AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

34TACD2024

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against Amended Notices of Assessment to Income Tax for the tax years 2016, 2017, 2018 and 2019. Those assessments were issued by the Revenue Commissioners (hereinafter "the Respondent") on 17th November 2021 as follows:

Year of Assessment	**Quantum**
2016	€47,837
2017	€233,388
2018	€6,840
2019	€832
Total	**€288,897**

2. The Appellant makes his appeal in accordance with the provisions of section 933 Taxes Consolidation Act 1997, as amended ("TCA 1997").

Background

3. The Appellant and some members of his family are involved in the building industry. Their primary business is carried on by a company called "[redacted] Limited" ("the company"). During the periods under appeal, the Appellant and his brother, [redacted] were directors of the company. Regrettably, [redacted] passed away in [redacted].

4. In or around 2008, the Appellant, his deceased brother and three other family members (hereinafter "the family") were approached by [redacted] of [redacted], a limited partnership operating in [redacted]. The family were not "connected parties" with [redacted], meaning that none of the family members had an equity interest or held directorships in [redacted]

5. [redacted] was involved in the business activity of an investment promoter with a speciality in the property sector. In 2008, [redacted] was engaged in the purchase and development of a property at [redacted] ("the property") which was being developed into residential apartments. On completion of the construction works to the property, it was envisaged that the property would be sold on a "bulk sale agreement" to an entity called [redacted]. An agreement had been entered into to this effect on 22nd March 2007 between [redacted] and [redacted].

6. Following the approach by [redacted], the family procured a letter of credit[1] from [redacted] in favour of [redacted] ("the Letter of Credit") to enable it to finance the acquisition and construction works on the property for the sum of United States ("US") $11 million and an additional US$200,000 to enable [redacted] cover a portion of its associated expenses.

7. On foot of the Letter of Credit, [redacted] was to transfer the US$11 million to an escrow account in the name of a New York law firm, [redacted]. ("the US Attorneys"), who were acting in the capacity as agents for [redacted].

8. The nature of the transaction was such that the family were liable to [redacted] to repay the US$11 million pursuant to the terms of the Letter of Credit and [redacted] was to repay the family. In addition, the expense sum advanced to [redacted] in the sum of US$200,000 was to be repaid by it to the family.

9. The family and [redacted] formalised the transaction by loan agreement dated 25th January 2009 (the "Loan Agreement"). The US$11 million was drawn down and transferred to the US Attorneys on 30th January 2009.

10. Security for the arrangement between the family and [redacted] was provided in part by a joint and several guarantee by a number of named parties, [redacted]. [redacted] (the "Guarantors") all of whom had addresses in [redacted]

11. The funds were intended to be repaid by [redacted] by the "Anticipated Repayment Date" which was defined as the earlier of 1st May 2009 or the completion of the purchase by [redacted], pursuant to the bulk sale agreement, of the last unit in the development. An interest rate of 25% per annum would apply if the funds were not repaid by the repayment date.

12. The Loan Agreement entered into between the family, [redacted] and the Guarantors also set out the additional consideration for the transaction, over and above the repayment of the funds, which would be owed to the family by [redacted]. This was to include reimbursement of certain expenses as well as a percentage of the profits realised by the

[1] A letter of credit, or a credit letter, is a letter from a bank guaranteeing that a buyer's payment to a seller will be received on time and for the correct amount. If the buyer is unable to make a payment on the purchase, the bank will be required to cover the full or remaining amount of the purchase. It may be offered as a facility (financial assistance that is essentially a loan) –
source: https://www.investopedia.com/terms/l/letterofcredit.asp

Borrower on the sale of any units in the development and/or by the Guarantors on the sale of their interests in [redacted].

13. Following advancement of the funds by the family, [redacted] became insolvent in or around 2009 and went into liquidation. As a result, [redacted] failed to repay the funds advanced under the loan agreement and the expense advancement, which resulted in a loss of US$11,200,000 arising for the family.

14. Following the insolvency of [redacted], the family engaged the services of US lawyers to instigate legal proceedings against [redacted] and the Guarantors for recovery of the funds advanced.

15. Following a review of the factual and legal position in 2017, and in noting that attempts to recover the advanced funds had proved fruitless, the family recognised that there was no prospect of the recovery of any funds from either [redacted] or the Guarantors. As a result of the funds being irrecoverable, the family claimed a *pro rata* trading loss for the sums advanced to [redacted][2], US$11,200,000, on their various individual tax returns in 2017[3]. In addition, the family each claimed their *pro rata* share of the interest paid on the [redacted] facility on their tax returns for the years of assessment under appeal.

16. As the individual family members all engaged in identical transactions and submitted identical appeals to the Commission (bar quantum[4]), it was agreed between the Appellants and the Respondent that the Appellant who had a 42.5% share of the family arrangement would act as the "lead appeal" with the other four family members acting as "follower appeals". As such, any references to the Appellant in the following paragraphs, chiefly apply equally to each of the follower appeals (bar quantum).

17. On 29[h] March 2019, the Respondent wrote to the Appellant in respect of an Aspect Query[5] relating to his submitted 2016 and 2017 income tax returns. Within that correspondence, the Respondent requested further details of the trading loss claimed by

[2] The family arrangement was split as follows, the Appellant 42.5%, [redacted] 42.5%, [redacted] 5%, [redacted] 5% and [redacted] 5%.
[3] Subject to certain conditions being fulfilled, section 381 TCA 1997 permits a taxpayer to carry back a portion of a loss incurred to the preceding tax year. As the Appellant was of the view that he fulfilled those conditions, he elected to carry-back a portion of the loss incurred to 2016.
[4] As will be noted later in this Determination, a condition of claiming a trading loss is that the claimant is required to be an "active partner" to qualify for unrestricted loss relief. The Appellant and his deceased brother claimed this unrestricted loss whereas the other three other family members did not. Hence the three family members' Notices of Appeal did not claim that they were entitled to unrestricted loss relief.
[5] An Aspect Query is regarded as a short, targeted intervention for the purpose of checking a particular risk identified by the Respondent following review of a taxpayer's returns.

the Appellant on his 2016 and 2017 income tax returns, which included questions on the nature of the underlying trade and its composition.

18. Following initial contact from the Appellant's accountants, the Appellant's Counsel replied to the Respondent's correspondence on 3rd May 2019. Within that correspondence, the Appellant's Counsel detailed the [redacted] transaction and stated that he had reviewed the transactions undertaken and following that review "*was satisfied that the money advanced is irrecoverable*". As the funds advanced were irrecoverable, the Appellant's Counsel outlined the reasons why the Appellant had claimed the loss as a "trading" loss rather than as a "capital" loss.

19. Subsequent correspondence ensued between the Appellant and the Respondent which cumulated in the Respondent issuing its Notices of Amended Assessment on 17th November 2021.

20. The Appellant who was not in agreement with those Notices of Amended Assessment submitted his appeal to the Commission on 14th December 2021. The Notice of Appeal detailed the following grounds of appeal which stated that the Respondent:

    20.1. Did not take into account the factual situation surrounding the trading nature of the "[redacted]" deal.

    20.2. Did not consider the legal effect and tax implications of the "letters of credit" component of the trade deal correctly or at all.

    20.3. Had no regard to correct accounting principles to be applied in recognising a loss in a trade.

    20.4. Wrongly contended that if a trade existed, then the trade ceased business operations in 2012.

    20.5. Failed to recognise that as the family paid off the [redacted] loan in 2020, then this was the correct date the "financing trade" ceased.

    20.6. Failed to allow the losses incurred to be offset against profits of the same trade going forward.

    20.7. Failed to recognise that the "financing trade" is the same trade or a "very similar trade" that the family members are engaged in within their other business activities of property development, property investment and the rental of properties.

20.8. Formed the view that from the Appellant's submitted tax returns that the [redacted] loan transaction was a "financing trade" when it was more properly described as a "property financing trade".

20.9. Failed to adequately consider the "badges of trade" in determining that the activities conducted by the Appellant were not a trade.

20.10. Wrongly concluded that the main members of the family (the Appellant and his deceased brother – hereinafter the "active partners") did not devote a considerable amount of time to the management of the financing trade and wrongly concluded that those family members were "passive investors".

20.11. Wrongly concluded that the active partners were not entitled to recognise the loan as a bad debt in 2017.

20.12. Wrongly applied "a banking trade" test in determining that the Appellant did not conduct a financing trade.

20.13. Wrongly disallowed the trade loss as if the [redacted] "deal" had been successful, the Appellant would have been liable to income tax, rather than capital gains tax ("CGT"), on any profits derived.

20.14. Wrongly held that the Appellant failed to keep proper books of account in accordance with the provisions of section 886 (2) TCA 1997.

20.15. Wrongly held that a "single transaction" cannot constitute a trade.

20.16. Wrongly held that a "capital profit" would have arisen if the transaction was successful.

20.17. Incorrectly held that the liquidation of [redacted] was the date the loss arose as the family continued to engage in legal proceedings to recover proceeds up to 2017 and serviced the [redacted] facility until 2020, before discharging the entire amount repayable.

20.18. Were fundamentally unfair and in contravention of its own Charter in taking two and a half years to raise its amended assessments on the Appellant.

20.19. Wrongly imposed a penalty on the Estate of the Appellant's deceased brother.

20.20. Wrongly charged interest on tax due by the Appellants. Owing to that rate of interest, the interest is more akin to a penalty and as such can only be imposed by the Courts, rather than the Respondent.

21. The Appeal was heard by the Commission on 31st May 2023. The Appellant was represented by his accountant, his tax advisor and Counsel. The Respondent was represented by Senior and Junior Counsel, its solicitor and two members of staff. In addition, the Commissioner heard sworn testimony from the Appellant and his Expert Witness, in addition to legal submissions from the parties.

Documentation presented to the Commission

22. Included within the documentation presented to the Commission was the following:

    22.1. Copy of a loan agreement drafted by [redacted] ("the Loan Agreement") with an effective date of 25th January 2009. The Loan Agreement referred to the "Person's named in Schedule 1, 2 and 3". "Schedule 1" referred to the lenders who were described as the Appellant and his family members. "Schedule 2" detailed the borrower as "[redacted]" "Schedule 3" referred to the Guarantors who were detailed as [redacted]

    22.2. The agreement provided a background which stated, "*the lenders in anticipation of becoming a limited partner of the Borrower:*

        22.2.1. Procured the provision of a Letter of Credit to enable the Borrower to meet its obligations to provide a down payment under the Bulk Sale Agreement; and;

        22.2.2. Provided a loan of US$200,000 to fund expenses incurred by the Borrower…;

        22.2.3. Pursuant to a notice…the Letter of Credit have been presented and the parties anticipate that shortly, US$11 million will be transferred by [redacted] to an escrow account…whereupon there shall be deemed to be a loan of US$11 million from the Lenders to the Borrower which shall be governed by the terms of this agreement…The Borrower wishes to give the Lenders such additional payments as are set out in this agreement."

    22.3. In addition, the Loan Agreement provided:

22.3.1. The "*Anticipated Repayment Date*" was 1st May 2009 or the "*completion of the purchase by the Borrower, pursuant to the Bulk Sale Agreement, of the last unit*".

22.3.2. The "*Bulk Sale Agreement*" was defined as "*the agreement of purchase and sale dated 22nd March 2007 made between* [redacted] *and the Borrower*".

22.3.3. The purpose of the loan was defined as "*to assist the borrower with its obligations under the bulk sale agreement*".

22.3.4. No interest was chargeable on the facility subject to the loan being repaid on the "*repayment date*". In the event of payment not occurring on that date, the rate of interest was set at 25% per annum.

22.4. The "*additional payments*" referred to in sub-paragraph 22.2.3 above were detailed as:

22.4.1. Fees and interest payable by the Lenders to [redacted] in connection with the provision of the Letter of Credit, subject (i) to a maximum amount of US$325,000 and (ii) such amount being vouched to the reasonable satisfaction of the Borrower.

22.4.2. Accountancy and legal fees… maximum of US$300,000…

22.4.3. On the completion of the sale of a unit or units by the Borrower within three years of the date of this agreement, the Guarantors shall, pursuant to 6.3, pay to the Lenders an amount equal to five percent of the Net Profit realised on such sale…

22.5. In addition to a personal guarantee from the Guarantors, the following additional security was provided under the Loan Agreement:

22.5.1. A pledge over the profits realised from a future sale by the Guarantors of their shares in [redacted]

22.5.2. A pledge over the profits, income and gains attributable to the Guarantors by virtue of their limited partnership interests in the Borrower;

22.5.3. A charge over the entire issued share capital of [redacted], a company registered in [redacted] under number [redacted], and

22.5.4. A deed of covenant from [redacted] in favour of the lenders that they will not sell, dispose or create security in respect of their limited partnership interests in [redacted]

22.6. The agreement was signed sealed and delivered by [redacted] on the family's behalf and for and on behalf of [redacted]

22.7. A letter of offer from [redacted] to the family dated 27th April 2009. This letter was headed "*Re: Property Acquisitions in UK and USA*" and provided facilities as follows:

22.7.1. Facility A – A term loan in the sum of stg£6,995,000.

22.7.2. Facility B – A term loan in the sum of US$11,000,000.

22.7.3. Facility C – A term loan of US$200,000

22.8. The purpose of those facilities was detailed as follows:

22.8.1. Facility A – To refinance the borrowers' interest in eight UK listed properties.

22.8.2. Facility B – "*To refinance a drawn line" following the calling of a Standby Letter of Credit in favour of* [redacted] *as Escrow Agent…to assist the borrowers investment in a residential development at* [redacted].

22.8.3. Facility C – To fund payment of fees in relation to the borrowers investment in a residential development at [redacted]

22.9. The borrowers were detailed as the Appellant and his four family members.

22.10. Included within the security section of the letter was the following:

22.10.1. A joint and several guarantee from the guarantors.

22.10.2. A first legal charge over the guarantor's right, title and interest in each of the properties, including the assignment of all rents.

22.10.3. Standard security over the properties.

22.11. Included within the "Covenants" section was the following narrative – "*The proceeds of the* [redacted] *loan agreement shall be applied in repayment of Facility 2 and facility 3 on or before 1 May 2009*".

22.12. The guarantors were detailed as "[redacted] *and any one of them*."

22.13. The agreement was signed by [redacted] "under Power of Attorney" on behalf of the Appellant and the other family members (detailed as [redacted]

22.14. Copy loan statements from [redacted] ("the [redacted] Loan") for the period 30th January 2009 to 31st January 2018. These statements showed the sum of US$11,000,000 was borrowed by the "[redacted]" on 30th January 2009 and that "interest only" payments were charged and paid on that loan balance to 28th October 2011. On 1st November 2011 a further US$200,000 was advanced which increased the loan balance to US$11,200,000. Thereafter, interest was charged and paid to 30th April 2013. On 25th July 2013, the sum of US$1,341,197.90 was repaid against the loan and described as "Principal Repayment". This reduced the loan amount from US$11,200,000 to US$9,858,802.10 and interest was charged and paid on the loan from that date to 17th August 2017. On the latter date US$5,013,500.41 was repaid against the loan and described as "Principal Repayment" which reduced the balance from US$9,858,802.10 to US$4,845,301.69. Further interest was charged and paid up until 31st January 2018, when the remaining sum, US$4,845,301.69 was cleared with the narrative beside that entry as "Conversion to GBP Loan".

22.15. [redacted] current account statements on an account in the name of the Appellants. The Appellants were described as the "[redacted] *Co-ownership Group*" and the statements were for sporadic periods between 29th December 2017 and 31st July 2019. Those statements included receipts of presumed rents from various presumed letting agents and payments which appeared to be loan repayments. No reconciliation or substantive narrative was provided to the Commission on the sums lodged and withdrawn from this account.

22.16. An excel spreadsheet in the name of the Appellant entitled "*Interest Schedule for USD Loan*" for the years 2016, 2017, 2018 and 2019. These showed the quarterly interest charges with the narrative "*agrees to bank statement provided by* [redacted]". The respective sums shown in US$ was $307,270, $315,314,

$48,209 (plus Great Brittan ("GB") £52,368) and GB£8,912. Beside each US$ amount was a conversion into euros multiplied by the Appellant's overall share of the Co-ownership, 42.50%. The 2017 spreadsheet listed the sum of €3,665,200 as being referable to the Appellant with the narrative "*Bad debt written off in 2017*".

22.17. Bank of Ireland interest certificate for the years ended 31st December 2017 and 31st December 2018. This showed that interest of US$315,314.04 was paid in 2017 and US$48,209 in 2018. In addition, a statement was provided in GB£ for 2018 which showed the sum of GB£52,368 was charged in interest for that year.

22.18. Copies of the Appellant's Tax Return for the years 2009 to 2019. These included the following sources of income for those years:

22.18.1. Schedule D, Case III income in the form of foreign rental profits from letting premises, United Kingdom ("UK") dividends and UK deposit interest;

22.18.2. Schedule D, Case IV, Irish deposit interest income;

22.18.3. Schedule D, Case V, rental income form letting premises;

22.18.4. Schedule E, employment income (from [redacted] and, in 2017, from [redacted].), and

22.18.5. Schedule F, Irish dividend income.

22.19. The Appellant's Income Tax Returns showed a number of Capital Gains Tax ("CGT") transactions for the tax years 2010, 2011, 2012, 2014, 2016 and 2018 and all of the provided returns showed significant investments in property (tax) incentive schemes and offshore products.

22.20. The Appellant's Income Tax Return for 2016 included a reference to a "*Financing Trade*" and detailed a loss of €118,660 incurred in that trade for the year. This loss was set off against other income under section 381 and/or section 392 TCA 1997. The "Extracts from Accounts" section was all completed as "0", save for the inputted loss figure. The accounting period was detailed as "31/12/2006 to 31/12/2006".

22.21. The 2017 Income Tax Return described the trade as "*other*" and detailed a loss incurred of €3,665,200 for that year. The accounts extracts detailed the accounting period as being from 31/12/2017 to 31/12/2017 and the extracts from accounts section was completed as for the prior year. A portion of the loss

incurred, €699,537 was set off against other income under sections 381 and/or section 392 TCA 1997.

22.22. The 2018 Income Tax Return detailed the trade as "*Financing Trade*" and detailed a loss incurred of €17,348 for that year which was offset against other income in accordance with section 381 and/or section 392 TCA 1997. The accounting period was shown as 1/1/2018 to 31/12/2008 and the accounts extracts were completed as in 2016 and 2017. The unused loss of €2,965,663 (€3,665,200 - €699,537) incurred in 2017 was not entered on the 2018 Income Tax Return.

22.23. The 2019 Income Tax Return also described the trade as "*Financing Trade*" and showed a loss of €4,281 incurred for that year. The loss was offset against other income in accordance with section 381 and/or section 392 TCA 1997 and the accounting period (1/1/2019 – 31/12/2019) extracts were completed as for the years 2016, 2017 and 2018.

22.24. A letter from [redacted] dated 4th November 2010. This letter was addressed to each of the Guarantors to the [redacted] loan at their home addresses in [redacted] and referred to the Appellant and each of his relevant family members. The purpose of this letter was to "*demand, pursuant to section 20 of the Loan Agreement, for immediate payment by you to the [Appellants] of US$16,049,333*". This letter further requested that the requisite payment be made on or before 23rd November 2010 to a nominated bank account.

Witness Evidence

[redacted]

23. [redacted] explained that he was a partner in [redacted] and that he was a Chartered Accountant since 1992. The witness explained that the Appellant and his family were clients of his Practice for 20 years and during that period he acted as advisor to the family business and family members.

24. The witness explained that he was involved in advising the Appellants on the "[redacted] deal". He explained [redacted] was a financing house that was involved in property transactions set up by individuals who had left [redacted]. He explained that the Appellants had previously lent money in early 2008 on a short-term basis to [redacted] for a transaction which took place in [redacted] and the entity that housed that project was called "[redacted]". He explained that the funds advanced by the Appellants under the

[redacted] deal was in the region of €1 million and the Appellants were fully paid back with a large return for what was a short-term transaction.

25. He explained that [redacted] had invested in a company, [redacted], which let out on a short-term basis apartments and they were the proposed tenant for the property in [redacted]. In addition, he explained that [redacted] were also involved in the development of the [redacted] and it had set up a limited partnership to fund that investment.

26. In order for [redacted] to fund its operations, it sought a loan from the Appellants which was initially provided by way of a letter of credit. Subsequently, he explained, the letter of credit was called and it turned into a "cash" loan. He stated that the nature of the transaction was intended to be a short term loan and this was reinforced by the penal rate of interest chargeable in the event that the loan was not repaid in the short term. He further stated that the Appellants funded the loan to [redacted] by way of a loan from [redacted] which was secured on properties owned by the Appellants.

27. The witness stated that the loan provided to [redacted] was not "asset based" but was secured by the named Guarantors in the Loan Agreement and pledges over profits, incomes and gains attributable to entities controlled by those Guarantors.

28. The witness stated that when the loan wasn't repaid by the due date, there was subsequent negotiations and discussions between the Appellants and the Promotors/Guarantors throughout 2009 but ultimately these discussions "*never bore fruit*". He explained that he was personally "*trying to pursue every avenue of security and repayment capacity*[6]" available.

29. The witness explained following that review, it was identified that the US Attorneys, who called the letter of credit were negligent in their actions as they had not correctly drawn down the funds. As such, the witness stated that it took some time to engage suitable lawyers for that negligence action but ultimately the legal action was unsuccessful.

30. In conjunction with the pursuit of the US Attorneys, the witness stated that attempts were made to secure funds from the [redacted] Loan Guarantors. He explained that matters needed to be looked at in context as in late 2008 and 2009, global property prices were dropping sharply in value. As the [redacted] Loan Guarantors had also suffered financially owing to the property market decline, he explained that attempts to secure funds from those individuals also proved fruitless. In addition to those attempts, the witness stated

[6] Transcript, page 24 at lines 4-6.

that unsuccessful claims were made against "individuals in [redacted]" and the development company engaged by [redacted] to develop the [redacted] property.

31. In tandem with those proceedings, the witness explained that [redacted] who had provided the loan for the [redacted] deal needed to be "dealt with". He explained following a period of forbearance that in or around 2014 or 2015, more "intense" negotiations took place with the bank. He explained that the initial discussions with the bank sought a reduction in the debt owed and as those negotiations were unsuccessful, a number of properties owned by the family had to be sold to discharge the sums due to the bank. The witness stated that the selling of these properties took a period of time and it was not until 2020 that the bank were fully repaid.

32. The witness further explained that the interest charged on the [redacted] loan had to be paid to the bank at all times and unlike other interest paid by the Appellants, the "[redacted] interest" was not charged against the Appellants' rental income. Finally, the witness stated that none of the funds advanced to [redacted] were ever repaid by it or by any other entity or individual.

33. Under cross examination, the witness stated that:

    33.1. The "[redacted]" deal was not financed by the Appellants individually but rather through the limited company, [redacted]

    33.2. The "[redacted]" was the first such transaction undertaken by the Appellants.

    33.3. The information provided to the Commission on the "[redacted]" deal was incomplete and as such unreliable.

    33.4. [redacted] owned [redacted] and the owners of that entity were the Guarantors to the [redacted] loan.

    33.5. No interest was ever paid to the Appellants, or received by them, on the [redacted] Loan.

    33.6. The provided [redacted] Loan documents had no continuity and had conflicting numbering and paragraphs within them. However, the witness explained that he was unable to comment on those documents as he did not prepare the hearing booklet.

    33.7. The [redacted] Loan contained a clause at 6.2.1 which stated "*On completion of the sale of the units by the borrower within three years of the date of the*

agreement, the borrower shall….pay an amount equal to 5% of net profits". When questioned about his evidence in chief in which he stated that the [redacted] Loan was designed as a short term transaction, he agreed that three years was not "short term".

33.8. There was a lack of available documentation to confirm the pursuit of the [redacted] Loan and the alleged negotiations with [redacted]

33.9. The transaction was constructed as a "Co-ownership" rather than a partnership between the family members.

33.10. He did not prepare the Income Tax Returns and as such was unsure why the interest paid on the [redacted] Loan was not claimed against the Appellants' rental income. For the same reasons, he stated that he was unable to assist on why the amounts of interest paid prior to 2006 was not claimed as a loss on the Appellants' Income Tax Returns.

The Appellant

34. The Appellant having being sworn in by the Commissioner stated that he was a quantity surveyor by profession but that he spends most of his business life, since the [redacted] developing and investing in property.

35. He explained that his main business entity was the corporate entity [redacted]. and the company was involved in the construction business, the buying and selling of land and it develops houses, apartments and industrial units.

36. He stated that the family Co-ownership was basically an [redacted] and [redacted] based property based entity. He further stated that it usually purchased property, enhanced it by conducting construction works and then retained the units for rental purposes.

37. The witness stated that he first got involved with [redacted] in 2008 when the company lent money on the [redacted] deal and that the company had made a quick return on that transaction. He advised that the success of this transaction encouraged him and the other family members to engage in the [redacted] deal, which they did in a personal capacity.

38. The witness stated that his understanding of the [redacted] transaction was that it was intended to be a "quick deal" which he explained as "certainly less than 12 months[7]" and the anticipated profit on the transaction was approximately €900,000.

[7] Transcript, page 59 at lines 24-25.

39. In terms of the efforts to recover the [redacted] Loan during 2010 to 2017, the witness referred to the provided letter (see sub-paragraph 22.24 above) which confirmed that he and the family instructed US lawyers to instigate proceedings for the recovery of US$16 million against the Guarantors to the [redacted] Loan. He stated in addition to seeking recovery on the [redacted] Loan, he had other legal and personal matters which he needed to attend to also, which included his mother passing away and the recovery of funds wrongly taken by an Irish financial institution, which he retrieved, in addition to keeping [redacted] "at bay".

40. The witness stated as there was so much going on, it was not until 2017 that a meeting of the family took place to put closure on the [redacted] transaction. The Appellant explained at that meeting the family agreed that the [redacted] Loan was no longer worth pursuing and as such should be treated as a bad debt. The witness further stated at the meeting that the Appellants agreed to adapt a policy of selling properties to discharge the [redacted] Loan and that process concluded in 2020 when the bank was repaid the entirety of the sum owed to it.

41. Under cross examination, the witness stated:

    41.1. While there was limited documentation available on the alleged attempts to recover the [redacted] Loan proceeds, it was clear from the available documentation that US$11 million was advanced to [redacted] and neither it nor any other individual or entity repaid that sum, in whole or in part.

    41.2. He probably came to the realisation that the [redacted] Loan was irrecoverable in 2013 or 2014 but he "would have been in trouble with the bank[8]" had he written it off at that stage.

    41.3. He was unable to provide an explanation as to why the alleged trading loss on the [redacted] Loan or the interest paid on the [redacted] Loan was not claimed on his 2009-2015 personal tax returns but stated "*actually by the way, it's a non-claim that I actually had. So in other words, I did myself you know*[9]".

    41.4. To his knowledge, the alleged trade did not produce any financial statements nor prepare any tax returns, aside from the entries contained in his tax returns for 2016 to 2019.

[8] Transcript, page 67 at lines 14-15.
[9] *Ibid*. Page 70 at lines 10-12.

41.5. Turning to the amount of time spent in looking after the affairs of the [redacted] Loan, the witness stated that he was required to travel to the [redacted] several times to conduct associated business whilst there. The witness stated that he did not maintain proof of those travels or associated backup such as diaries.

41.6. When asked about the amount of time taken to manage the limited company, his own property portfolio and the numerous capital transactions entered into over the years and how he was left with significant working time to deal with the [redacted] Loan, the Appellant stated that he could not provide an exact breakdown between each activity but he often worked long hours sometimes finishing at 10pm in the evening.

41.7. When asked whether the [redacted] loan was capital or trading in nature, the Appellant stated "*A capital transaction, I don't know, that is being honest with you*.[10]"

41.8. When further asked why his submitted Income Tax returns contained numerous share and property related transactions which were returned as capital transactions rather than trading transactions (bar his salary, rental income and the [redacted] alleged trade for 2016 to 2019), the Appellant stated that the [redacted] deal was "different" to the other property deals he had engaged in. When pressed on how it was different, he stated the nature of the [redacted] deal was that it was to be short term in nature.

41.9. When asked why the [redacted] Loan deal contained a three year payback incentive clause, he stated that it was intended to be short-term in nature and that was how he saw it.

41.10. The anticipated return of €900,000 was an estimate he prepared at the time he entered into the transaction. The witness stated that he had no workings to provide to the Commission on how he derived at that estimated return.

41.11. He agreed that the [redacted] Loan documentation "doesn't make sense[11]" owing to the gaps in the documentation and the inconsistent numbering and lettering within that document.

[10] Transcript page 78 at lines 2-3
[11] *Ibid.* Page 87 at line 15.

Submissions

Appellant

42. The Appellant stated that Letters of Credit have been in operation to facilitate foreign trade since the middle ages as documentary evidence exists that the Medici Bank in Bruges used them for that purpose from 1385-1401. As such, the Appellant submitted that the use of a letter of credit in financing the [redacted] Loan was a strong indicator that the Appellant entered into a trading transaction rather than an investment transaction.

43. The Appellant noted that the statutory definition of a trade was set out in section 3 (1) TCA 1997, which describes a "trade" as including "*every trade, manufacture, adventure or concern in the nature of a trade"*. As that definition is unsatisfactory, the Appellant submitted that regard should be had to the "badges of trade[12]" as those badges constituted the most widely accepted indicators of when a trade might exist.

44. Turning to the first of those badges, "the subject matter realised" which ordinarily means whether the transaction under review would normally be classified as a trading or investment "type" transaction. The Appellant opened *HH v MJ Forbes (Inspector of Taxes)* 2 ITR 614 ("*Forbes*"), in which a bookmaker purchased shares in sweepstakes tickets in respect of horse races in England, which did not constitute a part of his "normal trade" as a bookmaker. It was held in that case, as the purchase of the sweepstakes tickets was so close to his normal trade as bookmaker, which could not be distinguished from his trade and hence was treated as part of his normal trading activities. The Appellant submitted that as the [redacted] Loan was so close to the activities ordinarily conducted by the Appellant, then this was persuasive that the transaction was part of the Appellant's ordinary trading activities and should be allowed as such.

45. Turning to the second such badge, the length of period of ownership, the Appellant stated that trading activities are ordinarily characterised by short periods of ownership whereas investment related activities are ordinarily associated with longer periods of ownership. As the Appellant anticipated a period of 12 months or less for repayment of the [redacted] Loan with a profit of some €900,000, the Appellant submitted that this was a further indicator that he intended for the transaction to be short-term and as such, should form part of his trading activities.

[12] In 1955 a report by the Royal Commission on the Taxation of Profits and Income reviewed case law and identified six badges of trade. Although these six badges have been expanded upon owing to subsequent jurisprudence over the years, they are frequently referred to when seeking to establish whether a particular transaction is a "trading transaction" or an "investment transaction".

46. The Appellant stated that the third such badge was the frequency and number of transactions. The Appellant submitted as he and his family had been involved in the trade of property dealing, property development and construction since the [redacted] then his "new trade" of property financing was closely related to those activities and as such should be treated as a trade. Furthermore, the Appellant submitted as his associated company had engaged in a previous transaction with [redacted] (the "[redacted]" deal) and as the profit on that transaction had been subjected to income tax rather than capital gains tax, then this was a firm indicator that the Appellant was carrying on a trading activity.

47. In terms of the fourth such badge, "supplementary work on or in connection with the property realised", the Appellant opened *Martin v. Lowry* (1926) 11 TC 297 in which an elaborate selling organisation which was set up by a taxpayer constituted enough supplementary work to make the transaction trading in nature. In that case an agricultural machinery merchant purchased surplus aeroplane linen from the UK government, and having failed to sell it in one lot, set about renting offices and advertising the sale of linen to the public. The Appellant submitted as this test examines whether the person selling the goods has carried out any work to make the goods more saleable, that this test is more suitably applicable to manufacturing concerns and individuals carrying on businesses such as furniture restoration or market gardening. Given the nature of the transaction, the Appellant submitted that this test was not relevant to the Commissioner in determining whether the transaction was trading in nature as it was a "financing transaction" which did not require such works in execution.

48. As the fifth such badge requires a review of the circumstances giving rise to the realisation of the property, the Appellant submitted that this required an examination of whether there are any particular circumstances surrounding the sale of the item which might indicate trading or investment status. The Appellant opened the United Kingdom ("UK") case of *Rutledge v. The Commissioners of Inland Revenue* (1929) 14 TC 490, where it was held that the intention to sell toilet paper in exactly the same way as a regular trader was sufficient grounds for the sale to be in the course of a trade. This finding was reached despite the fact that the transaction was outside the normal scope of the business carried on by the taxpayer in question. As such, the Appellant submitted that it was open to the Commission to find that the transaction was a trading activity in the event that the Commissioner held that the activity was outside the Appellant's "normal" scope of business activity.

49. Lastly, turning to the "motive" of the transaction, the Appellant submitted that this requires an examination of whether when the person who acquired the item under review did so, was there an intention to sell it on or to hold onto it as an investment? The Appellant opened the case of *McCall (deceased) v. Commissioners of Inland Revenue* 1 ITR 28, in which a publican for many years purchased whiskey in bond from a distillery, and later sold it back to the distillery except for some which he kept for resale in his own business. It was held that the purchase and sale of whiskey in this way did constitute a trade as the motive was to resell at a profit, and the agreement with the distillery did not preclude him from selling to other parties if he could get a better price from them. The Appellant submitted akin to those facts as his motive at "all times" was to make a quick profit and as no investment of "enduring benefit" had come into existence, then this was conclusive proof that the Appellant was carrying on a trading activity.

50. The Appellant submitted while the badges of trade are persuasive, they must be applied to the circumstances of each individual case and possibly even to each individual transaction. Furthermore, the Appellant submitted that the absence of one or more of the indicators does not necessarily mean that a trade is absent, in the same way as the presence of many of them would not necessarily lead to the conclusion that a trade exists.

51. Turning to recent UK jurisprudence, the Appellant opened *Eugene Blaney* [2014] UKFTT 1001 (TC) and *Ewan Leslie James McMorris* [2014] UKFTT 1116 (TC) which were delivered within two months of each other. The Appellant stated that while both cases examined relief from CGT and income tax respectively, they both considered the existence of a trade and hence were relevant to the Appellant's appeal. In recognising that modern business practice has evolved considerably since the Royal Commission published its report, both decisions relied on the indicia as set out in the judgment of Sir Nicolas Browne-Wilkinson V-C in *Marson v Morton* [1986] STC 463, a case that considered whether a one-off transaction in land amounted to a trade. In approaching the issue, the Vice-Chancellor set out the following tests:

    (i) *"That the transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.*

    (ii) *Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver*

cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(iii) *The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman of the commissioners quoted from Inland Revenue Commissioners v. Reinhold, 1953 S.C. 49. For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.*

(iv) *In some cases, attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?*

(v) *What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term, a fair pointer towards trade.*

(vi) *Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.*

(vii) *Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.*

(viii) *What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.*

(ix) *Did the item purchased either provide enjoyment for the purchaser, for example a picture, or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale that is a strong pointer in favour of it being a trade rather than an investment.*"

52. The Appellant submitted that points (iv) and (v) above have direct application to the Appellant's position. Firstly, the Appellant submitted that as a Letter of Credit was unsuitable to finance an investment, then this was indicative that the transaction was a trading transaction in nature. Secondly, the Appellant submitted that as the Appellant was in the transaction for a short-term profit or as quoted by Mr John Tiley in Revenue Law 2000 (3rd Edition), "*a fast buck is the essence of the deal*" then this was a firm indication that the nature of the transaction was for that purpose and hence was a trading activity.

53. In noting that much documentation was no longer available by the Appellant owing to the passage of time, the Appellant opened the UK case of *Terrace Hill (Berkeley) Ltd v HMRC* [2015] UKFTT 75 (TC) (12 February 2015) ("*Terence Hill"*) which examined matters of proof. In that case, the UK's First Tier Tribunal[13] ("FTT") was required to determine whether the appellant's activity in the development of an office property was in the nature of a trading activity or an investment. Also considered was whether the appellant had been negligent in reporting the sale as a disposal of an investment as opposed to trading income and therefore whether it was liable to a penalty of £1m. The appellant was a special-purpose vehicle that was formed to hold the Terrace Hill group's 50% interest in the development of an office property in Mayfair known as 16 Berkeley Street. The Terrace Hill group was a property development group, substantially owned by the family trusts of the chairman, Mr Robert Adair. The group also held property investments. The FTT set out the competing contentions of the parties at para. 8:

"*The outcome of this case revolves entirely around whether we accept the oral evidence advanced by the directors of the Terrace Hill group, or whether we accept the Respondents' case, founded largely on the terms of the Joint Venture Agreement entered into by the two groups, and other references in letters, e-mails and minutes of*

[13] The FTT is responsible for handling appeals against some decisions made by His Majesty's Customs and Excise ("HMRC") relating to taxes including income tax, corporation tax and capital gains tax. Broadly speaking, it is the UK equivalent of the Commission.

meetings said to support the Respondents' case that the Appellant always intended to sell its interest in the property once its maximum value had been achieved, in other words once the building had been both completed and fully let."

54. In determining that the property was held as an investment asset as opposed to trading stock, the FTT made the following observations:

"*We then accept the consistent way in which the property was always treated for accounts purposes as a fixed asset, the way in which capital allowances were claimed for the plant and machinery content of the old and new buildings, and the fact that whenever minutes of Executive Committee meetings referred to the views of Mr. Adair, those minutes always reflected his desire to retain this property as an investment."*

55. The Appellant submitted that *Terence Hill* considered "substance over form", in which a greater reliance was placed on the evidence of the appellant's witnesses than on the assortment of documentation relied on by HMRC. Furthermore, within that case, counsel for the appellant suggested that if the issue was resolved in favour of the respondents, it would involve accepting that most of the appellant's witnesses had been lying in relation to all of the critical evidence. However, in deciding the matter in favour of the appellant, the FTT stated at para. 21 that the impressive nature of the appellant's evidence:

"*coupled with the credible strategy that Mr. Adair claimed to be pursuing, and the entirely understandable manner in which changed circumstances led to a change in plan, lead us to confirm that 16 Berkeley Street was held as an investment, and rightly accounted for throughout in that manner*".

56. The Appellant submitted in line with *Terence Hill*, that the Commission should carefully consider the importance of the Appellant's direct evidence as the Respondent's case was being placed on documentation, or the lack thereof, rather than the factual circumstances giving rise to the transaction. In applying this methodology, the Appellant submitted that the Commission would find that he was engaged in a trading, rather than an investment "type" transaction.

57. The Appellant further submitted in line with Generally Accepted Accounting Principles[14] ("GAAP") that a specific bad debt provision or the write off of a specific tax debt is deductible and that conversely the recovery of these items is treated as taxable income. The Appellant submitted that as the [redacted] Loan was fully repaid in 2020 and as a total loss

[14] GAAP is the industry standard rules applied to the preparation of statutory financial statements under the Companies Acts framework.

was suffered on that loan, meaning that no recovery was made against the sum lent to [redacted], then it was obvious that the Appellant had suffered a bad debt and as such, this was further proposition that the Appellant's appeal should succeed.

58. The Appellant acknowledged that section 11 of the Finance Act 2014[15] introduced a restriction on the availability of losses which restricts the use of available losses where those losses arise from a "passive trade" (meaning that the claimant does not spend more than 10 hours per week personally engaged in the trade or profession). The Appellant further acknowledged that this restriction operates by applying a cap on loss relief of €31,750 per year of assessment in which the available loss is claimed.

59. The Appellant acknowledged with the exception of himself and his deceased brother that this cap applied to the other family members. The Appellant submitted it was apparent from his evidence that he spent more than 10 hours per week attending to the [redacted] Loan "deal" and as such, the Commission should find that the applicable restriction did not apply to him.

60. Further or in the alternative, the Appellant submitted that the repayment of the [redacted] Loan, in full, was done so to "preserve the future of the Appellant's business" as absent same it was likely that the bank would have repossessed all of the Appellant's assets and hence there would be no such trade. As the UK case of Cooke *v Quick Shoe Repair Service* 1949 30 TC4 460 held that payments to protect goodwill are considered revenue rather than capital in nature, the Appellant submitted that both the repayment of the [redacted] capital loan balance and the associated interest on that loan should be treated as payments to protect the Appellant's business and as such be allowed as a trading expense.

61. In conclusion, the Appellant submitted that he had correctly identified and treated the bad debt arising on the [redacted] Loan as occurring in 2017, as that was the date when the commercial decision was reached on an informed basis that those funds were irrecoverable. The Appellant submitted that the effect of this decision was that a bad debt was incurred in 2017 which in turn generated a Schedule D, Case I trading loss and as such the Appellant was entitled to loss relief on this amount (which included the right to carry back a portion of that loss relief to 2016 and the balance forward to the years 2018 onwards for offset against profits of the same trade).

62. In addition, the Appellant submitted that the interest payable on the [redacted] Loan for the years of assessment 2018 and 2019, generated annual Schedule D Case I losses which

[15] This was inserted into the TCA 1997 under section 381C TCA 1997.

were available for offset against the Appellant's other income for those years. As the Appellant was "perfectly entitled under tax law as a taxpayer to claim tax relief on his trading losses", the Appellant submitted that his appeal ought to be allowed and the Notices of Amended Assessment which issued for the tax years 2016, 2017, 2018 and 2019 should be reduced to nil.

Respondent

63. The Respondent stated as it had not been provided with any partnership or Co-ownership agreement by the Appellant, it was unclear as to which type of entity the Appellant was operating through when conducting business activities with his family members. The Respondent noted that the Appellant had confused this issue by interchangeably using the expression "partnership" and "Co-ownership" within his submissions. However for the purpose of its submissions the Respondent stated that it preferred the description "Co-ownership" and where relevant would use this description in its submissions.

64. The Respondent submitted it was unclear from the provided documentation what type of transaction ("The Transaction") the Appellant had entered into. The Respondent explained that while the recitals in the [redacted] Loan Agreement were entered into by the Co-ownership "*in anticipation of becoming a limited partner*", clause 10 of that agreement contained an acknowledgement that the Lenders (the Co-ownership) "*did not become a limited partner of the Borrower and [did] not intend to do so"*.

65. That having said, the Respondent submitted it was trite law that the burden of proof rested with the Appellant in establishing that the issued Notices of Amended Assessment under appeal were incorrect. In support of this position, the Respondent opened *Menolly Homes v The Appeal Commissioners* [2010] IEHC 49 (*"Menolly Homes"*) in which the High Court held (at paragraph 22):

> "*… The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable. …*"

66. The High Court went on to quote from the earlier judgment of Gilligan J in *T.J. v Criminal Assets Bureau* [2008] IEHC 168 in *Menolly Homes* as follows:

> "*The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a*

computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court. Any reasonable approach dictates that if the applicant, on appeal to the Appeal Commissioners or to the Circuit Court, can demonstrate some form of prejudice, then an adjournment in accordance with fair procedures would have to be granted, and if not granted, the applicant would have an entitlement to bring judicial review proceedings. There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gains, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant." [Emphasis added.]"

67. In addition, to the extent that the Appellant's appeal depends on any allegations as to the meaning and effect of foreign law (such as the law of the [redacted]), the Respondent submitted that the Appellant must adduce appropriate evidence of foreign law to prove any such allegation as a fact. In support of this submission, the Respondent opened the case of *O'Callaghan v. Sullivan* [1925] 1 IR 90, at paragraph 112 in which the Supreme Court (Kennedy C.J.) held that where an issue of foreign law arises, it:

> "*…must be proved as a fact in the particular case, and…it must be so proved by the testimony and opinion of competent expert witnesses shown to possess a skill and knowledge, scientific or empirical, required for stating, expanding, and interpreting that law*".

68. Turning to the Appellant's submissions, the Respondent stated that in order to give rise to a claim for loss relief under section 381 or 381B TCA 1997, a loss must have been

sustained "*in any trade, profession or employment carried on by that person either solely or in partnership*".

69. As the Appellant submitted that The Transaction was a trading activity, the Respondent opened the case of *Perrigo Pharma International DAC v McNamara* IEHC 552 ("*Perrigo*") which at paragraphs 51 and 53 made the following observations on the meaning of a "trade" under the TCA 1997:

> "*In the absence of a comprehensive statutory definition of 'trade', the question whether a particular transaction forms part of a trade for tax purposes requires individual consideration of the underlying facts and circumstances… Essentially, a case by case analysis must be carried out… The indicia provided by the "badges of trade" identified by the 1955 Report of the UK Royal Commission on the Taxation of Profits and Income are now regularly used … in the determination, in an individual case, as to whether a particular transaction falls within the definition of trade…*"

70. Having cited the badges of trade, the court held that "*these factors are no more than a guide*" and "*[t]he weight to be given to the factors will vary according to the individual facts and circumstances of each case*". It was held that "*[i]n each individual case, it is always necessary to consider the full circumstances*".

71. The Respondent continued that those observations in *Perrigo* were echoed by Egan J in the subsequent High Court case of *Thornton v Revenue Commissioners* [2022] IEHC 396 at paragraphs 20 to 21 and as such, it was incumbent on the Commissioner to "*appreciate that the whole picture must be taken into account and that the weight to be given to the various factors may vary according to circumstances.*"

72. The Respondent opened the UK case of *Noddy Subsidiary Rights Co. Ltd. v. Inland Revenue Commissioners* [1967] W.L.R. 1 which it stated was a good example of a court considering the whole picture. The Respondent noted that within that case, the English High Court held that the grant of licences to use a piece of property, including intellectual property, could amount to a trading activity depending on the particular circumstances. In addition, the court had regard to the terms of the company's memorandum of association as well as the facts that, a manager spent half his working time managing the company's affairs; the manager actively sought out customers; and the manager exercised skill and labour of a continuous and variegated kind in dealing with the licences when granted. These activities, the Court held, went beyond "investment" in the ordinary sense.

73. The Respondent submitted in addition to an ordinary trading activity, the statutory definition makes clear that a "trade" can include an "*adventure … in the nature of trade*".

In *Revenue Commissioners v. O'Farrell* [2018] IEHC 171, the High Court cited a test set out in *Commissioners of Inland Revenue v. Livingston* [1927] S.C. 251 ("*Livingston*"). In *Livingston,* the Scottish Court of Session (Lord President Clyde) set out the following approach:

"*I think the profits of an isolated venture … may be taxable under Schedule D, provided the venture is 'in the nature of trade'. I say 'may be,' because, in my view, regard must be had to the character and circumstances of the particular venture. If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price, and a subsequent sale, it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls far short of constituting a dealer's trade as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in, or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. …*"

74. The Lord President went on in the same paragraph to state the test as being:

"*… whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as 'in the nature of trade,' merely because it was a single venture which took only three months to complete.*"

75. In applying the badges of trade test to the Appellant's circumstances, the Respondent made the following submissions:

1. Subject Matter

The Transaction involved funds being provided to [redacted] over a short-period. While the [redacted] Loan Agreement provided for annual interest, this was set at a penal level of 25% and The Transaction was structured such that, if [redacted] met its obligations, no interest would arise. Instead, it appears that the Co-ownership were to be remunerated by the "Additional Payments" set out in Clause 6 of the Loan Agreement. These Additional Payments were to be calculated as a percentage of the profits made, either on the sale of residential units in the underlying development, or on the sale by the Guarantors of their interest in [redacted]. The Appellant has

estimated that the Co-ownership would make a profit of "*circa €1 million in the short term*" (a return of between 9 and 10% on the funds provided to [redacted]);

In short, The Transaction was not a dealing in a commodity or manufactured articles such as would ordinarily feature in trade. Instead, it involved the use of funds by the Co-ownership to create rights to possible income streams;

Turning to the Appellant's reliance on *Forbes* under this heading, the Respondent submitted that the facts and circumstances of that case were so dissimilar to those of the Appellants, then it was unclear how this assisted the Appellant in his appeal. .

2. *Length of Ownership*

The Respondent accepted that the provision of the [redacted] Loan was intended to be a short-term transaction which would conclude shortly after advancement of the funds. However, the Respondent submitted that while the capital value of the loan was intended to be repaid on a short-term basis that no interest was chargeable on the loan and in place the potential return was provided for under Clause 6.1 of the [redacted] Loan Agreement. As the potential return was payable over a three-year term, and was calculated based on a percentage of profits, the Respondent submitted that the potential return was not on a short-term basis. As such, the Respondent submitted that this duration of time was indicative of an investment transaction having occurred as trading transactions ordinarily relate to short timeframes.

3. *Frequency of Transactions*

The Respondent noted that the Appellant in his evidence had confirmed that The Transaction was a one-off and the Co-ownership did not provide loans. As such, the Respondent submitted that The Transaction was an isolated financing arrangement with no precedent or successor.

The Respondent noted that cases such as *Marson v. Morton* 1986 STC 463 held that a once-off transaction can be indicative of trading, but for that to occur it was necessary for the transaction to be closely related to the trade which the Appellant carried out. As the Co-ownership did not prepare any financial statements or tax returns and as the Appellant's submitted tax returns for the years under appeal and prior did not indicate that he had Schedule D, Case I trading income from any trade whatever, let alone from a trade which could be said to be related to The Transaction, the Respondent submitted this was not possible. The Respondent further drew the Commissioner's attention to the "[redacted]" and noted that transaction,

which the Appellant seeks to rely on, was conducted by an entirely different taxpayer i.e. [redacted] Ltd.

The Respondent stated that while "*an adventure … in the nature of trade*" can amount to a trade on the facts, in accordance with *Livingston*, this requires that the adventure be characteristic of ordinary trading in the line of business in which the venture was made. The Respondent submitted that The Transaction was not characteristic of an ordinary financing transaction by a person in the business of moneylending. Rather, in both its terms and conduct, the Respondent submitted that The Transaction was not characteristic of an ordinary financing trade. The Respondent explained that it formed this view as the intended profit element hoped to be obtained by the Co-ownership was not in the nature of ordinary interest on the sum being borrowed, it was in the form of additional payments to be calculated as a percentage of the profits made, either on the sale of residential units in the underlying development, or on the sale by the Guarantors of their interest in [redacted] The Respondent noted that if the loan was not repaid on time, a penal interest rate of 25% applied. However, if [redacted] complied with its obligation to repay, no interest would arise at all.

The Respondent further submitted that the circumstances of The Transaction can be contrasted with those which were considered by the Exchequer Court of Canada (Cattanach J.) in *West Coast Parts Co. Ltd. v. Minister of National Revenue.* [1965] 1 Ex. C.R. 423. There, the directors of the appellant arranged for the company to enter into a loan agreement with an unrelated company. In determining whether the loan transaction was an adventure in the nature of trade, the court had regard to:

(i) Evidence of a careful decision-making process involved in deciding whether to grant the loan;

(ii) The profits to be derived from the loan were in the form of interest (which was held to be fixed at a normal rate for a loan of that nature) plus a fixed amount reflecting the degree of special risk involved;

(iii) The fact that the directors of the appellant were not unfamiliar with the finance and loan business. They were also directors of a group company which was engaged in the financing of purchases of motor vehicles sold by other related companies;

(iv) Another group company had made a loan to oblige a customer in the past;

(v) The appellant had done "precisely what an ordinary money lender would do".

As none of those facts pertained to the Appellant's appeal, the Respondent submitted that the Commissioner should find that The Transaction entered into by the Appellant was not a trading transaction.

4. Supplementary Work

The Respondent submitted, far from doing any supplementary work on the [redacted] Loan, the Appellant did little from the date of the grant of the loan to the end of the periods under appeal. The Respondent noted in this regard that the Appellant had failed to prepare any yearly financial accounts relating to The Transaction and had only provided the Commission with documentary evidence of one legal letter issued by the US attorneys seeking recovery of the sums from the [redacted] Loan Guarantors. As such, the Respondent submitted that the Appellant had failed to do any supplementary work for consideration that The Transaction was a trading activity.

5. *Circumstances Responsible for the Realisation*

The Respondent submitted that The Transaction was entirely different in character from the Co-ownership's established commercial dealings. The Respondent submitted that these circumstances point away from a conclusion that the circumstances were of a trading nature.

6. Motive

The Respondent submitted that it is clear from the [redacted] Loan Agreement that The Transaction was originally entered to with a view to the Co-ownership and/or the members thereof becoming a limited partner or partners in [redacted]. The Respondent submitted that this was later abandoned, and thereafter The Transaction was aimed at generating a significant profit rather than being part of an organised financing or moneylending trade which would provide income on an ongoing basis. On this basis, it was submitted that this badge suggests a conclusion of non-trading.

76. In addition to the factors arising from the badges of trade, and in order to take account of the "whole picture" as required by the relevant principles, the Respondent submitted that the conclusion of non-trading is supported by the facts that:

76.1. Despite [redacted], the sole customer of the alleged financing trade, becoming "hopelessly insolvent" in circa 2009, the Appellant alleges that the trade continued up to and including 2019;

76.2. There were no books of account kept in respect of The Transaction (despite same being required to meet the Co-ownership's obligations to keep records under section 886(2) TCA 1997);

76.3. Despite the allegation that the financing trade was in existence since at least 2009, none of the income tax returns filed by the Appellant or other members of the Co-ownership prior to 2016 refer to the said financing trade.

77. In conclusion, the Respondent submitted that although described as having taken place as part of a "financing trade" or a "property financing trade", The Transaction was neither a trade nor an adventure in the nature of trade. In those circumstances, the Respondent submitted no claim for trading loss relief arises under section 381 TCA 1997 and as such, the Appellant's appeal must fail.

78. The Respondent submitted, in the event of the Commissioner determining that the Appellant did conduct a trade, any claim to trading loss relief by the Appellant under section 381 TCA 1997 should have been made subject to the restrictions imposed by section 381B for passive trades.

79. The Respondent submitted that section 381B (2) TCA 1997 provides that where a person carries on a trade in a non-active capacity, the amount of any relevant loss sustained by that person in a year of assessment shall be capped at a maximum of €31,750. The Respondent further submitted that, as provided for under section 381 B (1) TCA 1997, a person carries on a trade in a "*non-active capacity*" if they do not work "*the greater part*" of their time on the day to day management and conduct of the trade during the period under consideration. Being found to work the "*greater part"* of their time, the Respondent submitted requires that the person works "*an average of at least 10 hours a week personally engaged in the activities of the trade*". The Respondent noted that section 381B TCA 1997 requires the activities of the trade must be carried out on a commercial basis "*and in such a way that profits of the trade … could reasonably be expected to be made in that period or within a reasonable time afterwards*"[emphasis added].

80. The Respondent submitted it is the Appellant who bears the burden of demonstrating that, if The Transaction was a trade or an adventure in the nature of trade, he carried on the trade in an active capacity for the periods under consideration. The Respondent submitted that the Appellant failed in that regard as he had not provided the Commission with any evidence that he spent a minimum of 10 hours per week on average personally engaged in activities relating to The Transaction (being the relevant alleged trade for these purposes) from 2009 onwards.

81. The Respondent further submitted that even if it were possible for the Appellant to demonstrate that this threshold was met, a further difficulty arises which points to a conclusion that the trade (if any) was carried on in a non-active capacity. The Respondent explained that [redacted] was obliged to repay the amounts owed to the Co-ownership in 2009 but instead became "hopelessly insolvent" and went into liquidation in or around 2009. Thus any activity which the Appellant could have personally engaged in relation to The Transaction could not possibly have been "*carried on a commercial basis and in such a way that profits of the trade or profession could reasonably be expected to be made in that period or within a reasonable time afterwards*" as required under section 381B (1) TCA 1997. Thus, the Respondent submitted that if the Commissioner determined that the Appellant was conducting a trade, then the amount of loss relief ought to be restricted in accordance with the provisions of section 381 (B) TCA 1997.

82. The Respondent submitted that an additional difficulty arose in the event of the Commissioner determining that the Appellant was entitled to restricted relief under section 381 B TCA 1997 for the periods under appeal. The Respondent opened section 381 (6) TCA 1997 which provides:

> "*A claim to repayment under this section shall be made, in a form prescribed by the Revenue Commissioners, not later than 2 years after the end of the year of assessment and shall be determined by the inspector*."

83. The Respondent submitted that the words "*the year of assessment*" within that section must be construed in accordance with section 381(1) TCA 1997 which makes it clear that the relief applies to a loss "sustained" in a year of assessment. As a result, the Appellant submitted the two year time limit for claiming relief in relation to a relevant trading loss runs from the year of assessment in which the loss was "sustained".

84. The Respondent further submitted that as it is the Appellant who bears the burden of demonstrating that the claim for loss relief under section 381 TCA 1997 (if such a claim could be made at all) was made within two years of the year of assessment in which the relevant loss was "sustained" within the meaning of section 381 TCA 1997. In this regard, the Respondent drew the Commissioner's attention to the following:

    84.1. The documentation produced by the Appellant states that [redacted] was obliged to repay the amounts owed on foot of The Transaction on the earlier of 1 May 2009 or the completion of the purchase by [redacted], pursuant to the bulk sale agreement, of the last unit in the development;

84.2. The Appellant's representative stated in provided correspondence that in July 2019 [redacted] "*went into liquidation circa 10 years ago*" and was "*hopelessly insolvent*". That letter stated that "*[a]ll legal advice to date suggest[ed] the loan [was] irrecoverable*" and that "*Statute of limitations would be an issue*";

84.3. The Appellant's representative stated in separate correspondence, in December 2019, that "*[i]t was prudent to recognise the loss in 2017 as in all probability the loan/debt was irrecoverable*". Within that correspondence the Appellant's representative further referred to obstacles to recovery including: "*practically*" (sic); "*expense*", "*statute of limitations*", and whether there was a suitable person from whom to make recovery as "*a number of parties involved in the transaction had gone into insolvency (or fled the state) so to a large extent a litigation victory in* [redacted] *would have been pyric [sic], and a case of throwing good money after bad*";

84.4. The Appellant's representative stated, in correspondence in March 2021, that "*[t]here is no hope of recovery of the monies*" and "*[v]arious legal avenues [had] been explored/exhausted both in an* [redacted] *and* [redacted] *context to no avail*". The Appellant's representative gave the example of efforts made by [redacted], the Managing Partner of [redacted] and that approaches were made to [redacted] "*which met with no success*" and that he had been asked to "*review numerous legal files … in early 2017" and that 2017 review "was the catalyst to recognising the loss*" (emphasis added).

84.5. The Appellant's representative stated in September 2021 that "*[t]here was and is no hope of recovery of the monies*" (emphasis added), that he saw "*huge obstacles*" to recovering the money and that the Appellant had had "*numerous meetings with various lawyers and among others the* [redacted] *Managing Partner* [redacted] *none of which led to any hope of recovery of the monies*".

85. As such, the Respondent submitted that the thrust of the facts alleged by the Appellant is that the amounts owed by [redacted] became irrecoverable upon the entry into insolvency of [redacted] in 2009 and that no viable party existed at that point from which to seek recovery of the US$11,200,000 owed to the Co-ownership. Thus the Appellant submitted that if the alleged loss arose at all, it must have been sustained in 2009. On this basis, the Respondent submitted that any losses arising from [redacted] default fall outside the two year time limit for making a claim.

86. The Respondent concluded its submissions by stating that the fact the Co-ownership "recognised" the loss in 2017 does not determine the point at which the loss was "sustained". If the point at which a loss was "sustained" for the purposes of section 381(1) TCA 1997 was entirely dependent on the taxpayer having "recognised" that the loss had been sustained, the time limit imposed by section 381(6) TCA 1997, the Respondent submitted, would be severely undermined.

87. In conclusion, the Respondent submitted that the Appellant had not satisfied the required burden of proof to establish that it had incurred a loss and in the event that a loss did arise that it was done so in the conduct of a trading activity. Further or in the alternative, the Respondent submitted in the event that the Appellant did incur a trading loss, it was incumbent on the Commissioner to restrict and disallow that loss under the relevant provisions of the TCA 1997. For those reasons, the Respondent submitted that the Appellant's appeal must fail.

Material Facts

88. The Commissioner finds the following material facts:

    88.1. The Appellant and four members of his family entered into an agreement ("the agreement") with an entity called "[redacted] on 25th January 2009.

    88.2. As no partnership or Co-ownership agreement was furnished to the Commission, for the purpose of consistency the Commissioner shall henceforth refer to the Appellant and his four family members as the "Co-ownership".

    88.3. [redacted] was involved in the business of purchasing and renovating a property situate at [redacted] ("the property"). Upon acquisition and development of this property, it was envisaged that it would be sold by [redacted] to an entity called [redacted] P.

    88.4. In order for [redacted] to conduct its activities, the Co-ownership agreed to provide [redacted] with a Letter of Credit for the sum of US$11 million and the additional sum of US$200,000 to cover expenses.

    88.5. In return for the facilities provided by the Co-ownership, [redacted] contracted under the agreement to repay the funds borrowed on 1st May 2009, or if earlier, the date of purchase of the last unit in the property.

88.6. No interest was charged on the facility provided by the Co-ownership to [redacted] in the event that the loan was repaid on or before 1st May 2009. In the event that the facility was not repaid by that date, a penal rate of interest, 25% was payable under the agreement.

88.7. In addition, the agreement provided that the Co-ownership was entitled to be repaid certain expenses and "*on the completion of the sale of a unit or units by* [redacted] *within three years of the date of [the] agreement …an amount equal to five percent of the Net Profit realised on such sale.*"

88.8. The agreement was personally guaranteed by four unconnected named parties and various pledges over interests they held in corporate entities.

88.9. [redacted] purportedly agreed to provide the Co-ownership with the Letter of Credit facility but no documentation to evidence this position was provided to the Commission.

88.10. On 30th January 2009, the sum of US€11 million was provided to a firm of US attorneys to be held in Escrow.

88.11. On 27th April 2009, [redacted] "called on" the Letter of Credit. The effect of this call was that the Letter of Credit was converted into a "cash" loan.

88.12. The Commission were provided with a Letter of Offer from [redacted] (the "Loan Offer") dated 27th April 2009. That document contains different numerical and alphabetical paragraphs and different type fonts within it. Clause 1.1 of the Loan Offer details the guarantors as "[redacted]."

88.13. The Loan offer purports to offer two relevant banking facilities. "Facility B" in the sum of US$11 million was provided "*to refinance a drawn line" following the calling of a Standby Letter of Credit in favour of* [redacted] *as Escrow Agent…to assist the borrowers investment in a residential development at* [redacted]*".* "Facility C" in the sum of US$200,000 was provided to "*fund payment of fees in relation to the borrowers investment in a residential development at* [redacted]

88.14. The Commission were provided with copies of [redacted] Loan Statements. These show the sum of US$11 million being advanced to the Co-

ownership on 30th January 2009 and the further sum of US$200,000 on 1st November 2011.

88.15. The provided [redacted] Loan Statements show repayments of the capital balance on 25th January 2013, 17th January 2017 and 31st January 2018. No evidence was provided to the Commission as to where these sums were derived from.

88.16. In or around 2009, [redacted] apparently became insolvent and entered into liquidation. No evidence was provided to the Commission to confirm this position.

88.17. The Commission were provided with one letter from a [redacted] firm of Attorneys dated 4 h November 2010 seeking recovery of the monies lent by the Co-ownership to the [redacted] Guarantors.

88.18. Within his evidence, the Appellant stated that he became aware in or around 2013 or 2014 that the [redacted] loan was irrecoverable but the Co-ownership did not write-off that loan at that time for fear of damaging its relationship with its bankers.

88.19. Following a family meeting in 2017, the Co-ownership decided that there was no prospect of recovery of the monies lent to [redacted] from either [redacted] or its loan guarantors. As such a decision was made to write off the [redacted] loan in 2017.

88.20. No financial statements were provided to the Commission for the Co-ownership for the periods under appeal.

88.21. The Commission were provided with copies of the Appellant's income tax returns for the years 2009 to 2019. Those tax returns disclosed:

88.21.1. That no trade was operated by the Appellant for the years 2009 to 2015.

88.21.2. The Appellant claimed a trade loss in the years 2016 to 2019 and set the amount of this loss against his other taxable income in those years.

88.21.3. The trade loss was first claimed by the Appellant when he submitted his 2017 Income Tax Return.

88.21.4. The "accounts section" of the tax returns detailed no income or expenses, assets or liabilities which explained how the inputted Case I loss figure was calculated.

88.21.5. The Appellant engaged in significant property related transactions over the majority of those years. Those gains were liable to CGT.

88.21.6. The Appellant engaged in a number of property incentive schemes and held (disclosed) offshore investment accounts.

88.22. No evidence was provided to the Commission to confirm that the Appellant had (previously) personally engaged in a trading activity liable to tax under Schedule D, Case I.

88.23. No documentary evidence was provided to the Commission which evidenced the time the Appellant spent in looking after the "[redacted] deal".

88.24. Based on the Appellant's tax returns, he is a sophisticated investor.

Analysis

89. The appropriate starting point for analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in *Menolly Homes* where Charleton J held at paragraph 22:-

> "*The burden of proof in this appeal process is … on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*."

90. This burden of proof was reiterated in the recent High Court case of *O'Sullivan v Revenue Commissioners* [2021] IEHC 118, ("*O'Sullivan*") where Sanfey J. held at paragraph 90:

> "*…The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer's position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position...*"

91. Thus, despite the Appellant submitting that much of the documentation relevant to his appeal was no longer available owing to the passage of time, this cannot carry any weight in the matters to be determined by the Commissioner. Furthermore, the Commissioner notes that the Appellant claimed loss relief in 2016 which was only a few years after the date the alleged loss was sustained and neglected his statutory duty to prepare accounts

for the Co-ownership despite submitting that the alleged bad debt should be allowed in accordance with Generally Accepted Accounting Principles.

92. While *Terence Hill* offers support to the proposition that a witness's oral evidence may be preferred over appeal documentation, the Commissioner notes that the appellant's evidence, within that case, was supported by corroborative documentation and executed actions such as the prepared financial statements, the board meeting minutes and how the transaction was consistently treated for taxation purposes. As limited documentation was made available to the Commissioner in the Appellant's appeal, it follows that the Commissioner is unable to lend any weight to this submission.

93. Turning to the documentation provided to the Commission, the Commissioner notes from the provided [redacted] Loan Offer that the documentation is inconsistent in its layout, sequence and typeset and contains contradictory information such as the Guarantors to that loan being individuals not associated with the Co-ownership.

94. In addition, the Commissioner notes that the sum of US$200,000, purportedly in respect of expenses payable to [redacted], was not drawn down on the provided [redacted] Loan statements until 1st November 2011, a date which is some two years after [redacted] was purportedly "hopelessly insolvent". For those reasons, the Commissioner finds that the provided Bank of Ireland documentation is unreliable.

95. However, in taking the [redacted] documentation at its height, the Commissioner notes that the alleged funds were initially provided by the Bank under a Letter of Credit. Subsequently when the Letter of Credit was "called", the Bank provided supplementary finance in the form of two loan facilities in the sum of US$11 million and US$200,000 respectively. The Commissioner notes that these funds were provided "*to assist the borrowers investment in a residential development at* [redacted] *"* and "*to fund payment of fees in relation to the borrowers investment in a residential development at* [redacted] "(emphasis added). The use of the word "investment" in the Bank's loan documentation is not helpful to the Appellant's submissions that he is carrying on a trading activity.

96. The Commissioner further notes within the Appellant's submissions he places significant reliance on the position that the Co-ownership advanced the funds to [redacted] in the form of a Letter of Credit, and as those forms of financial instruments are generally associated with trade "type" transactions, then this assists the Appellant's submissions that he was carrying on a trading activity.

97. However, while a Letter of Credit was the initial consideration offered to [redacted], the Commissioner notes that when this Letter of Credit was called, the Co-ownership obtained alternative finance from its bank in the form of the loan facilities under the alleged Letter of Offer dated 27th April 2009. As it is these alleged loans which were subsequently irrecoverable arising from [redacted] defaulting and which form the basis of the Appellant's purported entitlement to a Schedule D, Case I loss, the Commissioner finds that the central issue to be resolved by him is whether the Appellant is entitled to claim a Schedule D, Case I loss which arose from the alleged total loss of the funds advanced to [redacted].

98. In support of his appeal, the Appellant submits that had the [redacted] transaction been successful, alike the "[redacted]", he would have been liable to income tax on any profits made on such transaction. Given this position, the Appellant submits as he incurred a loss on the [redacted] transaction, then in converse, he should be entitled to a loss on repayment of the [redacted] loan as that was the "cost" of the underlying transaction in [redacted]

99. However, as the repayment of the loan element of the [redacted] transaction is tax neutral (as if funds were returned by [redacted] they would have been offset against the capital balance of the outstanding loan first), the Commissioner dismisses those submissions. As an aside, the Commissioner notes that Capital Gains Tax ("CGT") relief is not available on the write-off of loan balances unless they are considered a "debt on security" and as the loan of a type advanced by the Appellant is not classified as such, then no chargeable gain or loss for CGT purposes would have arisen on repayment of the loan by [redacted], or in the Appellant's case, owing to the non-recoverability of the advanced loan.

100. In discharging his statutory duty, the Commissioner must base his findings upon evidence. For the Commissioner to answer the question posed, he must consider a number of issues, such as whether [redacted] became insolvent and defaulted in repayment or whether [redacted] provided the funds for such purposes. As the Commissioner was provided with no documentary evidence that [redacted] became insolvent and was provided with unreliable information in relation to the [redacted] loan, it follows that the Commissioner is unable to fulfil his duties and so must find that the Appellant's appeal cannot succeed.

101. Furthermore, in noting that the Appellant is a "sophisticated investor", the Commissioner considers that the Appellant was aware of his duties to maintain adequate documentation in support of his claim but for reasons unknown chose to submit limited documentation to

the Commission. In particular, the Commissioner notes that he was only presented with one letter supporting the Appellant's claims that he pursued the [redacted] parties and advisors for recovery of the advanced funds.

102. However, if the Commissioner is incorrect in reaching his findings and in taking the Appellant's evidence at its height, the Commissioner finds that the transaction undertaken by the Appellant was not in the nature of a trade but rather that of an investment.

103. In coming to that finding, the Commissioner considered the relevant badges of trade, associated documentation and related evidence. Turning to relevant the badges of trade, the Commissioner notes that the alleged transaction was a "one off transaction" as the Appellant's tax returns indicate that he had no previous history of engaging in similar type transactions. While *Forbes* held that activities not ordinarily undertaken as part of a trade can be treated as trading transactions, the Commissioner notes that those activities should be closely related to the activities of the main trade. It follows that as the Appellant did not conduct any previous trade then he does not satisfy this requirement. Furthermore, this consideration finds that the "frequency and number of transactions" badge was not satisfied as no previous or subsequent type transactions were entered into by the Appellant.

104. Considering the "length of period of ownership" the Commissioner notes that the [redacted] loan itself was intended to be a short-term investment, that no interest was chargeable on that loan (save in the event of default), that any potential return was likely to take a period of up to three years to materialise, and that return was fixed at a percentage of envisaged profits. As the potential return was linked to profits and as agreed by the Appellant and his witness was "long-term" in nature and as such transactions are normally associated with investment rather than trading activities, the Commissioner finds these features are more indicative of an investment rather than a trading transaction having occurred.

105. Owing to the absence of supporting documentation, the Commissioner is unable to consider whether the Appellant engaged in "supplementary work" in respect of the [redacted] transaction, and as such, finds that no such work took place. In considering both the "circumstances giving rise to the realisation of the property" and the motive of the [redacted] Transaction, as noted, the Commissioner finds that the potential return being long-term in nature and calculated as a percentage of profits was more akin that of an investment activity rather than in the nature of a trade

106. Furthermore, while the Appellant states in his submissions that a decision was made in 2017 to abandon the prospect of recovery of funds and recognise the [redacted] debt as a bad debt, within his sworn evidence before the Commission he stated that he became aware that the [redacted] debt was irrecoverable in 2013 or 2014. As the loss was "sustained" at the latest 2014 and as section 381 (1) TCA 1997 which provides for the utilisation of losses does so on the basis of date the loss was sustained, it follows in accordance with the provisions of section 381 (6) TCA 1997 no claim was made within two years of the date the loss was sustained. As such, had the Appellant's claim been a valid claim, the Commissioner would have found that the claim was made outside the provided statutory timeframe and as such was invalid.

107. As it has been held that the Appellant did not undertake trading activities and as such, did not incur a trading loss, it follows that the Commissioner is not required to consider the availability of trading losses being carried forward against the same trade or the matter of restricting trading losses for the relevant family members under the provisions of section 381C TCA 1997.

108. Finally, in turning to the Appellant's other grounds of appeal. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015 and section 6(2) of the Finance (Tax Appeals) Act 2015 which sets out the functions of an Appeal Commissioner appointed pursuant to that Act. Therefore, the Commissioner is only conferred with the jurisdiction as set out in statute and does not have jurisdiction to set aside a decision of the Respondent based on alleged unfairness, as such grounds of appeal do not fall within the jurisdiction of an Appeal Commissioner and thus, cannot fall to be determined as part of the Appellant's appeal. Therefore, the Commissioner finds that he could not consider the Appellant's submission that the Respondent was "fundamentally unfair" and in contravention of its own Charter. Furthermore, as interest is a statutory charge and, as noted by the Appellant, the imposition of a penalty is the exclusive preserve of the courts, the Commissioner does not have jurisdiction to make findings on those matters contained within the Appellant's Notice of Appeal.

109. While the Commissioner lacks jurisdiction to adjudicate upon the imposition of penalties, the Commissioner notes that within any correspondence issued by the Respondent in which it seeks to impose a penalty, it advises the taxpayer that if it does not agree with the calculated penalty, it has the right of hearing before the Courts to have that matter listed for adjudication. Furthermore, while the Appellant submits that the Respondent was "fundamentally unfair" in taking two and a half years to issue its assessments to the Appellant, the provisions of section 959AA TCA 1997 provide a general time limit of four

years in which the Respondent may issue its assessments or, as in the Appellant's case, where neglect occurs "at any time".

110. As noted, the burden of proof lies with the Appellant. As confirmed in *Menolly Homes*, "*the burden of proof …is on the taxpayer"*. As confirmed in that case by Charleton J at paragraph 22:-

> "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable.*"

111. The burden of proof has not been discharged to satisfy the Commissioner that the taxation liabilities sought by the Respondent are not due.

Determination

112. As such and for the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the relevant tax is not payable.

113. Therefore, the Notice of Assessments dated 17th November 2021, in the sum of €288,897 for the years of assessment 2016 to 2019 are upheld.

114. The Commissioner appreciates that the Appellant will be disappointed with this determination but he was correct to seek legal clarity on his appeal.

115. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) of the TCA 1997.

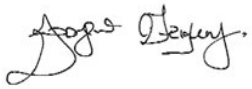
Notification

116. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ (5) and section 949AJ (6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ (6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

117. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in

accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Andrew Feighery

Appeal Commissioner

14th December 2023

Appendix 1 – Legislation

Section 381 TCA 1997 – Right of repayment of tax by reference to losses.

(1) Subject to this section and sections 381A, 381B and 381C, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.

(2) This section shall not apply to any loss sustained in any year of assessment by the owner of a stallion from the sale of services of mares by the stallion or of rights to such services or by the part-owner of a stallion from the sale of such services or such rights.

(2A) Subsection (2) shall cease to have effect as respects losses arising on or after 1 August 2008 and, as respects the chargeable period in which 1 August 2008 occurs, the amount of such losses will be determined by the formula—

$$A \times \frac{B}{C}$$

where—

A is the total amount of losses arising in the chargeable period,

B is the length, in days, of the period beginning on 1 August 2008 and ending on the last day of the chargeable period in which 1 August 2008 occurs, and

Ci s the length, in days, of the chargeable period.

(3) (a) In this subsection, "appropriate income" means either earned or unearned income according as income arising during the same period as the loss to the person sustaining the loss from the same activity would have been that person's earned or unearned income.
(b) For the purposes of subsection (1), the amount of income tax which would have been borne if income had been reduced by the amount of a loss shall be computed—

(i) where the loss has been sustained by an individual, on the basis of treating the loss as reducing—

(I) firstly, the appropriate income of the individual,

(II) secondly, the other income of the individual,

(III) thirdly, in a case—

(A) where the individual, or, being a husband or wife, the individual's spouse, is assessed to tax in accordance with section 1017, the appropriate income of the individual's wife or husband, as the case may be, or

(B) where the individual, or the individual's civil partner, is assessed to tax in accordance with section 1031C, the appropriate income of the individual's civil partner,

and

(IV) finally, the other income of the individual's wife, husband or civil partner, as the case may be, and

(ii) where the loss has been sustained in a trade carried on by a body corporate, on the basis of treating the loss as reducing—

(i) firstly, the income of the body corporate from profits or gains of the trade in which the loss was sustained, and

(ii) then, the other income of the body corporate.

(4) The amount of a loss sustained in an activity shall for the purposes of this section be computed in the like manner as profits or gains arising or accruing from the activity would be computed under the relevant provisions of the Income Tax Acts.

(5) Where repayment has been made to a person for any year under this section—

(a) no portion of the loss which in the computation of the repayment was treated as reducing the person's income shall be taken into account in computing the amount of an assessment for any subsequent year, and

(b) so much of the loss as was required by subsection (3) to be treated as reducing income of a particular class or income from a particular source shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year.

(6) A claim to repayment under this section shall be made, in a form prescribed by the Revenue Commissioners, not later than 2 years after the end of the year of assessment and shall be determined by the inspector.

(7) A person aggrieved by a determination of the inspector in relation to a claim by that person to repayment may appeal the determination to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that determination

Section 381 B TCA 1997- Restriction of loss relief – passive trades.

(1) (a) n this section "relevant loss" means a loss in a trade or profession (including any amount in respect of allowances which, pursuant to section 392, is to be treated as a loss for the purposes of section 381) but does not include a loss which arises from—

(i) farming, within the meaning of Part 23,

(ii) market gardening,

(iii) a trade which consists of the underwriting business of a member of Lloyd's,

(iv) *any amount in respect of qualifying expenditure which by virtue of section 482(2) is to be treated as a loss, or*

(v) *any amount in respect of specified capital allowances, within the meaning of section 531AAE, which pursuant to section 392 is to be treated as a loss.*

(b) For the purposes of this section—

(i) *an individual carries on a trade in a non-active capacity during a period if the individual does not work for the greater part of his or her time on the day to day management or conduct of the trade or profession during that period, and*

(ii) *an individual does not work for the greater part of his or her time on the day to day management or conduct of the trade or profession during a period unless, over the course of that period, he or she spends an average of at least 10 hours a week personally engaged in the activities of the trade or profession and those activities are carried on on a commercial basis and in such a way that profits of the trade or profession could reasonably be expected to be made in that period or within a reasonable time afterwards.*

(2) (a)Subject to paragraphs (b) and (c), where a person carries on a trade or profession in a non-active capacity during a year of assessment then for the purposes of section 381, the amount of any relevant loss sustained by that person in that trade or profession in that year of assessment shall be the actual amount of the loss so sustained, or €31,750, whichever is the lower.

(b)Where the basis period for a year of assessment is shorter than 12 months, then the reference to €31,750 in paragraph (a) shall be construed as €31,750 reduced in the proportion that the length of the basis period bears to 12 months.

(c)Where a person carries on 2 or more trades or professions to which this subsection applies, then for the purposes of section 381, the aggregate of the amount of the losses sustained by that person in those trades or professions in any year of assessment shall be the aggregate of the actual amount of the losses so sustained, or €31,750, whichever is the lower.

Section 381 C TCA 1997 – Restriction of loss relief – anti avoidance

(1) (a) In this section—

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

"relevant loss" means a loss in a trade or profession (including any amount in respect of allowances which, pursuant to section 392, is to be treated as a loss for the purposes of section 381) but does not include a loss which arises from—

(i) *any amount in respect of qualifying expenditure which by virtue of section 482(2) is to be treated as a loss, or*

(ii) *any amount in respect of specified capital allowances, within the meaning of section 531AAE, which by virtue of section 392 is to be treated as a loss;*

"relevant period for a year of assessment" means the basis period for the year of assessment, or where that basis period is shorter than 6 months—

(i) where the basis period is determined in accordance with section 67(1)(a), a period of 6 months ending on the last day of that basis period, or

(ii) in all other cases, a period of 6 months starting on the first day of the basis period;

"relevant tax avoidance arrangements" means arrangements the main purpose, or one of the main purposes of which, is to give rise to a claim under section 381.

(b)For the purposes of this section—

(i) an individual carries on a trade in a non-active capacity during the relevant period for a year of assessment if the individual does not work for the greater part of his or her time on the day to day management or conduct of the trade or profession during that period, and

(ii) an individual does not work for the greater part of his or her time on the day to day management or conduct of the trade or profession during the relevant period for a year of assessment unless, over the course of that period, he or she spends an average of at least 10 hours a week personally engaged in the activities of the trade or profession and those activities are carried on on a commercial basis and in such a way that profits of the trade or profession could reasonably be expected to be made in that relevant period for a year of assessment or within a reasonable time afterwards.

(2) Where a person carries on a trade or profession in a non-active capacity in the relevant period for a year of assessment and sustains a relevant loss in that trade or profession for that year of assessment and that loss arises in whole or in part, directly or indirectly, in consequence of or otherwise in connection with relevant tax avoidance arrangements, then for the purposes of section 381 that person shall be deemed not to have sustained a loss in that trade or profession for that year of assessment.

Section 392 TCA 1997 – Option to treat capital allowances as creating or augmenting a loss.

(1) Subject to this Chapter, any claim made under section 381 for relief in respect of a loss sustained in any trade in any year of assessment (in this Chapter referred to as "the year of the loss") may require the amount of the loss to be determined as if an amount equal to the capital allowances for the year of the loss were to be deducted in computing the profits or gains or losses of the trade in the year of the loss, and a claim may be so made notwithstanding that apart from those allowances a loss had not been sustained in the trade in the year of the loss.

(2) Where on any claim made by virtue of this Chapter relief is not given under section 381 for the full amount of the loss determined under subsection (1), the relief shall be referred, as far as may be, to the loss sustained in the trade rather than to the capital allowances in respect of the trade.

Section 933 TCA 1997 – Appeals against assessment.

(1) (a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.

…

Section 959AA TCA 1997 – Chargeable persons: time limit on assessment made or amended by Revenue Officer

"(1) 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—

(a) an assessment for that period, or

(b) an amendment of an assessment for that period,

shall not be made by a Revenue officer 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.

(2) Nothing in this section prevents a Revenue officer from, at any time, amending an assessment for a chargeable period—

(a) where the return for the period does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period,

(b) to give effect to—

(i) a determination of an appeal against an assessment,

(ii) a determination of an appeal, other than one made against an assessment, that affects the amount of tax charged by the assessment, or

(iii) An agreement within the meaning of section 949V.

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

(d) to correct an error in calculation in the assessment, or

(e) 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 (notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made) where appropriate in accordance with any such amendment.