from [redacted] for incidental costs of the disposal of the property, and (iii) the purchase by the Appellant of the RTDs.

The Capital Contribution

133. [redacted] the Appellant was issued with [redacted] A ordinary shares in [redacted] On [redacted], the Appellant resolved to convert an outstanding loan due from [redacted] in the amount of €27,397,936 at that time, to a capital contribution. On [redacted] the rights attaching to the A ordinary shares held by the Appellant were amended such that they ranked *pari passu* with the ordinary shares. The Appellant has claimed the capital contribution as deductible expenditure under section 552(1)(b) of the TCA 1997.

134. Section 552 of the TCA 1997 provides *inter alia* that

> "*(1) Subject to the Capital Gains Tax Acts, the sums allowable as a deduction from the consideration in the computation under this Chapter of the gain accruing to a person on the disposal of an asset shall be restricted to—*
>
> *[…]*
>
> *(b) the amount of any expenditure wholly and exclusively incurred on the asset by the person or on the person's behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal…"*

135. Therefore, in order to be classified as enhancement expenditure for the purposes of section 552(1)(b), it is necessary to show that (1) the expenditure was wholly and exclusively incurred on the asset, (2) for the purpose of enhancing the value of the asset, and (3) the expenditure was reflected in the state or nature of the asset at the time of the disposal. The asset, in this instance, is the A ordinary shares held by the Appellant in [redacted]

136. The Commissioner is not satisfied that the Appellant has demonstrated that the conversion of the loan due to it by [redacted] constituted enhancement expenditure within the meaning of section 552(1)(b). Firstly, he is not satisfied that the conversion of the loan was "*expenditure wholly and exclusively incurred on the asset*". *In Aberdeen Construction Group Ltd v Commissioners of Inland Revenue* 52 TC 281, the Lord President (Emslie) stated, at p. 290,

> "*To describe the making of the loans, or their waiver, as expenditure within the meaning of para 4(1)(b) of Sch 6 is however quite unacceptable. The making of the*

loan created rights and obligations and the waiver constituted an abandonment of the rights but in neither case was there the kind of expenditure with which para 4(1)(b) is concerned. In any event, by no reasonable stretch of the imagination is it possible to classify the making of the loans or their waiver as expenditure wholly and exclusively incurred "on" the shares and I find it impossible to say that either were reflected in the state or nature of the shares which were sold. The waiver of the loans may well have enhanced their value but what para 4(1)(b) is looking for is, as the result of relevant expenditure, an identifiable change for the better in the state or nature of the asset, and this must be a change distinct from the enhancement of value."

Importantly, for these purposes, the wording of paragraph 4(1)(b) of Schedule 6 of the UK Finance Act 1965 was essentially identical to that of section 552(1)(b) of the TCA 1997.

137. Therefore, the Commissioner understands from the above that the making or waiving of loans does not constitute expenditure wholly and exclusively incurred on the shares. However, he considers that this is what occurred in this instance. In his evidence on behalf of the Appellant, [redacted] agreed with the Respondent's counsel that the capital contribution by the Appellant was equivalent to a gift and had no strings attached. He also agreed that it was not stipulated to be on the A ordinary shares.

138. The Commissioner considers that his view is strengthened by the fact that the A ordinary shares were written off by the Appellant in its [redacted] accounts. The A ordinary shares were not afforded a value in the Appellant's accounts until [redacted]. It seems to the Commissioner that the writing off of the loan could not be said to be wholly and exclusively on the shares, when the shares were subsequently given no value by the Appellant. He does not accept the submission of counsel for the Appellant that this was merely because the value was so low as to be immaterial; the accounts show the shares having no value, and the Commissioner considers this indicative that the capital contribution was not wholly and exclusively on the shares.

139. As each of the elements of section 552(1)(b) needs to be proven, it follows that the Commissioner finds that the Appellant has not demonstrated that the capital contribution was enhancement expenditure. However, even assuming that he was satisfied that the writing off of the loan was expenditure wholly and exclusively on the shares, he does not consider that the second element of the section has been met by the Appellant. The Commissioner considers that there should be evidence that the purpose of the expenditure was for the purpose of enhancing the value of the asset. In coming to this view, he is mindful of McKechnie J's *dictum* in *Dunnes Stores v Revenue Commissioners*

[2019] IESC 50 at paragraph 66 that "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning*." He does not agree with the submission of the Appellant that the purpose was self-evident, which seems, to him, to beg the question.

140. The Commissioner considers that there is no evidence before him to show that the purpose of the Appellant at the time of making the capital contribution was to enhance the value of the A ordinary shares. To the contrary, the evidence that does exist suggests the opposite. The minutes of the meeting of the Appellant's board of directors on [redacted] stated that

> "*having reviewed the financial statements for the year ended* [redacted] *and having considered the financial position of the company [the directors] decided that the inter-company loan of €27,397,936 owing from* [redacted] *be converted to capital contribution and treated as permanent capital of* [redacted] *and that such capital contribution is unconditional, irrevocable, irredeemable and non-repayable*."

141. There is nothing in the above that suggests the purpose of the Appellant's decision in writing off the loan to [redacted] was to enhance the value of the shares it held in [redacted] rather it suggests that there was no such purpose. The Commissioner would expect that, if the purpose at the time was to enhance the shares, this would have been stated in the minutes or some other appropriate contemporaneous document. The Commissioner's conclusion that this was not the purpose is again strengthened by the fact that the shares were subsequently written off as worthless in the Appellant's accounts.

142. The Appellant has submitted that the intention of the Appellant in making the capital contribution was self-evidently for the purpose of enhancing the value of the shares, and has relied on the Special Commissioners' determination in *FD Fenston Will Trusts v HMRC* [2007] STC (SCD) 316. The Commissioner considers that the determination in *FD Fenston Will Trusts* that there was an "*irresistible inference*" that the capital contributions in that case were incurred with the purpose of enhancing the value of the asset was based on the evidence in that case, including that each contribution actually resulted in an increase in equity shown in the accounts, and he does not consider that the Special Commissioners were seeking to lay down a principle that *any* contribution *must necessarily* be inferred to be for the purpose of enhancing value. To the extent (if at all) that such a general principle was being stated by the Special Commissioners, the Commissioner would decline to apply it herein, as he considers that any such principle could not be in compliance in this jurisdiction with the *dictum* of McKechnie J in *Dunnes Stores* set out above.

143. The Commissioner considers that the Appellant's argument is not strengthened by its subsequent decision, over [redacted] years after the capital contribution was made, to amend the A ordinary shares. The Commissioner is satisfied that no such subsequent decision could possibly operate to retrospectively alter, amend or clarify the purpose of the Appellant at the time it made the capital contribution in [redacted]. Therefore, he finds that the amendment to the A ordinary shares in [redacted] had no relevance to the purpose of the writing off of the [redacted] loan in [redacted]

144. Consequently, as the Commissioner is not satisfied that the Appellant has demonstrated that the capital contribution in [redacted] met either the first or second limb of the test set out in section 552(1)(b), it follows that he determines that the capital contribution did not constitute enhancement expenditure for the purposes of that section. It is therefore not necessary to determine the third limb of the test. However, he notes in passing that the Special Commissioners in *FD Fenston Will Trusts* and the Court of Session in *Aberdeen Construction Group Ltd* both held that the expenditure being reflected in the "*state or nature*" of the asset at the time of disposal must involve something other than an enhancement in value. While the Appellant sought to rely on the Australian case of *National Mutual Life Association of Australia Ltd v Commissioner of Taxation* [2009] FCAFC 96, the Commissioner notes that the wording of the relevant statute, while similar to section 552(1)(b), was not identical, and therefore it would appear that the two UK decisions are better precedents.

The [redacted] *Fee*

145. [redacted] managed the property on behalf of the Appellant. On [redacted] the Appellant sold the property to [redacted] for €[redacted] On [redacted], [redacted] invoiced the Appellant in the amount of €3m plus VAT (€3,690,000) for services provided by [redacted] to the Appellant relating to the sale of the property. The Appellant has claimed the [redacted] fee as deductible expenditure under section 552(1)(c) of the TCA 1997.

146. Section 552 of the TCA 1997 provides *inter alia* that

> *"(1) Subject to the Capital Gains Tax Acts, the sums allowable as a deduction from the consideration in the computation under this Chapter of the gain accruing to a person on the disposal of an asset shall be restricted to—*
>
> *[…]*
>
> *(c) the incidental costs to the person of making the disposal*.
>
> *(2) For the purposes of the Capital Gains Tax Act as respects the person making the disposal, the incidental costs to the person of the acquisition of the asset or of its*

disposal shall consist of expenditure wholly and exclusively incurred by that person for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor, valuer, auctioneer, accountant, agent or legal advisor and costs of transfer or conveyance (including stamp duty)…"

147. Therefore, what must be shown by the Appellant for the [redacted] fee to be deductible is that the expenditure was wholly and exclusively incurred for the purposes of disposal of the property. The Commissioner is satisfied that the evidence before him clearly demonstrates that the work carried out by [redacted] on behalf of the Appellant between [redacted] and [redacted] was not wholly and exclusively for the purposes of selling the property.

148. The Commissioner accepts that [redacted] provided significant services to the Appellant in respect of the property from [redacted] to [redacted] This is not surprising, as the Appellant had no employees, and therefore [redacted] acted as the management agents of the property during that time. [redacted] received some payments from the Appellant for these management services during the relevant years, although neither the number of such payments nor the amount paid by the Appellant is clear to the Commissioner from the evidence provided. The witness from [redacted], accepted that some payments had been made but was unclear about how many. In any event, the Commissioner does not consider it necessary to make a finding on the amount of management fees paid to [redacted] because the transaction under consideration is the €3m + VAT paid for services relating to the sale of the property.

149. [redacted] own evidence made clear that, even on [redacted] terms, not all of the work carried out by it was for the purpose of selling the property. He talked about the property "*needed to be got ready for sale in the event that the bank* [redacted] *don't provide a refinance in* [redacted] He also stated on cross examination that "*one of*" the options available was for the Appellant to hold on to the property. It seems clear to the Commissioner that [redacted] focus in the earlier years of its engagement was on the refinancing option with [redacted] and he does not consider that a refinancing of a loan can be considered equivalent to a disposal of a property for the purposes of section 552.

150. Furthermore, the Commissioner must have regard to the witness statement of [redacted], who was at the time of the sale of the property a director and part-owner of the Appellant. The statement, dated [redacted], was prepared in the context of the Appellant's litigation with [redacted] and at paragraph [redacted] stated that "*the long term intentions of [the Appellant] with respect to the Property was to keep possession of it, but due to the wrongful actions of* [redacted] *this became impossible.*" The Commissioner

considers that this clearly contradicts the contention by the Appellant in this appeal that its intention was always to sell the property and that [redacted] was engaged on that basis. The Commissioner further considers that it was the Appellant's view, at the time, of whether or not the expenditure was wholly and exclusively incurred for the purposes of the disposal of the property, and not [redacted] view, that is relevant for section 552. The Commissioner considers it clear from the above statement of [redacted] that the Appellant could not have considered that [redacted] work on behalf of it was wholly and exclusively for the purpose of sale, when its own stated intention was to retain the property.

151. In *Commissioners of Inland Revenue v Richards's Executors* 46 TC 626, Lord Reid stated that "wholly and exclusively" should not be read too literally but should be given a reasonable result, and counsel for the Appellant submitted that this principle should be applied herein to allow the [redacted] fee to be claimed as a deductible expense. However the Commissioner is satisfied that the evidence clearly demonstrates that, at the time the expenditure was incurred, the Appellant did not consider its purpose was for the sale of the property, and he does not believe that this finding involves an overly literal interpretation of the phrase "wholly and exclusively". The Commissioner considers that to find that the purpose of the expenditure was for the sale of the property would require him to completely ignore the words "wholly and exclusively", which could not have been the intention of the Oireachtas when enacting section 552.

152. While not directly addressed by the parties, the Commissioner considers that it would in principle be open to him to apportion some of the expenditure pursuant to section 544(5) of the TCA 1997. However he is satisfied that there is insufficient evidence before him that would enable him to apportion the [redacted] fee to account for expenditure wholly incurred for the purposes of the disposal. In particular, the invoice of [redacted] issued by [redacted] provides no breakdown of the work carried out by [redacted] and simply states that it was for "*Professional fee: Sale of property*". The Commissioner considers the lack of narrative to be surprising, particularly considering the very large fee sought. He considers that no adequate explanation was provided by [redacted] as to why [redacted] fee was so much larger than [redacted] (with whom ultimately €[redacted] was agreed as the fee) who had been appointed as sole selling agent of the property. No other documentary evidence of the work carried out by [redacted] was provided by the Appellant, and [redacted] evidence was that there was no written agreement between [redacted] and the Appellant. Given the size of the fee sought by [redacted] as well as the connections between the Appellant and [redacted] (via [redacted]), the Commissioner considers that it would have been reasonable to expect the Respondent to take a heightened interest in the claim for

deduction, and therefore it would have been advisable for the Appellant (and [redacted] to have properly documented their engagement and the work done on the property. Additionally, the Commissioner does not consider that [redacted] evidence would enable him to properly apportion the fee, and indeed it was the evidence of [redacted], and the Appellant, at the hearing that the fee was incurred wholly and exclusively for the purpose of the sale of the property, so consequently the issue of apportionment did not arise in evidence.

153. Consequently, as he has found that the [redacted] fee was not wholly and exclusively incurred for the purpose of the disposal of the property, and as there was insufficient evidence to enable the Commissioner to apportion the fee, the Appellant's claim for the fee of €3m + VAT to be a deductible expense is not allowed.

The RTDs

154. On [redacted], the Appellant made an offer to [redacted] to acquire the RTDs held by [redacted] in the Appellant for €7m. On [redacted], [redacted] accepted the offer and transferred €100 to the Appellant. The remainder of the purchase price was accounted for by way of a loan from [redacted] to the Appellant in the amount of €7m. On [redacted], the Appellant migrated its tax residence to [redacted] It is the Appellant's case that the sale of the RTDs to the Appellant had the result that section 617 of the TCA 1997 applied to the disposal of the RTDs by [redacted] to the Appellant. In its Outline of Arguments, the Appellant stated that

> *"The disposal of the RTDs by [redacted] on [redacted] gave rise to a part disposal (in accordance with the provisions of section 557) of the [redacted] ordinary shares in the share capital of the Appellant in respect of which the RTDs arose. At that time, the Appellant had shareholders' funds of €7,874,238. The expenditure allowable to [redacted] as a deduction on a disposal of the [redacted] ordinary shares in accordance with section 552 was €62,138,560. In calculating the portion of such expenditure allowable as a deduction in accordance with section 557, the value of the consideration for the disposal of the RTDs needed to be ascertained as required by section 557(2). As the disposal of the RTDs was a disposal between connected parties in accordance with the provisions of section 549, the consideration was deemed to be the market value of the RTDs as at [redacted] in accordance with the provisions of section 547.*
> *The Appellant therefore submits that the consideration which the Appellant was treated as paying to [redacted] for the RTDs was €55,239,49*

being €62,138,560 multiplied by the fraction €7,000,000 / €7,874,238. This is calculated on the basis as outlined above and on the basis of the market value of the RTDs at €7,000,000. This calculation resulted in an allowable loss of €48,239,495 arising for the Appellant on the deemed disposal of the RTDs on [redacted]."

155. The Respondent contends that the payment for the RTDs should be classified as an income rather than a capital receipt in the hands of [redacted] and that consequently section 617 did not apply to the sale of the RTDs to the Appellant. The test for determining whether proceeds are capital or income was set out by Dyson LJ in *IRC v John Lewis Properties plc* [2003] STC 117. Before considering this test, the Commissioner considers that it would be helpful to briefly set out some of the circumstances surrounding the sale of the RTDs.

156. On [redacted], [redacted] made an offer to the Appellant to acquire the RTDs in the Appellant (held by [redacted] for the amount of €7m. [redacted] was owned and controlled by [redacted]. At the time, he was also a director of [redacted] and the Appellant (as well as [redacted] having been appointed by [redacted] on [redacted]. [redacted] was to fund the €7m purchase price for the RTDs by way of a loan from [redacted] which was owned by [redacted] wife.

157. The offer letter from [redacted] signed by [redacted], provided for a schedule of dividends to be paid annually from [redacted] until [redacted] however the minimum cumulative dividends for each year from [redacted] to [redacted] were stated to be €7.8m. The offer letter also included a proposed undertaking: "*The Offeree shall procure that the Offeror receives the full benefit of an undertaking from* [redacted] *inter alia, to vote the Shares in such manner as is consistent with the ownership of the RTD by the Offeror.*"

158. Subsequently, on [redacted], the Appellant made an offer to [redacted] to purchase the RTDs for €7m. The offer letter was very similar to that provided by [redacted] the previous day, both of which were signed by [redacted]. The letter offered to purchase "*The rights to all dividends ("RTD") payable by the Offeror each year from the date of acceptance of the Offer by the Offeree until* [redacted] *(both dates inclusive), in respect of the* [redacted] *ordinary shares of* [redacted] *each (the "Shares") issued by the Offeror which are currently legally and beneficially owned by the Offeree*." However, no schedule of dividend payments was set out, and the wording of the undertaking was "*The Offeree shall issue an undertaking to the Offeror to vote the Shares as is consistent with the ownership of the RTD by the Offeror.*"

159. The minutes of a meeting of the Appellant at 5pm on [redacted] stated that [redacted], as sole director of the Appellant, noted "*that the proposed sale of the RTD to*

[redacted] *would involve the sale of an asset of the Company to a third party outside the group of companies within which the Company forms part. As a consequence, the Sole Director resolved to obtain appropriate professional advice (including but not limited to taxation, accounting and legal advice) in connection with the transaction set out in the* [redacted] *Offer Letter before deliberating further on whether to proceed with such transaction*." Regarding the offer letter sent by the Appellant to [redacted] the minutes noted that "*it was resolved that…entering into the* [redacted] *Offer Letter and the* [redacted] *Transaction would promote the success of the Company for the benefit of its members as a whole...*" On [redacted], [redacted] accepted the Appellant's offer to purchase the RTDs.

160. There was a further meeting of the Appellant at 3pm on [redacted]. Under "*Consideration of Migration to* [redacted] the minutes stated that "*The Sole Director [i.e.* [redacted]*] noted that if the Company if it was [sic] to undertake the Proposed Migration it would need to, amongst other matters… identify office space in* [redacted] *form [sic] which to operate; the Company would need to close its bank account in Ireland and open a new bank account in* [redacted] *the Company would need to appoint a* [redacted] *individual with appropriate experience to replace the Sole Director as sole director of the Company; and the Company would need to appoint* [redacted] *auditors. The Sole Director resolved to obtain appropriate legal, regulatory, tax and accounting advice from appropriate individuals in both Ireland and* [redacted] *before finally determining whether to undertake the Proposed Migration. However, the Sole Director resolved that if the relevant advice obtained did not render the Proposed Migration an unattractive proposition, the date for completing the Proposed Migration would be* [redacted]." The Appellant did subsequently migrate to [redacted] on [redacted].

161. Turning now to the consideration of whether or not the proceeds of the sale constituted income or capital, the five *indicia* of a capital payment set out in *John Lewis Properties Ltd* are as follows: (1) the duration of the asset; (2) the value of the asset assigned; (3) whether the payment caused a diminution in the value of the assignor's interest; (4) whether the payment was of a single lump sum; (5) whether the disposal of the asset was accompanied by a transfer of risk in relation to it. Each of these elements will be considered in turn. Each of the elements is relevant to the question of whether a payment was capital or income; however none is decisive and much depends on the nature of the transaction and the matrix in which it is set.

Duration

162. Dyson LJ stated at paragraph 80 that "*If what is disposed of is long-lasting, it is more likely to be a capital asset than if it is something which is evanescent. The cases show that an asset which has an enduring or long-lasting quality is likely to be regarded as a capital asset, and payment received from its acquisition a capital receipt*." He considered the case of *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1966] AC 295, wherein *inter alia* Lord Pearce stated (at page 336) that the acquisition of an interest in land pointed strongly to a capital expenditure, but payment of premiums for leases without any acquisition of an interest in land would have been income where the transaction was for a five year period, but would have been capital if for a twenty-one year period "*and which thereby acquire a more enduring and structural quality*."

163. The duration of the agreement for acquisition of the RTDs between the Appellant and [redacted] is unclear. Unlike the [redacted] offer letter, the Appellant's offer letter to [redacted] did not include a schedule of payments. Like the [redacted] offer letter, it was stated to last seven years, from [redacted]. However, the schedule of payments set out in the [redacted] offer provided that the minimum cumulative dividends for each year from [redacted] were to be €7.8m. Therefore, while the [redacted] offer was stated to be for seven years, the Commissioner considers that in reality it provided for four years of dividend payments. In the absence of any additional evidence in the [redacted] offer letter or otherwise, the Commissioner will assume that the schedule of payments set out in the [redacted] offer would also apply to the [redacted] offer. He considers this a reasonable assumption to make, given the [redacted] offer was made on foot of the [redacted] offer and that the Appellant was purportedly considering the [redacted] offer, and if the [redacted] offer was accepted the Appellant would have required the dividend payments to have been made in line with the schedule provided by [redacted] Consequently, while the [redacted] offer was stated to be for seven years, the Commissioner finds on the balance of probabilities that four years of dividend payments were due under it. He does not consider that this is indicative of the Appellant acquiring an interest with an "*enduring and structural quality*", as stated by Lord Pearce in *Strick,* and therefore he finds under this heading that the duration of the agreement between [redacted] and the Appellant was indicative of an income rather than capital receipt.

Valuation

164. Dyson LJ stated that "*the value of the asset assigned is also a relevant factor*" and referred to *Strick*, wherein Lord Upjohn indicated that the greater the value, the more likely the asset was to be treated as capital rather than income. The correct valuation of

the RTDs herein was considered at length in the hearing. Section 548(4) of the TCA 1997 provides that

> "*Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length*."

165. The valuation of €7m was originally contained in the offer from [redacted] to the Appellant. Given the very close connections between all the relevant parties – [redacted] was the director of [redacted] the Appellant and [redacted] and the purchase price of €7m was apparently to be funded by way of a loan from a company owned by the wife of the Appellant's owner – the Commissioner does not consider that the offered price of €7m can reasonably be considered to represent what would have been achieved on the open market. This was obviously in no way an arm's length offer. The Commissioner considers it reasonable to conclude that the offer price of €7m was proposed in order to give an apparently 'objective' basis for the subsequent offer by the Appellant to purchase the RTDs from [redacted] for €7m, and he so finds on the balance of probabilities.

166. The parties subsequently retained expert witnesses to provide a valuation on the RTDs at the time of purchase. Reports were provided by [redacted] on behalf of the Appellant and by [redacted] on behalf of the Respondent. The report of [redacted], dated 16 January 2020, stated that "*We have solely relied on the information provided to us by you* [i.e. the Appellant] *and your advisors for the purposes of preparing our valuation.*" The report noted that, as per the Appellant's financial statements as at [redacted] the distributable reserves were €7.8m. The report stated that the appropriate method to value the right to future dividends was the Dividend Discount Model (DDM), which was used to value stocks based on the net present value of the future dividends. The report stated that "*we believe that the value of the RTDs of [the Appellant] is €7,029,899 using the DMM* [sic] *model and other factors considered i.e. where the business is located etc.*" In a subsequent letter dated 11 March 2021, in response to the valuation report prepared on behalf of the Respondent, [redacted] stated that "*Our valuation was based on the hypothesis that [the Appellant] had full control as to when dividends were paid in relation to the RTDs acquired…We have assumed that the RTDs acquired by [the Appellant] from [redacted] would have a similar payment profile to that set*

out in the [redacted] *offer…Our valuation was based on the hypothesis that [the Appellant] had full control as to when dividends were paid in relation to the RTDs acquired and consequently a hypothetical purchaser would have had the benefit of certainty as to payment of dividends.*"

167. In its report prepared on behalf of the Respondent dated 11 February 2021, [redacted] stated that, as per the management accounts dated [redacted], the group (i.e. the Appellant, [redacted]) had cash balances of €9,288,451, a tax liability of €7,677,568 and net assets of €1,726,851. The report stated that the valuation was based on Net Assets Method, which was appropriate because the main asset within the group was cash and the Appellant had no income generating potential. The DDM was not appropriate because the Appellant did not have sufficient distributable reserves, had disposed of its income generating asset (i.e. the property) in [redacted], was not actively trading on [redacted], did not generate income post [redacted], and was not under an obligation to make the dividend payments outlined in the [redacted] offer letter. The valuation concluded that the maximum value of 100% shareholding in the Appellant at [redacted] was €205,170, and that therefore the maximum value of the RTDs at [redacted] was €205,170.

168. Oral evidence from the expert witnesses was heard at the hearing. [redacted] had provided the report on behalf of the Appellant. He stated that he valued the RTDs as at [redacted], on the basis that the Appellant had net assets of €7.8m based on the crystallisation of the tax loss on its balance sheet due to the migration to [redacted] on [redacted]. [redacted] had provided the report on behalf of the Respondent. He stated that he accounted for the CGT liability of €7,667,568 in the Appellant's account, which left a net asset figure of €205,170. He believed that a third party would carry out due diligence and see the CGT liability, and that therefore the offer of €7m for the RTDs from [redacted] was not credible. The witnesses agreed that the main difference between them was the provision for CGT.

169. The Commissioner has considered the reports and oral evidence provided by the expert witnesses and is satisfied that the evidence of the witness retained by the Respondent is more convincing. He agrees with [redacted] that a genuine third party would take the very sizeable CGT provision into account in any offer, and that consequently the €7m offer from [redacted] was not credible. He considers that the attempts by counsel for the Appellant to minimise the significance of the CGT provision by arguing that it was merely a provision and had not crystallised were unconvincing. He notes that [redacted] based his valuation on the assumption that it was known on [redacted] that the Appellant

would move its residence the following day, which would have dealt with the CGT provision. However, as set out above, the minutes of the Appellant at 3pm on [redacted] set out a number of steps that would need to be completed in order to enable a transfer of residency to take place, and resolved that the sole director would "*obtain appropriate legal, regulatory, tax and accounting advice from appropriate individuals in both Ireland and* [redacted] *before finally determining whether to undertake the Proposed Migration*." Therefore, the Commissioner considers that the Appellant's expert was wrong to assume that it was decided and known on [redacted] that the Appellant would change its residence the next day, and that consequently the CGT provision could be disregarded. The witness acknowledged this in cross-examination, when he stated "*the way these minutes are drafted, that I couldn't say it with 100% certainty, absolutely not.*" He went on to say that the commonality of the directors between the various participants meant it would have been known at the time that the residence would change. However, this is not what the minutes provide, and in considering the correct valuation the Commissioner needs to consider the information that would be available to a genuine third party purchaser, not a connected party. In the circumstances, the Commissioner is satisfied that the valuation provided on behalf of the Appellants can be disregarded.

170. The Respondent's expert stated that the maximum value of the RTDs was €205,170. Counsel for the Appellant took issue with the valuation being done on [redacted] rather than [redacted], when the transaction took place. However, other than the proposed change to residency, which as the Commissioner has found was not confirmed as of [redacted], the Commissioner does not believe there to have been any substantive difference between the [redacted] and [redacted] for the purposes of valuation, and therefore nothing turns on this.

171. The question remains whether the valuation of the RTDs should be set at €205,170 or at a lesser amount, or nothing at all. In his evidence [redacted] stated that he did not consider it appropriate to assume a third party would have the same benefits as the Appellant. In the report, the expert retained by the Respondent stated that the Appellant's letter of offer did not outline a fixed minimum dividend payable and therefore the dividend payable was at the discretion of the Appellant and not the holder of the RTDs. Therefore, the right to dividends was contingent.

172. The Commissioner agrees that there was no schedule of payments set out in the offer letter from the Appellant to [redacted] and that a third party seeking to purchase the RTDs would expect such a schedule. He also considers that the undertaking provided by [redacted] to the Appellant needs to be considered in the context of two related companies with

shared ownership and control, and that a third party purchaser would expect and require greater comfort that the dividend payments would be made to it as expected. However, he considers that there was value in the RTDs and it would not be appropriate to give them a nil value, notwithstanding the deficiencies in the undertakings from the point of view of a hypothetical third party. As no methodology has been proposed for a reduction in value to account for these deficiencies, the Commissioner considers that the fairer approach is to accept the maximum value ascribed by the expert proposed by the Respondent, i.e. €205,170.

173. Having concluded that the value of the RTDs when purchased by the Appellant was €205,170, it falls to conclude whether or not that is indicative of a capital or income receipt. While the figure is not an insubstantial sum, it is considerably smaller than the value purportedly given to the RTDs in the [redacted] offer and the offer to [redacted] On balance, the Commissioner concludes that the figure is not large enough to indicate that the RTDs should be considered as capital, and therefore he finds that it suggests an income receipt.

<u>Diminution in interest</u>

174. Dyson LJ stated at paragraph 85 of *John Lewis Properties Ltd* that "*the fact that the disposal of the asset has caused the value of the assignor's interest to be diminished is a relevant factor. It seems to me that the amount by which the value of the reversionary interest is diminished is also of some materiality.*"

175. In considering this element of the test, the Commissioner considers it to be of obvious and clear significance that [redacted] and the Appellant were members of the same group of companies with the same ownership and control structure. [redacted] owned [redacted] which in turn owned [redacted] which in turn owned [redacted] which in turn owned the Appellant (save for the [redacted] A shares held by the Appellant in [redacted] [redacted] was the director of [redacted] [redacted] and the Appellant. Given these circumstances, the Commissioner does not consider that [redacted] interest in the RTDs was in reality diminished at all. It remained, albeit indirectly, the owner of the RTDs. Therefore, the Commissioner concludes that this is indicative of an income receipt.

<u>Lump sum payment</u>

176. Dyson LJ stated at paragraph 86 that "*If a payment is one of a series of recurring payments made at frequent intervals, it is likely to be income in the hands of the payee. On the other hand, a single lump sum for the once and for all disposal of a particular asset is more likely to be a capital payment.*"

177. In this appeal, the RTDs were acquired by the Appellant on the basis of a payment of €7m, satisfied by way of a loan from [redacted] to the Appellant. The Commissioner considers that this constitutes a lump sum payment for the purposes of this *indicium* and therefore suggestive of a capital asset.

Transfer of risk

178. At paragraph 87, Dyson LJ stated "*if the disposal of the asset is accompanied by a transfer of risk in relation to it, that tends to suggest that the sum paid for the asset is capital.*" In this instance, and for similar reasons as set out under "Diminution of interest", the Commissioner is satisfied that there was no transfer of risk involved in the purchase by the Appellant of the RTDs from [redacted] The transaction was essentially circular, the reality of which is emphasised by the provision of a loan to the Appellant from [redacted] to purchase the RTDs payable by the Appellant to [redacted] Consequently, the Commissioner concludes that this is suggestive of an income receipt.

John Lewis Properties – conclusion of considerations

179. The Commissioner has found that four of the *indicia* set out by Dyson LJ suggest that the purchase by the Appellant of the RTDs was an income receipt in the hands of [redacted] and one of the *indicia* is suggestive of a capital receipt. Consequently, he concludes that, on balance, the acquisition of the RTDs should be classified as an income rather than a capital receipt. Therefore, he finds that there was no part disposal under section 557 of the TCA 1997, and there was no intra-group transfer for the purposes of section 617. As a result, the base cost in [redacted] did not transfer to the Appellant and the Appellant is not entitled to claim the base cost as deductible expenditure.

180. The Commissioner considers that there is support for this conclusion in certain *dicta* of the English courts. In a dissenting judgment in *John Lewis Properties Ltd*, Arden LJ stated at paragraph 28 that "*the right to receive distributions made by a company is not in reality the asset from which profit in the form of distribution is earned. Distributions are paid out of profits earned on the assets representing a company's share capital and reserves: all these represent the tree while distributions declared (and the assets earmarked to pay them) and the right to receive future distributions represent the fruit*."

181. The case of *IRC v McGuckian* [1997] STC 908 considered whether the assignment of a right to dividends of a company constituted capital or income. The case was decided by the House of Lords on the principle set out in *Ramsay (WT) Ltd v IRC* [1981] STC 174, which is not the law in this jurisdiction, and therefore the *ratio* of that judgment is not applicable herein. Nevertheless, the Commissioner considers that useful guidance is

provided by the judgment of Lord Cooke of Thorndon. At page 919 of the judgment he set out the factual background:

> "*Mr and Mrs McGuckian, residents of the United Kingdom, owned and controlled the Irish company Ballinamore Textiles Ltd (Ballinamore), which had accumulated undistributed profits. For fiscal reasons, apparently including the avoidance of an apprehended wealth tax, their shares were transferred to the Guernsey company, Shurltrust Ltd. Mrs McGuckian was the income beneficiary of the trust upon which Shurltrust held the shares. A scheme was devised by a taxation consultant whereby from time to time Shurltrust would assign its rights to dividends during specified periods to Mallardchoice Ltd, an ad hoc and virtually assetless United Kingdom company formed by the consultant, for a price representing on each occasion the planned dividend less only commission or fees; on the declaration of the dividend, the company would pay it out to a Dublin solicitor who would in fact act for all parties but receive it on behalf of Mallardchoice, and he would immediately pay it to Shurltrust, after deducting commission or fees, in satisfaction of the price. In the transaction to which the present appeal relates the assignment by Shurltrust to Mallardchoice was dated 23 November 1979 and applied to dividends to be declared during the remainder of 1979. The consideration expressed was Ir£396,054. On 27 November 1979 Ballinamore declared a dividend of Ir£400,055, which the solicitor received and paid to his client account for Mallardchoice; on or about the same day he paid the Ir£396,054, which represented 99% of the dividend, to Shurltrust*."

182. The Commissioner considers that there are similarities between the facts as set out in *McGuckian* and those at issue in this appeal, albeit they are obviously not identical. The House of Lords found for the Crown on the basis of the *Ramsay* principle. However, Lord Cooke of Thorndon stated, at page 919 that he would have found that the receipt was income rather than capital, even without applying the *Ramsay* principle: "*The dividend was intended to be for the benefit of Shurltrust and the circular route by which the payment was made was no more than machinery for giving effect to that intention. The assignment was created simply as a bridge or vehicle for attaining that end. The money was unmistakably traceable through a single link. Whether a receipt is income for tax purposes is a question of mixed fact and law. In this instance the facts, in my view, admit of only one reasonable answer*." Lord Steyn agreed with Lord Cooke of Thorndon that, even without applying the *Ramsay* principle, "*the more realistic interpretation of the undisputed facts is that what Shurltrust received was income.*"

183. Before concluding, the Commissioner notes in passing that, during closing submissions, and in apparent contradiction to the Appellant's own written submissions, counsel for the Appellant contended that the uncontested evidence of the two expert witnesses was that, irrespective of the valuation of the RTDs, the entirety of the base cost transferred to the Appellant. The Commissioner has reviewed the evidence and does not consider that [redacted] agreed that was the case. Furthermore, it appears to the Commissioner that [redacted] based his contention on the undertaking provided by [redacted] and the Commissioner has already found that this undertaking was deficient and would not satisfy a third-party purchaser. Consequently, the Commissioner does not consider that the evidence demonstrated that, even if the acquisition of the RTDs had resulted in allowable expenditure, the entire of the base cost in [redacted] would have transferred.

Conclusion

184. The Commissioner has determined that the Appellant's appeal in respect of each of the three transactions at issue, being the capital contribution, the [redacted] fee and the RTDs, is unsuccessful. Therefore, it is not necessary to consider whether the transactions should be disallowed under section 546A of the TCA 1997.

Determination

185. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent's notice of amended assessment to corporation tax for the period of [redacted] in the amount of €8,901,633 is correct, and the notice of amended assessment stands.

The appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act 1997 as amended ("TCA 1997"). This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
18th July 2023