/ AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

94TACD2023

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against amended notices of assessment to Capital Gains Tax ("CGT") raised by the Revenue Commissioners ("the Respondent") on 23rd November 2020. Those assessments relate to the years of assessment 2015, 2016 and 2017 and the quantum of tax at issue is €65,796 exclusive of interest and penalties. The Appellant makes his appeal in accordance with the provisions of section 945 of the Taxes Consolidation Act 1997 ("TCA 1997").

2. The appeal relates to the consideration as to whether certain loan notes disposed of by the Appellant constitute a "debt on security" within the meaning of section 541 TCA 1997 and as such, whether the Appellant was entitled to claim loss relief on their disposal.

Background

3. On 21st February 2005, the Appellant acquired 2,390 units in [redacted] PLC. He then acquired a further 530 units in [redacted] PLC on 24th March 2006. A "unit" consisted of a zero-coupon loan note which had a nominal value of €90

and an ‘A’ ordinary share which had a nominal value of €10. Each of the investments in [redacted] PLC and [redacted] PLC (“the investments”) were structured so that each investor’s interest was represented by a mixture of zero-coupon loan notes and ‘A’ class share capital.

4. Both investments were involved in the activity of developing land and as the underlying companies’ activities were unsuccessful they both went into liquidation on [redacted] 2012. The effect of this liquidation was that the Appellant suffered total monetary losses on the investments as the companies were insolvent and as such were unable to make a distribution to the Appellant.

5. The Appellant claimed these losses on the full value of the units acquired, meaning that he claimed for the loss on the purchase price of both the ‘A’ ordinary shares and the loan notes, for CGT purposes on his 2015 tax return. The total losses claimed on his 2015 tax return was €230,000 of which €200,800 related to the investments. These losses were utilised against CGT gains in 2015 and the unutilised portion of these losses was carried forward to 2016 and 2017 and offset against capital gains in those periods.

6. On 23rd January 2020, an aspect query was issued to the Appellant from the Respondent. An aspect query is a short, targeted intervention initiated by the Respondent and is designed to investigate a particular area of a taxpayer’s returns. In the Appellant’s case the Respondent was investigating the CGT element of the Appellant’s tax returns and sought clarification on the nature of the losses claimed by the Appellant on his tax returns for 2015, 2016 and 2017.

7. Further correspondence ensued between the Appellant and the Respondent which cumulated in the Respondent issuing amended notices of assessment to CGT in the sum of €65,796 on 23rd November 2020.

8. The Appellant who was not in agreement with the notices of assessment lodged a notice of appeal with the Commission on 17th December 2020. The appeal was heard in person on the 11th January 2023 and the Appellant was represented by his tax agent and Senior Counsel. The Respondent was represented by Counsel, its solicitor and a member of its staff.

Legislation and Guidelines

9. The following legislation is relevant to this appeal.

Section 541 (1) TCA 1997

(1) *(a) For the purposes of the Capital Gains Tax Acts but subject to paragraph (b), where a person incurs a debt to another person (being the original creditor), whether in Irish currency or in some other currency, no chargeable gain shall accrue to that creditor or to that creditor's personal representative or legatee on a disposal of the debt.*

(b) Paragraph (a) shall not apply in the case of a debt on a security within the meaning of section 585.

Section 585 TCA 1997

(1) In this section –

'conversion of securities' includes—

(a) a conversion of securities of a company into shares in the company,

(b) a conversion at the option of the holder of the securities converted as an alternative to the redemption of those securities for cash, and

(c) any exchange of securities effected in pursuance of any enactment which provides for the compulsory acquisition of any shares or securities and the issue of securities or other securities instead;

'investment undertaking' and 'unit' have the same meanings respectively as in section 739B;

'security' includes any loan stock or similar security, whether of any government or of any public or local authority or of any company and whether secured or unsecured but excluding securities within section 607.

(1A)For the purposes of this section, a conversion of securities shall not include a conversion of securities into units in an investment undertaking, being a company.

(2) Section 584 shall apply with any necessary modifications in relation to the conversion of securities as it applies in relation to the reorganisation or reduction of a company's share capital.

Section 546 TCA 1997

(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.

Section 607 TCA 1997

(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, Board Gáis Éireann, the company established pursuant to section 5 of the Gas Regulation Act 2013, Irish Water, Radio Telefís Éireann, Córas Iompair Éireann, Bord na Móna, or Dublin Airport Authority,

(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,

(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.

(2) (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),

(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.

(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.

(c) Where a profit or loss on a futures contract is calculated, either directly or indirectly, by reference to the acquisition cost or disposal proceeds of an instrument to which subparagraph (i) of subsection (2)(a) applies, then—

(i) that acquisition cost shall be the market value of the instrument at the date of acquisition, and

(ii) those disposal proceeds shall be the market value of the instrument at the date of disposal.

<u>*Section 739B Interpretation and application*</u>

(1) ....

"unit" includes any investment made by a unit holder, such as a subscription for shares or a contribution of capital, in an investment undertaking, being an investment which entitles the investor—

(a) to a share of the investments or relevant profits of, or

(b) to receive a relevant payment from,

the investment undertaking;

"unit holder", in relation to an investment undertaking, means any person who by reason of the holding of a unit, or under the terms of a unit, in the investment undertaking is entitled to a share of any of the investments or relevant profits of, or to receive a relevant payment from, the investment undertaking.

<u>*959Z Right of Revenue officer to make enquiries*</u>*.*

(1) A Revenue officer may, subject to this section, make such enquiries or take such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to—

(a) whether a person is chargeable to tax for a chargeable period,

(b) whether a person is a chargeable person as respects a chargeable period,

(c) the amount of income, profit or gains or, as the case may be, chargeable gains in relation to which a person is chargeable to tax for a chargeable period, or

(d) the entitlement of a person to any allowance, deduction, relief or tax credit for a chargeable period.

(2) The making of an assessment or the amendment of an assessment in accordance with section 959Y (2) by reference to any statement or particular referred to in paragraph (a) of that section does not preclude a Revenue officer from, subject to this section, 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.

(3) Subject to subsection (4), any enquiries or actions to which either subsection (1) or (2) applies shall not be made in the case of a chargeable person for a 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.

(4) Enquiries and actions to which either subsection (1) or (2) applies may be made at any time in relation to a person or a return for a chargeable period where—

(a) any of the circumstances referred to in paragraph (a), (b) or (c) of section 959AC (2) apply,

(b) a Revenue officer has reasonable grounds for believing, in accordance with section 959AD (3), that any form of fraud or neglect has been committed by or on behalf of the person in connection with or in relation to tax due for the chargeable period.

…

Documentation Presented to the Commission

10. Included with the documentation submitted to the Commission was the following:

10.1 The Memorandum and Articles of Association of ████████ PLC.

10.2 The loan note instrument in ████████ PLC. This document confirms that the loan notes are tied to the "A" ordinary shares, that they may only be redeemed in conjunction with the "A" ordinary shares and that they do

not bear interest or have automatic rights entitling them to be converted into ordinary shares of any class.

10.3 A copy of the prospectus for [redacted] PLC. Under the heading "Tax Issues for Investors" at paragraph 13.3 of that document it advises:

- *"Irish resident individuals are assessable to Irish income tax on the gross amount of any dividend received (including Dividend Withholding tax ("DWT")). A credit is available in respect of the DWT against the tax liability arising on such dividends.*
- *On the basis that the Loan Notes are non-interest bearing, income tax issues does not arise in relation to the Loan Notes held by investors.*
- *The Disposal of the "A" class ordinary shares in [redacted] by the shareholders will constitute a disposal for Irish resident shareholders for the purposes of Irish capital gains tax. The current rate of capital gains is 20%...On the assumption that the Loan Notes are to be redeemed at par a charge to Irish capital gains tax should not arise.*"

10.4 The Investor Presentation for the investment in [redacted] PLC dated January 2005. Included within that documentation under the heading "*Investment Structure", it states*

> *"It is intended that investors will receive a combination of ordinary shares and loan notes*
>
> *- This structure will be to facilitate the repayment of the investment to investors in an efficient manner over the life of the investment.*
>
> *- Further details of the investment structure outlined in the prospectus."*

10.5 Identical documentation containing similar recitals as in 10.1 – 10.4 for [redacted] PLC.

10.6 Financial statements for [redacted] PLC for the year ended 31st December 2010 and [redacted] PLC for the year ended 31st December 2009. Both sets of financial statements show the loan notes under the hearing "Shareholder Loans" in the Share Capital and Reserves section of the Balance Sheet. In the accompanying notes to those financial statements, it states "*The shareholder loans are unsecured, interest free and have no fixed repayment date. The shareholder loans have been presented as part of shareholder funds on the basis that repayment is at the discretion of the Company*".

10.7 The Appellant's handwritten contemporaneous notes (see below at subparagraph 11.2 for further). .

Witness Evidence – The Appellant

11. The Appellant advised that –

11.1 [redacted] were the promotors of the investments.

11.2 Following a presentation given to potential investors, he subsequently invested sums of money through [redacted] into those investments. He advised in preparing for his appeal that he came across a contemporaneous handwritten note which stated within them that "*the funds are to be transferred by 18th February for equity investment*". As such, he submitted that he was always of the "*clear view*" that he was investing in an equity "*type investment*".

11.3 He was given a copy of a prospectus before making the investments. Included within this documentation was an example of "*What would happen in respect of a particular investment*". He explained that while the investment was in "units" rather than "shares" no real explanatory information was provided in respect of the units and as such he paid little attention to this description of the investment.

11.4 He was absolutely "*shocked*" when the Respondent refused to accept that he had capital losses on the investments as his understanding from the outset was that he was making an equity investment and if he incurred losses on those investments that they would be available for offset against other capital gains.

11.5 That he wrote the one cheque in payment of the first investment and one cheque in respect of the second investment and in return for these investments he received a number of units. He stated that his view was that these units were "*equity units*".

11.6 That the investor prospectus and the contract notes confirmed that both the 'A' ordinary shares and the loan notes investments were "*subject to the rules and regulations of the Irish stock exchange*".

12. Under cross examination, the Appellant advised that:

12.1 He was a "sophisticated investor" meaning that he had entered into numerous investments over the years in different companies.

12.2 The investor prospectus for the investments confirmed that the loan notes were "*interest free, unsecured and had no automatic rights to convert to equity*".

12.3 Under the heading "*Tax Issues for Investors*", the prospectus stated "*on the assumption that the loan notes are to be redeemed at par no charge to Irish capital gains tax should not arise*".

12.4 The investment deal notes confirmed that he had separately bought ordinary shares and loan notes under both of the investments.

Submissions

Appellant

13. The Appellant's Counsel submitted that the 2015 notice of assessment, which was issued by the Respondent on 23rd November 2020, had issued out beyond the four year time period permitted under 959Z (3) TCA 1997 and as such was void.

14. Without prejudice to the foregoing, the Appellant's Counsel submitted that although the investments were technically separate instruments, they were inseparable by the terms of the investments themselves and as such were "stapled investments". For the purpose of comprehension a "stapled investment" is defined as[1] "*a financial product that consists of two or more securities that are bound to form a single unit that cannot be bought or sold separately. Usually a stapled security consists of a unit in a unit trust and a share in a company. The two securities are bound via a number of contractual documents, including the unit trust deed, company constitution and associated stapling agreement. Investors receive a single security*".

15. Counsel for the Appellant stated that as one part of the unit could not be disposed of without the other part, then the Appellant's investments ought to be considered one single equity investment and as such any gain chargeable to CGT or as in the Appellant's case, any loss allowable for CGT purposes. The Appellant's Counsel submitted that this was evident from a review of the prospectus which did not distinguish between the loan notes and ordinary shares and as such they were inextricably linked.

16. In support of this linkage, the Appellant's Counsel referred to the following documentation:

[1] https://uk.practicallaw.thomsonreuters.com/w-014-2708?transitionType=Default&contextData=(sc.Default)

16.1 Clause 3 of the Loan Note Instrument which states: "*Notes may only be issued … for cash, receivable by the Company and contemporaneously with the allotment of Ordinary Shares on the basis of €90 in nominal amount of Notes for each Ordinary Share allotted.*"

16.2 Condition 1.10 of the First Schedule to the Loan Note Instrument which states: "*No transfer of the Notes may be made unless transferred with the relevant Ordinary Shares and unless the person to whom the Notes is transferred enters into a deed of adherence to the Loan Note Instrument, the Articles, the Nominee Trust and any other document reasonably required by the Company in a form reasonably satisfactory to the Company"*.

16.3 Article 29.2 of the company's Articles of Association which states: "*Any person who proposes or is required to transfer any Share or Shares and/or any Interest in Shares shall also be required to simultaneously transfer a proportionate amount of the Loan Notes and/or Interest in Loan Notes held by him, and, for the avoidance of doubt, any reference in these Articles to a transfer of Shares and/or Interest in Shares shall be deemed to include both Shares and/or Interest in Shares and the proportionate amount of Loan Notes and/or Interest in Loan Notes"*.

17. Counsel for the Appellant submitted as section 585 TCA 1997 does not define "*debt on security*" then in ascertaining the meaning of those words, the Commission is required to have regard to the jurisprudence of the Superior Courts.

18. The Appellant's Counsel opened that the case of *Mooney v McSweeney* [1997] IEHC 59 (*"McSweeney*"). Counsel explained by way of background that the case concerned a loan made by a taxpayer to a company in which he was a major shareholder. The loan itself was part of an overall package of refinancing of the company in which several financial institutions participated and while the taxpayer's loan was a subordinated loan, not carrying interest, it was convertible into shares in the company at the option of the loan note holder.

19. In ascertaining the meaning of "debt on security" in *McSweeney*, Mr. Justice Morris considered several decisions of the courts of the United Kingdom ("UK"). At paragraph 23 of his judgment, he summarised the decision of *Taylor Clark International Limited v Lewis (Inspector of Taxes)* 1997 STC 499 ("*Taylor Clark*") which noted that a debt on security had to have certain characteristics, being:

(i) It had to be capable of being assigned;

(ii) It had to carry interest;

(iii) It had to have a structure of permanence, and

(iv) It had to provide proprietary security.

20. Mr. Justice Morris rejected this as being the correct test. He noted the difficulty that several members of the United Kingdom (UK) bench had in defining and identifying the nature of a debt on security. He noted that all of them agreed, however, that this does not simply mean a debt which is secured or put another way it is not the opposite of an unsecured debt. He also agreed with Lord Cameron when he said in *Cleveleys Investment Trust Co v CIR* 47TC300 at page 318 that "*whatever else it may mean, the phrase "the debt on a security*" is not a synonym for secured debt. Mr. Justice Morris further agreed with the *dicta* of Lord Wilberforce in *WT Ramsey limited v CIR* where he said that a debt on security is "*debts with added characteristics such as enable them to be realised or dealt with at a profit*" or again that it has "*such characteristics as enable it to be dealt in and, if necessary, converted into shares or other securities".*

21. Having considered the UK jurisprudence, Mr Justice Morris held:

"*In my view, these are the elements which identify a debt on a security. This, it seems to me, to be no more than common sense. The pure loan is exempt from Capital Gains Tax because it can never exceed in value. With the additional rights to convert it into stock, a debt on security may appreciate value and can be marketed as a profit. This is a clear distinction between the two. I am of the view that the four characteristics of a loan on security proposed to be identified in Taylor's case arise only because in separate cases transactions have been disallowed as Loans on Security for those stated reasons, however, I do not believe that these reasons of necessity identify what is and what is not a Loan on Security. The essence of a Loan on Security must be whether the additional "Bundle of Rights" acquired with the granting of the Loan, to use Lord Wilberforce's phrase, enhance the Loan so as to make it marketable and potentially more valuable than the value of the prepaid loan upon repayment. This potential increase in value must not be illusory or theoretical. It must be realistic at the time when the Loan and the rights are acquired by the lender.*"

22. The Appellant's Counsel submitted that *McSweeney* makes it clear that a debt may be a debt on security notwithstanding that it does not carry a rate of interest. In particular, the Appellant's Counsel submitted a key characteristic of a debt on security is that it must have the potential to increase in value such that it is capable of being dealt in or realised at a profit and therefore has the necessary characteristics of marketability.

23. Counsel for the Appellant submitted that the issue of a debt on security arose again for consideration in *Inspector of Taxes v Thomas Keleghan* [2001] IR 490 ("*Keleghan*"). Counsel advised that case was concerned with a transaction which had its origins in 1990 when the taxpayer sold shares in a company, the consideration for which was satisfied by the issue of loan notes. The loan notes in question were redeemed for cash in 1993. The Inspector of Taxes sought to assess the gain on the disposal of the loan notes to CGT. The principle defence against this was the loan notes did not constitute "a debt on security" and accordingly no chargeable gain could arise on their disposal as he was the original holder of the notes.

24. Having considered the UK decisions, Mr. Justice Murphy stated in *Keleghan* "*the right to assign a debt in whole or in part and the arrangements made to facilitate such an assignment may be material in determining whether a particular debt has the requisite characteristics of marketability*" before holding that the particular debt was not a debt on security. Central to the court's findings was that while the debt had many characteristics of a debt on security, as it was not marketable then there was little or no chance of the debt increasing in value.

25. The Appellant's Counsel submitted what emerged from the Irish jurisprudence is that an analysis must be carried out on the commercial reality of the underlying transaction and the potential for the debt to increase in value. Counsel submitted when looking at the facts of the Appellant's appeal, it is necessary to look at the transaction (the separate investments in each of the underlying companies) as one, rather than two separate transactions. Thus, the Appellant's Counsel submitted that the acquisition of the "A" ordinary shares and the loan stock were one transaction and as they had the potential to increase in value when combined, then they fulfilled the requirements set out in *McSweeney* and *Keleghan* and as such ought properly be considered a debt on security.

26. Counsel for the Appellant submitted that the manner in which a stapled debt and equity investment is treated for tax purposes arose in an Australian decision of *Universal Castings Corp v Commissioner* (37 TC 107 (1961) ("*Universal Castings*"). In that case the Tax Court ("the court") held because the notes and stock were "locked in" as a single investment that no debtor/creditor relationship existed. The court held that as *Universal Castings* debt interests always existed in tandem with its equity interests and the nature of the "locked-in feature" was further emphasised by a shareholders agreement requiring shareholders to issue debt to the corporation in direct proportion to their stock ownership, this precluded shareholders from selling either notes or stock without the other. Due to the existence of this stapling function the court found that the investor's interest as a

creditor could never be different from its interests as a shareholder. As a result, the court disallowed the corporate interest deductions claiming the investment was strictly equity in nature.

27. The Appellant's Counsel submitted under the scheme which the Appellant invested in, he was unable to acquire the "A" ordinary shares without acquiring a corresponding portion of loan notes. The Appellant's Counsel submitted that this structure was not "commercially significant" having regard to the overall investment as the Articles and Loan Note Instruments provided that both the loan notes and ordinary shares were required to have been disposed of together or not at all. Thus, the Appellant's Counsel submitted that as the Appellant's investments each constituted a single "stapled investment" then having regard to "*Universal Castings*", the Commission ought to find that the Appellant's investments were "*strictly equity in nature*" and as such allowable for CGT loss relief purposes.

28. The Appellant's Counsel further submitted that taken in isolation, the loan notes would be deemed "uncommercial investments" as they did not carry interest and were repayable at par. However, adopting a holistic approach and in noting the potential gain was inextricably linked to the ordinary shares, and as the Appellant could not invest in one transaction without the other, the Appellant's Counsel submitted that the Appellant's investments ought to be viewed as one investment and as such that they were marketable securities in that they had such "characteristics as may enable them to be realised or dealt with at a profit".

29. In conclusion, the Appellant's Counsel submitted that the 2015 notice of assessment was issued by the Respondent beyond the permitted statutory timeframe and as such was void. Further or in the alternative, Counsel submitted that the Appellant's investment in the loan notes equated to the acquisition of a "debt on security" and given this the capital loss on their disposal ought to be allowed against the Appellant's capital gains in accordance with the provisions of section 546(2) TCA 1997.

Respondent

30. The Respondent's Counsel submitted that section 541 TCA 1997 is clear in its wording and intention and as such, there is no ambiguity arising therefrom. Counsel submitted that as the loan notes acquired by the Appellant are a "simple debt" and not a "debt on security" within the meaning of sections 541 and 585 (1) TCA 1997, then the Appellant cannot secure relief on the "creation of capital losses".

31. Counsel for the Respondent submitted, if she was wrong in this regard and the Commissioner held that there was ambiguity in the phrase "debt on security", then the meaning of the phrase ought to be considered in the context of the intention of the legislature and not be interpreted in such a manner as to widen or to provide financial assistance which the legislature did not provide for as was held by Kennedy C.J. in *Revenue Commissioners v Doorley* [1933] IR750.

32. Counsel for the Respondent opened the case of *Shane Coleman v The Revenue Commissioners* [2014] IEHC 662, which was considering the taxpayer's claim for a tax relief known as "artist's exemption" in which it was held:

    "*The Appeal Commissioner was not entitled to expand or alter the meaning of biography by reference to what he perceived as free interpretation of the statutory code by the Revenue Commissioners in another taxpayer's case. The Revenue Commissioners commitment in the Taxpayers' Charter to fairness, reasonableness and consistency cannot be applied in a manner which overrides their duty and the Appeal Commissioner's duty to give effect to the plain meaning of a word in a statutory code which restricts an exemption from tax.*"

33. Thus, the Respondent's Counsel submitted as there is no statutory definition of the words "debt on security", the Commissioner is required to interpret the meaning of those words with further reference of the Superior Court's findings.

34. The Respondent's Counsel referred to the *McSweeney* case opened by the Appellant's Counsel. The Respondent's Counsel submitted that it was evident from the reading of this case that in order for a debt to be considered a debt on security it must by virtue of the "bundle of rights" attaching to it enable it to be realised or dealt with at a profit. The Respondent's Counsel submitted that this essential characteristic of a debt on security was reinforced in *Keleghan* where the court examined the decisive importance of the underlying commercial potential of the debt to appreciate in value by virtue of factors such as the share conversion rights attaching to the loan stock or the interest payable on it. The Respondent's Counsel submitted that as the Appellant's loan stock did not have these characteristics, then it was incumbent on the Commission to hold that they did not qualify as a debt on security and hence the losses incurred on their disposal was not available for offset against the Appellant's capital gains.

35. The Respondent's Counsel further submitted by virtue of the loan notes being interest free, unsecured and having no automatic rights to convert to equity, as provided for in section 12.2 of the prospectus that they were not marketable and this was fatal to the Appellant's submissions to the contrary.

36. In summation, the Respondent's Counsel submitted that as the Appellant failed in his submissions to establish that the loan notes are a "debt on security" as defined under section 541 TCA 1997, then the Appellant is not entitled to claim a loss for CGT purposes and offset that loss against his 2015, 2016 and 2017 gains. In those circumstances, the Respondent's Counsel submitted that the Commission ought to refuse the Appellant's appeal and uphold the Respondent's notice of assessment.

Material Facts

37. The Commissioner finds the following material facts:-

37.1. The Appellant acquired a number of units in two separate investments in 2005 and 2006.

37.2. These units consisted of a "zero coupon" loan note and an "A" class ordinary share.

37.3. On acquisition and subsequent, the terms of the loan notes stipulated that they were interest free, unsecured and had no automatic rights to convert into equity. By virtue of this, any return on the Appellant's investments attached solely to the "A" class ordinary shares and not the loan notes.

37.4. Under the investment documentation, the units could only be purchased and sold as a unit. This resulted in it not being possible for the Appellant to have either have purchased or sold the individual loan notes or "A" class ordinary shares on a standalone basis.

37.5. The underlying companies which the Appellant invested in went into liquidation on ███ ████████ 2012.

37.6. The result of this liquidation on the Appellant's investments was that they became worthless.

37.7. The Appellant claimed loss relief for CGT purposes on the value of the losses sustained by him in the investments. These losses were offset against the Appellant's capital gains in 2015, 2016 and 2017.

37.8. The Term "Debt on Security" is not defined in the TCA 1997.

37.9. The Respondent issued notices of amended assessment to capital gains tax for the years 2015, 2016 and 2017 on 23rd November 2020.

Analysis

38. Before turning to the substantive matter, the Appellant's Counsel submitted that the notice of assessment for 2015 issued out beyond the four year period permitted under section 959Z (3) TCA 1997 and as such was void. Section 959AA (1) TCA 1997, imposes an identical timeframe for the amendment of an assessment. As the 2015 notice of assessment was required to have been issued on or before 31st December 2019, and as the Respondent did not issue it until 23rd November 2020, at face value, it follows that the 2015 assessment issued beyond the timeframe permitted by statue and is therefore void.

39. However, section 959AC (2) (b) TCA 1997 provides that there is no time limit imposed on the Respondent in the making of an assessment where the Respondent is not satisfied with the sufficiency of the Appellant's 2015 tax return or has reasonable grounds for believing that a return does not contain a full and true disclosure of all material facts.

40. It therefore follows that the 2015 amended notice of assessment is valid if it can be established that the Appellant's 2015 return was not sufficient or whether it did not contain a full and true disclosure of all material facts. In order to establish this position, it is therefore necessary to consider whether the Appellant was correct in claiming the CGT losses on his 2015 income tax return. Given this position, the Commissioner is firstly required to consider the substantive issue before issuing this finding.

41. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners and ors.* 2020 IEHC 552 ("*Perrigo*") where he summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

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

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

    (b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said

that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

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

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

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

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

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766: "Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

42. Section 546 TCA 1997 provides that where an asset is outside the scope of CGT any loss on the disposal of that asset is not available for offset against the Appellant's chargeable gains. Section 541 (1) TCA 1997 states that unless a debt is a "debt on security" it is not a chargeable asset and as such is outside the scope of CGT. It therefore follows that unless the acquisition of the loan stock by the Appellant is considered a debt on security, the loss on its disposal is not available for offset against the Appellant's chargeable gains.

43. Unhelpfully, while the term "security" is defined in section 585 TCA 1997, the term "debt on security" is not so provided for. Similarly while the Appellant seeks to rely on the term "stapled securities", this concept is not defined under Irish taxation statues nor has it been considered to date by the Irish courts.

44. The Commissioner notes from the Appellant's submissions that the loan notes acquired by the Appellant were contractually linked to the acquisition of the "A" class ordinary shares ("the ordinary shares") and as such the Appellant could neither acquire nor dispose of the associated units unless in tandem. However, contrary to the Appellant's submissions that the units were inextricably linked, the Commissioner finds that while same may hold true from a contractual standpoint, the ordinary shares and the loan notes are not separate and distinct assets for the purpose of CGT.

45. In coming to that finding, the Commissioner applied the findings in *McSweeney* and *Keleghan*. These findings require that in order for a debt on security to exist, it is required at the time of acquisition, to have certain characteristics chiefly that it is capable of being marketed and has the ability to increase in value. While the Appellant contends that these conditions exist by the nature of the "stapled securities" acquired by the Appellant, the Commissioner having examined the investment documentation is unable to substantiate this submission.

46. As separate deal notes issued for the purchase of the loan notes and the ordinary shares, it follows that while they were contractually interdependent on one another at purchase and sale points, they were acquired as individual investments by the Appellant. Accordingly, the Commissioner is required to look at the rights attaching to the ordinary shares and the loan notes in isolation.

47. In noting that the rights attaching to the loan notes (that they were interest free, unsecured and did not carry automatic rights to convert to equity) and in further noting any potential value attached solely to the "A" class ordinary shares, the Commissioner finds that the loan notes acquired by the Appellant did not fulfil the criteria set out in *McSweeney* and *Keleghan* as by the nature of the loan notes they do not have the

potential to increase in value and as such are "not marketable". Therefore the Commissioner finds that the loan notes acquired by the Appellant cannot be considered to be a "debt on security" and as such the Appellant's appeal must fail.

48. The Commissioner notes that there is limited guidance available in this jurisdiction on the CGT treatment of stapled securities but is reassured of his findings having regard to available guidance of the Australian Taxation Office[2] which discuss the CGT treatment on the disposal of stapled securities. While not binding in this jurisdiction, this document confirms, akin to the Commissioner's findings, that while a stapled security must be dealt with as a whole the individual securities are treated separately for CGT purposes and that the taxpayer is required to work out any capital gain or capital loss separately for the loan stock and the ordinary share by virtue of the rights attaching to the individual investment.

49. As the Appellant incorrectly claimed CGT losses on his 2015 tax return and did not alert the Respondent to the nature of these losses by means of an "expression of doubt" or such like, it follows that is reasonable for the Commissioner to assume that the Respondent is not satisfied with the sufficiency of the Appellant's 2015 tax return or that it has reasonable grounds for believing that the Appellant's 2015 return did not contain a full and true disclosure of all material facts. Therefore, the Commissioner finds that the provisions of section 959AC (2) (b) TCA 1997 apply and the Respondent is not precluded from issuing the amended notice of assessment for 2015.

Determination

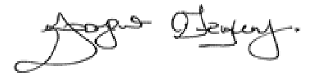
50. The Commissioner determines that the Appellant has been unsuccessful in his appeal. Therefore the notices of amendment assessment to CGT for the years of assessment 2015, 2016 and 2017 stand and the Appellant is required to discharge the sum of €65,796 plus interest and penalties to the Respondent.

51. It is understandable that there will be disappointment with the outcome of this appeal. However the Commissioner has no discretion in these cases as he is required to apply the provisions of the legislation, as enacted, without deviation or expansion.

52. The appeal is determined in accordance with section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party

[2]Guide to CGT 2022 - https://www.ato.gov.au/Forms/Guide-to-capital-gains-tax-2022/?=redirected_CGTstapledsecurities&anchor=Stapled_securities#Stapled_securities

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
9th May 2023