AN COIMISIÚN UM ACHOMHAIRC CHÁNACH

TAX APPEALS COMMISSION

105TACD2026

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by the Appellant against a Notice of Opinion given to the Appellant by the Respondent under section 811 of the Taxes Consolidation Act 1997 ("the TCA 1997") on 30 December 2009 ("the Notice").

2. In accordance with the provisions of sections 949U and 949AN of the TCA 1997, this appeal is determined without a hearing.

Background

3. The Appellant acted through an authorised tax agent in this matter.

4. The Notice informed the Appellant that the Respondent had formed the opinion that a transaction, as described in the Notice ("the Transaction"), was a tax avoidance transaction within the meaning of section 811 of the TCA 1997. The Respondent considered that arising from the Transaction, the Appellant had obtained a tax advantage, which was a reduction in his Capital Gains Tax ("CGT") liability for the year 2004 in the amount of €99,692 (€498,462 capital loss claimed at 20%). The Notice stated that should the opinion become final and conclusive, the tax consequences arising would be for the Respondent to amend the assessment to CGT for 2004 and withdraw the capital loss relief claimed in the sum of €498,462.

5. On 18 January 2010, the Appellant appealed the Notice to the Respondent. In 2016, the Appellant's appeal was transmitted to the Commission under section 31 of the Finance (Tax Appeals) Act 2015.

6. On 2 July 2020, the Commission issued determination 134TACD2020, which concerned the appeal of a Notice of Opinion given under section 811 of the TCA 1997. In that case, the Appeal Commissioner found that the appellant procured a tax advantage as a result of engaging in a tax advantage transaction and the transaction resulted in a misuse of section 31 of the TCA 1997. The Appeal Commissioner held that the appellant's claim for capital loss relief could not succeed and their allowable capital loss should be reduced.

7. Determination 134TACD2020 was the subject of a request to state a case to the High Court on a point of law. A number of appeals to the Commission, including this appeal, were stayed pending the outcome of those proceedings.

8. The High Court issued its judgment on 14 January 2022, in *Hanrahan v Revenue Commissioners* [2022] IEHC 43. That judgment was appealed to the Court of Appeal. On 15 May 2024, the Court of Appeal issued its judgment in *Hanrahan v The Revenue*

Commissioners [2024] IECA 113 ("*Hanrahan*"), in which the Court upheld the determination of the Commission in 134TACD2020. Leave to appeal that judgment to the Supreme Court was refused on 30 August 2024 in *Hanrahan v Revenue Commissioners* [2024] IESCDET 106.

9. On 13 September 2024, the Commission asked the Appellant to confirm whether he intended to proceed with or withdraw this appeal, in light of the Supreme Court determination in *Hanrahan v Revenue Commissioners* [2024] IESCDET 106 to refuse leave to appeal the Court of Appeal judgment in *Hanrahan*.

10. The Appellant subsequently sought, and was granted, a number of extensions of time within which to confirm his position to the Commission. In correspondence with the Commission, the Appellant referred to ongoing discussions with the Respondent. On 21 March 2025, the Respondent informed the Commission that this appeal had not settled.

11. On 4 April 2025, the Commission notified the parties that it intended to determine this appeal without a hearing under section 949AN of the TCA 1997, having regard to the determination made in appeal 134TACD2020, which was an appeal that raised common or related issues to this appeal. Copies of the redacted determination in 134TACD2020, the Court of Appeal judgment, and the Supreme Court determination were provided with the notification. The parties were advised that they could submit arguments in relation to why it would not be appropriate to have regard to the determination in appeal 134TACD2020, and state whether they wished the Commissioner to hold a hearing and explain why such a hearing was considered to be necessary or desirable. The Commissioner will refer to this notification as the "Section 949AN Notification".

12. On 18 July 2025, the Appellant informed the Commission that he did not wish to have a hearing in this appeal. No objection to determining this appeal under section 949AN of the TCA 1997 was received from the Respondent.

13. Consequently, although a response was received to the notification under section 949AN of the TCA 1997, the Commissioner is not persuaded that it would be appropriate to disregard the previous determination or that it is necessary to hold a hearing to determine this appeal.

Legislation

14. The legislation relevant to this appeal is as follows:

15. Section 949U of the TCA 1997 provides 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)."

16. Section 949AN of the TCA 1997 provides 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 new 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) and that it is necessary to hold a hearing to determine the new appeal."

17. Section 811 of the TCA 1997 provides (among other things) that:

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

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

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

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

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

[…]

(7) Any person aggrieved by an opinion formed or, in so far as it refers to the person, a calculation or determination made by the Revenue Commissioners pursuant to subsection (4) may appeal the opinion to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that opinion on the grounds and, notwithstanding any other provision of the Acts, only on the grounds that, having regard to all of the circumstances, including any fact or matter which was not known to the Revenue Commissioners when they formed their opinion or made their calculation or determination, and to this section -

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

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

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

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

(8) In adjudicating and determining an appeal, the Appeal Commissioners shall not enquire into any grounds of appeal other than those specified in subsection (7).

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

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

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

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

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

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

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

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

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

Submissions

Appellant

18. In his Notice of Appeal submitted on 18 January 2010, the Appellant stated that:

"The transaction specified or described in the notice of opinion is not a tax avoidance transaction.

The amount of the tax advantage specified or described in the notice of opinion is incorrect.

The actions proposed and specified in the notice of opinion would not be just and reasonable in the circumstances for the purposes of withdrawing or denying any alleged tax advantage specified in the notice of opinion.

The Revenue Commissioners have failed to calculate the amount of relief from double taxation which they propose to give.

There are factual errors in the description in the opinion of the transaction which suggest that your opinion could not have been validly formed.

The Revenue Commissioners, having formed the opinion that the transaction specified in the notice of opinion was a tax avoidance transaction, failed to immediately notify our client and therefore breached a fundamental provision in S.811.

The person who formed the opinion was not a validly nominated officer for the purpose of Section 811.

The Revenue Commissioners have unlawfully exceeded their powers in issuing a notice of opinion in these circumstances.

The Revenue Commissioners did not form their opinion in accordance with the provisions of S.811, TCA, 1997."

19. In his Outline of Arguments submitted on 24 March 2020, the Appellant stated (among other things) that:

"In summary the Appellant submits that:

The Notice of Opinion which issued on the 30th December 2009 is fatally flawed and invalid in its format and, contrary to the provisions of section 811(6)(a) TCA 1997, it is submitted that the Notice of Opinion was not immediately notified to the Appellant.

The steps outlined at paragraph 2 above do not constitute a "transaction" within the legislative meaning of that term as defined in section 811 TCA 1997.

Even if the steps do constitute a "transaction" (which is denied) the transaction specified or described in the notice of opinion is not a "tax avoidance transaction" and the transaction does not give rise to a "tax advantage" within the meaning of those terms as they are defined in section 811 TCA 1997.

Even if the steps do constitute a transaction which gives rise to a "tax advantage", (which is denied) the transaction was undertaken for business reasons and was not entered into primarily for the purposes of obtaining a tax advantage.

Furthermore, the transaction did not result directly or indirectly in the misuse or abuse of the provisions concerned, having regard to the purpose for which those provisions were enacted.

The amount of the tax advantage specified or described in the Notice of Opinion which would be withdrawn from or denied to the Appellant is incorrect.

The tax consequences specified or described in the Notice of Opinion are such that it would not be just and reasonable in order to withdraw or to deny the tax advantage or part of the tax advantage specified or described in the notice of opinion.

The introduction of a new provision in Finance Act 2010 (section 546A TCA 1997) clearly means that, prior to the introduction of the new provision, transactions such as that at issue in this case constituted bone fide transactions and were not covered by the provisions of section 811 TCA 1997.

By virtue of the provisions of section 955 TCA 1997 the Respondent is now precluded from issuing an amended assessment for 2004."

20. Following the Section 949AN Notification and the Court judgments on determination 134TACD2020, the Appellant did not make additional submissions or seek to differentiate this appeal from determination 134TACD2020.

Respondent

21. In its Outline of Arguments submitted on 15 August 2019, the Respondent contended (among other things) that the Transaction was a tax avoidance transaction within the meaning of section 811 of the TCA 1997, which generated a loss that far exceeded the actual monetary loss.

22. Following the Section 949AN Notification and the Court judgments on determination 134TACD2020, the Respondent did not make additional submissions or seek to differentiate this appeal from determination 134TACD2020.

Material Facts

23. In 134TACD2020, the Appeal Commissioner considered whether the transaction at issue was a tax avoidance transaction under section 811 of the TCA 1997, and made material findings of fact at pages 2 and 3 of the determination.

24. Having regard to those material findings of fact, as well as to the circumstances of this appeal, the Commissioner makes the following findings of fact:

    24.1. In 134TACD2020, the Commission upheld a Notice of Opinion given by the Respondent under section 811 of the TCA 1997 against the appellant. That determination was the subject of a case stated to the High Court (*Hanrahan v*

Revenue Commissioners [2022] IEHC 43), and on appeal to the Court of Appeal (*Hanrahan v The Revenue Commissioners* [2024] IECA 113). The Court of Appeal substantively upheld the Commission's determination in 134TACD2020.

24.2. The Appellant was one of a number of appellants before the Commission whose appeal was stayed pending the outcome of proceedings in respect of determination 134TACD2020.

24.3. The documentation submitted by the Appellant and the Respondent in this appeal demonstrates that the following facts are undisputed:

24.3.1 On 26 November 2004, the Appellant purchased 5000 non-cumulative non-voting preference shares of €1 each in a company ("the Company").

24.3.2 On 13 December 2004, the Company purchased German Government Bonds with a nominal value of €526,875 for €547,368.

24.3.3 On 13 December 2004, the Company granted another company ("Company B") a call option to purchase the German Government Bonds at an option price.

24.3.4 The Company was connected with Company B.

24.3.5 On 13 December 2004, the Appellant purchased the German Government Bonds with a nominal value of €526,875 subject to the call option agreement, for €104,000, from the Company.

24.3.6 On 30 December 2004, the Appellant sold the German Government Bonds to Company B for €49,866.

24.4. On 4 April 2025, the Commission notified the parties to this appeal that it intended to determine this appeal without a hearing under section 949AN of the TCA 1997, having regard to the determination issued in appeal 134TACD2020, which was an appeal that raised common or related issues to this appeal. Copies of the redacted determination in 134TACD2020, the Court of Appeal judgment, and the Supreme Court determination were provided with the notification. The parties were advised that they could submit arguments in relation to why it would not be appropriate to have regard to the determination in appeal 134TACD2020 and state whether they wished the Commissioner to hold a hearing and explain why such a hearing was considered to be necessary or desirable.

24.5. Following the Section 949AN Notification, neither party provided additional submissions or sought to differentiate this appeal from 134TACD2020.

Analysis

Jurisdiction

25. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015. As a statutory body, the Commission only has the powers that have been granted to it by the Oireachtas. The powers of the Commission to hear and determine tax appeals are set out in Part 40A of the TCA 1997. Section 949J of the TCA 1997 states that an appeal shall be valid if "*it is made in relation to an appealable matter*". Section 949A of the TCA 1997 defines an "*appealable matter*" as "*any matter in respect of which an appeal is authorised by the Acts*". Therefore, in order for an appeal to be valid, it must concern a matter in respect of which an appeal is authorised by the Tax Acts. The Commission does not have a general or residual power to hear appeals into matters where no appeal is authorised by the Tax Acts.

26. The Commission's jurisdiction was considered by the Court of Appeal in the case of *Lee v The Revenue Commissioners* [2021] IECA 18, in which Murray J stated that:

> *"The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation".*

27. It follows from the above that for an appeal to be a valid appeal that may be accepted by the Commission, there must exist some provision in legislation conferring on a taxpayer the right to appeal a specific decision to the Commission. The Commission does not have a general power to hear appeals into matters where no appeal is authorised and the Commission does not have a supervisory jurisdiction in respect of the processes of the Respondent or the conduct of the Respondent's officials.

28. This appeal was made by the Appellant on 18 January 2010 in relation to the Notice, which was given under section 811 of the TCA 1997. Consequently, the Appellant's right of appeal is authorised under section 811(7) of the TCA 1997, and the Commission's jurisdiction derives from that statutory provision.

29. Section 811(8) of the TCA 1997 provides that "*the Appeal Commissioners shall not enquire into any grounds of appeal other than those specified in subsection (7)*" (emphasis added). The use of the word "shall" in section 811(8) of the TCA 1997 indicates an absence of discretion in the application of this provision. The wording of the provision does not provide for extenuating circumstances and the legislation does not afford the Commissioner any discretion to disapply the rule.

Burden

30. This appeal relates to a Notice of Opinion issued by the Respondent on 30 December 2009. In the High Court case of *Menolly Homes Ltd v The Appeal Commissioners and The Revenue 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".*

31. The Court of Appeal confirmed this position in *JSS & Ors v A Tax Appeal Commissioner* [2025] IECA 96, in which McDonald J stated at paragraph 34 that:

> *"the taxpayer bears the burden of demonstrating that a tax assessment is wrong."*

32. However, it is important to note that in *Hanrahan*, the Court of Appeal clarified the approach to the burden of proof where an appeal relates to the interpretation of law only. The court stated (among other things) that:

> *"Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake. It is perhaps easier to use an example that might arise under a different subclause of s. 811(3) to demonstrate the importance of this issue. For example, if there was an issue as to whether a particular transaction "was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person" (pursuant to s. 811(3)(i)(I)), the placing of the burden of proof on the taxpayer would be of particular significance.*
>
> *In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law; whether a transaction, which has been found to have no commercial or business purpose, is not, by virtue of s. 811(3)(ii) TCA, a tax avoidant transaction. It is difficult to see how any particular burden, other than one of seeking to persuade by way of argument that as a matter of law the transaction is not one that falls foul of s. 811 TCA, could arise in such*

a situation. Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation The High Court cannot be bound by an interpretation of law by an administrative body. It is the role of the courts to apply the law and it is therefore difficult to see how reference to this particular burden goes beyond the usual burden that a moving party would bear before a court when seeking to persuade a court of the correctness of their position at law."

Court of Appeal Conclusions

33. In *Hanrahan*, the Court of Appeal concluded that:

"160. In these circumstances we would answer the questions of the Appeal Commissioner as:

(a) Yes, the Appeal Commissioner was correct to hold that the Notice of Opinion was not void;

(b) Yes, but subject to the following proviso. Revenue is not precluded by the operation of the time limit in s. 955(2) from raising an assessment on foot of the Notice of Opinion primarily because that time limit did not apply in circumstances where the taxpayer had not made a full and true disclosure of all facts material to an assessment of his liability to CGT in either 2004 or 2005. However, even if the taxpayer had made a fully compliant disclosure the effect of s. 811(5A) TCA read with s. 130 of the Finance Act, 2012 is to disapply the time limit in s. 955(2) and to allow an assessment to be raised on or after 28 February 2012 withdrawing the tax advantage of any tax avoidance transaction even where 4 years has passed from the end of the relevant chargeable period;

(c) Yes, the Appeal Commissioner was correct in his interpretation and application of s. 549 TCA;

(d) Yes, he was correct in determining that the Transaction was a tax avoidance transaction as statutorily defined;

(e) Yes, in holding that the appellant/taxpayer was required to discharge a "positive burden" in the interpretation and application of s. 811 (3)(a)(ii) TCA

but only insofar as such relates to an evidential burden where matters of fact are concerned;

(f) Yes, in holding that the intention of the Oireachtas, as discerned from the wording of s. 31 TCA, is to provide relief to ameliorate actual financial hardship correlating to actual monetary loss;

(g) Yes, in holding that there was a misuse of s. 31 TCA for the reasons set out in this judgment, and

(h) Yes, in determining that the capital gains tax actual loss be restricted to €258,591 but only in so far as it just and reasonable to make that adjustment."

Section 949AN

34. Section 949AN of the TCA 1997 permits the Appeal Commissioners to "*have regard to a previous determination made by them in respect of an appeal that raised common or related issues*". The Commissioner is satisfied that this appeal raises "common or related" issues to those in 134TACD2020. Therefore the Commission issued the Section 949AN Notification.

35. The Appellant confirmed that he did not wish to have a hearing in this appeal and the Respondent did not object to this appeal being determined pursuant to section 949AN. Neither party provided additional submissions or sought to differentiate this appeal from 134TACD2020.

36. Consequently, the Commissioner considers it appropriate to apply the findings made by the Commission in 134TACD2020, as upheld by the Court of Appeal.

Whether the Transaction was a Tax Avoidance Transaction

37. In 134TACD2020, the Appeal Commissioner found that the appellant engaged in a complicated series of transactions and claimed a loss on the disposal of an asset which had no correlation to the actual monetary loss. He found that in structuring a transaction to avail of the "connected persons" provisions under section 549 of the TCA 1997, the appellant procured a "tax advantage". The Appeal Commissioner found that the purchase and sale of the bond "*was …. arranged primarily …. to give rise to a tax advantage*", thereby constituting a "*tax avoidance transaction*".

38. In that case, the Appeal Commissioner found that the appellant's entitlement to capital loss relief was "*highly contrived*". He noted that the granting of a call option to a connected company reduced the market value of the bond in that case, while from a CGT

perspective, the appellant was deemed to have acquired the bond at its full market value without any recognition of the impairment caused by the call option. Thereafter the disposal of the bond for a consideration of €319,938 was higher than the value of the impaired bond of €297,450 but 90% lower than the unfettered bond of €2,977,446.

39. The Appeal Commissioner found that the Appellant engaged in a highly contrived series of steps that could not have been envisaged by the Oireachtas in enacting legislation that permits the calculation of "allowable losses" in accordance with section 546 of the TCA 1997 to reduce "chargeable gains" under section 31 of the TCA. The Appeal Commissioner agreed with the Respondent that the purpose of section 31 of the TCA 1997 was to provide relief for the actual loss sustained.

40. Consequently, the Appeal Commissioner found that the series of transactions that produced an artificial loss of €2,657,508 was arranged for the purpose of obtaining the benefit of the relief provided by section 31 of the TCA 1997 <u>and</u> that the transaction resulted in a misuse of that provision.

41. In *Hanrahan*, the Court of Appeal found that:

> *"146. Applying that to the facts here, the sale of the bond by Parnell (for €578,529) to the taxpayer was a transaction between connected persons and the acquisition was deemed to be for a consideration of €2,977,446 because there was a call option in favour of Securitisation, and Parnell and Securitisation were connected persons. The taxpayer then exercised the put option and Securitisation purchased the bond for €319,938. These were actual transactions which took place and the provisions of the tax code applied to them such that the gains and losses which were generated or deemed to have been generated under the provisions applied… If s.811 did not exist, there would be nothing further that Revenue could do.*
>
> *147. Section 811 does, however, exist. It gives to Revenue a completely different dissection kit with which to examine the Transaction…Undoubtedly, this Transaction was undertaken or arranged for the purpose of taking advantage of the relief under s.31 through the use of the deeming provisions of s.549. The purpose of s.31 must be considered in the context of the provisions of the TCA including those of the interlocking section 549. Those provisions are material to a consideration of s.31 TCA. Actual or real financial losses are to be set against actual or real financial gains in circumstances where provision is made intending that connected persons are not permitted to manipulate the CGT provisions so as to over value losses or undervalue gains. We say directly because the purpose of s.31 cannot, contrary to the trial judge's finding, be assessed without reference to the interlocking provisions of s.549 TCA.*

148. In those circumstances, there was a clear misuse and abuse of the provisions of s. 31 by this Transaction. Its sole purpose was to manipulate, and thereby misuse and abuse, the provisions of s. 549 concerning connected persons for the purposes of constructing "an artificial loss". This was truly an "artificial loss" because it made use of the deeming provisions to generate a loss for the sole purpose of avoiding tax. That is a clear misuse of s. 549 which results directly or indirectly in a clear misuse of s. 31 provisions. As O'Donnell J. in O'Flynn Construction said of the concepts of abuse and misuse, while it may be helpful to offer some sort of definition of the individual concepts the section is best understood when those concepts illuminate each other. We say that the words "directly or "indirectly" illuminate the comprehensive nature of the subsection. Revenue has used the phrase "feeds into" to describe the interaction of s. 549 with s. 31 and we say that such a concept is useful in understanding how a purpose may be either "directly or indirectly" misused or abused. This is another way of saying that the purpose of s. 549 must be considered when addressing the purpose of s. 31. We have done so and it is clear that there has been a misuse and abuse of that purpose. Put simply, this Transaction, which was carried out solely for the purpose of avoiding tax, exploited the anti-avoidance provisions of s. 549 and thus misused and abused the purpose of that provision. Prior to the enactment of s. 86 in 1989, that was an entirely legitimate approach to avoiding paying full tax. That approach can no longer bring about its stated purpose to avoid tax. The general tax avoidance provisions in s. 811 set at nought this particular attempt to avoid tax."

42. In this appeal, the Appellant submitted that the Transaction was not a tax avoidance transaction under section 811 of the TCA 1997. Yet following the Section 949AN Notification and the Court judgments on determination 134TACD2020, the Appellant did not make additional submissions or seek to differentiate the Transaction from the transaction in determination 134TACD2020 which was considered by the Commission and the Court of Appeal and found to be a tax avoidance transaction.

43. Therefore, the Commissioner has proceeded to apply the findings made by the Commission in 134TACD2020, as upheld by the Court of Appeal. The Commissioner finds that the Appellant structured the Transaction, as outlined above, to avail of the "connected persons" provisions under section 549 of the TCA 1997. The Commissioner finds that in so doing, the Appellant procured a "*tax advantage*" and the purchase and sale of the German Government Bonds "*was …. arranged primarily …. to give rise to a tax advantage*", thereby constituting a "*tax avoidance transaction*" under section 811 of the TCA 1997. The Commissioner finds that the Transaction that produced an artificial loss of €498,462 was arranged for the purpose of obtaining the benefit of the relief

provided by section 31 of the TCA 1997 and the Transaction resulted in a misuse of section 31 of the TCA 1997.

Whether the Notice was Void

44. In 134TACD2020, the Appeal Commissioner was satisfied that notwithstanding a misdescription in the Notice of Opinion in that case, the Nominated Officer understood the essential fundamentals of the transaction and the associated legislation. Furthermore, the Appeal Commissioner found that having reviewed the necessary documentation and having had "*regard to all matters to which the Revenue Commissioners may or are required to have regard under this section*" under section 811(9)(a) of the TCA 1997, the appellant procured a "tax advantage" and the transaction was a "tax avoidance transaction". The Appeal Commissioner found that the Nominated Officer's misdescription was therefore irrelevant.

45. In *Hanrahan*, the Court of Appeal held that:

"156. On balance we are of the view that the Notice of Opinion is not invalid. Crucially the element of the transaction which is misdescribed (the identity of the grantee of the put option) is not a matter which fed into the tax consequences of the transaction nor its nature as a tax avoidance transaction. The two key factors which made the transaction a tax avoidance transaction were the connection between Parnell as the vendor of the Bond and the taxpayer as purchaser, and the consequent substitution of market value for the price actually paid by the taxpayer for the Bond. Neither the identity of Securitisation as the purchaser of the bond nor the fact that it was purchased pursuant to the exercise of a put option conferred any tax advantage on the taxpayer or had any bearing on the tax consequences of the transaction. We do not agree with the trial judge that the granting of the put option must be regarded as a material step in the transaction because the Nominated Officer included it in the description of the transaction and therefore must have regarded it as such and the Appeal Commissioner did not expressly say it was not material. The connectivity between the parties did not arise from the put option. The put option simply ensured that the taxpayer could sell the Bond, or, as Revenue termed it, provided the taxpayer with comfort. Equally the substitution of market value for the price paid for the Bond did not arise from the put option. Insofar as the price of the Bond was affected by its impairment, that arose because of the call option.

[…] It is of course also salient that the matter proceeded before the Appeal Commissioner, who has a full de novo jurisdiction on appeal under s. 811(9)(a)(i), in circumstances where everybody including the Appeal Commissioner was on notice of

and understood each element of the transaction which is correctly set out in the determination from which this case stated arises.

159. In any event, in light of our conclusions on the time issue, it is probable that this point is of less significance that it would be if the time limit were to be treated as having expired by reference to the chargeable period for which repayment of tax is sought and not by reference to the date of any assessment to be raised on foot of a final and conclusive Notice of Opinion even where the chargeable period pre-dates the 2012 amendments. As the s. 955(2) time limit does not apply, there would be nothing to prevent Revenue re-commencing the process and issuing a further Notice of Opinion which would exclude the misdescription. For the avoidance of doubt, if it were necessary to do so this Court would be prepared to exercise the jurisdiction conferred on the High Court under s. 811(9)(b) when dealing with a question of law arising on a case stated to do any of the things an Appeal Commissioner can do under s. 811(9)(a) to formally amend the Notice of Opinion so as to state that the put option was granted to the taxpayer rather than to Securitisation."

46. In this appeal, the Appellant submitted that the Notice was "*fatally flawed and invalid in its format*". However, following the Section 949AN Notification, the Appellant did not provide any submissions on this matter and did not seek to differentiate this appeal from the appeal in 134TACD2020. In any case, as the Court of Appeal held in *Hanrahan*, the Commissioner has full jurisdiction on appeal under section 811(9)(a) of the TCA 1997. For the reasons outlined above, the Commissioner has found the Transaction to be a tax avoidance transaction under section 811 of the TCA 1997.

Whether a Time Limit applied

47. In 134TACD2020, the Appeal Commissioner found that he was jurisdictionally constrained from departing from the wording contained in section 811(5A) of the TCA 1997 in respect of the making or amending an assessment on or after 28th February 2012. The Appeal Commissioner also found it significant that as the appellate process was extant, the purported unlawful act of making or amending the 2004 and 2005 assessments had not yet occurred. Therefore, he found that there was no statutory impediment restricting the Respondent from making or amending an assessment after the appellate process had been completed. On this basis the Appeal Commissioner found that he was unable to consider the appellant's submission on time limits.

48. In *Hanrahan*, the Court of Appeal held that:

"67. In circumstances where the meaning of s. 811(5A) and s. 130(2) are clear and are clearly intended to have retrospective as well as prospective effect, they are not precluded from having that effect by reason of the presumption against retrospective legislation. Equally, absent a constitutional challenge, the presumption of constitutionality cannot avail the taxpayer and operate to disapply what is a clearly unambiguous provision. Consequently, we agree with the trial judge that the Appeal Commissioner was correct in holding that s. 811(5A) applied so as to disapply the time limit contained in s. 955(2) from the Notice of Opinion in this case. However, for reasons explained at the outset of this analysis, we would prefer to decide the issue on the basis that the time limit in s. 955(2) never applied in the first place (and therefore did not need to be disapplied) since the taxpayer had not made a full and true disclosure of all facts material to the assessment of CGT in either 2004 or 2005. As the Notices of Opinion are not statute barred we will now proceed to consider the substantive issue."

49. In this appeal, the Appellant submitted that under section 955 of the TCA 1997[1] the Respondent was precluded from issuing an amended assessment for 2004. However, the only matter under appeal in this case is the Notice given on 30 December 2009. Accordingly, it is unnecessary for the Commissioner to make a finding on this point. For completeness, the Commissioner notes the Court of Appeal's finding on the time limit issue in *Hanrahan*, as well as the provisions of section 811(5A) of the TCA 1997.

Conclusion

50. In light of the above, the Commissioner is satisfied that the capital loss relief claimed by the Appellant, which was in the amount of €498,462, is not allowable.

51. In exercise of her powers under section 811(9) of the TCA 1997, the Commissioner determines that it is just and reasonable to reduce the Appellant's allowable capital loss relief to the actual capital loss incurred, which was in the amount of €54,134 (€104,000 actual cost of acquiring the German Government Bonds less €49,866 consideration received on disposing of the German Government Bonds).

Determination

52. For the reasons set out above, the Commissioner determines that it is just and reasonable to reduce the allowable capital loss relief to €54,134, and that the Notice shall be altered accordingly.

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[1] Now section 959AA of the TCA 1997.

53. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 811(7), 949AL, 949U and 949AN. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

54. 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

55. 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.

Jo Kenny
Appeal Commissioner
31 July 2026