AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

57TACD2023

Between

[redacted]

Appellants

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This matter relates to a number of appeals pursuant to section 811(7) Taxes Consolidation Act 1997 ("TCA 1997") against various Notices of Opinions ("Notices") issued to the Appellants by Nominated Officers of the Revenue Commissioners ("the Respondents") in accordance with the provisions of section 811 (6) TCA 1997.

2. At the commencement of the appeal hearing on 3rd October 2022, Counsel for the Respondent advised the Tax Appeals Commission ("the Commission") that there were thirteen related Appellants who had cases under appeal. While both Counsel for the Appellants and the Respondent had previously agreed that the four named parties in this appeal would act as the lead appeals, the Respondent's Counsel advised both she and the Appellants' Counsel had agreed at the commencement of the hearing that as the transactions under appeal were similar in nature submissions would only be made in respect of two lead Appellants, chiefly [redacted] ("the first-named Appellant") and to a lesser extent [redacted] ("the second-named Appellant").

3. On 19th December 2012, [redacted], a Nominated Officer of the Respondents (hereinafter the **"**Nominated Officer"), for the purposes of section 811 TCA 1997, issued two Notices to the first-named Appellant pursuant to section 811 TCA 1997, in respect of two transactions entered into by the first named-Appellant in the year ended 2007.

4. On 3rd December 2014, [redacted], a Nominated Officer of the Respondents (hereinafter also referred to as the "Nominated Officer"), for the purposes of section 811 TCA 1997, issued two further Notices to the first-named Appellant pursuant to section 811 TCA 1997, in respect of two additional transactions entered into by the first-named Appellant in the year ended 2008.

5. These Notices stated that the Nominated Officers had formed the following opinion:

    5.1. That the four transactions entered into by the first-named Appellant in 2007 and 2008, constituted "tax avoidance transactions" within the meaning ascribed thereto by section 811 TCA 1997;

    5.2. That a tax advantage, including surcharge, of €4,097,741.34 (in respect of 2007); €1,478,830.85 (in respect of 2008); €23,771.10 (in respect of 2009); €2,265.30 (in respect of 2010) and €722,724 (in respect of 2011) had accrued to the Appellant and a potential tax advantage of €2,994,114.07 in respect of future years was further available as a result of the aforesaid alleged tax avoidance transactions.

5.3. That the tax consequences of the opinions becoming final and conclusive will be the disallowance of capital gains losses claimed under section 31 TCA by the first-named Appellant; the imposition of a surcharge in accordance with section 811A TCA 1997; the issue of amended CGT assessments for 2007, 2008, 2009, 2010 and 2011; the disallowance of CGT losses carried forward and that the due date for the tax arising in 2007, 2008, 2009, 2010 and 2011 will be 31 October 2007, 31 January 2009, 15 December 2009, 15 December 2010 and 15 December 2011, for the purpose of liability to interest in accordance with section 811A TCA 1997;

5.4. That the amount of relief from double taxation in respect of the Appellant was nil.

6. By letters dated 17th January 2013 and 10th December 2014, the first-named Appellant's agent lodged appeals to the Commission under section 811 (7) TCA 1997 against the above notices on the grounds, *inter alia*, that:

6.1. The Respondent, having formed the opinion that the transaction purportedly specified in the Notice was a tax avoidance transaction, failed to notify the first-named Appellant immediately on forming such an opinion, and therefore breached a fundamental requirement of Section 811, thereby rendering the purported opinion *void ab initio*.

6.2. The Notice, in merely listing a number of events and documents, has failed to comply with the provisions of sections 811(2) and 811(6) TCA to expressly specify or describe "the transaction which in the opinion of the Revenue Commissioners is a tax avoidance transaction" and the purported opinion contained in the Notice is therefore *void ab initio*.

6.3. None of the disparate actions / events listed (i) to (xv) in the Notice, no combination of them nor all of them, constitute a tax avoidance transaction as asserted in the Notice.

6.4. Without prejudice to ground 6.3 above, the transaction purportedly specified or described in the Notice is not a tax avoidance transaction.

6.5. The amount of the tax advantage purportedly specified or described in the Notice which would be withdrawn or denied is incorrect and unsupported by evidence.

6.6. The tax consequences purportedly specified or described in the Notice would not be just and reasonable in the circumstances of the case to withdraw or to deny the purported tax advantage specified or described in the Notice.

6.7. Without prejudice to ground 6.3 above, none or all, and no combination of, the disparate actions / events listed in the Notice were entered into for the sole or main purpose of achieving a tax advantage.

6.8. Without prejudice to ground 6.3 above, the disparate actions / events listed in the Notice were undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person and none or all of them, and no combination of them, were undertaken or arranged primarily to give rise to a tax advantage.

6.9. Without prejudice to grounds 6.3, 6.4, 6.7 and 6.8 above, if any of the disparate actions / events listed within the Notice were entered into for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts (as defined in section 811(1)(a) TCA 1997), such of the disparate actions / events listed within the Notice did not result directly or indirectly in a misuse of such provision or an abuse of such provision having regard to the purposes for which such provision was provided.

6.10. Without prejudice to grounds 6.2, 6.3 and 6.4 above, the transaction purportedly specified or described in the Notice is not a tax avoidance transaction because the description of the transaction (as asserted) is incorrect.

6.11. The amount of the tax advantage referred to in the Notice which would be withdrawn or denied fails to comply with the definition of "tax advantage" in section 811(1)(a) TCA and with the requirement of section 811(6)(a)(ii) TCA 1997 to specify or describe such tax advantage; therefore the purported opinion is *void ab initio*.

6.12. The Notice has failed to comply with the provisions of section 811(6) (a) (iii) TCA 1997 to expressly specify or describe the "tax consequences" of the purported transaction in sufficient detail or at all; therefore the Notice is *void ab initio*.

6.13. Without prejudice to ground number 6.6 above, the tax consequences purportedly specified or described in the Notice would not be just and reasonable to ensure that tax is deemed to be payable on a date or dates in accordance with section 811A(4)(a) TCA 1997.

7. Those appeals included other grounds which alleged that the provisions of section 811 TCA 1997 were unconstitutional. However, with the passage of time since the date the appeals were lodged and the date of the hearing of the appeal (the delays having been caused, in part, by Judicial Review proceedings which were withdrawn by the Appellants in late 2019) and intervening jurisprudence, in particular *Kenny Lee v The Revenue*

Commissioners [2021] IECA 114 ("*Lee*"), the Appellant's Counsel advised that he was not pursuing those grounds as he accepted that the Commission did not have jurisdiction to adjudicate upon such matters. In line with *Lee,* the Commissioner additionally finds that he does not have jurisdiction to consider points 6.6 and 6.13 of the appeal grounds and dismisses them accordingly.

8. For the avoidance of doubt, similar Notices issued to all thirteen Appellants involved in this appeal and identical grounds of appeal were advanced for each of those Appellants.

Material Findings of Fact

9. As all the transactions under appeal entered into by all the Appellants were identical in nature (bar quantum and timings), the Commissioner confines his material findings of fact to the first transaction entered into by the first-named Appellant. As such, the following findings of fact, while representative, are identical to the other three transactions entered into by the first-named Appellant and all of the transactions entered into by the remaining Appellants (bar quantum and timings). Those material findings of fact are as follows:

    9.1. The first-named Appellant opened a Euro bank account with [redacted]. Ltd. ("[redacted]") on 1st November 2007.

    9.2. On 13th November 2007, [redacted] issued an International Swap Dealers Association ("ISDA") master agreement dated 13th November 2007.

    9.3. On a date unknown but evidently shortly after 13th November 2007, the first-named Appellant signed the agreement at 9.2.

    9.4. On 15th November 2007, the first-named Appellant lodged the sum of €1,400,000 to his then solicitors' client account.

    9.5. The sum of €1,085,714 was lodged by the first-named Appellant's solicitors to the first-named Appellant's [redacted] Euro Account on 16th November 2007.

    9.6. A Gilt Forward Contract ("GFC") was entered into by the first-named Appellant and [redacted] with:

        9.6.1. The issuing of a "Gilt Forward Term Sheet" by [redacted] to the first-named Appellant.

        9.6.2. The signing of the Gilt Forward Term Sheet by the first-named Appellant on 19th November 2007.

9.6.3. The issuing of a "Gilt Forward Confirmation" by [redacted] to the first-named Appellant.

9.6.4. The signing of the Gilt Forward Confirmation by [redacted] on 11th December 2007.

9.6.5. The counter-signing of the Gilt Forward Confirmation by the first-named Appellant on 14th December 2007.

9.7. A Foreign Exchange Contract for Difference ("FECD") was entered into by [redacted] and the first-named Appellant with:

9.7.1. The issuing of a FECD Term Sheet by [redacted] to the first-named Appellant.

9.7.2. The signing of the FECD Term Sheet by the first-named Appellant on 19th November 2007.

9.7.3. The issuing of a FECD conformation by [redacted] to the first-named Appellant.

9.7.4. The signing of the FECD confirmation by [redacted] on 11th December 2007.

9.7.5. The countersigning of the FECD confirmation by the first-named Appellant on 14th December 2007.

9.8. The issue of a letter of instruction on 11th December 2007 to [redacted] by the first-named Appellant on regarding the settlement of the gilt forward transaction.

9.9. The issue of a letter of instruction on 11th December 2007 to [redacted] by the first-named Appellant regarding the settlement of the FECD transaction.

9.10. The signing of the cash charge over cash account with [redacted] document dated 19th November 2007 on behalf of the first-named Appellant and witnessed thereof.

9.11. The issuing of the "Gilt Forward Maturity Confirmation" by [redacted].

9.12. The acquisition of €10 million nominal value of Irish Treasury Stock 3.25% (2003 to 18th April 2009) by [redacted], acting as agent for the first-named Appellant for €10,114,080.60 on 20th December 2007 for value on 21st December 2007 and the debiting of the [redacted] Euro bank account with the sum of €10,114,080.60 on 20th December 2007 for value on 21st December 2007.

9.13. The sale of €10 million nominal value of Irish Treasury Stock 3.25% (2003 to 18th April 2009) by the first-named Appellant to [redacted] for the sum of €19,903,830.60 on 21st December 2007 for value on 21st December 2007 and the crediting of the sum of €19,903,830.60 to the [redacted] Euro bank account on 20th December 2007 for value on 21st December 2007.

9.14. The issuing of the FECD maturity confirmation by [redacted].

9.15. The payment of €9,913,105.26 to [redacted] by the first-named appellant and the debiting of the [redacted] Euro bank account with the amount of €9,913,105.26 on 20th December 2007 for value on 21st December 2007.

Tax Consequence of the Transaction

10. The following comprises the tax consequences of the aggregate arrangements at paragraphs 9.1 to 9.15 above:

10.1. The sale of the Irish Treasury Stock 3.25% (2003 to 18th April 2009) gives rise to a gain of €9,789,750 [€19,903,830.60 - €10,114,080.60]. As gains on disposals of Government securities, which include Irish Treasury Stock, are ordinarily exempt from Capital Gains Tax ("CGT") the first-named Appellant deemed that he was not liable to CGT on this GFC gain.

10.2. The loss on the disposal of the FECD in the sum of €9,913,105.26 having being computed in accordance with the provision of section 546 TCA 1997 was treated as an allowable CGT loss by the first-named Appellant. The first-named Appellant contended that this loss was available for offset against any capital gains made by him under the provisions of section 31 TCA 1997.

11. As all of the transactions entered into by the Appellants were similar in nature, it follows that the tax consequences of the transactions were computed and treated in an identical manner to that illustrated at paragraph 10 (bar quantum and timings).

Legislation and Guidelines

12. The following legislation is relevant to this appeal.

Section 5 TCA 1997 - Interpretation of Capital Gains Tax Acts.

(1) In the Capital Gains Tax Acts, except where the context otherwise requires -

"Appeal Commissioners" has the meaning assigned to it by Section 850;

"body of persons" has the same meaning as in section 2;

"branch or agency" means any factorship, agency, receivership, branch or management, but does not include the brokerage or agency of a broker or agent referred to in section 1039;

"local authority" has the meaning assigned to it by section 2(2) of the Local Government Act, 1941, and includes a body established under the Local Government Services (Corporate Bodies) Act, 1971;

"allowable loss" has the meaning assigned to it in section 546;

"capital allowance" means any allowance under the provisions of the Tax Acts which relate to allowances in respect of capital expenditure, and includes an allowance under section 284;

"chargeable gain" has the same meaning as in section 545;

"charity" has the same meaning as in section 208;

"class", in relation to shares or securities, means a class of shares or securities of any one company;

"close company" has the meaning assigned to it by section 430;

"company" means any body corporate, but does not include a grouping within the meaning of section 1014;

"control" shall be construed in accordance with section 432;

"inspector" means an inspector of taxes appointed under section 852;

"land" includes any interest in land;

"lease" –

(a)in relation to land, includes an underlease, sub-lease or any tenancy or licence, and any agreement for a lease, underlease, sub-lease or tenancy or licence and, in the case of land outside the State, any interest corresponding to a lease as so defined, and

(b) in relation to any description of property other than land, means any kind of agreement or arrangement under which payments are made for the use of, or otherwise in respect of, property,

and "lessor", "lessee" and "rent" shall be construed accordingly;

"legatee" includes any person taking under a testamentary disposition or an intestacy or partial intestacy or by virtue of the Succession Act 1965, or by survivorship, whether such person takes beneficially or as trustee, and a person taking under a donatio mortis causa shall be treated as a legatee and such person's acquisition as made at the time of the donor's death and, for the purposes of this definition and of any reference to a person acquiring an asset as legatee, property taken under a testamentary disposition or on an intestacy or partial intestacy or by virtue of the Succession Act 1965, includes any asset appropriated by the personal representatives in or towards the satisfaction of a pecuniary legacy or any other interest or share in the property devolving under the disposition or intestacy or by virtue of the Succession Act 1965;

"market value" shall be construed in accordance with Section 548;

"minerals" has the same meaning as in section 3 of the Minerals Development Act, 1940;

"mining" means mining operations in the State for the purpose of obtaining, whether by underground or surface working, any minerals;

"part disposal" has the meaning assigned to it by Section 534;

"personal representative" has the same meaning as in Section 799;

"prescribed" means prescribed by the Revenue Commissioners;

"profession" includes vocation;

"resident" and "ordinarily resident", in relation to an individual, shall be construed in accordance with Part 34;

"settled property" means any property held in trust other than property to which section 567 applies, but does not include any property held by a trustee or assignee in bankruptcy or under a deed of arrangement;

"settlement" and "settlor" have the same meanings respectively as in section 10, and "settled property" shall be construed accordingly;

"shares" includes stock, and shares or debentures comprised in any letter of allotment or similar instrument shall be treated as issued unless the right to the shares or debentures conferred by such letter or instrument remains provisional until accepted and there has been no acceptance;

"trade" has the same meaning as in the Income Tax Acts;;

"trading stock" has the same meaning as in section 89;

"unit trust" means any arrangements made for the purpose, or having the effect, of providing facilities for the participation by the holders of units, as beneficiaries under a trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatever;

"units", in relation to a unit trust, means any units (whether described as units or otherwise) into which are divided the beneficial interests in the assets subject to the trusts of a unit trust;

"unit holder", in relation to a unit trust, means a holder of units of the unit trust;

"wasting asset" has the meaning assigned to it by section 560 and paragraph 2 of Schedule 14;

"year of assessment" means -

> *(a) in relation to a period prior to 6 April 2001, a year beginning on 6 April in one year and ending on 5 April in the next year,*

(b) the period beginning on 6 April 2001 and ending on 31 December 2001, which period is referred to as the 'year of assessment 2001', and

(c) thereafter, a calendar year and, accordingly, the 'year of assessment 2002' means the year beginning on 1 January 2002 and any corresponding expression in which a subsequent year of assessment is similarly mentioned means the year beginning on 1 January in that year;

"the year 1997-98" means the year of assessment beginning on the 6th day of April, 1997, and any corresponding expression in which 2 years are similarly mentioned means the year of assessment beginning on the 6th day of April in the first-mentioned of those 2 years.

(2) (a) References in the Capital Gains Tax Acts to a married woman living with her husband shall be construed in accordance with section 1015 (2).

(b) For the purposes of paragraph (a), the reference in section 1015 (2) to a wife shall be construed as a reference to a married woman.

(3) *Any provision in the Capital Gains Tax Acts introducing the assumption that assets are sold and immediately reacquired shall not imply that any expenditure is incurred as incidental to the sale or reacquisition*.

Section 31 TCA 1997 - Amount chargeable.

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

(a) any allowable losses accruing to that person in that year of assessment, and

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

Section 546 TCA 1997 - Allowable losses.

(1) Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.

(2) Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.

(3) Except where otherwise expressly provided, the provisions of the Capital Gains Tax Acts which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss and part not, and references in the Capital Gains Tax Acts to an allowable loss shall be construed accordingly.

(4) A loss accruing to a person in a year of assessment for which the person is neither resident nor ordinarily resident in the State shall not be an allowable loss for the purposes of the Capital Gains Tax Acts unless under section 29(3) the person would be chargeable to capital gains tax in respect of a chargeable gain if there had been a gain instead of a loss on that occasion.

(5) Except where provided by section 573, an allowable loss accruing in a year of assessment shall not be allowable as a deduction from chargeable gains in any earlier year of assessment, and relief shall not be given under the Capital Gains Tax Acts -

(a) more than once in respect of any loss or part of a loss, and

(b) if and in so far as relief has been or may be given in respect of that loss or part of a loss under the Income Tax Acts.

(6) For the purposes of section 31, where, on the assumption that there were no allowable losses to be deducted under that section, a person would be chargeable under the Capital Gains Tax Acts at more than one rate of tax for a year of assessment, any allowable losses to be deducted under that section shall be deducted -

(a) if the person would be so chargeable at 2 different rates, from the chargeable gains which would be so chargeable at the higher of those rates and, in so far as they cannot be so deducted, from the chargeable gains which would be so chargeable at the lower of those rates, and

(b) if the person would be so chargeable at 3 or more rates, from the chargeable gains which would be so chargeable at the highest of those rates and, in so far as they cannot be so deducted, from the chargeable gains which would be so chargeable at the next highest of those rates, and so on.

Section 607 TCA 1997 - Government and certain other securities.

(1) The following shall not be chargeable assets -

(a) securities (including savings certificates) issued under the authority of the Minister for Finance,

(b) stock issued by -

(i) a local authority, or

(ii) a harbour authority mentioned in the First Schedule to the Harbours Act, 1946,

(c) land bonds issued under the Land Purchase Acts,

(d) debentures, debenture stock, certificates of charge or other forms of security issued by the Electricity Supply Board, Bord Gáis Éireann, Radio Telefís Éireann, Córas Iompair Éireann, Bord na Móna, Aerlínte Éireann, Teoranta, Aer Lingus, Teoranta or Aer Rianta, Teoranta,

(e) securities issued by the Housing Finance Agency under section 10 of the Housing Finance Agency Act, 1981,

(f) securities issued by a body designated under section 4(1) of the Securitisation (Proceeds of Certain Mortgages) Act, 1995,

(fa) securities issued by the National Development Finance Agency under section 6 of the National Development Finance Agency Act 2002,

(g) securities issued in the State, with the approval of the Minister for Finance, by the European Community, the European Coal and Steel Community, the International Bank for Reconstruction and Development, the European Atomic Energy Community or the European Investment Bank, and

(h) securities issued by An Post and guaranteed by the Minister for Finance.

(i) (a) All futures contracts which -

(i) are unconditional contracts for the acquisition or disposal of any of the instruments referred to in subsection (1) or any other instruments to which this section applies by virtue of any other enactment (whenever enacted), and

(ii) require delivery of the instruments in respect of which the contracts are made,

shall not be chargeable assets.

(b) The requirement in paragraph (a) that the instrument be delivered shall be treated as satisfied where a person who has entered into a futures contract dealt in or quoted on a futures exchange or stock exchange closes out the futures contract by entering into another futures contract, so dealt in or quoted, with obligations which are reciprocal to those of the contract so closed out and are thereafter settled in respect of both futures contracts by means (if any) of a single cash payment or receipt.

Section 811 Transactions to avoid liability to tax.

(1) (a) In this section and section 811A -

"the Acts" means -

(i) the Tax Acts,

(ii) the Capital Gains Tax Acts,

(iii) the Value-Added Tax Act, 1972, and the enactments amending or extending that Act,

(iv) the Capital Acquisitions Tax Consolidation Act, 2003, and the enactments amending or extending that Act,

(v) Part VI of the Finance Act, 1983, and the enactments amending or extending that Part, and

(vi) the statutes relating to stamp duty,

and any instruments made thereunder;

"business" means any trade, profession or vocation;

"notice of opinion" means a notice given by the Revenue Commissioners under subsection (6);

"tax" means any tax, duty, levy or charge which in accordance with the Acts is placed under the care and management of the Revenue Commissioners and any interest, penalty or other amount payable pursuant to the Acts;

"tax advantage" means -

(i) a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or

(ii) a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person, including any potential or prospective amount so refundable or payable, arising out of or by reason of a transaction, including a transaction where another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction;

"tax avoidance transaction" has the meaning assigned to it by subsection (2);

"tax consequences", in relation to a tax avoidance transaction, means such adjustments and acts as may be made and done by the Revenue Commissioners pursuant to subsection (5) in order to withdraw or deny the tax advantage resulting from the tax avoidance transaction;

"transaction" means -

(i) any transaction, action, course of action, course of conduct, scheme, plan or proposal,

(ii) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and

(iii) any series of or combination of the circumstances referred to in paragraphs (i) and (ii),

whether entered into or arranged by one person or by 2 or more persons -

(I) whether acting in concert or not,

(II) whether or not entered into or arranged wholly or partly outside the State, or

(III) whether or not entered into or arranged as part of a larger transaction or in conjunction with any other transaction or transactions.

(b) In subsections (2) and (3), for the purposes of the hearing or rehearing under subsection (8) of an appeal made under subsection (7) or for the purposes of the determination of a question of law arising on the statement of a case for the opinion of the High Court, the references to the Revenue Commissioners shall, subject to any

necessary modifications, be construed as references to the Appeal Commissioners or to a judge of the Circuit Court or, to the extent necessary, to a judge of the High Court, as appropriate.

(c) For the purposes of this section and section 811A, all appeals made under section 811(7) by, or on behalf of, a person against any matter or matters specified or described in the notice of opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction, if they have not otherwise been so determined, shall be deemed to have been finally determined when -

(i) there is a written agreement, between that person and an officer of the Revenue Commissioners, that the notice of opinion is to stand or is to be amended in a particular manner,

(ii) (i) the terms of such an agreement that was not made in writing have been confirmed by notice in writing given by the person to the officer of the Revenue Commissioners with whom the agreement was made, or by such officer to the person, and

(II) 21 days have elapsed since the giving of the notice without the person to whom it was given giving notice in writing to the person by whom it was given that the first-mentioned person desires to repudiate or withdraw from the agreement, or

(iii) the person gives notice in writing to an officer of the Revenue Commissioners that the person desires not to proceed with an appeal against the notice of opinion.

(2) For the purposes of this section and subject to subsection (3), a transaction shall be a "tax avoidance transaction" if having regard to any one or more of the following -

(a) the results of the transaction,

(b) its use as a means of achieving those results, and

(c) any other means by which the results or any part of the results could have been achieved,

the Revenue Commissioners form the opinion that -

(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and

(ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,

and references in this section to the Revenue Commissioners forming an opinion that a transaction is a tax avoidance transaction shall be construed as references to the Revenue Commissioners forming an opinion with regard to the transaction in accordance with this subsection.

(3) (a) Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that -

(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction –

(I) was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and

(II) was not undertaken or arranged primarily to give rise to a tax advantage,

or

(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided.

(b) In forming an opinion referred to in paragraph (a) in relation to any transaction, the Revenue Commissioners shall have regard to -

(i) the form of that transaction,

(ii) the substance of that transaction,

(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and

(iv) the final outcome and result of that transaction and any combination of those other transactions which are so related or connected.

(v) Subject to this section, the Revenue Commissioners as respects any transaction may at any time -

(a) form the opinion that the transaction is a tax avoidance transaction,

(b) calculate the tax advantage which they consider arises, or which but for this section would arise, from the transaction,

(c) determine the tax consequences which they consider would arise in respect of the transaction if their opinion were to become final and conclusive in accordance with subsection (5) (e), and

(d) calculate the amount of any relief from double taxation which they would propose to give to any person in accordance with subsection (5) (c).

(vi) (a) Where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive, they may, notwithstanding any other provision of the Acts, make all such adjustments and do all such acts as are just and reasonable (in so far as those adjustments and acts have been specified or described in a notice of opinion given under subsection (6) and subject to the manner in which any appeal made under subsection (7) against any matter specified or described in the notice of opinion has been finally determined, including any adjustments and acts not so specified or described in the notice of opinion but which form part of a final determination of any such appeal) in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned.

(b)Subject to but without prejudice to the generality of paragraph (a), the Revenue Commissioners may -

(i) allow or disallow in whole or in part any deduction or other amount which is relevant in computing tax payable, or any part of such deduction or other amount,

(ii)allocate or deny to any person any deduction, loss, abatement, relief, allowance, exemption, income or other amount, or any part thereof, or

(iii) recharacterize for tax purposes the nature of any payment or other amount.

(c) Where the Revenue Commissioners make any adjustment or do any act for the purposes of paragraph (a), they shall afford relief from any double taxation which they consider would but for this paragraph arise by virtue of any adjustment made or act done by them pursuant to paragraphs (a) and (b).

(d) Notwithstanding any other provision of the Acts, where -

(i) pursuant to subsection (4)(c), the Revenue Commissioners determine the tax consequences which they consider would arise in respect of a transaction if their opinion that the transaction is a tax avoidance transaction were to become final and conclusive, and

(ii) pursuant to that determination, they specify or describe in a notice of opinion any adjustment or act which they consider would be, or be part of, those tax consequences,

then, in so far as any right of appeal lay under subsection (7) against any such adjustment or act so specified or described, no right or further right of appeal shall lie under the Acts against that adjustment or act when it is made or done in accordance with this subsection, or against any adjustment or act so made or done that is not so specified or described in the notice of opinion but which forms part of the final determination of any appeal made under subsection (7) against any matter specified or described in the notice of opinion.

(e) For the purposes of this subsection, an opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction shall be final and conclusive -

(i) if within the time limited no appeal is made under subsection (7) against any matter or matters specified or described in a notice or notices of opinion given pursuant to that opinion, or

(ii) as and when all appeals made under subsection (7) against any such matter or matters have been finally determined and none of the appeals has been so determined by an order directing that the opinion of the Revenue

Commissioners to the effect that the transaction is a tax avoidance transaction is void.

(4) (a)Where pursuant to subsections (2) and (4) the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction, they shall immediately on forming such an opinion give notice in writing of the opinion to any person from whom a tax advantage would be withdrawn or to whom a tax advantage would be denied or to whom relief from double taxation would be given if the opinion became final and conclusive, and the notice shall specify or describe -

(i) the transaction which in the opinion of the Revenue Commissioners is a tax avoidance transaction,

(ii) the tax advantage or part of the tax advantage, calculated by the Revenue Commissioners which would be withdrawn from or denied to the person to whom the notice is given,

(iii) the tax consequences of the transaction determined by the Revenue Commissioners in so far as they would refer to the person, and

(iv) the amount of any relief from double taxation calculated by the Revenue Commissioners which they would propose to give to the person in accordance with subsection (5) (c).

(b) Section 869 shall, with any necessary modifications, apply for the purposes of a notice given under this subsection or subsection (10) as if it were a notice given under the Income Tax Acts.

(5) Any person aggrieved by an opinion formed or, in so far as it refers to the person, a calculation or determination made by the Revenue Commissioners pursuant to subsection (4) may, by notice in writing given to the Revenue Commissioners within 30 days of the date of the notice of opinion, appeal to the Appeal Commissioners on the grounds and, notwithstanding any other provision of the Acts, only on the grounds that, having regard to all of the circumstances, including any fact or matter which was not known to the Revenue Commissioners when they formed their opinion or made their calculation or determination, and to this section -

(a) the transaction specified or described in the notice of opinion is not a tax avoidance transaction,

(b) the amount of the tax advantage or the part of the tax advantage, specified or described in the notice of opinion which would be withdrawn from or denied to the person is incorrect,

(c) the tax consequences specified or described in the notice of opinion, or such part of those consequences as shall be specified or described by the appellant in the notice of appeal, would not be just and reasonable in order to withdraw or to deny the tax advantage or part of the tax advantage specified or described in the notice of opinion, or

(d) the amount of relief from double taxation which the Revenue Commissioners propose to give to the person is insufficient or incorrect.

(6) The Appeal Commissioners shall hear and determine an appeal made to them under subsection (7) as if it were an appeal against an assessment to income tax and, subject to subsection (9), the provisions of the Income Tax Acts relating to the rehearing of an appeal and to the statement of a case for the opinion of the High Court on a point of law shall apply accordingly with any necessary modifications; but on the hearing or rehearing of the appeal -

(a) it shall not be lawful to enquire into any grounds of appeal other than those specified in subsection (7), and

(b) at the request of the appellants, 2 or more appeals made by 2 or more persons pursuant to the same opinion, calculation or determination formed or made by the Revenue Commissioners pursuant to subsection (4) may be heard or reheard together.

(7) (a) On the hearing of an appeal made under subsection (7), the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under this section, and -

(i) in relation to an appeal made on the grounds referred to in subsection (7)(a), the Appeal Commissioners shall determine the appeal, in so far as it is made on those grounds, by ordering, if they or a majority of them –

(I) consider that the transaction specified or described in the notice of opinion or any part of that transaction is a tax avoidance transaction, that the opinion or the opinion in so far as it relates to that part is to stand,

(II) consider that, subject to such amendment or addition thereto as the Appeal Commissioners or the majority of them deem necessary and as they shall specify or describe, the transaction, or any part of it, specified or described in the notice of opinion, is a tax avoidance transaction, that the transaction or that part of it be so amended or added to and that, subject to the amendment or addition, the opinion or the opinion in so far as it relates to that part is to stand, or

(III) do not so consider as referred to in clause (I) or (II), that the opinion is void,

(ii) in relation to an appeal made on the grounds referred to in subsection (7)(b), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the tax advantage or the part of the tax advantage specified or described in the notice of opinion be increased or reduced by such amount as they shall direct or that it shall stand,

(iii) in relation to an appeal made on the grounds referred to in subsection (7)(c), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the tax consequences specified or described in the notice of opinion shall be altered or added to in such manner as they shall direct or that they shall stand, or

(iv) in relation to an appeal made on the grounds referred to in subsection (7)(d), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the relief from double taxation specified or described in the notice of opinion shall be increased or reduced by such amount as they shall direct or that it shall stand.

(b) This subsection shall, subject to any necessary modifications, apply to the rehearing of an appeal by a judge of the Circuit Court and, to the extent necessary, to the determination by the High Court of any question or questions of law arising on the statement of a case for the opinion of the High Court.

(10)The Revenue Commissioners may at any time amend, add to or withdraw any matter specified or described in a notice of opinion by giving notice (in this subsection referred to as "the notice of amendment") in writing of the amendment, addition or withdrawal to each and every person affected thereby, in so far as the person is so affected, and subsections (1) to (9) shall apply in all respects as if the notice of amendment were a notice of opinion and any matter specified or described in the notice of amendment were specified or

described in a notice of opinion; but no such amendment, addition or withdrawal may be made so as to set aside or alter any matter which has become final and conclusive on the determination of an appeal made with regard to that matter under subsection (7).

(11) Where pursuant to subsections (2) and (4) the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction and pursuant to that opinion notices are to be given under subsection (6) to 2 or more persons, any obligation on the Revenue Commissioners to maintain secrecy or any other restriction on the disclosure of information by the Revenue Commissioners shall not apply with respect to the giving of those notices or to the performance of any acts or the discharge of any functions authorised by this section to be performed or discharged by them or to the performance of any act or the discharge of any functions, including any act or function in relation to an appeal made under subsection (7), which is directly or indirectly related to the acts or functions so authorised.

(12)The Revenue Commissioners may nominate any of their officers to perform any acts and discharge any functions, including the forming of an opinion, authorised by this section to be performed or discharged by the Revenue Commissioners, and references in this section to the Revenue Commissioners shall with any necessary modifications be construed as including references to an officer so nominated.

(13)This section shall apply as respects any transaction where the whole or any part of the transaction is undertaken or arranged on or after the 25th day of January, 1989, and as respects any transaction undertaken or arranged wholly before that date in so far as it gives rise to, or would but for this section give rise to -

(a) a reduction, avoidance or deferral of any charge or assessment to tax, or part thereof, where the charge or assessment arises by virtue of any other transaction carried out wholly on or after a date, or

(b) a refund or a payment of an amount, or of an increase in an amount, of tax, or part thereof, refundable or otherwise payable to a person where that amount or increase in the amount would otherwise become first so refundable or otherwise payable to the person on a date, which could not fall earlier than the 25th day of January, 1989.

Section 811A TCA 1997

Transactions to avoid liability to tax: surcharge, interest and protective notification.

(1) (a)In this section references to tax being payable shall, except where the context requires otherwise, include references to tax being payable by a person to withdraw

from that person so much of a tax advantage as is a refund of, or a payment of, an amount of tax, or an increase in an amount of tax, refundable, or otherwise payable, to the person.

(b) For the purposes of this section the date on which the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive is -

(i) where no appeal is made under section 811(7) against any matter or matters specified or described in the notice of that opinion, 31 days after the date of the notice of that opinion, or

(ii) the date on which all appeals made under section 811(7) against any such matter or matters have been finally determined and none of the appeals has been so determined by an order directing that the opinion of the Revenue Commissioners to the effect that the transaction is a tax avoidance transaction is void.

(c) This section shall be construed together with section 811 and shall have effect notwithstanding any of the provisions of section 811.

(2) Where, in accordance with adjustments made or acts done by the Revenue Commissioners under section 811(5), on foot of their opinion (as amended, or added to, on appeal where relevant) that a transaction is a tax avoidance transaction having become final and conclusive, an amount of tax is payable by a person that would not have been payable if the Revenue Commissioners had not formed the opinion concerned, then, subject to subsection (3) -

(a) the person shall be liable to pay an amount (in this section referred to as the 'surcharge') equal to 10 per cent of the amount of that tax and the provisions of the Acts, including in particular section 811(5) and those provisions relating to the collection and recovery of that tax, shall apply to that surcharge, as if it were such tax, and

(b) for the purposes of liability to interest under the Acts on tax due and payable, the amount of tax, or parts of that amount, shall be deemed to be due and payable on the day or, as respects parts of that amount, days specified in the notice of opinion (as amended, or added to, on appeal where relevant) in accordance with section 811(6)(a)(iii) construed together with subsection (4)(a) of this section,

and the surcharge and interest shall be payable accordingly.

(c) (a) Subject to subsection (6), neither a surcharge nor interest shall be payable by a person in relation to a tax avoidance transaction finally and conclusively determined to be such a transaction if the Revenue Commissioners have received from, or on behalf of, that person, on or before the relevant date (within the meaning of paragraph (c)), notification (referred to in this subsection and subsection (6) as a 'protective notification') of full details of that transaction.

(b) Where a person makes a protective notification, or a protective notification is made on a person's behalf, then the person shall be treated as making the protective notification -

(i) solely to prevent any possibility of a surcharge or interest becoming payable by the person by virtue of subsection (2), and

(ii) wholly without prejudice as to whether any opinion that the transaction concerned was a tax avoidance transaction, if such an opinion were to be formed by the Revenue Commissioners, would be correct.

(c) Regardless of the type of tax concerned -

(i)where the whole or any part of the transaction, which is the subject of the protective notification, is undertaken or arranged on or after 2 February 2006, then the relevant date shall be –

(I) the date which is 90 days after the date on which the transaction commenced, or

(II) if it is later than the said 90 days, 2 May 2006,

(ii) where -

(I) the whole of the transaction is undertaken or arranged before 2 February 2006, and would give rise to, or would but for section 811 give rise to, a reduction, avoidance, or deferral of any charge or assessment to tax, or part thereof, and

(II) that charge or assessment would arise only by virtue of one or more other transactions carried out wholly on or after 2 February 2006,

then the relevant date shall be the date which is 90 days after the date on which the first of those other transactions commenced, or

(iii) where -

(I) the whole of the transaction is undertaken or arranged before 2 February 2006, and would give rise to, or would but for section 811 give rise to, a refund or a payment of an amount, or of an increase in an amount of tax, or part thereof, refundable or otherwise payable to a person, and

(II) that amount or increase in the amount would, but for section 811, become first so refundable or otherwise payable to the person on a date on or after 2 February 2006,

then the relevant date shall be the date which is 90 days after that date.

(d) Notwithstanding the receipt by the Revenue Commissioners of a protective notice, paragraph (a) shall not apply to any interest, payable in relation to a tax avoidance transaction finally and conclusively determined to be such a transaction, in respect of days on or after the date on which the opinion of the Revenue Commissioners in relation to that transaction becomes final and conclusive.

(d) (a)The determination of tax consequences, which would arise in respect of a transaction if the opinion of the Revenue Commissioners, that the transaction was a tax avoidance transaction, were to become final and conclusive, shall, for the purposes of charging interest, include the specification of -

(i) a date or dates, being a date or dates which is or are just and reasonable to ensure that tax is deemed to be due and payable not later than it would have been due and payable if the transaction had not been undertaken, disregarding any contention that another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction, and

(ii) the date which, as respects such amount of tax as is due and payable by a person to recover from the person a refund of or a payment of tax, including an increase in tax refundable or otherwise payable, to the person, is the day on which the refund or payment was made, set off or accounted for,

and the date or dates shall be specified for the purposes of this paragraph without regard to -

(I) when an opinion of the Revenue Commissioners that the transaction concerned was a tax avoidance transaction was formed,

(II) the date on which any notice of that opinion was given, or

(III) the date on which the opinion (as amended, or added to, on appeal where relevant) became final and conclusive.

(b) Where the grounds of an appeal in relation to tax consequences refer to such a date or dates as are mentioned in paragraph (a), subsection (7) of section 811 shall apply, in that respect, as if the following paragraph were substituted for paragraph (c) of that subsection:

(c) the tax consequences specified or described in the notice of opinion, or such part of those consequences as shall be specified or described by the appellant in the notice of appeal, would not be just and reasonable to ensure that tax is deemed to be payable on a date or dates in accordance with subsection (4) (a) of section 811A,'

and the grounds of appeal referred to in section 811(8)(a) shall be construed accordingly.

(e) A surcharge payable by virtue of subsection (2)(a) shall be due and payable on the date that the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive and interest shall be payable in respect of any delay in payment of the surcharge as if the surcharge were an amount of that tax by reference to an amount of which the surcharge was computed

(f) (a) A protective notification shall -

(I) be delivered in such form as may be prescribed by the Revenue Commissioners and to such office of the Revenue Commissioners as -

(I) is specified in the prescribed form, or

(II) as may be identified, by reference to guidance in the prescribed form, as the office to which the notification concerned should be sent, and

(ii) contain -

(I) full details of the transaction which is the subject of the protective notification, including any part of that transaction that has not been undertaken before the protective notification is delivered,

(II) full reference to the provisions of the Acts that the person, by whom, or on whose behalf, the protective notification is delivered, considers to be relevant to the treatment of the transaction for tax purposes, and

(III) full details of how, in the opinion of the person, by whom, or on whose behalf, the protective notification is delivered, each provision, referred to in the protective notification in accordance with clause (II), applies, or does not apply, to the transaction.

(b) Without prejudice to the generality of paragraph (a), the specifying, under -

(i) section 19B of the Value-Added Tax Act 1972,

(ii) section 46A of the Capital Acquisitions Tax Consolidation Act 2003,

(iii) section 8 of the Stamp Duties Consolidation Act 1999, or

(iv) section 955(4) of this Act,

of a doubt as to the application of law to, or the treatment for tax purposes of, any matter to be contained in a return shall not be regarded as being, or being equivalent to, the delivery of a protective notification in relation to a transaction for the purposes of subsection (3).

(a) Where the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction and believe that a protective notification in relation to the transaction has not been delivered by a person in accordance with subsection (6)(a) by the relevant date (within the meaning of subsection (3)(c)) then, in giving notice under section 811(6)(a) to the person of their opinion in relation to the transaction, they shall give notice that they believe that a protective notification has not been so delivered by the person and section 811 shall be construed, subject to any necessary modifications, as if -

(g) (i)subsection (7) of that section included as grounds for appeal that a protective notification in relation to the transaction was so delivered by the person, and

(ii)subsection (9) of that section provided that an appeal were to be determined, in so far as it is made on those grounds, by ordering that a protective notification in relation to the transaction was so delivered or that a protective notification in relation to the transaction was not so delivered.

(h) This section shall apply -

(a) as respects any transaction where the whole or any part of the transaction is undertaken or arranged on or after 2 February 2006, and

(b) as respects any transaction, the whole of which was undertaken or arranged before that date, in so far as it gives rise to, or would but for section 811 give rise to -

(i) (i) a reduction, avoidance, or deferral of any charge or assessment to tax, or part thereof, where the charge or assessment arises only by virtue of another transaction or other transactions carried out wholly on or after 2 February 2006, or-

(ii)a refund or a payment of an amount, or of an increase in an amount of tax, or part thereof, refundable or otherwise payable to a person where, but for section 811, that amount or increase in the amount would become first so refundable or otherwise payable to the person on or after 2 February 2006.

Section 955 TCA 1997 - Amendment of and time limit for assessments.

(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.

(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return.

(b) Nothing in this subsection shall prevent the amendment of an assessment -

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

(ii) to give effect to a determination on any appeal against an assessment'

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3).

(3) A chargeable person who is aggrieved by an assessment or the amendment of an assessment on the grounds that the chargeable person considers that the inspector was precluded from making the assessment or the amendment, as the case may be, by reason of subsection (2) may appeal against the assessment or amended assessment on those grounds and, if on the hearing of the appeal the Appeal Commissioners determine -

(a) that the inspector was so precluded, the Tax Acts shall apply as if the assessment or the amendment, as the case may be, had not been made, and the assessment or the amendment of the assessment as appropriate shall be void, or

(b) that the inspector was not so precluded, the assessment or the assessment as amended shall stand, except to the extent that any amount or matter in that assessment is the subject of a valid appeal on any other grounds.

(4) (a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but

that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.

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

(5) (a)In this subsection, "relevant chargeable period" means -

(i) where the chargeable period is a year of assessment for income tax, the year 1988-89 and any subsequent year of assessment,

(ii) where the chargeable period is a year of assessment for capital gains tax, the year 1990-91 and any subsequent year of assessment, and

(iii) where the chargeable period is an accounting period of a company, an accounting period ending on or after the 1st day of October, 1989.

(b)Sections 919(5)(b) and 924 shall not apply in the case of a chargeable person for any relevant chargeable period, and all matters which would have been included in an additional first assessment under those sections shall be included in an amendment of the first assessment or first assessments made in accordance with this section.

(c) For the purposes of paragraph (b), where any amount of income, profits or gains or, as respects capital gains tax, chargeable gains was omitted from the first assessment or first assessments or the tax stated in the first assessment or first assessments was less than the tax payable by the chargeable person for the relevant chargeable period concerned, there shall be made such adjustments or additions (including the addition of a further first assessment) to the first assessment or first assessments as are necessary to rectify the omission or to ensure that the tax so stated is equal to the tax so payable by the chargeable person.

<u>Section 956 TCA 1997 -Inspector's right to make enquiries and amend assessments.</u>

(1) (a)For the purpose of making an assessment on a chargeable person for a chargeable period or for the purpose of amending such an assessment, the inspector -

(I) may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and

(II) may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains, or allow any deduction, allowance or relief by reference to such statement or particular.

(b)The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a) (i) shall not preclude the inspector -

(i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and

(ii) subject to section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate.

(c) Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.

(2) (a) A chargeable person who is aggrieved by any enquiry made or action taken by an inspector for a chargeable period, after the expiry of the period referred to in subsection (1)(c) in respect of that chargeable period, on the grounds that the chargeable person considers that the inspector is precluded from making that enquiry or taking that action by reason of subsection (1)(c) may, by notice in writing given to the inspector within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners, and the Appeal Commissioners shall hear the appeal in all respects as if it were an appeal against an assessment.

(b)Any action required to be taken by the chargeable person and any further action proposed to be taken by the inspector pursuant to the inspector's enquiry or action shall be suspended pending the determination of the appeal.

(c)Where on the hearing of the appeal the Appeal Commissioners -

(i) determine that the inspector was precluded from making the enquiry or taking the action by reason of subsection (1)(c), the chargeable person shall not be required to take any action pursuant to the inspector's enquiry or action and the inspector shall be prohibited from pursuing his enquiry or action, or

(ii) decide that the inspector was not so precluded, it shall be lawful for the inspector to continue with his or her enquiry or action.

Section 5 Interpretation Act 2005 - Construing ambiguous or obscure provisions, etc.

(1)In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of -

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment.

Preliminary issues

Burden of Proof

13. In *Revenue Commissioners v O'Flynn Construction Company Limited and Others* [2011] IESC 47, McKechnie J. espoused the following clarification of the law relating to the burden of proof in section 811 TCA 1997 "type" appeals at paragraph 147:

> "*In my view, the situation arising under s86 is at least to a certain but definite extent, different from the situation where an appeal against an assessment is raised. In the first instance the avoidance provision can only be activated by the Revenue Commissioners, who, for the provision to have effect, must arrive at a view that the scheme or arrangement is captured by it. They must assess a violation and do so by issuing a Notice of Opinion to that effect. Such a notice can only issue if by reference to certain specified matters, they have reached a definite conclusion. This exercise is conducted by way of objective assessment. In addition, they assert, not simply a breach of the section, but also what, in their opinion and judgment, are the tax consequences which arise if such an arrangement had not taken place. All of these steps involve positive assertions on the part of the Revenue. In such circumstances, noting the wording and structure of the section, and in the absence of any provision to the contrary, it seems to me that if the notice is challenged the normal evidence rule of "he who asserts must prove*."

14. Furthermore, in *McNamee v Revenue Commissioners* [2016] IESC 33, Charleton J. further confirmed at paragraph 14:

> "*As to the burden of proof on the hearing before the Appeal Commissioners, the Revenue Commissioners have conceded that, at such a hearing, they bear the burden of demonstrating that the use by the taxpayer of the system of allowances or exemptions in question amounted to avoidance. This concession may be helpful. It is to be noted that, in his judgment in the O'Flynn Construction case, McKechnie J at para. 147, dissenting as to the result, commented expressly on that issue*:"

15. In light of the foregoing jurisprudence, Counsel for the Respondent conceded that the burden of proving that the transactions under appeal were tax avoidance transactions rested with the Respondent.

Validity of the Notice of Opinion

Appellant

16. The Appellants' Counsel submitted that the Respondent failed to notify the Appellants in a timely manner of the alleged tax avoidance transactions and further failed to describe the alleged tax avoidance transaction in sufficient detail as required by the provisions of section 811 TCA 1997. Given this position, the Appellants' agent submitted that the Notices which issued by the Respondent were invalid.

17. Further or in the alternative, the Appellants' Counsel asserted In line with the reasoning of the Supreme Court in *Revenue Commissioners v Droog* [2016] IESC 55 ("*Droog*"), that the transactions which occurred in 2007 and 2008 may not validly be included in the Notices as the time limits set out in sections 955 and 956 TCA 1997 had not been adhered to (see below under "time limits"). The Appellants' Counsel further submitted that the Respondent by its action of seeking to form its Notices based on events or actions which are out of time has invalidated the Notices in whole and as such all actions pursuant to the Notices are invalid.

18. The Appellants' Counsel further submitted that the Appellants had submitted a "full and true return" and stated that the Notices had not issued out within four years of the date which the Respondent began its enquiries. Given this position, the Appellants' Counsel submitted that *Droog* essentially entitled the Appellants to rely on the four year timeframe from the later of the date which the Appellants had submitted their returns or the date upon which the Respondent begun its enquiries. As this had not occurred, the Appellants' Counsel submitted that the Notices were invalid.

19. The Appellants' Counsel opened the case of *Dermot Hanrahan v Revenue Commissioners* [2022] IEHC 43 ("*Hanrahan*") which discussed retrospective legislation as it similarly examined section 811 (5A) TCA 1997 which, similar to the Appellants' appeal, was not introduced until a date later than the facts under dispute in *Hanrahan* (section 130 Finance Act 2012 introduced section 811 (5A) TCA 1997). While at paragraph 259 (1) in *Hanrahan*, Stack J. held that:-

    "*The time limits in s. 955 (2) TCA do not apply to the Notice of Opinion or any part of it, by reason of s. 811 (5A)…*"

    The Appellants' Counsel submitted that Stack J. formed this opinion based upon the *dicta* contained in paragraph 98 of her judgment which stated "*that subsection (5) (a) does not repeal any pre-existing statutory provision*". The Appellant's Counsel submitted that it was the Appellants' view it did.

20. The Appellants' Counsel opened section 2 of the Interpretation Act 2005 which defines "*repeal*" as "*revokes, rescinds, abrogates or cancels*". The Appellants' Counsel submitted that the effect of section 811(5)(a) of the TCA 1997 is that it is intended to repeal the *Droog* decision as applied to time limits in section 811 TCA 1997 cases. Given this position, the Appellants' Counsel submitted that the introduction of section 811(5) (a) TCA 1997 amounted to a "repeal of a right" and accordingly the *Hanrahan* decision ought to be revisited and amended in its favour.

Respondent

21. In response, the Respondent's Counsel submitted that contrary to the Appellants' assertion, the Respondent complied with the provisions of section 811(6) TCA 1997. The Respondent's Counsel submitted that the Notices were issued immediately, in fact on the same day as the Opinions were formed by the Nominated Officers. The Respondent's Counsel submitted that as the Notices clearly described the respective transactions as well as the tax consequences arising therefrom and as such they had complied with the legislative provisions. The Respondent's Counsel concluded by stating that there is no requirement under section 811(6) TCA 1997 for the Respondent to expressly specify or describe the respective transactions in any greater detail than it had so done.

22. Further or in the alternative, the Respondent's Counsel submitted that the Appellants' notices of assessment did not clearly stipulate these grounds of appeal in a manner which complied with the provisions of section 949I TCA 1997 and should be discounted by the Commission.

Finding

23. In examining the Notices, the Commissioner does not accept the Appellants' submissions that those Notices did not contain "*sufficient detail*" within them. In any event, the Commissioner finds those submissions moot as he is required, pursuant to section 811(9) (a) TCA 1997 to have regard to all the matters to which the Respondent may or is required to have regard to under the provisions of section 811 TCA 1997.

24. As such, the Commissioner finds that the Appellants engaged in a complicated series of transactions and claimed a loss on the disposal of the FECDs. When the FECD loss is combined with the non-taxable profit on the GFC transactions, the fiscal result is that an overall loss is produced. However, when looking at the quantum of the actual monetary loss incurred, and comparing this to the losses generated for CGT purposes, it is apparent that there is no correlation between the two (see paragraph 101 below which summarises the monetary loss incurred versus the generated CGT losses).

25. In this regard, the Commissioner reviewed all the necessary documentation and had regard to "*all the matters to which the Revenue Commissioners may or are required to have regard under this section*" and for reasons which will become apparent, has concluded that the Appellants procured a "*tax advantage*".

26. In noting the Respondent's objections regarding the Appellants' time-limit submissions, detailed at paragraphs 16 to 20 above, the Commissioner finds that he is not required to consider same. As was noted in *Lee*, the Commission does not enjoy any inherent or general jurisdiction, and its functions are confined to effecting the provisions of section 811(5A) TCA 1997 as enacted by the Oireachtas and as interpreted by the Superior Courts. Given this position, the Commissioner is unable to consider the Appellants' submissions regarding the validity of *Hanrahan* and must apply the principles promulgated by the High Court.

27. In so doing, and having particular regard to *Hanrahan*, the Commissioner finds that the time limits under sections 955 and 956 TCA 1997 do not apply to the Notices received by the Appellant which are under appeal. In addition, as the Commissioner determines the Appellants procured a tax advantage, this renders the Appellant's submissions moot. Accordingly, the Appellants' submissions on the validity of the Notices are dismissed.

Time Limit Issue

Appellant

28. The Appellants' Counsel submitted that in order to issue an amended assessment, the liability to pay the tax is dependent upon there being a communication of an asserted liability to additional tax, issuing within a period of four years from the date which the returns were submitted by the taxpayer.

29. The Appellants' Counsel submitted that as the Notice for 2007 did not issue until 19th December 2012 and the Notice for 2008 until 3rd December 2014, then no communication by way of assessment was made by the Respondent to the first-named Appellant seeking the additional tax, and as such any amended assessment is out of time. The Appellants' Counsel submitted that the Notices themselves do not constitute an assessment or an amended assessment and as such the Respondent is prevented from issuing valid notices of assessment at this juncture.

30. The Appellants' Counsel submitted that *Droog* clearly sets out that a taxpayer who files a return containing a full and true disclosure of all relevant facts should be entitled to rely on the general time limit, otherwise it gives rise to the potential of unfairness, contrary to the intention of the legislation. The Appellants' Counsel submitted that as they were

satisfied that the 2007 and 2008 returns submitted by the Appellants met the standard of a full and true disclosure and were submitted on their due date then it follows from *Droog,* that the Appellants should be entitled to rely on the general time limit, such that any amended assessments to be issued by the Respondent for 2007 or 2008 are now time barred.

Respondent

31. The Respondent's Counsel stated that the Appellants for the first time in its Outline of Arguments introduced time limits as a new ground of appeal. The Respondent's Counsel advised that while the Notices of Appeal identified some 14 grounds of appeal, none of those grounds related to time limits. Accordingly, the Respondent's Counsel submitted it was incumbent on the Commission to disallow this ground of appeal having regard to the provisions of section 949I TCA 1997.

32. The Respondent's Counsel submitted that as the *Droog* (High Court) judgment was delivered in 2011, more than three years before the Appellants lodged their appeals, and as that judgment determined that the time-limits under Part 41 TCA 1997 applied to section 811 TCA 1997 Notices, then there were no grounds for admitting this new ground of appeal.

Finding

33. Section 949I (2) TCA 1997 provides that a notice of appeal shall specify, inter alia,

> *"(d) the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds*."

34. Section 949I (6) TCA 1997 further provides:

> "*A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal* ***unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice*****". [emphasis added**].

35. Having examined the notices of appeal, the Commissioner is satisfied that no time related grounds were included within them. Furthermore, the Commissioner finds that no submissions were presented by the Appellants which would justify the time-limit grounds being now admitted to the Appellants' appeal.

36. Having regard to the provisions of section 949I TCA 1997, the Commissioner dismisses the Appellants' additional ground of appeal on time-limits and the Appellants' request is therefore refused.

Expert Reports

37. In advance of legal submissions, owing to the complexity of the transactions under appeal, Counsel for the Respondent and the Appellants tendered expert witnesses ("the witnesses") to give their respective opinions on the operation of the transactions under appeal. In line with the recent judgment in *Patrick Duffy v Brendan McGee T/A McGee Insulation Services & Anor* [2022] IECA 254, the witnesses acknowledged that their duty was to provide independent assistance to the Commission by way of an objective opinion in matters within their expertise.

Respondent

38. The Respondent's expert witness, [redacted] ("the Respondent's witness") is a Fellow of the Institute of Chartered Accountants and a Fellow of the Chartered Institute for Securities and Investment. He advised that he had previously worked in "a big six" (as it was then, namely a major accountancy practice) firm of accountants before moving to the corporate banking sector where he held a number of senior positions within that industry and held a number of non-executive directorships with public limited companies. His report contained 122 pages of information, was professionally presented and he presented to the Commissioner as a knowledgeable and credible expert witness.

39. Within his report, the Respondent's witness examined the four transactions undertaken by the first Appellant, looked at index data for relevant periods and gave a summary of all of the transactions (which amounted to 43 separate transactions for the then 14 Appellants who had cases under appeal).

40. The Respondent's witness advised that the transactions entered into by the first-named Appellant were very complex from a financial perspective. This complexity related to the component parts of the arrangements and how they interacted with each other, together with some very complex formulas used to determine the amounts payable at various points. He stated he had only ever seen similar type formulas once in his career. He stated in evidence that *"complexity is the name of the game*"[1]. The Respondent's witness stated that the formulas used were unduly complicated and included an item within the FECD referable to the foreign exchange risk which cancelled itself out. When questioned

[1] Day 2 of the transcript at page 95, lines 15 and 16.

about this complexity, he stated "*it seems to me that if you can't understand the formulas then you can't understand the transaction*"[2].

41. The Respondent's witness detailed the two underlying components of the arrangements which were the GFC and FECD. A GFC is ordinarily taken to mean a derivatives contract to buy or sell fixed interest securities at some date in the future, but at a price (determined by factors or a series of factors in a formula) accepted on the date the derivative is acquired. A FECD is a financial contract that pays the differences in the settlement price between the opening and closing trades (or price).

42. The Respondent's witness used a hypothetical person ("Mr A") in his analysis with a notional figure of €10 million euros used for value. The Respondent's witness advised that although he was using a hypothetical person and monetary amount, that his analysis was consistent with the transactions entered into by the Appellants (bar the names, dates and monetary amounts).

43. The Respondent's witness advised that the first step in the arrangements was for Mr A to sell €10 million nominal gilts to a bank on a date, 30 days later (the "expiry date"). This part of the arrangements was governed by an International Swap Dealers Association ("ISDA") Master Agreement, with the transaction specific terms recorded in a Gilt Forward Term Sheet ("Gilt Forward"). The price at which the gilts were to be sold was to be determined by a formula which could only be calculated at the expiry date.

44. Having entered into the Gilt Forward, and in order to be able to deliver the gilts to the bank on the expiry date, Mr A would instruct the bank to purchase €10 million nominal gilts in the market on his behalf, at the then market price, shortly before the sale of the gilts under the Gilt Forward was to take place.

45. Mr A would therefore make a profit or loss on the sale of these gilts being the difference between:

    45.1. The Gilt Forward sales price (as determined by the formula), and

    45.2. The cost of acquiring the gilts (at the then market price)

46. The Respondent's witness advised that the formula used in the GFC was such that the quantum of the profit (or loss) on the Gilt sale was only dependent on the level of the Dow Jones Euro Stoxx 50 Price Index ("the index") at the expiry of the Gilt Forward. The index is a major index for the Eurozone which provides blue-chip representation of very large companies in the region, covering 50 stocks from nine Eurozone countries, including

[2] *Ibid*. lines 26 to 28.

Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands and Spain.

47. The Respondent's witness advised that the second part of the transaction required Mr A, at the same time as entering into the GFC, to enter into a €10 million FECD with the bank, with start and end dates corresponding to those of the GFC. As for the GFC, this part of the arrangement was governed by an ISDA Master Agreement.

48. The Respondent's witness continued that under the terms of the FECD, on the expiry date (being the same expiry date as used in the GFC), a payment would be due, either to Mr A from the bank or vice versa, the amount of which would depend on the difference between the euro equivalent of a United States Dollar ("USD") amount (which would not be known until the expiry date), and a fixed amount of euro, €10 million. However, by virtue of the way the USD amount was to be calculated, the amount due to, or from Mr A would actually be dependant only on the level of the index at the expiry date.

49. Having outlined the hypothetical analysis of Mr A, the Respondent's witness advised that he examined the four transactions undertaken by the first-named Appellant. He provided the following table to summarise the trade and expiry dates, the pre-tax profit and loss figures and the tax losses claimed by the first-named Appellant:

Transaction	Trade Date	Expiry date	Pre-Tax Loss	Tax Losses
1	19/11/2007	19/12/2007	123,355	9,913,105
2	19/11/2007	20/12/2007	113,092	9,895,888
3	19/11/2007	18/01/2008	216,400	9,955,000
4	19/11/2007	21/01/2008	270,401	6,145,293
Totals			723,248	35,909,286
Advisory Fees			314,287	
Total Net (monetary) loss			1,037,535	

50. The Respondent's witness advised that while the first-named Appellant claimed the fees payable to [redacted] (as they were embedded into the formula) as part of the CGT losses, he did not claim the sum of €314,287 payable in advisory fees. Hence, the first-named Appellant acquired available CGT losses of €35,909,286 for a net outlay of €1,037,535.

51. Under examination in chief, the Respondent's witness advised the Respondent's Counsel that he was of the view that entire tenet of the arrangements was that the GFC and the FECD would be entered into together, or not at all. He advised that the reasons for him

holding this view was that the transactions examined all had the same trade dates, expiry dates and settlement dates and he was of the view that this was done so as to enable all of the transaction cash flows to be netted off against each other which would not be the case if the transactions had different settlement dates. In addition, he advised, allied to the above point, if either contract was to be taken out on a standalone basis, he would have expected a "margin" requirement to be in place ("margin" is the money borrowed from a broker to purchase an investment and is the difference between the total value of an investment and the loan amount – source Investopedia.com), under which either party would be required to pay the other the estimated liability on the contract on say a daily basis. He advised that the margin would be calculated by assuming the contract was to be closed out at the end of any particular day, requiring a market valuation by reference to the index level at the close of the business day. The Respondent's witness advised that there was no such margin requirements in either the GFC or FECD.

52. The Respondent's witness advised that although there was no contractual margin requirements, on 16th November 2007, some three days before entering into the four transactions on 19th November 2007, the first-named Appellant transferred the sum of €1,085,714 into a bank account which [redacted] had a charge over. When asked why this was done, the Respondent's witness stated that "*while there was no legal obligation for this amount to be deposited…in my view the €1,085,714 was most probably a requirement of* [redacted] *in order for them to have sufficient cash upfront so as to cover the maximum amount [the first named-Appellant] would owe to* [redacted] *under the four transactions*". In his own words, he continued "*put it another way, the €1,085,714 was effectively a margin call for all four transactions and this would only be the case if all of the GFC's and FECD's were taken out together*"[3].

53. The Respondent's witness further advised while the returns generated or lost were subject to a range around the index, all of the transactions undertaken by all of the Appellants fell within this range, save two transactions referable to the first and second-named Appellants. In relation to these transactions, and using the second-named Appellant as the illustrative example, it was agreed between the second-named Appellant and [redacted] that instead of closing out the GFC by physical delivery as was specified in the gilt forward contract, that they would alter that and cash settle the GFC. The effect of this was that the second-named Appellant avoided a potential CGT liability of €633,583 had the GFC been settled on its original terms and was instead entitled to avail of a CGT loss on the transactions of €162,000.

[3] Paragraph 241 of [redacted] report and referred to at page 40 of the transcript (day 2).

54. When questioned by the Respondent's Counsel regarding the probability of the transactions falling within the range outlined in the formula, the Respondent's witness stated that although [redacted] and their advisors had stated that there was a 90% probability of this occurring, he was of the view that it was in fact a 95% probability and this was demonstrated by his analysis of all of the transactions undertaken by all of the Appellants which proved this figure as correct. While the Appellants' Counsel objected to the Respondent's witness giving evidence on probability, as he was not an expert in that field, the Commissioner found that those figures proven as the Respondent's witness's evidence was backed up by the transactional analysis included within his report.

55. Under cross examination, the Respondent's witness agreed with the Appellants' Counsel that while the probability of the GFCs generating profits and the FECDs producing losses was high, that this position was in no way guaranteed by virtue of market volatility. However, while the Respondent's witness agreed with the Appellants' Counsel that hedging ("a trading strategy to protect a portfolio position from price fluctuations") is a completely common feature of investment, he was unwilling to agree that the transactions of a type undertaken by the Appellants was hedging by virtue of his analysis of the financial models upon which the returns or losses were calculated.

Appellant

56. The Appellants' expert witness [redacted] ("the Appellants' witness") is a member of the Chartered Institute for Securities and Investment and holds additional qualifications in financial derivatives and investment management. He advised in addition to owning his own financial services and consultancy company that he acts as a lecturer in financial law and regulatory modules to a number of leading UK and French universities. His report, while brief at 15 pages, was professionally presented and he also presented to the Commissioner as a knowledgeable and credible expert witness.

57. In the Executive Summary to his report, the Appellants' witness advised that it was beyond his expertise to advise on the tax implications of the transactions and as his expertise extends to derivatives, structured products, currency, private banking and in particular hedging of risk, he had confined his report to those latter categories.

58. The Appellants' witness stated that his view of the transactions entered into was that they were indicative of risk mitigation, more commonly known as hedging. He advised that hedging of risky investments is common place, prudent and in his view unsurprising in looking at the nature of the transactions undertaken by the Appellants. The reason provided for this understanding was that the GFC and FECD outcomes were dependent on the underlying markets which by their nature are volatile. Thus, he stated that the

value on maturity could not be guaranteed and having regard to the timeframe (2007 and 2008) in which the transactions occurred, that this risk was inflated as there was exceptional market and economic volatility as the Global financial crisis unfolded.

59. The witness report of the Appellants' focused solely on one of the transactions entered into by the first-named Appellant who he noted was a seasoned investor with good knowledge and who had undertaken previous investments, notably a US Dollar position which resulted in a €400,000 gain in 2008. Although the Appellants' witness said that he considered the first-named Appellant was a seasoned investor, under cross examination by the Respondent's Counsel, he conceded that one previous dollar position investment did not make the first-named Appellant a seasoned investor.

60. The Appellants' witness advised that the GFC and FECD transactions undertaken by the Appellants are considered high risk investments owing to their component elements and their over the counter ("OTC") construction and hence were not subject to regulation by a central exchange. He stated that OTC trades give rise to counterparty risk in particular as they are traded on secondary markets.

61. The Appellants' witness stated that his view of the simultaneous trades in the GFC and FECD transactions was that they were undertaken to provide an element of hedging. He advised that [redacted] letter of the 16th November 2007 warned of the risk of short term trade positions and he stated that such comments were conducive to investors adopting risk mitigation protection.

62. The Appellants' witness stated that either the GFC or FECD transaction could have been entered into in isolation and that it was not unknown for sophisticated investors to take such risks. The Appellants' witness further advised that [redacted] letter of 26th March 2010 advised that GFC and FECD were independent of each other and that this confirmed such views.

63. The Appellants' witness advised that he had the benefit of seeing the Respondent's witness's report in advance of the hearing and while he generally agreed with its contents, he was of the view that it provided nothing to detract from the fact that the entering into of the two transactions (the GFC and FECD) by the Appellants was a form of hedging.

64. The Appellants' witness confirmed in his evidence that the foreign exchange component used in the FECD formula cancelled itself out and when asked to provide an explanation as to why this occurred, he was unable to assist the Commissioner. While the Appellant's witness did not provide any reason to the Commissioner regarding the foreign exchange

question posed, he did confirm that the formulas used to calculate the gains or losses in both the GFC and FECD transactions were complex in nature.

Submissions – Substantive Issue

Respondent

65. The Respondent's Counsel submitted that the transactions undertaken by the Appellants were structured and priced to enable the Appellants to make a gain on the GFC transactions and a loss on the FECDs. The Respondent's Counsel submitted as the gain on the GFC transactions was ordinarily exempt from CGT and the loss ordinarily allowable on the FECDs for CGT purposes that those transactions were not structured investments but rather transactions primarily undertaken to secure tax advantages. The Respondent's Counsel submitted that a comparative of the monetary losses incurred by the Appellants versus the CGT losses obtained as a result of entering into the transactions was additional evidence of the motivation behind the transactions. Furthermore, the Respondent's Counsel submitted that it's expert witness had provided evidence to the Commission that there was a very high probability that the GFCs would incur profits and the FECDs losses having regard to the available documentation and formula used for calculating the gains/losses.

66. The Respondent's Counsel opened the United Kingdom ("UK") case of *Ramsay v IRC* 1981 [STC] 174 ("*Ramsay*"), where Lord Wilberforce held at paragraph 179:

> "*The scheme consists…of a number of steps to be carried out, documents to be executed, payments to be made, according to a timetable, in each case rapid…In each case two assets appear, like particles in a gas chamber with opposite charges, one of which is used to create the loss, the other of which gives rise to an equivalent gain which prevents the taxpayer from supporting any real loss and which gain is intended not to be taxable. Like the particles, these assets have a very short life. Having served their purpose they cancel each other out and disappear. At the end of the series of operations, the taxpayer's financial position is precisely as it was at the beginning, except that he has paid a fee, and certain expenses to the promoter of the scheme.*
>
> *There are other significant features which are commonly found in schemes of this character. Firstly it is the clear and stated intention that once started each scheme shall proceed through the various steps to the end – they are not intended to be arrested half way. This intention may be expressed either as a firm contractual obligation or as an expectation without contractual force.*

Secondly, although sums of money, sometimes considerable, are supposed to be involved in individual transactions, the tax payer does not have to put his hand in his pocket…In some cases one may doubt whether, in any real sense, any money existed at all."

67. The Respondent's Counsel likened Lord Wilberforce's analogy to the Appellants' appeal with the matching "particles" being the GFC and FECD. The Respondent's Counsel submitted that there was no commercial motive for the transactions undertaken by the Appellants and that the only advantage derived, and sought to be derived, was the CGT losses generated. Counsel further advised that the GFC and FECD transactions were entered into on the same date, for short-periods of time and were settled on the same date in submitting that there was no commercial intent to those transactions.

68. Counsel for the Respondent submitted that the GFC and FECD while not contractually interdependent were commercially necessitated to be entered into together or not at all. The Respondent's Counsel submitted that none of the Appellants had entered into one transaction and not the other as to do so would have left their potential exposure unlimited.

69. The Respondent's Counsel further submitted that the transactions did not fall into any of the exceptions contained in section 811(3) (a) TCA 1997 as the transactions were not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

70. The Respondent's Counsel submitted that the intention of section 31 TCA 1997 was to provide relief for real loses rather than the artificial losses incurred by the Appellants. In support of this contention the Respondent's Counsel opened section 556 TCA 1997 which restricts indexation relief to prevent the conversion of an actual loss into a gain, the increase of an actual loss or indeed the conversion of an actual gain into a loss. The Respondent's Counsel further submitted that the *dicta* of Lord Wilberforce in the United Kingdom case of *Aberdeen Construction Group Ltd v IRC* [1978] STC 127 was pertinent where he held (at 131) that: "*…capital gains tax is a tax on gains; it is not a tax on arithmetical differences*". In the instant appeal, the Respondent's Counsel submitted that as the losses were "*manifestly contrived*", then relief should be denied as to do so would result in the Appellants obtaining relief on "arithmetical differences".

71. The Respondent's Counsel submitted that while gains achieved on government gilts are ordinarily exempt from CGT under the provisions of section 607 TCA 1997, that the intent of the Oireachtas in providing this exemption was to encourage investors to invest in such securities as opposed to other types of investment. The Respondent's Counsel submitted that as the intent behind the transactions under appeal was to exempt the GFCs from

CGT on "counterweight grounds" and in those circumstances the Appellants' Counsel requested that the Commission view the transactions in a "holistic manner" and in so doing find that the Appellants' loss is artificial in nature and ought therefore to be disallowed.

Appellant

72. The Appellants' Counsel submitted that GFCs were heavily geared and it was envisaged in all the transactions that those contracts would be settled by the physical delivery of such gilts. However, the Appellants' Counsel submitted that while this was the envisaged position, it was possible by virtue of the validity of those gilt investments that the Appellants would also have to pay cash to settle those transactions, as had occurred in the illustrated two transactions.

73. To reduce the risk associated with the FECDs, the Appellants' Counsel submitted that the Appellants acquired the GFCs and the purpose of this, was as per their expert witness, to act as a form of hedge and thereby adopt an established investor strategy of protecting the overall investor return. The Appellants' Counsel submitted that the GFC and FECD transactions were completely independent of each other and it was never envisaged that the transactions would net out (meaning that the value of the losses incurred would be roughly reduced to nil by virtue of the gains achieved).

74. The Appellants' Counsel submitted that FECDs are capital assets to which CGT rules apply and that this was confirmed by the Respondent in its ebrief No 36/2007. The Commissioner understands that e-brief's are explanatory guidance notes issued by the Respondent which provide guidance on aspects of particular sections of the TCA 1997. The Appellants' Counsel submitted that the CGT rules applicable to FECDs meant that they were allowable losses and for the Respondent to seek to effectively tax them (in the form of disallowing those losses against chargeable gains) was in contravention of the TCA 1997.

75. Counsel for the Appellants submitted that the results of the transactions must be taken into account rather than the state of mind of the taxpayer in entering into the transaction and accordingly the fact that the Appellants may have been motivated by a tax avoidance consideration is not directly relevant as all that mattered was the legal and commercial effects of those transactions.

76. In support of this view, while conceding that the case related to Value Added Taxation ("VAT), the Appellants' Counsel opened the Court of Justice of the European Union

("COJEU") case of *Halifax plc v Commissioners of Customs & Excise* ECJ [2006] C-255/02 ("*Halifax*") where it was held at paragraph 86 of that judgement:

> "*For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which will be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage".*

77. The COJEU indicated the basis for its conclusions at paragraphs 74 and 75 of its judgment in *Halifax* as follows:

> "*it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions*".

78. The Appellants' Counsel submitted it was evident from *Halifax,* that for a tax avoidance transaction to exist there must be a tax advantage and that it must be apparent from an examination of objective factors that the essential aim of the transactions was to gain the tax advantage. The Appellants' Counsel submitted that this was not the case in the instant appeal as the GFCs and FECDs were separate transactions, entered into independently of each other with no necessary correlation and as such the transactions had commercial validity in their own right.

79. Counsel for the Appellants submitted that the GFC and FECD contracts were independent of each other and should be regarded as separate and distinct transactions as:

    79.1. Any allowable loss realised on one transaction did not in itself trigger the gain on the other transaction. Any profit that was realised on that other transaction was as a result of the operation of a distinct and separate transaction.

    79.2. The settlement amounts received were determined independently of each other by reference to an external index i.e. the Dow Jones Euro Stoxx 50 (Price) Index. The settlement position was then determined by the value of the index at the time the GFC and the FECD expired.

79.3. It was anticipated any movement in the underlying index would produce a settlement value that would be determined by the terms of the GFC and the FECD. Accordingly, the final position could not be determined at the commencement of the transactions and in this way the steps and the separate financial transactions could not be argued to be self-cancelling.

80. The Appellants' Counsel submitted that the outcome of the transactions was that the Appellants obtained a profit on one part and a loss on the other and it was not open to the Respondent to challenge that position or the result achieved on the basis of an objective, *post-hoc* evaluation of the business strategy undertaken.

81. In support of that contention, the Appellants' Counsel referred to the decision of Lynch J. in *Airspace Investments Limited v Moore* (1994) V ITR 3, where he held at page 2, that provided a taxpayer entered into a transaction based on a valid commercial evaluation, it was not permissible to question that judgement with the benefit of hindsight or, in effect, to query the wisdom of *bona fide* commercial assumptions underlying the decision to carry out the transaction.

82. The Appellants' Counsel submitted that the provision allowing for the deduction of allowable losses in section 31 TCA 1997 is expressed in clear, emphatic and unambiguous language. The Appellants' Counsel submitted that the term "*allowable loss*" is defined in sections 5 and 546 TCA 1997 and is in no way qualified by terms such as "commercial", "monetary", "real", "arms-length", "genuine", or similar language. The Appellants' Counsel submitted as Section 31 TCA 1997 simply says if a taxpayer has a loss computed according to the Capital Gains Tax Acts, then they are entitled to offset it against any same or future year gains. The Appellants' Counsel submitted given this position and in applying the principles of statutory construction, the effect of applying the clear and unambiguous words of section 31 TCA 1997 required the Commission to allow the losses incurred by the Appellants against gains in the manner afforded under that section of the TCA 1997.

83. The Appellants' Counsel further submitted that the actual result achieved by the transactions, was precisely the purpose of the legislation. The Appellants' Counsel submitted in applying sections 5, 31, 546 and 607 TCA 1997 to the transactions undertaken by the Appellants that no other purpose could be detected from those words and as a result there is no misuse or abuse of the loss relief legislation or of the government gilt exemption.

84. In conclusion and without prejudice to the foregoing, in the event of the Commission finding against the Appellants, the Appellants' Counsel requested that the Commission

allow the actual monetary losses incurred by the Appellants on the overall transactions as an allowable loss under the provisions of section 31 TCA 1997.

Material Facts

85. Having reviewed the documentation submitted, and having listened to the oral submissions of the parties and their respective witnesses at the hearing, the Commissioner makes the following findings of material fact:

    85.1. The Appellants entered into a number of transactions in 2007 and 2008. These transactions involved the acquisition of financial products knows as GFCs and FECDs.

    85.2. All of the Appellants entered into both the GFC and FECD transactions and as such, none of the Appellants acquired either the GFC or the FECD on a standalone basis.

    85.3. Aside from the experts' reports and a letter from [redacted] dated 26th March 2010 stating that the GFC and FECD transactions were independent to each other and could have been acquired in isolation, limited documentation was made available to the Commissioner on the operation of the transactions. The Commissioner notes that the letter from [redacted] stating that one or other of the transactions could be taken out in isolation is dated several years after the transactions were entered into by the Appellants.

    85.4. In particular, no investor offering memoranda or similar documentation was presented to the Commission regarding the launch of or operation of the transactions.

    85.5. Both the GFC and FECD transactions had the same trade, expiry and settlement dates. The dates on which the GFCs and FECDs were acquired and disposed of, were for a relatively short period of time, spanning a period of between four to eight weeks.

    85.6. At the inception of the transactions, the Appellants lodged a sum of money into their solicitors' client account. Aside from this being provided to discharge professional fees, no evidence was provided to the Commission which explained why the Appellants were required to make this payment.

    85.7. As this evidence was not provided to the Commission, the Commissioner in noting that no contractual margin requirement was in place, makes the material finding that this payment equated to the provision of a margin as it is illogical

that an investment provider would offer products of a type provided to the Appellants without any apparent form of recourse.

85.8. Those sums of money advanced by the Appellants were insufficient to purchase the government bonds acquired at inception of the transactions.

85.9. The results of the transactions entered into by the Appellants was that –

85.9.1. They made a gain on the GFC transactions.

85.9.2. They made a loss on the FECD transactions.

85.9.3. The gain on the GFC transaction is ordinarily exempt from the payment of CGT.

85.9.4. The loss on the FECD transaction is ordinarily allowable for CGT purposes and as such is ordinarily available for offset against CGT gains.

85.9.5. The gain on the GFC and the loss on the FECD transactions were roughly equal and opposite in monetary terms. The transactions when combined produced a monetary loss which was overshadowed by the potential CGT benefits obtained.

81.9 The investment return on the transactions was derived from the application of a complex mathematical formula applied on the settlement date. As the part of the formula referable to the FECD transaction, which related to currency exposure was self-cancelling, the return on both the GFC and FECD transactions was derived from the movement on the Euro Stoxx 50 index.

81.10 There was a significant probability that the transactions entered into by the Appellants would fall within the range provided under the formula. If the GFC and FECD transactions fell within the provided range it would result in the GFCs deriving gains and the FECDs suffering losses.

81.11 Of the transactions entered into by the Appellants, two such transactions fell outside the range of the formula used to compute the investment returns. In both of these instances, the transaction close-out arrangements were altered from that originally provided under the scheme. The manner of the alteration was that rather than the Appellants settle the transactions by physical delivery, the close out arrangements were amended to require the Appellants to cash settle those transactions. The effect of this amendment was that the Appellants avoided a CGT gain and in place incurred a CGT loss.

81.12 None of the transactions entered into by the Appellants were traded on a secondary market.

81.13 The fees payable to the promoters of the scheme were not claimed by the Appellants when computing their allowable CGT losses.

Analysis – Substantive Issue

86. On the hearing of an appeal against an opinion, determination or calculation of the Respondent, as noted, section 811(9)(a) TCA 1997 mandates that "*the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under*" the provisions of section 811 TCA 1997.

87. The Commission is therefore required, pursuant to section 811(2) TCA 1997, to determine whether a transaction is:

> "*a "tax avoidance transaction" if having regard to any one or more of the following-*
>
> *(a) the results of the transaction,*
>
> *(b) its use as a means of achieving those results, and*
>
> *(c) any other means by which the results or any part of the results could have been achieved,*
>
> *…*
>
> *that-*
>
> *i. the transaction gives rise to, or but for this section would give rise to, a tax advantage, and*
>
> *ii. the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,"*

88. A transaction is not be considered to be a tax avoidance transaction if it comes within either the 'Business Profit Exclusion' or the 'Relief Exemption' provisions contained in section 811(3)(a) TCA 1997 and expressed as follows:

> "*Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the [Appeal Commissioners] shall not regard the transaction as being a tax avoidance transaction if they are satisfied that-*

(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction-

(I) was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and

(ii) was not undertaken or arranged primarily to give rise to a tax advantage,

Or

(iv) *the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*."

89. In making such a determination it is also necessary to consider the following criteria contained in section 811(3)(b) TCA 1997:

"*(i) "the form of that transaction,*

(ii) the substance of that transaction

(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and

(iv) the final outcome and result of that transaction and any combination of those other transactions which are so regulated or connected."

90. Furthermore, in determining the appeal under any of the permitted grounds of appeal, section 811(9) (a) TCA 1997 provides the alternative determinations which may be made by the Commission.

Exemption of gains on the GFCs

91. Section 607 TCA 1997 provides that government bonds and certain other securities are not chargeable assets and as such any gains on the disposal of government bonds are ordinarily exempt from CGT. Subsection 2 (a) provides that all future contacts which-

" *(i) are unconditional contracts for the acquisition or disposal of any of the instruments referred to in subsection (1) or any other instruments to which this section applies by virtue of any other enactment (whenever enacted),*

(ii) require delivery of the instruments in respect of which the contracts are made, and

(iii) meet the requirements of paragraph (c) of this subsection,

Shall not be chargeable assets."

92. Section 607 (2) (c) (i) and (ii) TCA 1997 states that the acquisition cost shall be the market value of the instrument at the date of acquisition and the disposal proceeds shall be the market value of the instrument at the date of disposal.

93. The first-named Appellant engaged in the following GFC transactions:

Trade Number	***Trade Date***	***Settlement Date***	***Gilt Acq Cost***	***Gilt Sale Proceeds***	***Gain on Gilt Sale***
1	19/11/2007	21/12/2007	€10,114,080	€19,903,830	€9,789,750
2	19/11/2007	24/12/2007	€10,117,744	€19,900,540	€9,782,796
3	19/11/2007	22/01/2008	€10,190,245	€19,928,845	€9,738,600
4	19/11/2007	23/01/2008	€10,209,633	€16,084,525	€5,874,892
	Total Gain				**€35,186,038**

94. Thus, the GFC transactions resulted in the first-named Appellant making a gain of €35,186,038 which when applying the provisions of Section 607 TCA 1997 resulted in those transactions ordinarily being exempt from CGT.

95. The Commissioner determines that the computation of the gains on the GFC transactions entered into by the first-named Appellant were correctly calculated in accordance with the provisions of section 607 TCA 1997.

Loss Relief Provisions – Section 546 TCA 1997

96. The entitlement to deduct "allowable losses" is governed by section 546 TCA 1997 as follows:

"(1) Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.

(2) Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed."

97. As the FECDs do not enjoy an exemption from CGT, it follows that any profit on the disposal of a FECD would be chargeable to CGT and any loss on disposal ordinarily allowable for CGT purposes.

98. The results of the FECDs were as follows:

Trade Number	***Trade Date***	***Settlement Date***	***Settlement Amount***
1	19/11/2007	21/12/2007	-€ 9,913,105
2	19/11/2007	24/12/2007	-€ 9,895,888
3	19/11/2007	22/01/2008	-€ 9,955,000
4	19/11/2007	23/01/2008	-€ 6,145,293
	Total Loss		**-€ 35,909,286**

99. Thus, the FECD transactions resulted in the first-named Appellant making losses of €35,909,286 which where correctly computed in accordance with the provisions of section 546 (2) TCA 1997.

Purpose of the Transactions

100. The combined result of the GFC and FECD transactions was that the first-named Appellant made a monetary loss of €723,248 (€35,186,038 - €35,909,286) including the fees payable to [redacted] (as these costs were embedded in the transactions) but excluding the other advisor fees paid (but not claimed for CGT purposes) of €362,466.

101. The net result of the transaction was therefore that the first-named Appellant acquired capital losses of €35,909,286 for a total consideration of €1,085,714 (€723,248 + €362,466). While the Appellants' Counsel submitted that the transactions were not envisaged to net-out, these results prove, relative to the losses obtained, they effectively did.

102. Counsel for the Appellants further submitted that the purpose of the transactions entered into by the Appellants was that they acted as a hedge against one another.

103. The Commissioner discounts this view for reasons following in paragraph 112 below and finds that the transactions entered into by the Appellants were done so primarily to give rise to a tax advantage having regard to the quantum of the generated CGT losses versus the monetary loss incurred by the Appellants.

Reduction in Chargeable Gains – Section 31 TCA 1997

104. As the transactions were arranged primarily to give rise to a tax advantage, the Commissioner is required under section 811 (3) (a) (ii) TCA 1997 to consider whether the

Appellants' entitlement to reduce their chargeable gains in the years of assessment 2007 and following in accordance with the provisions of section 31 TCA 1997, would result "*directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*".

105. Section 31 TCA 1997 provides:

> "*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..."*

106. The Respondent submitted that the Appellants' claim for section 31 TCA 1997 relief cannot be regarded as a proper and intended use of that section, nor can it be described as an appropriate use of the relief. The Respondent asserted that the purpose of capital gains tax loss relief operates in the real world and is to ensure that taxpayers are taxed on their net chargeable gains by conferring a relief to compensate a person for enduring a financial deprivation. The Respondent also argued that the form of the transactions enabled the first-named Appellant to claim relief for a loss which has been artificially inflated to multiples of its real value. As this loss of €35,909,286 was an artificially generated capital loss, the transactions must therefore be considered to be a misuse or abuse of the relief afforded by section 31 TCA 1997 as there are no rules in the TCA 1997 that confers an entitlement on a taxpayer to claim artificial losses or to claim losses in excess of those actually incurred. Therefore, no loss was suffered by the first-named Appellant other than the €362,486 paid to the scheme advisors for the facility of entering into the transactions and the negative return of €723,248 incurred on the transactions (which incorporated the fees payable to [redacted]).

107. During the course of the hearing, the Appellants submitted that the loss arose directly from the correct application of section 546 TCA 1997. In so doing, there was a requirement on the Appellants to discharge the positive obligation to prove that the transactions did not result in "*a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*". However, despite the Appellants' submissions, no credible explanation was advanced to discern the purpose of sections 31, 546 and 607 TCA 1997. In those circumstances, it is not clear how the Appellants can submit that those provisions were not misused or abused in claiming the artificial capital gains tax loss of €35,909,286.

108. While the Appellants submitted that the overall loss incurred derived from the adoption of a hedging strategy adopted by the Appellants, the Commissioner was not convinced by such submissions. The reasons for the Commissioner's views in this regard were the results of the formulas used to calculate the investment returns or losses which created a significant likelihood of the GFCs producing gains and the FECDs producing losses. Detrimental to the Appellants' submissions was the adoption of a different contractual close-out position where the only two transactions which fell outside the formula range were adapted, the results of which altered an otherwise chargeable gain into a CGT loss.

109. Notwithstanding the parties' submissions, it is necessary to consider the clarification in the interpretation of tax statutes specifically in the consideration of section 811 TCA 1997 espoused by O'Donnell J. in *O'Flynn* at paragraph 70:

> "*the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in McGrath, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes. Accordingly, the Appeal Commissioners' conclusion that the principles set out in McGrath prohibited the adoption of a purposive approach is incorrect on a number of levels."*

110. Therefore, in accordance with the principles of law set out in *O'Flynn*, the Commissioner is satisfied that the loss claimed by the Appellants arose from the prescriptive interpretation and application of statutory provisions. Furthermore, an attempt must be made to discern a purpose of a contested statutory provision which as observed by O'Donnell J., at paragraph 74, requires:

> "*an evaluation of the particular transaction and a consideration as to whether it comes not just within the words, but also within the intended scheme, or is rather, a misuse or abuse of it. The fact that such an evaluation may be difficult and can create some uncertainty, is not a reason to avoid the task*."

111. In noting that there is no statutory definition of the noun "loss" for CGT purposes, the Commissioner relies on its ordinary meaning as denoting "a decrease in something or in the amount of something"[4]. The use of the noun "loss" in a financial context therefore requires some element of tangible financial deprivation. Accordingly, in the interpretation of "*losses accruing to that person*" as set out in section 31 TCA 1997, the Commissioner

[4] Source - https://www.britannica.com/dictionary/loss

is satisfied that the intention of the Oireachtas, as discerned from the words deployed, is to provide relief to ameliorate actual financial hardship.

112. In noting that the acquisition of the GFCs which gains were almost certain and the polar applying to the FECDs materially resulted in the tax exempt gains substantially cancelling the ordinarily allowable tax losses, the Commissioner is of the view that the Appellants' entitlement to the loss relief was highly contrived. This view is further compounded in noting that –

112.1. The GFC and FECD had the same trade, settlement and expiry dates.

112.2. All of the Appellants entered into the GFC and FECD transactions.

112.3. It would have been inconceivable for a reputable financial product provider to have provided the GFC or FECD products in isolation absent a contractual margin call unless the outcome that the transactions would net out and be all but guaranteed.

112.4. Of the 43 transactions entered into by the Appellants, all but two of those fell within the "acceptable" range. The position regarding the two out of range transactions is detailed at paragraph 81.11 above.

112.5. None of the GFCs or FECDs were traded on a secondary market.

112.6. Having regard to the short life-span of the GFCs and in noting the fixed interest return on the government gilts acquired by the Appellants, it appeared inconceivable to the Commissioner that the value of the gilts would have almost doubled in the period of ownership.

112.7. Aside from the sum referable to professional fees, no explanation or documentation was provided to the Commission as to why the Appellants were required to lodge a large sum of money into their solicitors' client account prior to entering the transaction.

112.8. There is no commercial reality to acquiring some €36 million of CGT losses for a net outlay of some €1.1m.

113. As such, the result of those highly contrived steps could not be a series of transactions that could have been envisaged by the Oireachtas for the purposes of establishing an "*allowable loss*" calculated in accordance with section 546 TCA 1997 deductible in reducing "chargeable gains" pursuant to section 31 TCA 1997.

114. Therefore, in compliance with the Commissioner's statutory obligations, the Commissioner engaged in an evaluation of the transactions and the relevant legislation agrees with the Respondent that the purpose of section 31 TCA 1997 as discerned from express wording contained therein and indeed from the Act as a whole is to provide relief for the actual loss sustained. Fortification for this conclusion is derived from a consideration of section 546 TCA 1997 that restricts indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or indeed converting an actual gain into a loss.

115. As a consequence, the Commissioner finds that the series of contrived transactions that produced an artificial loss of €35,909,286 for the first-named Appellant was arranged for the purpose of obtaining the benefit of the relief provided by section 31 TCA 1997 and that the transactions resulted in a misuse of that provision having regard to the purposes for which it was provided. Furthermore, it is significant that the Appellants failed to discharge their positive obligation to prove that the transactions did not result in "*a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*". The Commissioner is therefore satisfied that the Appellants' claim for capital gains tax loss relief cannot succeed and extends these findings to all of the transactions entered into by all of the Appellants.

Determination

116. The Commissioner is satisfied that the purpose of the Appellants entering into the transactions was to obtain a gain on the disposal of the GFCs and a loss on the disposal of the FECDs as the Commissioner was unable to identify any commercial motive for the investment apart from the deemed tax advantage derived.

117. Therefore, the purchase and disposal of the GFCs and FECDs by the Appellants could have had no commercial purpose other than to crystallise an artificial tax loss. As such, in structuring the transactions in an attempt to procure the exemption contained in section 607 TCA 1997, the Commissioner is satisfied that the Appellants procured a significant "*tax advantage*" and that the purchase and sale of the transactions "*was …. arranged primarily …. to give rise to a tax advantage*" thereby constituting a "*tax avoidance transaction*".

118. Contrary to the positive obligation to demonstrate that there was no "*misuse …. or an abuse of*" section 31 TCA 1997 "*having regard to the purposes for which it was provided*", the Appellants failed to satisfy this requirement. Therefore, it is not clear how the

Appellants can succeed when there was no articulation of the purpose of section 31 TCA 1997.

119. In the absence of a statutory definition of the noun "loss" for capital gains tax purpose, the Commissioner relies on its ordinary meaning as denoting the process that leads to a position where you no longer have something or have less of something. The use of the noun "loss" in a financial context requires some element of financial deprivation. Therefore, in the interpretation of the term "l*osses accruing to that person*" as set out in section 31 TCA 1997, the Commissioner is satisfied that the intention of the Oireachtas, as discerned was to alleviate financial hardship for actual monetary losses sustained.

120. The Commissioner is reassured that this is the correct interpretation by consideration of section 556 TCA 1997 which restricts indexation relief to prevent turning an actual loss into a gain, increasing an actual loss or indeed converting an actual gain into a loss.

121. In this regard, the Commissioner concludes that the Appellants engaged in a highly contrived series of steps that could not have been envisaged by the Oireachtas in enacting legislation that permits the calculation of "allowable losses" in accordance with section 546 TCA 1997 to reduce "chargeable gains" pursuant to section 31 TCA 1997.

122. Therefore, in compliance with the Commissioner's statutory obligations, the Commissioner engaged in an evaluation of the transactions and the relevant legislation and finds that the Appellants procured a 'tax advantage' as a result of engaging in a "tax avoidance transaction" and that the transactions resulted in a misuse of section 31 TCA 1997 having regard to the purposes for which it was provided. The Commissioner is therefore satisfied that the Appellants' claim for capital gains tax loss relief cannot succeed.

123. For the avoidance of doubt, as all of the Appellants in the within appeal entered into similar transactions (bar quantum and timing), the Commissioner extends his findings to all of the transactions undertaken by all of the Appellants.

124. On this basis and pursuant to section 811(9)(a)(ii) TCA 1997, the first-named Appellant's entitlement to the capital gains tax loss relief in accordance with section 31 TCA 1997 is calculated by reducing the loss to reflect the monetary loss incurred on the joint transactions and is calculated as follows:

Profit on Disposal of GFCs	€35,186,038
Loss on Disposal of FECDs	-€35,909,286
Allowable Capital Gains Tax Loss	-€ 723,248

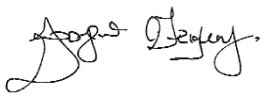
125. For reasons best known to the Appellants, the fees paid to the first-named Appellant's advisors in the sum of €362,466 were not claimed by the first-named Appellant in computing the CGT losses as they were deemed to be unconnected with the transactions. It therefore follows that those fees paid by the first-named Appellant and the like fees paid by all of the Appellants are not allowable in calculating the overall allowable CGT losses as they were similarly deemed unconnected with the transactions.

126. Therefore, the actual capital loss available to the first-named Appellant as a consequence of this determination should be reduced to €723,248 with *pro-rata* adjustments similarly applicable to all of the Appellants. The due dates for payment of any CGT arising for the Appellants are those as set out in paragraph 5.3 of this determination.

127. For the reasons set out above, the Commissioner determines that the Appellants' appeal has in-part failed as it has not been shown that the Appellants are entitled to the extent of losses originally claimed for CGT purposes.

128. It is understandable that there will be disappointment with the outcome of this appeal. However, the Commissioner is charged with applying the provisions of the TCA 1997 without deviation or expansion in fulfilling his duties.

129. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons 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.



Andrew Feighery
Appeal Commissioner
20th February 2023

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997