



BETWEEN/

72TACD2023
[REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondents

DETERMINATION

Background

1. This is an appeal against a notice of assessment to capital gains tax dated 22 December 2020 in the sum of €1,092,085 in relation to the sale of a portfolio of Irish mortgage loans secured over Irish land ('the Portfolio') which took place on [REDACTED] 2016.
2. The appeal raised a number of issues including *inter alia* whether the disposal of the loan portfolio constituted the disposal of an '*interest in land*' for the purposes of section 5 TCA 1997 and whether the disposal came within the charge to capital gains tax imposed on non-residents pursuant to s.29(3) TCA 1997.
3. The facts in this appeal are set out in the amended statement of agreed facts of 18 May 2022, as follows;

Acquisition of the Portfolio



- The Appellant is a company that is incorporated and tax resident in [REDACTED]. It carries on business in the United Kingdom through a permanent establishment in the United Kingdom.
- The Appellant's profits attributable to its permanent establishment in the United Kingdom are subject to corporation tax in the United Kingdom.
- On [REDACTED] the Appellant acquired a portfolio of Irish mortgage loans secured over Irish land (the "Portfolio") from [REDACTED]
[REDACTED].
- The mortgage loans comprising the Portfolio were loans advanced to individuals and one company and were secured over properties in Ireland.
- The Portfolio was attributable to the Appellant's permanent establishment in the United Kingdom. The Appellant purchased the Portfolio in the ordinary course of the [REDACTED] business it carries on in the United Kingdom. The Portfolio was not acquired through a branch or agency in Ireland.

Sale of the Portfolio by the Appellant

- On or about [REDACTED] 2016, the Appellant agreed to sell the Portfolio to an unconnected purchaser (the "Purchaser"). The Purchaser was a company incorporated and tax resident in Ireland.
- The Purchaser proposed to withhold 15% of the consideration payable to the Appellant in respect of the Portfolio in accordance with section 980 the Taxes Consolidation Act, 1997 (as amended) ("TCA"), unless the Appellant provided a Form CG50A tax clearance certificate.
- The Appellant contested the view that the sale of the Portfolio was chargeable to Irish CGT or subject to withholding tax pursuant to section 980 TCA. It held the view that a Form CG50A was not required under section 980 TCA.
- The Appellant and the Respondent engaged with each other on the matter and disagreed on both the application of Irish CGT to the sale of the Portfolio and the requirement to deduct tax and / or to produce a Form CG50A pursuant to section 980 TCA.
- Ultimately, the Appellant agreed to pay €1,092,085 to the Respondent on a 'without prejudice' basis in order that the sale of the Portfolio could be completed.
- It was accepted by the Respondent that the amount paid by the Appellant was equivalent to the Irish CGT that would have been payable if the sale of the Portfolio was within the charge to Irish CGT. The Respondent did not issue any assessment for





Irish CGT at the relevant time and the amount was paid on a 'without prejudice' basis by the Appellant.

- Notwithstanding the €1,092,085 payment, the Appellant maintained the position that its disposal of the Portfolio was not chargeable to Irish CGT and was outside the scope of both section 29 and section 980 TCA. The Appellant made this position clear to the Respondent at all times.
- Following the 'without prejudice' payment, the Respondent confirmed in writing by letter dated [REDACTED] 2016 that a Form CG50A was not required by the Purchaser in connection with its acquisition of the Portfolio and that no deduction was required to be made by the purchaser from the consideration pursuant to section 980(4)(a) TCA. Accordingly, the Purchaser did not withhold any amounts pursuant to section 980 TCA.
- On 3 December 2020, the Appellant requested a refund of the said €1,092,085. This request for a refund was made under section 865(2) TCA. The Respondent acknowledged this request.
- The Respondent considers that this refund is not due and therefore did not refund the said sum of €1,092,085.
- A Notice of Assessment to CGT in the sum of €1,092,085 issued on 22 December 2020.
- The Appellant filed an Irish CGT return on 14 January 2021 on a without prejudice basis and appealed the Notice of Assessment to the Tax Appeal Commissioners ("TAC") on 19 January 2021.

Submissions in brief

4. The principal question which fell for consideration was whether the disposal of the loan portfolio constituted the disposal of an '*interest in land*' for the purposes of section 5 TCA 1997 and whether the disposal came within the charge to capital gains tax imposed on non-residents pursuant to s.29(3) TCA 1997.
5. The Appellant submitted that secured loans did not constitute 'land' nor an 'interest in land' for the purposes of the Capital Gains Tax Acts and that the sale was not subject to the withholding tax provisions of section 980 TCA 1997. The Appellant submitted that the application of section 537 TCA 1997 prevented any imposition of tax by the Respondent pursuant to section 29 TCA 1997.





6. The Appellant submitted that secured loans were not shares for CGT purposes and that the sale of the portfolio did not constitute the disposal of a security within the meaning of section 29 TCA 1997.
7. The Respondent submitted that the sale of the loan portfolio constituted the sale of 'land' for the purposes of the Capital Gains Tax Acts, specifically section 29(3) and that the sale was not subject to the withholding tax provisions of section 980 TCA 1997. The Respondent submitted that section 537 was inapplicable in the context of the within appeal. The Respondent submitted that the principal charging section was section 29(3) TCA 1997 but on a complementary basis the Respondent submitted that the sale also came within the definition of relevant assets for the purposes of section 29(1A) TCA 1997.

Evidence

8. Evidence of [REDACTED]
9. Oral evidence was provided by [REDACTED] on whose behalf a witness statement was also furnished. The evidence can be summarised as follows;
 - [REDACTED], a Chartered Financial Analyst, stated that he worked in the Commercial Real Estate [REDACTED], London Branch since 2014. The Group is involved in buying and selling distressed loan portfolios across Europe. Under cross-examination he stated that the group was also involved in writing and granting loans to customers.
 - He stated that the Appellant purchased distressed loans with a view to disposing of them but also that part of the intention of acquiring them was to generate cash flow during the hold period from payments being made by the borrowers.
 - [REDACTED] confirmed that he was a member of the deal team that worked on the original transaction involving the acquisition and disposal of the portfolio the subject matter of this hearing. He stated that all other members of the [REDACTED] [REDACTED] that were involved in the original transaction are no longer employed by [REDACTED]





- He stated that he had been in touch with the tax team who advised him that the Portfolio was considered to be trading stock of the [REDACTED] from a UK corporation tax perspective.
- He stated that they confirmed that the profits were subject to Corporation Tax in the United Kingdom.
- He stated that he did not know whether a receiver had been appointed over any of the [REDACTED] properties.
- The witness was asked a number of questions about the facility letters in relation to various loans but was unsure as to details in relation to the loan transactions. He stated under re-examination that these documents were received from [REDACTED] when the portfolio was purchased.
- He confirmed that the total portfolio purchase price was [REDACTED] and that 23.5% of this was sold to [REDACTED]. He stated that the remainder of the portfolio had been resolved, largely by selling the secured properties. He stated that this occurred in most cases by way of an agreement with the borrower. He stated that he thought it very likely that receivers were appointed in relation to some of the loans. He stated in re-examination that distressed loans which were resolved with borrowers generally resulted in a discounted amount being paid.
- He confirmed that of the 76.5% of the loans which were not acquired by [REDACTED] the Appellant operated the loans and made collections from the borrowers via either payments or sales of the properties.
- He confirmed that the loans when they were acquired by the Appellant, were acquired for approximately one quarter of their then value. He stated that many of the more senior employees who worked on the deal had since left the Appellant's employment and that he was not front and centre on the decisions made around the claim for repayment of tax. He stated that he familiarised himself with information and spoke to other colleagues but that he did not make decisions in relation to the claim at the relevant time.

Legislation

10. Relevant excerpts of the following statutory provisions are set out below;

- Section 29 TCA 1997 (*Persons chargeable*)





- *Section 5 TCA 1997 (Interpretation of Capital Gains Tax Acts)*
- *Section 537 TCA 1997 (Mortgages and charges not to be treated as disposals)*
- *Section 643 TCA 1997 (Tax to be charged under Case IV on gains from certain disposals of land)*
- *Section 11 of the Land and Conveyancing Law Reform Act 2009 ('LCLRA') (Restrictions on legal estates and interests)*

ANALYSIS

11. As a non-Irish resident company, the Appellant is subject to Irish CGT pursuant to section 29(3)(a) TCA 1997, in respect of chargeable gains accruing on the disposal of land in the State. The profits of the Appellant company, being a non-resident company, are not subject to Irish corporation tax. Article 7 of the DTA between [REDACTED] and Ireland provides that business profits of an enterprise of one State can be taxed only in that State unless it carries on business through a permanent establishment in the other State. Article 7(7) provides:

'Where profits include items of income or capital gains which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.'

12. The Respondent taxed the capital gain on the disposal of the loan portfolio secured on land in the State and not the business profits and consequently the provisions of Article 13(2) of the DTA applies. Article 13(2) provide:

'Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.'

13. Article 6(2) of the DTA provides:

'The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the





provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall be not regarded as immovable property.'

14. While '*immovable property*' is not defined in the TCA, Article 6 of the DTA provides that immovable property shall have the meaning which it has under the law of the Contracting State in which the property in question is situated, namely, under Irish law.
15. The Appellant submitted that a mortgage or a charge is not a self-defining interest and is not immovable property but is a debt with access to resort to land for payment in the event of a default. In this regard the Appellant cited and relied on the case of *Lawson v Commissioners of Inland Revenue* [1896] 2 IR 418.
16. The Respondent submitted that as long as the debt is outstanding, the mortgage subsists and the interest in land subsists. The Respondent submitted that the fact that the mortgage is not independent of the borrowing is completely immaterial.
17. The Respondent relied on *Re Hoyle* [1911] Ch 179, a case of the Court of Appeal which postdates the *Lawson* decision by some fifteen years. While reference was made in *Re Hoyle* to the *Lawson* case during Counsels' arguments, no reference was made to the case in the body of the judgment of the Court. In *Re Hoyle*, the Court held that a mortgage debt secured by land is to be regarded, not as a moveable, but as an immovable.

The meaning of 'land' for the purposes of sections 29(3) and section 5 TCA 1997

18. The Appellant, as a non-resident company, is subject to Irish CGT pursuant to section 29(3)(a) TCA 1997, which provides:

'Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident nor ordinarily resident in the State shall be chargeable to capital gains tax for a year of





assessment in respect of chargeable gains accruing to such person in that year on the disposal of –

(a) Land in the State '

19. The definition of 'land' is contained at section 5 TCA 1997, as follows;

"land" includes any interest in land;

20. As regards the meaning and interpretation of '*land*' for the purposes of section 29(3), both parties agreed that the relevant provision was section 5 TCA 1997 and that sections 4 and 20 of the Interpretation Act 2005, were not applicable.

21. The question which arises then is whether a mortgage/charge over land, is an '*interest in land*' for the purposes of the relevant provisions.

22. The parties disagreed on the matter of the statutory interpretation of the expression '*interest in land*'. While the Respondent argued that the expression bore and should be afforded its technical legal meaning, the Appellant submitted that as that taxing statutes were addressed to the public at large, the words found therein must bear their ordinary and natural meaning and the definitions must be read in that context. The Appellant cited and opened the well known authority of *Inspector of Taxes v Kiernan* [1982] ILRM 13 in support of its position together with the recent Supreme Court authority of *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60. The Respondent submitted that even if the Appellant were correct that a non-technical legal meaning applied, a member of the public, reasonably informed would regard a mortgage or charge as being an interest in land.

23. Since the date of hearing of this appeal before the Tax Appeals Commission, Ms. Justice Butler in the High Court has handed down judgment in the case of *Cintra Infrastructure Internacional Slu v the Revenue Commissioners* [2023] IEHC 72.

24. The *Cintra* case came before the High Court following an appeal by way of case stated from determination 75TACD2021 of this Commission, a determination upon which the Respondent in submissions relied. In *Cintra*, Ms. Justice Butler considered and





addressed in detail, the meaning of '*land in the State*' for the purposes of section 29(3)(a) TCA 1997 and '*land*' for the purposes of section 5 TCA 1997.

25. At paragraphs 42-63, Butler J. considered the meaning of '*land*' at paragraphs 49, 50 and 53, of the judgment as follows;

'49. The word "land" has multiple meanings, not all of which are relevant in a revenue context, much less in the more specific context of capital gains tax. Clearly "land" in this sense does not mean a country nor does it mean the physical action of the verb "to land". Given that broadly speaking revenue statutes deal with the taxation of income and property, the sense in which "land" is used in a revenue statute will necessarily be linked to real property or, more indirectly, to the generation of income from property. This is the natural and ordinary meaning of the core concept of land in the context of the TCA 1997 but the limits of that concept are not especially well defined. Legally speaking, the concept of "land" in the sense of real property is capable of comprising a large number of different interests (using that word neutrally) which range across a spectrum from absolute ownership to more peripheral rights. In construing the word "land" in s.5 of the TCA 1997 the court is attempting to ascertain where on this spectrum the Oireachtas intended to fix the outer limits of the concept for the purposes of capital gains tax.

50. Here, the definition of land as including interests in land under s.5 of the TCA 1997 is necessarily narrower than a definition which includes estates, rights and interests in land. On a spectrum of how the concept of "land" is understood under Irish law, estates in land represent the core concept and the greatest expression of a person's potential ownership of land (with a freehold estate necessarily connoting a somewhat greater interest than a leasehold estate). Other, lesser interests in land which are nonetheless proprietorial in nature and which connote a significant connection to the land over which they operate fall further along this spectrum. Such interests have long been recognised under the Common Law and their recognition is now codified by s.11(4) of the Land and Conveyancing Law Reform Act 2009. These interests vary significantly in their nature and extent and, to add to the confusion, some of them are referred to as "rights" (e.g. rights of way, turbary rights etc.). However, they differ from "rights" in the sense in which that word is used in the phrase "estate, right or interest in





or over land" because they can be assigned or disposed of by the holder, a fact which is recognised in s.11(9) of the LCLRA 2009.

.....

53. When viewed in this way it is evident that in the section 5 definition of land, the Oireachtas terminated the scope of the concept of land at a point on the spectrum where it includes interests in but does not include rights in or over land. The 2005 Act definition is broader including as it does both rights and interests, but it cannot simply be imported into section 5 just because both definitions deal with land. The same cannot be said of "estates" in land. Estates in land are fundamental to our understanding of land as a legal concept and, thus, are part of the core concept itself. If estates were to be excluded from the section 5 definition because they are not expressly listed as being included, the definition itself would cease to have a real meaning capable of being applied in a revenue context. This is not so as regards rights over land, the exclusion of which does not negate the core concept of "land".'

26. The issue in *Cintra* arose in the context of a disputed CGT liability of the Appellant, Cintra, a non-resident company, on profits accruing on the disposal of shares in an Irish company, Eurolink. That liability depended on whether the shares in the Irish company derived their value from '*land in the State*'. The Court upheld the determination of Commissioner O'Mahony in finding that the contract in question amounted to a licence which did not confer an estate nor an interest in land.

27. Items (i) to (iii) of the case stated raised questions which are relevant to this appeal. Those questions are;

- i. *Was I correct in finding or inferring that a proprietary interest in land was necessary for non-residents to be charged to tax pursuant to s.29(3) of TCA 1997?*
- ii. *Was I correct in finding that when construing the word "land" for the purposes of s.29(3)(a), I should confine myself to considering the meaning given to that word by s.5 of the TCA 1997?*





iii. *Was I correct in finding that "land" for the purposes of s.29(3)(a) means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in s.11(4) of LCLRA 2009?*

28. At paragraph 63 of her judgment, Judge Butler addressed questions (i) to (iii) of the case stated with reference to the detailed analysis contained in her judgment, and stated that;

'Based on the above analysis it is evident that I am satisfied that the Appeal Commissioner was correct in the findings he made that are the subject of questions (ii) and (iii) of the case stated namely that in construing "land" for the purposes of s.29(3)(a) he should confine himself to the meaning of that word in section 5 of TCA 1997 and in finding that "land" for that purpose means a freehold or leasehold estate or one of the lesser interests formally recognised by the Common Law and now codified in s.11(4) of the 2009 Act. By extension it follows that the Appeal Commissioner was correct in finding or inferring that a proprietary interest in land was necessary for non-residents to be charged a tax pursuant to s.29(3) of TCA 1997. A proprietary interest connotes ownership and whilst possession of a legal or equitable estate in land is not necessary for the holder to have an interest in land, the interest relied on nonetheless must be one capable of being owned. In the circumstances the answer to the first three questions posed in the case stated is "yes".'

[emphasis added]

29. The Land and Conveyancing Law Reform Act 2009 ('LCLRA') codified and consolidated land law and conveyancing practice in Ireland. As regards the concept of an '*interest in land*' the Act codified and restated the law as it stood prior to 2009.

30. Section 11(1) of the 2009 Act provides: '*The only legal estates in land which may be created or disposed of are the freehold and leasehold estates specified by this section.*'

31. Section 11(4) provides:

'The only legal interests in land which may be created or disposed of are -

(a) an easement,





(b) a freehold covenant,

(c) an incumbrance, ... '

32. The term '*incumbrance*' is defined in non-exhaustive terms in section 3 of the 2009 Act, as follows;

*"incumbrance" includes an annuity, charge, lien, **mortgage**, portion and trust for securing an annual or capital sum; ... [emphasis added]*

33. Prior to the 2009 Act, a mortgage of unregistered land was created by a conveyance of the freehold estate or a demise of the leasehold interest, each-with a proviso for re-entry. The legal title vested in the mortgagee, the full legal owner in law, subject to the proviso for re-entry vested in the mortgagor, on payment of the mortgaged loan.

34. A charge over registered land did not convey the legal title to a chargee, however, the charge was registered as the holder of a legal charge on the folio and was in law deemed to be the mortgagee of the land. In that regard, section 62(6) of the Registration of Title Act, 1964 provides: *'On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Act, and the registered owner of the charge shall, for the purposes of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge.'*

35. Since the enactment of the 2009 Act on 1 December 2009, mortgages of unregistered land are now also created by instruments of charge as prescribed by the Act, rather than by the method of a traditional mortgage by conveyance or demise. In this regard, section 90(1) of the 2009 Act provides:

(i) Subject to this Part, where a mortgage is created after the commencement of this Chapter –

...





(b) The Mortgagee has the same obligations, powers and rights as the mortgagee would have had,

If the mortgagee's security had been created by a conveyance before the commencement of the legal estate or interest in the land of the mortgagor.

36. The Appellant had argued that loans secured on land in Ireland do not constitute an '*interest in land*' for the purposes of the CGT Acts regardless of whether a mortgage or security interest could be considered to be an estate or interest in land under common law or for the purposes of the Land and Conveyancing Law Reform Act 2009. However, Judge Butler in *Cintra* held that that "land" for the purposes of section 5 TCA 1997 means a freehold or leasehold estate or one of the lesser interests formally recognised by the Common Law and now codified in s.11(4) of the 2009 Act.
37. One of the arguments raised by the Appellant which merits consideration at this point related to the provisions of section 537 TCA 1997. In written submissions, (paragraphs 4.1.11 to 4.1.14) the Appellant argued that a person who acquires a security interest in land does not acquire an interest in land for the purposes of the CGT Acts because section 537 overrides the general legal position. The Appellant's position was that pursuant to section 537, a person who has acquired a security interest over land has not acquired an interest in land that is capable of disposal for the purposes of the CGT Acts. Section 537 provides:

'The conveyance or transfer as security of an asset or of an interest or right in or over an asset, or the transfer of a subsisting interest or right as security in or over an asset (including a retransfer on redemption of the security), shall not be treated for the purposes of the Capital Gains Tax Acts as involving any acquisition or disposal of the asset.' [emphasis added]

38. The Respondent submitted that based on the ordinary and natural meaning of the words, section 537 does not capture the transfer of an existing security in land unless that transfer is for the purposes of creating a security. The Respondent's argument was that as it wasn't transferred "as security" the section had no application and that section 537 does not capture a secondary assignment of a security and does not apply in the context of this appeal. The Respondent submitted that the Appellant sought to read the section to avoid the words 'as security' and that this approach was





impermissible because, in accordance with the rule against surplusage, one must assume that every word is contained in the legislation for the intended purpose.

39. The Respondent submitted that section 537 is a reflection of the fact that as between the mortgagor and mortgagee, there could never be a capital appreciation on the part of the mortgagee because the mortgagee can never recover on the disposal of the property or on the realisation of the security, anything more than is due on foot of the mortgage loan and the interest agreed to be paid and any capital appreciation will always inure for the benefit of the mortgagor or chargor.
40. The Appellant referred to Michael Sherry, Whiteman and Sherry on Capital Gains Tax, 5th edition, paragraph 7.73 which provides:

'Section 26.1 of TCGA 1992 has the effect that the transfer of property by way of security and the transfer of an existing security right is not to be treated as involving any acquisition or disposal of the asset. Note however that, under 26(2), dealings with the asset by the mortgagee, or the exercise of a charge by him or by a person appointed by him as receiver and manager or judicial factor, are treated as if they were done through him as nominee for the owner of the asset.'
41. While textbooks can be a very useful resource at times, there can be no argument but that the legislation is the source that contains the relevant words for present purposes, and it is to the legislation one must look in ascertaining the scope of any charge to tax.
42. I accept the Respondent's submissions on this point and find that section 537 TCA 1997, is irrelevant for present purposes and does not apply in the context of the facts and circumstances of this appeal.
43. In conclusion, the loan portfolio in this case comprises securities over both unregistered and registered land in the State, same having been created on a variety of dates. For the reasons set out, I am satisfied that the mortgages of unregistered land and charges over registered land contained in the loan portfolio, comprise an '*interest in land*' for the purposes of section 5 TCA 1997 and comprise '*land*' for the purposes of section 29(3) TCA 1997.





Shares and securities

44. The Respondent submitted that the principal charging section is section 29(3) TCA 1997 but on a complementary basis the Respondent submitted that the sale also came within the definition of relevant assets for the purposes of section 29(1A) TCA 1997.
45. The Respondent submitted that it was clear from the facility letter dated 27 April 2009 that apart from the debenture, the corporate loan was secured by fixed charges over land within the State. The Respondent submitted that this brought it within the extended definition of share contained in section 29 TCA 1997 (Persons chargeable) which provides:

"shares" includes stock and any security;

"security" includes securities not creating or evidencing a charge on assets, and interest paid by a company on money advanced without the issue of a security for the advance, or other consideration given by a company for the use of money so advanced, shall be treated as if paid or given in respect of a security issued for the advance by the company..'

46. As I have determined that the mortgages of unregistered land and charges over registered land contained in the loan portfolio, comprise an '*interest in land*' for the purposes of section 5 TCA 1997 and comprise '*land*' for the purposes of section 29(3) TCA 1997 and are therefore within the charge to capital gains tax, it is not necessary to determine the question of whether the sale also came within the definition of "relevant assets" for the purpose of section 29(1A) TCA 1997. A number of submissions in this appeal which related to the question of whether the loans comprised securities within the meaning of section 29(1) TCA 1997, do not now fall to be considered.

Alleged change in position on the part of the Respondent





47. It was submitted on behalf of the Appellant that there was a change of position on the part of the Respondent in relation to whether the sale of portfolios of securities over land in the State are or are not within the charge to Capital Gains Tax. The Appellant relied upon documentation obtained following a freedom of information request in 2021. The Appellant suggested there was confusion and uncertainty on the part of taxpayers as to what the Respondent's position was.
48. The Respondent stated that there was little substance to the complaint that there was confusion on the part of the taxpayer. The Respondent stated that there was no confusion on [REDACTED] part because [REDACTED] insisted on the production of a tax clearance CG50 certificate and in the absence of such a certificate, intended to withhold 15% of the purchase price on the completion of a loan sale agreement. In the circumstances, the capital gains tax was paid by the Appellant on a without prejudice basis and a letter was furnished by the Respondent confirming that no CG50 certificate was required.
49. The transaction the subject of these proceedings took place in 2016. The position of the Respondent as set out in its tax manual in 2016 as contained in Revenue ebrief 43/16 provides:

'Clarification of circumstances where a CGT clearance certificate is not required.'

Following requests for clarification in relation to the CG50 certification procedures in section 980 Taxes Consolidation Act 1997 (TCA), ebrief No. 105/15 was issued on 27 October 2015.

In the interim, a number of associated issues have arisen in the course of enquiries from and correspondence with practitioners, and Part 42-03-01 of the Income Tax, Capital Gains Tax and Corporation Tax manual has been amended to refer to 4 particular issues:

Sales by financial institutions of loans secured on land in the State in the ordinary course of trades not carried on in the State.'

50. The relevant part of the manual provides:





'Sales by financial institutions of loans secured on land in the State'

Section 980 will not apply to the sale by a financial institution of loans secured on land in the State where the sale arises in the ordinary course of the carrying out of its trading activities. In other words, the section will not apply to the sale of such a loan by a financial institution in circumstances where any profit on the sale would be treated as a trading receipt of its trade, including a trade carried on through a branch or agency.

However, in the case of a sale by a financial institution of a loan secured on land in the State, which arises in the ordinary course of a trade that is not carried on in the State, the Revenue view is that such a sale is a disposal for CGT purposes to which section 980 is applicable.

The Revenue view in regard to loans secured on land in the State is that, in general, such loans are interests in land for the purposes of section 980 and are regarded as securities for the purposes of that section.

It follows, therefore, that the provisions of section 980 will have application where the sale of such a loan would be a disposal for CGT purposes.'

51. The Respondent submitted that as of 2016, there was no want of clarity in relation to the Respondent's official position in relation to the tax treatment and liability for the sale of loan portfolios by entities that were not resident in the State, where those loans were secured on land situate within the State.
52. The Respondent opened the relevant 2015 ebrief statement which provided:

'Sales by financial institutions of loans secured on land in the State'

The section will not apply to the sale by a financial institution of loans secured on land in the State where the sale arises in the ordinary course of the carrying out of its trading activities. In other words, the section will not apply to the sale of such a loan by a financial institution in circumstances where any profit on the sale would be treated as a trading receipt of its trade.





However, in regard to loans secured on land in the State, Revenue wishes to make clear its view that:

- *In general, such loans are interests in land for the purposes of section 980, and*
- *In general, such loans are securities for the purposes of that section.*

It follows, therefore, that the provisions of section 980 will have application where the sale of such a loan would be a disposal for CGT purposes.'

53. The Respondent submitted that the view of the Revenue officer to which the Appellant relied, which dated from 2012, was wrong in law. The Respondent submitted that while the 2015 ebrief was not as explicit as the 2016 amendment to the tax manual, the Respondent's position was sufficiently clear.
54. It is established law (see *Lee v Revenue Commissioners* [2021] IECA 18) that the Tax Appeals Commission does not have jurisdiction to adjudicate claims in legitimate expectation but in any event, there was no evidence that the Appellant was on notice of the 2012 document prior to 2021 and the Appellant did not seek to suggest that a claim for legitimate expectation arose nor could be advanced before the Tax Appeals Commission.

Section 643 TCA 1997

55. The Appellant raised and relied upon section 643 TCA 1997 and the Respondent submitted that the gain on the portfolio sold by the Appellant was not a gain falling within the scope of section 643 and that section 643 had no application or relevance in the context of the appeal herein.
56. Part 2 of the TCA 1997 contains provisions re the charge to tax. Chapter 1 (sections 12-20) deals with income tax and Chapter 2 (sections 21-31) deals with corporation tax. Section 25(1) TCA 1997 (Companies not resident in the State) provides:

'A company not resident in the State shall not be within the charge to corporation tax unless it carries on a trade in the State through a branch or agency, but if it does so it





shall, subject to any exceptions provided for by the Corporation Tax Acts, be chargeable to corporation tax on all its chargeable profits wherever arising.'

57. The Appellant is a [REDACTED] resident company not carrying on a trade within the State through either a branch or agency and consequently, the Appellant company does not come within the charge to corporation tax.

58. Section 643(17) TCA 1997 provides:

'This section shall apply to a person, whether resident in the State or not, if all or any part of the land in question is situated in the State.'

59. The Respondent submitted that section 643(17) did not override section 25(1) TCA 1997.

60. The Appellant did not have a branch, agency or permanent establishment within the State and the Respondent's position was that there was no evidence of trading activity.

61. The Respondent submitted that the onus rested upon the Appellant and the evidence from [REDACTED] was that in the context of the € [REDACTED] that was purchased by [REDACTED] from [REDACTED] approximately € [REDACTED] (23.5%) was sold on as a portfolio approximately one year later. The remaining € [REDACTED] (76.5%) was held by the Appellant in the normal way. Repayments were made by certain of the borrowers and aside from that, the loans were redeemed at face value on consent by parties to the mortgages and by the mortgagors.

62. The Respondent submitted that the Appellant did not satisfy the criteria to come within the section. Section 643(3) provides:

This section shall apply in any case where -

- (a) Land or property deriving its value from land is acquired with the sole or main object of realising a gain from disposing of the land,*
- (b) Land is held as trading stock, or*
- (c) Land is developed by a company with the sole or main object of realising a gain from disposing of the land when developed,*





And any gain of a capital nature is obtained from disposing of the land –

(i) By the person acquiring, holding or developing the land, or by a person connected with that person, or

.....

63. In relation to criterion (a), the Respondent submitted that the onus was on the Appellant to prove that the Appellant intended to sell the portfolio and that the Appellant had this as its sole or main objective at the time of acquisition. The Respondent stated that there was insufficient evidence and that the onus had not been met. The Respondent submitted that on the evidence, the Appellant had not established that it came within the criterion.

64. The Appellant's position was that [REDACTED] evidence that the Appellant bought portfolios of lands throughout Europe and purchased them to make a profit either by selling or by other means of resolution, was sufficient to satisfy criterion (a). However, section 643(3)(a) specifically requires that the land is '*acquired with the sole or main object of realising a gain from disposing of the land*' which necessitates evidence of the Appellant's intention at the time of acquisition, to dispose of the land. On review of the evidence, I find that the evidence was insufficient to conclude that this was the sole or main intention. [REDACTED] stated that the Appellant purchased distressed loans with a view to disposing of them but also that part of the intention of acquiring them was to generate cash flow during the hold period from payments being made by the borrowers.

65. Secondly, the Respondent stated that the evidence in relation to the requirement at subsection (b), that the land be held as trading stock, was insufficient. Senior Counsel for the Respondent stated that the evidence of [REDACTED] amounted to hearsay evidence namely, that he spoke with a person or persons in the tax department who told him that it was held as trading stock. While Senior Counsel for the Respondent stated that [REDACTED] was not challenged under cross-examination in relation to that, the Respondent's position was that the Appellant bore the onus and that the evidence fell short of meeting that onus. The Appellant's position was that [REDACTED] gave sworn evidence that the land was held as trading stock, and that this evidence went unchallenged by the Respondent.





66. In conclusion on this point and on review of the evidence, I am unable to conclude that [REDACTED] hearsay evidence was sufficient to meet the onus and to satisfy the statutory requirement that the land was held as trading stock.
67. The Respondent submitted that the charge to corporation tax is contained in section 25 and the charge to capital gains tax, contained in section 29 TCA 1997. Senior Counsel for the Respondent stated that the DTA reflected the division between sections 25 and 29 of the TCA in that Article 7 of the DTA which deals with business profits, reflects 25(1) on the basis that profits of an enterprise are assessable to income tax in the State, only where the enterprise has a branch or permanent establishment within the State.

68. Article 7(4) provides:

'Where profits include items of income or capital gains which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.'

69. Article 13 of the DTA deals expressly with capital gains and provides:

'Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.'

70. The Respondent submitted that Article 13 mirrored the provisions referred to in section 29 TCA 1997.
71. The Respondent referred to section 826 (1) TCA 1997 which enshrines the provisions of the Double Taxation Agreement into Irish law as if it were an Act of the Oireachtas.
72. In short, the Respondent's position was that section 29 was the appropriate provision under which to charge and assess and that section 643 TCA 1997 had no application. I accept the submissions of the Respondent in this regard and find that the sale of the loan portfolio does not fall within the provisions of section 643.





Determination

73. For the reasons set out above, I am satisfied that the disposal of the loan portfolio by the Appellant constituted the disposal of an '*interest in land*' for the purposes of section 5 TCA 1997, is within the charge to capital gains tax imposed on non-residents pursuant to s.29(3) TCA 1997 and was thereby correctly subject to the withholding tax provisions of section 980 TCA 1997. It follows that the Appellant is not entitled to a repayment of the sum of €1,092,085. This appeal is hereby determined in accordance with section 949AK TCA 1997.

A handwritten signature in black ink that reads "Lorna Gallagher".

COMMISSIONER LORNA GALLAGHER

20th day of March 2023

