



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

145TACD2025

Between

████████████████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) on behalf of ██████████ (“the Appellant”) against assessments to income tax for the 2011 and 2012 tax years raised by the Revenue Commissioners (“the Respondent”).
2. In accordance with the provisions of sections 949U and 949AN of the Taxes Consolidation Act 1997 (“TCA 1997”), this appeal is determined without a hearing.

Background

3. The Appellant was one of a large number of appellants who participated in one or more of the Liberty Syndicates. The appeals are referred to in this determination as the Liberty Syndicate appeals, or simply the Liberty appeals.
4. In December 2019, the Commission issued determinations in respect of 32 appeals concerning the Liberty Syndicates. These determinations included 32TACD2020 and 53TACD2020. Commissioner Gallagher found against the appellants on all three grounds of appeal, and determined that the assessments raised by the Respondent should stand.

5. Originally, all 32 determinations were the subject of requests to state a case to the High Court on a point of law. The remaining Liberty appeals were stayed pending the outcome of the case stated procedure. Some of the 32 appellants dropped out before the case stated was heard by the High Court. Ultimately, it was agreed that the High Court would hear two appeals as lead cases, and its judgment would bind the others. [REDACTED]
[REDACTED]
6. The High Court issued its judgment ([2022] IEHC 396) on 1 July 2022. Both the appellants and the Respondent appealed against the High Court judgment to the Court of Appeal. On 21 December 2023, the Court of Appeal issued its judgment ([2023] IECA 316). The Court of Appeal substantively upheld the determination of the Commission on all three grounds of appeal. The effect of this judgment was that the assessments raised by the Respondent in respect of the 32 appeals determined by the Commission in 2019 were upheld.
7. Following the perfection of the orders of the Court of Appeal, the stay on the remaining Liberty appeals was lifted by the Commission. On 14 January 2025, the Commission notified the parties to this appeal that it was intended to determine the appeal without a hearing pursuant to section 949AN of the TCA 1997, having regard to the Commission's determinations in 32TACD2020 and 53TACD2020 and the related judgments [2022] IEHC 396 and [2023] IECA 316. Copies of the redacted determinations in 32TACD2020 and 53TACD2020 were provided with the notification, and the parties were advised that if they disagreed with the proposed approach, they should provide arguments within 21 days.
8. No response was received from the Appellant's agent to the above notification. The Respondent confirmed that it had no objection to the appeal being determined without a hearing. The Commissioner is satisfied that it is appropriate to determine this appeal without a hearing.
9. The Commissioner notes that this appeal was referred by the Respondent to the Commission's predecessor, the Office of the Appeal Commissioners, pursuant to Part 40 of the TCA 1997. The appeal was transferred to the Commission following its establishment in 2016.

Legislation

10. Section 949U of the TCA 1997 states that:

“(1) Subject to subsection (3), the Appeal Commissioners shall not be required to adjudicate on a matter under appeal by way of a hearing and may, where they consider it appropriate, adjudicate on the matter solely by way of—

(a) the consideration of a notice of appeal, a statement of case or any other written material provided by a party,

(b) the holding of discussions with a party, or

(c) any other means they consider appropriate.

(2) Where the Appeal Commissioners consider that it is appropriate to adjudicate without a hearing, they shall notify the parties in writing of their intention to do so.

(3) Notwithstanding subsection (1) but subject to section 949AN(3), the Appeal Commissioners shall adjudicate by way of a hearing where a party requests a hearing by notifying the Appeal Commissioners in writing within 21 days after the date of the notification referred to in subsection (2).”

11. Section 949AN of the TCA 1997 states that

“(1) Subject to subsection (2), in adjudicating on and determining an appeal (in this section referred to as a “new appeal”), the Appeal Commissioners may—

(a) have regard to a previous determination made by them in respect of an appeal that raised common or related issues, and

(b) if they consider it appropriate, in the light of such a determination, determine the new appeal without holding a hearing.

(2) Where the Appeal Commissioners wish to act in accordance with subsection (1), they shall—

(a) send a copy of the previous determination referred to in that subsection to the parties in a way that, in so far as it is possible, does not reveal the identity of any person whose affairs were dealt with on a confidential basis during the proceedings concerned (being proceedings that were not held in public),

(b) request that each of the parties submit arguments to them within 21 days after the date of the request in relation to why it would not be appropriate to have regard to the previous determination in determining the new appeal, and

(c) request that each of the parties state whether the party wishes the Appeal Commissioners to hold a hearing and, where a party so wishes, to require that the party explain why such a hearing is considered to be necessary or desirable.

(3) Notwithstanding section 949U, the Appeal Commissioners may determine the appeal without holding a hearing where -

(a) no response is received from a party within the period referred to in subsection (2) (b), or

(b) a response is received but the Appeal Commissioners are not persuaded that it would be appropriate to disregard the previous determination referred to in subsection (1) that it is necessary to hold a hearing to determine the new appeal.”

The Liberty Syndicates

12. In 32TACD2020 and 53TACD2020, Commissioner Gallagher provided a background summary of how the Liberty Syndicates operated. She noted that the participants signed up to form a Syndicate and contributed funds to it.
13. Prior to contributing funds to the Syndicate, the participants were provided with an opportunity to review a copy of an investment management proposal, background information documents and a syndicate agreement. These documents confirmed that:
 - i. Persons wishing to receive the services as a part of the Syndicate must be individuals who are resident or ordinarily resident in Ireland for tax purposes;
 - ii. The opportunity best suited higher-rate taxpayers with sufficient income and/or capital gains to absorb any initial trading and/or tax loss, and may not be suitable for non-higher rate taxpayers; and
 - iii. The initial contribution would not be returned.
14. The only documentation which the participants were required to sign in order to pay in to the Syndicates was the subscription agreement, a capital loan application and a power of attorney.
15. Among the transactions in which the Syndicates engaged, was the purchase of the right to receive a dividend payable by a company incorporated in the British Virgin Islands (“BVI”) (“BVI Dividend Transaction(s”).
16. Each BVI Dividend Transaction undertaken by the participants was preceded by a new investment of capital by the Liberty Syndicate member. The vendor in the BVI Dividend

Transactions was also a company incorporated in the BVI. Both the company which paid the dividend and the holding company which sold the right to receive the dividend were resident outside the State at all material times. The Syndicate did not purchase the shares on which the dividend was payable or any interest in those shares other than the right to receive a specific dividend or dividends.

17. The vast majority of the funds which the participants contributed to the Syndicate were funded by a limited-recourse loan from a third BVI-incorporated company. The loan agreement provided for a term of no more than 30 days. The loan was repayable only if and to the extent that the dividends from the first BVI company were actually paid to the participants. The funds provided under the loan agreement with the third company were used to purchase the dividend from the first BVI company.
18. The remaining funds which the participants contributed to the Syndicate for a period of up to five years were funded from the participants' own resources or other borrowings of the participants. These funds were available for the purchase of a portfolio of transactions in financial securities.
19. The monies lent by the third BVI company to the participants were drawn down by a transfer of funds directly to the vendor of the dividend as consideration for the purchase of the right to the dividend by the participants. The third BVI company also advanced a loan to the vendor of the dividend. The amount of the loan was very slightly higher (less than 0.1%) than the amount of the dividend which was purchased by the participants.
20. The proceeds of the loan from the third BVI company to the vendor of the dividend were used to make a capital investment in the subsidiary which declared the dividend. The vendor of the dividend used the proceeds from the sale of the dividend to repay the vast majority of the loan which it owed to the third BVI company, leaving a small deficit.
21. The repayment by the participants of the loans from the third BVI company and the payment of the fees charged by the third BVI company under the loan agreements were completed by the payment of the dividend purchased by the participants directly to the third BVI company. A very small surplus of the value of the dividend purchased was then remitted by the third BVI company to the participants.
22. Apart from the remittance of this small surplus by the third BVI company to the participants, all transfers of funds related to the BVI Dividend Transactions occurred in a period of less than one month.
23. One of the transactions the Syndicates entered into involved the acquisition from an offshore parent company of its right to receive an interim dividend declared by an offshore

subsidiary company. As the parent company sold the right to receive the dividend without selling or transferring ownership of the underlying shares, the participants contended that the dividend qualified as a security for the purposes of section 812 of the TCA 1997.

24. The cost of acquiring the right to receive the dividend was treated by the participants as an expense in each of their trading accounts. In reliance on the operation of section 812, the participants did not include the dividend income in their tax computation for the accounting period and the resulting computational losses were offset by each participant against his/her taxable income pursuant to the provisions of section 381 of the TCA 1997.
25. At paragraph 2 of the Court of Appeal judgment, Allen J summarised the matter as follows:

“The appellants were two of a number of participants in a number of syndicates which, over a number of years, had dealings with a number of British Virgin Islands (“BVI”) companies. In very broad terms, a parent BVI company borrowed money to fund a capital investment in a subsidiary. The investment would enable the subsidiary to declare a dividend. The participants in the syndicates borrowed more or less the same amount of money to purchase from the parent the right to receive the dividend. The parent used the proceeds of sale of the dividend rights to repay its loan, and the participants used the dividend to repay their loan. By an alchemy which I will come to, the participants claimed that the transactions gave rise to losses for tax purposes which they were entitled to set off against their liability to pay income tax. Revenue contested this. The various syndicates, in the various years of assessment, dealt with different BVI companies and there are obviously differences in the granular detail of the appellants’ assessments to tax but the basic structure was the same and the assessments to tax gave rise to issues common to all of the participants.”

Submissions

Appellant

26. A summary of the submissions of the appellants in 32TACD2020 and 53TACD2020 is set out at pages 8 and 9 of those determinations. The appellants submitted that in terms of their involvement in the Liberty Syndicates, they were at all times carrying on a trade in financial instruments and securities. They did not accept the Respondent’s submission that involvement in the Syndicate constituted investing and not trading.
27. Secondly, they submitted that the provisions of section 812 of the TCA 1997 applied to exclude the dividend income from their tax computation for that accounting period, which

resulted in substantially increased computational losses which were then offset against their taxable income.

28. Thirdly, they submitted that the expressions of doubt filed by them on their income tax returns were valid expressions of doubt, were genuine and were in compliance with the requirements of section 955(4) of the TCA 1997. Consequently, even if the Commission found against them on the first and second points, they should not be liable to interest and penalties.
29. No attempt has been made by the Appellant's agent in this appeal to make additional submissions or to differentiate this appeal from 32TACD2020 and 53TACD2020.

Respondent

30. A summary of the Respondent's submissions in 32TACD2020 and 53TACD2020 is also set out at pages 8 and 9 of those determinations. In respect of the first issue, the Respondent submitted that the appellants' capital contribution to the Liberty Syndicates constituted an investment, and it refuted the appellants' suggestion that they were carrying on a trade.
31. Secondly, it submitted that section 812 of the TCA 1997 did not have extra-territorial effect and did not apply and that as a result, the dividend income was taxable in the normal way under section 18 of the TCA 1997.
32. Thirdly, it submitted that the appellants' expressions of doubt failed to adequately specify the doubt, were not genuine, were not in compliance with section 955(4) of the TCA 1997 and were not valid.
33. The Respondent in this appeal has not sought to make additional submissions or to differentiate this appeal from 32TACD2020 and 53TACD2020.

Material Facts

34. In 32TACD2020 and 53TACD2020, Commissioner Gallagher set out the evidence before her between pages 9 and 30 of the determinations. She then considered, between pages 30 and 54, whether the appellants had established that they had been trading in financial instruments, rather than, as the Respondent contended, being involved in investments. Having so considered, at pages 55 and 56 she made a number of material findings of fact.
35. Having regard to those material findings of fact, as well as to the circumstances of this appeal, the Commissioner makes the following findings of material fact:

- i. The Appellant was one of a number of appellants before the Commission who participated in the Liberty Syndicates.
- ii. In 32TACD2020 and 53TACD2020, the Commission upheld assessments raised by the Respondent against those appellants on foot of their participation in the Liberty Syndicates. [REDACTED] determinations were the subject of a case stated to the High Court ([2022] IEHC 396), and on appeal to the Court of Appeal ([2023] IECA 316). The Court of Appeal substantively upheld the Commission's determinations.
- iii. On 14 January 2025, the Commission notified the parties to this appeal that it was intended to determine the appeal without a hearing pursuant to section 949AN of the TCA 1997. The parties were advised that if they disagreed with the proposed approach, they should provide arguments within 21 days.
- iv. Neither party objected to the Commission proceeding by way of section 949AN, nor did they provide submissions seeking to differentiate this appeal from those previously determined by the Commission.
- v. The background information document and the Syndicate agreement provided that the initial contribution made by the Appellant would not be returned to him.
- vi. There was no risk undertaken by the Appellant in respect of the dividend purchase transaction. The documentation provided, and the Appellant knew and was on notice of the fact, that his capital would not be returned. He made capital contributions to participate in the Syndicate in the knowledge that his capital would not be returned. He was not at risk of not having his capital returned. He consented to not having his capital returned.
- vii. There was no risk for the Syndicate participants in respect of the dividend purchase transactions as the loan funding the transactions was limited recourse.
- viii. The fees and charges incurred by the Appellant were significantly referable to the dividend purchase transaction, which was inherently loss making.
- ix. The complex structured arrangements underlying the Syndicates pointed away from the existence of real, market driven commercial transactions and away from the existence of a genuine and authentic trade. In addition, the strategic design of these complex transactions pointed towards an objective other than trading and other than profit - namely, tax advantages in the form of substantial tax losses generated by the Syndicates.

- x. An analysis in accordance with the badges of trade supported a finding that the Appellant was not involved in the carrying on of a trade in financial instruments and securities.
- xi. The Appellant was not carrying on a trade and failed to identify a commercial rationale for the Syndicate transactions.
- xii. The Syndicate documentation contained references which suggested that the purpose and object of the Syndicate was the generation of a tax advantage for its participants.
- xiii. Any suggestion that the principal object of the Syndicate was to generate profits over the lifetime of the Syndicate was unsupported by the Syndicate documentation and lacking in credibility.
- xiv. The object and purpose of the dividend purchase transaction was that it converted a loss-making transaction into a valuable transaction from a tax perspective for the Appellant by means of the generation of tax losses which were utilised by him to reduce taxable income.

Analysis

- 36. The burden of proof in this appeal rests on the Appellant (via his agent), who must show that the assessment raised by the Respondent was incorrect. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that *"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."*
- 37. Section 949AN of the TCA 1997 permits the Commission, in appeals raising "*common or related*" issues, to "*have regard*" to a previous determination made by it. The Commissioner is satisfied that this appeal raises "*common or related*" issues to those in 32TACD2020 and 53TACD2020. Accordingly, the parties were notified by the Commission that it was intended to determine the matter pursuant to section 949AN, and they were notified that, if they did not agree, they should submit arguments as to why regard should not be had to the previous determinations.
- 38. The Respondent agreed to this appeal being determined pursuant to section 949AN. No submissions were received from the Appellant's agent seeking to differentiate this appeal from 32TACD2020 and 53TACD2020, nor arguing that this appeal should not be

determined pursuant to section 949AN. Consequently, the Commissioner considers it appropriate to apply the findings made by the Commission in 32TACD2020 and 53TACD2020, as upheld by the Court of Appeal.

Whether the dividend purchase transactions were part of a trade in financial instruments

39. Commissioner Gallagher found that the purchases of the BVI dividends were complex transactions to acquire dividends from a particular BVI company, financed by a loan from a BVI lender carried out in order to generate a tax advantage for the participants in the Syndicate, in the form of tax losses.
40. She determined that the object and purpose of each dividend purchase transaction was to convert a loss-making transaction into a valuable transaction from a tax perspective for each of the appellants by means of the generation of tax losses which were utilised by the appellants to reduce taxable income.
41. The appellants failed to identify a commercial rationale for the Syndicate transactions and failed in their assertions that the commercial rationale was to generate a profit through trade. The contention that the principal object of the Syndicate was to generate profits over the lifetime of the Syndicate was unsupported by the syndicate documentation and was lacking in credibility.
42. Accordingly, it was determined that the appellants were not carrying on a trade in financial instruments and securities, and that the nature of the appellants' involvement in the Syndicate was that of investor and that each capital contribution to the Syndicate was in the nature of an investment.
43. The Court of Appeal concluded that Commissioner Gallagher was correct to determine that the appellants were not carrying on a trade, and that the object and purpose of each dividend purchase transaction was to convert a loss-making transaction into a valuable transaction from a tax perspective for each of the appellants by means of the generation of tax losses which were utilised by the appellants to reduce taxable income. The court concluded that it was not necessary to consider whether the Commissioner had correctly determined that the appellants' involvement was that of investor.
44. Accordingly, as the Appellant's agent herein has not differentiated this appeal from 32TACD2020 and 53TACD2020, it is found that the Appellant was not carrying on a trade in his involvement in the Liberty Syndicate, and that the object and purpose of each dividend purchase transaction was to convert a loss-making transaction into a valuable transaction from a tax perspective for the Appellant by means of the generation of tax losses which were utilised by him to reduce taxable income.

Whether the dividend income received by the Appellant is to be deemed not to have been so received

45. Commissioner Gallagher determined that section 812 of the TCA 1997 does not apply to deem a dividend to be the income of 'the owner' of the underlying securities where that owner is established outside the State and is neither within the jurisdiction of the Oireachtas nor within the charge to Irish tax.
46. As a general proposition, foreign dividend income received by Irish residents is taxable pursuant to section 18 of the TCA 1997. Based on the evidence and submissions before her, she concluded that there was no basis upon which to take the view that the appellants were not subject to income tax on their foreign dividend income in accordance with section 18 of the TCA 1997.
47. The Court of Appeal stated, at paragraph 255, that the Commission was "*correct in determining that s. 812 does not apply to deem a dividend to be the income of the owner of the underlying securities in circumstances in which the income could not, by the application of the deeming provision, be deemed to be income for the purposes of the Taxes Consolidation Act, 1997.*"
48. The court also concluded that the Commissioner was correct to find that the appellants' foreign dividend income fell within the charge to tax pursuant to section 18, while noting "*that the real issue before the TAC was not whether the appellants fell squarely within the charge to tax in s. 18 of the Act of 1997 but whether they were taken out of charge by the deeming provision of s. 812.*"
49. Accordingly, as the Appellant's agent herein has not differentiated this appeal from 32TACD2020 and 53TACD2020, it is found that the Appellant was not taken out of the charge to tax by section 812, and he was liable to income tax on his foreign dividend income in accordance with section 18 of the TCA 1997.

Whether the expression of doubt (if any) was valid

50. In 32TACD2020 and 53TACD2020, the Commission determined that the expressions of doubt filed by the appellants failed to specify the doubt as required by section 955(4)(a) of the TCA 1997. In addition, it was determined that the expressions of doubt were not genuine and that the appellants were acting with a view to the avoidance of tax.
51. The Court of Appeal noted that some, but not all, of the appellants before it had submitted expressions of doubt when filing their income tax returns. Allen J stated that

"201...There were some differences in the precise detail but broadly speaking there were two different formulas.

202. One of the formulas...was:

'We have been advised that a transaction entered into as part of the Schedule D Case I trade could fall within s. 812 Taxes Consolidation Act 1997. The computation of the Schedule D Case I trade has been prepared on the basis of s. 812 TCA 199 [sic].'

203. The other formula was – more or less:-

'Form PN1 Protective Notification was submitted in accordance with section 811A TCA '97 (copy of which can be forwarded for your file upon request).''

52. The court concluded that the Commission was correct to determine that the expressions of doubt failed to satisfy the requirements of section 955(4)(a) of the TCA 1997, and stated that it was not necessary to go on to consider whether the appellants' doubt was genuine.
53. It is not clear from the material provided to the Commission whether the Appellant herein provided an expression of doubt on his income tax return. If he did not, nothing arises for determination on this issue. If he did provide an expression of doubt, his agent has not sought to differentiate it from those considered by the Commission in 32TACD2020 and 53TACD2020 and by the Court of Appeal. Accordingly, it is found that, if the Appellant provided an expression of doubt, it did not satisfy the requirements of section 955(4)(a) of the TCA 1997.

Determination

54. In the circumstances, the Commissioner determines that the assessments to income tax raised against the Appellant for the 2011 and 2012 tax years should stand.
55. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK, 949U and 949AN thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

56. 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

57. 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.



Simon Noone
Appeal Commissioner
9 April 2025