



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

56TACD2026

[REDACTED]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This appeal comes before the Tax Appeals Commission (from here on referred to as the "Commission") against Notices of Amended Assessment to income tax for the years 2017 and 2019 raised by the Revenue Commissioners (from here on referred to as the "Respondent") on 10 December 2022.
2. The amount of tax in dispute is €33,422.73.

Background

3. The Appellant is a taxpayer who, in 2007, made an investment in the [REDACTED] [REDACTED] (from here on referred to as the "Fund").
4. The Fund was incorporated in [REDACTED] on 30 April 2007 and was not tax resident in Ireland. The Fund was promoted by [REDACTED] (from here on referred to as the "Bank") and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.
5. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which he entered into for a total amount of €102,500. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant.
6. As a result of the Capital Commitment Agreement entered into by the Appellant, he invested in, and was issued, 25 Participating Shares in the Fund at a value of €1,000 per share, representing a value of €25,000. The Commissioner has not been furnished with documentary evidence of the share certificates issued to the Appellant as a result of him entering into the Capital Commitment Agreement.
7. In addition, as part of the Capital Commitment Agreement entered into by the Appellant, he advanced a total of €77,500 to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Loan Notes were fully repaid to the Appellant. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
8. The Fund was wound up voluntarily by resolution on 31 July 2015 with [REDACTED] [REDACTED] (from here on referred to as the "Liquidator") being appointed as Liquidator.

9. In 2017, the Appellant received distributions totalling €85,815 in respect of "Distributions by way of a liquidation distribution" on foot of the liquidation of the Fund (from here on referred to as the "liquidation distribution").
10. In addition, in 2019 the Appellant received distributions totalling €4,720 in respect of the liquidation distribution.
11. On 10 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as "*Schedule D - Offshore Income Gain*" in the amount of €62,118. The tax payable in the Notice of Amended Assessment to income tax for 2017 is €31,680.48.
12. On 10 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2019 as "*Schedule D - Offshore Income Gain*" in the amount of €3,417. The tax payable in the Notice of Amended Assessment to income tax for 2019 is €1,742.25.
13. The Notice of Appeal in this appeal was submitted by the Appellant on 29 December 2022.
14. This appeal is part of a group of appeals submitted to the Commission in relation to the same subject matter, that is to say Notices of Amended Assessment raised by the Respondent in relation to the liquidation distributions made by the Fund in 2017 and 2019 (from here on referred to as the "group"). Following correspondence with the parties to all of the appeals in the group, the Commissioner placed a stay on the progression of all of the appeals save and except for one appeal which, it was decided by the Commissioner, would be determined prior to the balance of the appeals in the group being determined.
15. On 20 December 2023, following an oral hearing, a Determination was issued in the first appeal in the group of appeals and has been published on the Commission's website as 42TACD2024¹. A request to sign and state a case for the opinion of the High Court was received in relation to Determination 42TACD2024. Following the Commissioner issuing the signed Case Stated to the appellant in similar appeal Determination 42TACD2024, the appellant notified the Commissioner that the Case Stated would not be lodged in the

¹ Available at <https://www.taxappeals.ie/en/determinations/42tacd2024-income-tax>

High Court. Therefore, no Case Stated relating to the subject matter of Determination 42TACD2024 has been taken.

16. Subject to certain conditions being fulfilled, section 949AN of the Taxes Consolidation Act 1997 (from here on referred to as the "TCA 1997"), which is entitled "*Appeals raising common or related issues*", provides that where an Appeal Commissioner considers it appropriate, they may determine an appeal having regard to a previous determination issued by the Commission (from here on referred to as the "similar appeal") where the matter under appeal and the similar appeal share common or related issues.
17. Where those provisions apply, the Commission is required to send a copy of the similar appeal Determination, redacted for privacy, to the Appellant and the Respondent (from here on referred to as the "parties"). The Commission is also required to request arguments from the parties, to be received within 21 days after the date of the request, in relation to why it would not be appropriate for the Appeal Commissioner to have regard to the similar appeal determination in determining their appeal. In addition, the Commission is required to request each of the parties to state whether they wish the Appeal Commissioner to hold a hearing in their appeal and, where a party so wishes, to explain why such a hearing is considered to be necessary or desirable.
18. On 23 February 2024, the Commissioner wrote to the parties to this appeal informing them of:
 - 18.1. the fact of the publication of Determination 42TACD2024;
 - 18.2. that a request to sign and state a case for the opinion of the High Court had been received in relation to Determination 42TACD2024;
 - 18.3. that the determination of this appeal pursuant to the provisions of section 949AN of the TCA 1997 was being considered by the Commissioner; and
 - 18.4. seeking the parties' views as to whether they wished this appeal to be stayed until such time as the High Court issued its opinion in the Case Stated or whether they wished their appeal to be determined.
19. On 4 March 2024, the Appellant requested a stay in this appeal pending the outcome of the Case Stated in Determination 42TACD2024.
20. On 25 March 2024, the Commissioner granted a stay in this appeal pursuant to the provisions of section 949W of the TCA 1997 for the purposes of allowing the Case Stated in Determination 42TACD2024 to proceed and be determined. The Commissioner, pursuant to the provisions of section 949W(2) of the TCA 1997, also specified that this

appeal shall be resumed on finalisation of the Case Stated in appeal 42TACD2024 or in circumstances where the Case Stated in appeal 42TACD2024 is withdrawn or in circumstances where the Case Stated in appeal 42TACD2024 is not lodged in the High Court by the Appellant pursuant to the time limits provided for in section 949AQ of the TCA 1997.

21. On 24 June 2024, the Tax Agent representing the appellant in Determination 42TACD2024 wrote to the Commission informing the Commissioner that the Case Stated in Determination 42TACD2024 would not be lodged in the High Court.
22. On 25 June 2024, in accordance with section 949AN of the TCA 1997, the Commission wrote to the parties and:
 - 22.1. enclosed a copy of the similar appeal Determination 42TACD2024;
 - 22.2. requested arguments from the parties, to be received within 21 days after the date of the request, in relation to why it would not be appropriate for the Appeal Commissioner to have regard to the similar appeal determination in determining their appeal; and
 - 22.3. requested each of the parties to state whether they wish the Appeal Commissioner to hold a hearing in their appeal and, where a party so wishes, to explain why such a hearing is considered to be necessary or desirable.
23. On 26 June 2024, the Respondent indicated that it had no objection to this appeal being determined pursuant to the provisions of section 949AN of the TCA 1997.
24. On 30 June 2024, the Appellant indicated to the Commission that he wished for an oral hearing to take place in this appeal and that he did not agree with this appeal being determined pursuant to section 949AN of the TCA 1997.
25. The Commissioner acceded to the Appellant's request for an oral hearing and this appeal proceeded by way of an oral hearing.
26. The Appellant represented himself at the oral hearing with the assistance of his brother. The Respondent was represented by Counsel.
27. The Appellant indicated that he wished for this appeal to be held in private in his Statement of Case. As a result, the publication of this determination shall be made 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 in compliance with section 949AO(4) of the TCA 1997.

Legislation and Guidelines

28. The legislation relevant to the within appeal is as follows:

Section 740 of the TCA 1997 (as in force from 30 November 1997 onwards)

“740 Interpretation (Chapter 2 and Schedules 19 and 20).

In this Chapter and in Schedules 19 and 20—

“account period” shall be construed in accordance with subsections (8) to (10) of section 744;

“disposal” shall be construed in accordance with section 741(2);

“distributing fund” shall be construed in accordance with subsections (2) and (3) of section 744;

“the equalisation account” has the meaning assigned to it by section 742(1);

“Irish equivalent profits” has the meaning assigned to it by paragraph 5 of Schedule 19;

“material interest” shall be construed in accordance with section 743(2);

“non-qualifying fund” has the meaning assigned to it by section 744(1);

“offshore fund” has the meaning assigned to it by section 743(1);

“offshore income gain” shall be construed in accordance with paragraphs 5 and 6(1) of Schedule 20.”

Section 743 of the TCA 1997 (as in force from 30 November 1997 to 14 March 2021)

“743. Material interest in offshore funds.

(1) In this Chapter, references to a material interest in an offshore fund shall be construed as references to such an interest in any of the following -

(a) a company resident outside the State,

(b) a unit trust scheme the trustees of which are not resident in the State, and

(c) any arrangements not within paragraph (a) or (b) which take effect by virtue of the law of a territory outside the State and which under that law create rights in the nature of co-ownership (without restricting that expression to its meaning in the law of the State),

and any reference in this Chapter to an offshore fund shall be construed as a reference to any such company, unit trust scheme or arrangements in which any person has an interest which is a material interest.

(2) Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).

(3) For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.

(4) For the purposes of subsections (2) and (3) -

(a) a person shall be deemed to be able to realise a particular amount if the person is able to obtain that amount either in money or in the form of assets to the value of that amount, and

(b) if at any time an interest in an offshore fund has a market value which is substantially greater than the portion which the interest represents, as mentioned in subsection (3), of the market value at that time of the assets concerned, the ability to realise such a market value of the interest shall not be regarded as an ability to realise such an amount as is referred to in that subsection.

(5) An interest in a company, scheme or arrangements shall be deemed not to be a material interest if it is either -

(a) an interest in respect of any loan capital or debt issued or incurred for money which in the ordinary course of business of banking is loaned by a person carrying on that business, or

(b) a right arising under a policy of insurance.

(6) Shares in a company within subsection (1)(a) (in this section referred to as "the overseas company") shall not constitute a material interest if -

(a) the shares are held by a company and the holding of them is necessary or desirable for the maintenance and development of a trade carried on by the company or a company associated with it,

(b) the shares confer at least 10 per cent of the total voting rights in the overseas company and a right in the event of a winding up to at least 10 per cent of the assets of that company remaining after the discharge of all liabilities having priority over the shares,

(c) not more than 10 persons hold shares in the overseas company and all the shares in that company confer both voting rights and a right to participate in the assets on a winding up, and

(d) at the time of its acquisition of the shares the company had such a reasonable expectation as is referred to in subsection (2) by reason only of the existence of either or both -

(i) an arrangement under which, at some time within the period of 7 years beginning at the time of acquisition, that company may require the other participators to purchase its shares, and

(ii) provisions of either an agreement between the participators or the constitution of the overseas company under which the company will be wound up within a period which is or is reasonably expected to be shorter than the period referred to in subsection (2),

and in this paragraph "participators" means the persons holding shares which are within paragraph (c).

(7) For the purposes of subsection (6)(a), a company shall be associated with another company if one company has control (within the meaning of section 432) of the other company or both companies are under the control (within the meaning of that section) of the same person or persons.

(8) An interest in a company within subsection (1)(a) shall be deemed not to be a material interest at any time when the following conditions are satisfied -

(a) that the holder of the interest has the right to have the company wound up, and

(b) that in the event of a winding up the holder is, by virtue of the interest and any other interest which the holder then holds in the same capacity,

entitled to more than 50 per cent of the assets remaining after the discharge of all liabilities having priority over the interest or interests concerned.

(9) The market value of any asset for the purposes of this Chapter shall be determined in the like manner as it would be determined for the purposes of the Capital Gains Tax Acts except that, in the case of an interest in an offshore fund for which there are separate published buying and selling prices, section 548(5) shall apply with any necessary modifications for determining the market value of the interest for the purposes of this Chapter.”

Section 745 of the TCA 1997 (as in force from 30 November 1997 onwards)

“745. Charge to income tax or corporation tax of offshore income gain.

(1) Where a disposal to which this Chapter applies gives rise, in accordance with Schedule 20, to an offshore income gain, then, subject to this section, the amount of that gain shall be treated for the purposes of the Tax Acts as -

(a) income arising at the time of the disposal to the person making the disposal, and

(b) constituting profits or gains chargeable to tax under Case IV of Schedule D for the chargeable period (within the meaning of section 321 (2)) in which the disposal is made.

(2) Subject to subsection (3), sections 25(2)(b), 29 and 30 shall apply in relation to income tax or corporation tax in respect of offshore income gains as they apply in relation to capital gains tax or corporation tax in respect of chargeable gains.

(3) In the application of sections 29 and 30 in accordance with subsection (2), section 29(3)(c) shall apply with the deletion of "situated in the State".

(4) In the case of individuals resident or ordinarily resident but not domiciled in the State, subsections (4) and (5) of section 29 shall apply in relation to income tax chargeable by virtue of subsection (1) on an offshore income gain as they apply in relation to capital gains tax in respect of gains accruing to such individuals from the disposal of assets situated outside the State.

(5)(a) In this subsection, "charity" has the same meaning as in section 208, and "market value" shall be construed in accordance with section 548.

32. The Expert was engaged by the Respondent to act as an independent expert witness in this appeal. The Respondent sought the Expert's opinion on the following questions:

"First, in June 2007, would it be reasonable to consider that there was a secondary market in Ireland for unquoted securities, comprising;

- (1) *shares in [REDACTED] that ultimately derive their value from [REDACTED] property; and*
- (2) *shares in [REDACTED] that ultimately derive their value from [REDACTED] property and a loan note issued by [REDACTED].*

Secondly, should an investor open such a position, would it be reasonable to assume that on the date of investment, there was a fair expectation that they would realise the value of their initial investment within seven years?"

33. The Expert submitted a written report dated 23 June 2023 (from here on referred to as the "Report") to the Commissioner and the evidence which he gave was based on that Report. The Report undertook specific analysis for the period 30 April 2007 to 29 June 2007 which was within the period between which the Fund was created and the due date for investors to pay their initial capital commitments. The Commissioner has also reviewed the Report in considering this appeal.

34. The Fund, he stated, was established with the intention of investing in commercial property in [REDACTED], with the ability to invest in other Eastern European commercial property such as [REDACTED].

35. The source of funding for the Fund was intended to be a mix of debt and equity through equity investments from investors, debt from investors and leveraged debt from financial institutions.

36. The intention of the Fund was, he stated, to profit from appreciation of property values over time and also to gain rental yields from tenants in the various commercial properties which it would invest in.

37. He then went on to address the specific question which he had been asked to consider in his Report:

"In June 2007, would it be reasonable to consider that there was a secondary market in Ireland for unquoted securities, comprising;

- (1) *shares in [REDACTED] that ultimately derive their value from [REDACTED] property; and*

43. He stated that if, in the period 30 April 2007 to 30 June 2007, a problem could have been anticipated in the market, spikes or deteriorations in the volume of liquidity traded would have been evident. He stated that there was no evidence of such market spikes or deteriorations in 2007. In that regard, the Expert referred to the following figures which were contained in his Report:
- 43.1. Figure 2 which is entitled “*EURO STOXX price indices January 2000 through December 2022*”. He stated that Figure 2 shows that prior to 2007 markets had grown quite substantially in both value and liquidity and that conditions had maintained up to that point. He stated that Figure 2(i) represents the top 50 largest companies in Europe which he stated was quite consistent throughout the period January 2000 through December 2022. He stated that Figure 2(ii) relates to the 600 largest companies in Europe, Figure 2(iii) and (iv) relate to the banking stocks in Europe through that period as a comparison to the broad STOXX index. He stated that all of the figures provided show that there was no deterioration in those values between 30 April 2007 and 30 June 2007.
- 43.2. Figure 3 which is entitled “*Selected EURO STOXX price indices (January 2007 through December 2007)*”. He stated that the price indices peaked in Quarter 3 of 2007 and that during Quarter 3 and Quarter 4 of 2007 the beginning of the market crash which subsequently occurred started to come to light.
44. Figure 4 which is entitled “*Selected EURO STOXX liquidity conditions (January 2006 through December 2022)*”. This, he stated, represents the EURO STOXX main contract liquidity conditions during that period. He stated that of interest in this figure is the fact that liquidity conditions remained consistent the whole way through the period from 2006 to 2022, aside from 2011 where a fall in liquidity conditions occurred.
45. Figure 5 which is entitled “*Liquidity conditions in the [REDACTED] banking and construction sectors (January 2000 through December 2022)*”. The Expert stated that this shows a very, very sharp appreciation in trading volume in [REDACTED] between 2002 and 2008 which, he stated, was abnormal.
46. Figure 6 which is entitled “*Liquidity conditions in the European banking and construction sectors (January 2000 through December 2022)*”. The Expert stated that this figure provides context of the sharp growth in liquidity conditions in the European banking and construction sectors, not just in the Irish context. He stated that this figure demonstrates the Bank’s context of investing in [REDACTED] property as a diversification tool for Irish investors.

ownership, we can establish that there was a reasonable expectation by the company themselves, that a secondary market in Ireland existed for such unquoted securities, to which direction was provided describing a pathway to resale for [REDACTED] investors.”

Expert opinion on whether it be reasonable to assume that on the date of investment, there was a fair expectation that investors would realise the value of their initial investment within seven years?

52. The Expert referred the Commissioner to section 3 of his Report which deals with the second question posed to him by the Respondent as: “*On 29 June 2007, would an investor in the [REDACTED] fund have reasonably considered the realisation of at least the value of their initial investment within seven years?*”

53. In his Report, the Expert undertook analysis in the following areas prior to forming his opinion:

53.1. The performance of [REDACTED] property prices in advance of the beginning of the Fund;

53.2. Whether there were negative US and European financial market signals on the VIX and VSTOXX indices in advance of the beginning of the Fund;

53.3. Whether there were elevated signals in the Irish media that would influence an investor’s expectation of realising at least the value of their initial investment within seven years.

The performance of [REDACTED] property prices in advance of the beginning of the Fund:

54. The Expert stated that in researching this question he had considered how [REDACTED] property prices performed in advance of the beginning of the Fund investments in June 2007. In that regard the Expert pointed the Commissioner to the following figures in his Report:

55. Figure 8 which is entitled “*[REDACTED] property price performance, quarterly (2005-2022)*”. This figure refers to nominal house prices and to house costs in [REDACTED] from 2005 to 2022. He stated that Figure 8 makes it very obvious that, in the period from 2005 through to 2007, there was substantial growth in the [REDACTED] property market. He stated that Figure 8 shows that in 2007, [REDACTED] property had obtained international attention because of the level of growth in the market, which he stated was extraordinary. He stated that housing prices in [REDACTED] almost doubled from 2005 to 2007 which he stated made the [REDACTED] property market deeply attractive from an investment standpoint.

56. Figure 9 which is entitled “**██████** national rental price performance, quarterly (2005-2022)”. He stated that this shows that rental yield in **██████** was consistently growing from 2005 to 2009 during which time the rental yield index rose from approximately 73 in 2005 to approximately 97 in 2007. He stated that this represents an approximate 20% increase in rental yield during that period and that this represented a sharply appreciating base price accompanied by a sharply growing year-on-year rental increase. This, he stated, was a deeply attractive investment at that time of June 2007.
57. Figure 10 which is entitled “**██████** property ratio performance, quarterly (2005-2022).” The Expert stated that this figure shows a sharp appreciation in terms of the price-to-income ratio and the price-to-rent ratio in the **██████** market. He stated that price-to-income ratio measures the relative price growth of property with respect to the relative income growth of the average citizen. He stated that the price-to-income index value was 100 in early 2006 and that midway through 2007 it had risen as high as 180.
58. Having considered all of the information as set out in Figures 8 to 10 of his Report, the Expert stated in his Report at the conclusion of section 3.1 that:

*“Such price performance in the **██████** property market would have been impossible to ignore. Through **██████**, investors would have been leveraging their position substantially through the use of debt, therefore taking what would be considered extremely high levels of risk in a market that was presenting many substantial signs of sharp price appreciation. Any investor that would have considered the **██████** property market to be in a state of overheating would not have invested in **██████**. Failure to acknowledge such risks would present direct evidence of a catastrophic failure of due diligence and portfolio management. Further, if an investor could state in the period thereafter that they could not have reasonably anticipated the return of at least their initial investment within seven years, it would present substantial evidence of a failure of duty of care and reasonable risk management. Through the use of **██████**, investors would have undoubtedly understood the sophistication and risk contained within this detailed investment product, and specifically the exact nature of the risks to which they had been exposed at the point of investment. It is beyond doubt that when considering **██████** property performance in the years before 29 June 2007, **██████** investors were attracted by the exceptional price performance that had been experienced.”*

Whether there were negative US and European financial market signals on the VIX and VSTOXX indices in advance of the beginning of the Fund:

59. The Expert, in considering the Respondent's second question, also investigated whether negative United States and European financial market signals were available when observing the VIX and VSTOXX indices.
60. He stated that the VIX and the VSTOXX are known as the "*fear gauges*" of the United States and European financial markets respectively. The CBOE Volatility Index (from here on referred to as the "VIX") is a real-time index reflecting the US market's expectations for the relative strength of short-term price changes in the S&P 500 Index. The VIX is derived from the S&P 500 Index options with near-term expiration dates, enabling a 30 day forward projection of volatility. Volatility, he stated in his Report, indicates the speed of price changes, and serves as a metric to assess market sentiment and the level of fear among participants.
61. The EURO STOXX 50 Volatility Index (from here on referred to as the "VSTOXX") is designed to gauge the anticipated volatility of the EURO STOXX 50 Index within a future timeframe based on the available option contracts on the Eurex Exchange for that particular index. He stated that the VSTOXX methodology leverages the entire spectrum of open strikes to provide an accurate estimate of implied volatility. He stated that this approach differs from other models that predominantly rely on (near) At-The-Money strikes. He stated that the EURO STOXX 50 options are among the most heavily traded products on the Eurex Exchange and the VSTOXX indices reflect the skewed or "*smiling*" profile observed in the volatility surface.
62. The Expert pointed the Commissioner to Figures 11 and 12 contained in his Report as follows:
63. Figure 11 which is entitled "*The VIX Index*". He stated that this figure clearly shows that there was no escalation, or significant escalation, in the VIX from 2000 until August 2007. This, he stated, coincided with the collapse of BNC Bank and funds relating to Bear Stearns. He stated that at the point of time of the making of the investment in the Fund in June 2007, an investor would have expected continued growth and performance. He stated that the best way to draw expectation relating to tomorrow's price performance is to incorporate the information relating to recent past performance. He stated that the VIX Index would not have given any cause for concern of immediate 30 day future problems at the point in time from 30 April 2007 through to 30 June 2007.
64. Figure 12 which is entitled "*The VSTOXX Index*". He stated that this reflected the same position as the VIX Index and that it would not have given any cause for concern of immediate 30 day future problems at the point in time from 30 April 2007 through to 30 June 2007.

65. In his conclusion to section 3.2 of his Report, the Expert states:

“Such evidence indicates that the United States and European markets, on 29 June 2007, nor in the months immediately before this date, did not present evidence of elevated fear about future market conditions. Therefore, [REDACTED] investors could reasonably expect the current financial market conditions would persist and realise at least the value of their initial investment within seven years, even with short-term and medium-term headwinds. [REDACTED], and the leveraged investment contained therein, was undoubtedly targeted at sophisticated investors who understood the investment type and the inherent risks they were taking.”

Whether there were elevated signals in the Irish media that would influence an investor’s expectation of realising at least the value of their initial investment within seven years:

66. The Expert also researched as to whether there were elevated signs in the Irish media that would influence an investor’s expectation of realising at least the value of their initial investment within seven years of the date of the investment. In that regard the Expert stated that he used broadsheet newspapers including the Irish Times, the Irish Independent, the Sunday Independent, the Sunday Tribune, the Sunday Business Post, the Irish Examiner and also RTE as a broad representation of what the average Irish person would consider in terms of their investment decisions. He stated that, having downloaded all of the articles from those sources, he used the Harvard General Inquirer IV-4 dictionary and the Loughran and McDonald Financial Sentiment dictionary through which it was established that, in the entire period during 2007, only 27% of the articles were negative in tone. He further stated that less than a total of 10 articles in the entire period before Quarter 3 of 2007 were negative in tone. The Expert stated that this analysis is based on his own research which has been published in top ranking economics and finance journals.

67. Figure 13 which is entitled “*Mainstream Irish media coverage using the term ‘recession’ during 2007*”. He stated that there were mentions of the word “recession” in Q1 and Q2 of 2007 but that, just before September 2007, an elevation occurred which, he stated, was the Irish media drawing attention to the term “recession”. He stated that this coincides with the collapse of BNC Bank and the Lehman Brothers and Bear Stearns issues that began in late July / August 2007.

68. Figure 14 which is entitled “*Mainstream Irish media coverage using the term ‘bubble’ during 2007*”. This, he stated, was consistent the whole way throughout 2007 and there was no elevation in the use of the word “bubble” during that period.

69. Figure 15 which is entitled “*Mainstream Irish media coverage using the term ‘subprime’ during 2007*”. He stated that the use of the term “subprime” was first seen in March 2007. He stated that a sharp escalation in the usage of that term was not seen until after July 2007 and that the use of the term “subprime” was not prevalent in the Irish media until after June 2007.
70. Figure 16 which is entitled “*Mainstream Irish media coverage using the term ‘property price’ during 2007*” which, he stated was consistent throughout 2007.
71. Figure 17 which is entitled “*Mainstream Irish media coverage using the term ‘financial crisis’ during 2007*”. The Expert pointed to an article in the Irish Examiner on 15 November 2007 which is entitled “*Global financial crisis no real danger to Ireland, says Central Bank*”. He stated that the relevance of this article is that during a period of almost 6 months after the investment period in the Fund, the Central Bank of Ireland was stating to the population that the country was sheltered economically.

72. The Expert came to the following conclusion in section 3 of his Report:

“Overall, the frequency of publication of terms such as “recession”, “bubble”, “subprime”, “property prices”, and “financial crisis” increased only after mid-Q3 2007, beyond the period where investments in ██████████ were made. Moreover, the relative scarcity of the term “financial crisis” in the media during this period indicated the presence of financial stability in Ireland and Europe. Hence, in such a climate, investors in ██████████ could reasonably expect to recover at least their initial investment within seven years. The overall optimism about the Irish economy’s resilience was further underscored in a November 2007 print media coverage based on the Central Bank of Ireland’s 2007 Financial Stability Report. Therefore, it would be particularly challenging for a ██████████ investor to assert that they did not invest with the expectation of recouping their initial investment within seven years.”

73. The Expert gave his opinion in section 4 of his Report as to the inherent risks associated with an investment in the Fund considering the information contained in his Report. In coming to this opinion the Expert noted that the Memorandum contained the following statements:

“The minimum amount of Capital Commitment is €250,000 for private investors and €150,000 for pension funds. The Company may waive these minimum investment amounts in its sole discretion, provided always that it will not waive such minimum investment amounts to the extent that it would be necessary to prepare a prospectus

in accordance with the requirements of the Prospectus Directive (or any relevant Member State's legislation implementing the Prospectus Directives)."

"In respect of the Capital Commitment made by an Investor, 90 per cent will be required to be made to the Company in the form of interest free, non-recourse, subordinated loans to the Company evidenced by Loan Notes and the remaining 10 percent will be an Investor's subscription for Participating Shares, although these proportions may be varied in the sole discretion of the Company. Holders of Loan Notes and Participating Shares are unable to call for the redemption or repayment thereof."

74. The Expert stated the following in conclusion to section 4 of his Report:

"Considering the sharp appreciation of ██████ property prices and rental yields in advance of the establishment of ██████, as presented in Section 2.2, it is without a doubt that the use of leverage would have been considered to create an extremely high-risk investment. Such acceptance of this level of risk would have been robustly indicated to each investor in ██████ at the time at which the position was opened through the multiple Memoranda and Prospectuses that existed, along with the substantiative [sic] media coverage that ██████ received in comparison to other similar funds. There would have been, without any doubt, a reasonable assumption that the investor was utilising such leveraged when creating their position so as to maximise their potential profit.

This Expert would have little doubt that such investment in ██████ was no more than an opportunistic attempt to obtain continued high-risk exposure to property markets that had presented some of the largest price appreciation in the world prior to the establishment of ██████. Such investment would have been particularly prudent so as to generate portfolio diversification in the face of some gentle headwinds that were evident through the first half of 2007 due to growing uncertainty surrounding the United States subprime market. However, the fund's blend, comprising substantial leverage through 10% equity and 90% debt, presented substantial evidence of the risk that each investor had accepted so as to maximise their potential future profits."

75. The Expert summarised his conclusions in section 5 of his Report stating:

"Is it reasonable to consider that there was a secondary market for Irish unquoted securities such as that of ██████?"

- *The ██████ fund was reported to have been oversubscribed by the Irish media; therefore, beyond any reasonable doubt, it can be immediately implied there*

existed a natural, active secondary market for the resale and transfer of ownership of [REDACTED] Participating Shares.

- Irrespective of whether we consider [REDACTED] and European construction sectors or related investment funds as represented by property-related ETFs and REITs, we observe that market liquidity conditions elevated throughout the period before 2007. This increased market liquidity was further experienced throughout the period, including early 2008, in advance of the beginning of the international financial crisis that followed the United States subprime collapse. [REDACTED] property, in particular, benefited from elevated international interest due to significant price appreciation and positive rental yields. Based on such evidence, it would be reasonable to consider that a strong, secondary market for Irish unquoted securities such as [REDACTED] existed throughout 2007, including the specific date 29 June 2007.
- The [REDACTED] Capital Commitment Agreement directly refers to the expected process when transferring ownership. We can therefore established that there was a reasonable expectation that such transfers would have been sought.

On 29 June 2007, would an investor in the [REDACTED] fund have reasonably considered the realisation of at least the value of their initial investment within seven years?

- The strong price performance in the [REDACTED] property market would have been impossible to ignore. Through [REDACTED], investors would have been leveraging their positions substantially through the use of 90% debt, therefore taking what would be considered extremely high levels of risk in a market that was presenting many substantial signs of continuing sharp price appreciation. Any investor that would have considered the [REDACTED] property market to be overheating would not have invested in [REDACTED]. Failure to acknowledge such risks would present direct evidence of a catastrophic failure of due diligence and portfolio management. Further, if an investor could state in the period thereafter that they could not have reasonably anticipated the return of at least their initial investment within seven years, it would present substantial evidence of a failure of reasonable risk management, therefore raising substantial doubts about their ability to manage their investment portfolio.

- *Through the use of ██████ investors would have undoubtedly understood the sophistication and risk contained within this detailed investment product, and specifically the exact nature of the risks to which they had been exposed at the point of investment. It is beyond doubt that when considering ██████ property performance in the years before 29 June 2007, ██████ investors were attracted by the exceptional price performance that had been experienced.*
- *Investigating the performance of the VIX and VSTOXX indices indicates that the United States and European markets, on 29 June 2007, nor in the months immediately surrounding this date, did not present evidence of elevated fear about future market conditions. Therefore, ██████ investors could reasonably expect that current financial market conditions would persist and realise at least the value of their initial investment within seven years, even with short-term and medium-term headwinds.*
- *Further, it is clear there were indications in the Irish media that could impact on investor's anticipation of recovering their initial investment within seven years. The frequency of publication of terms such as 'recession', 'bubble', 'subprime', 'property prices' and, 'financial crisis' increased only after mid-Q3 2007, beyond the period where investments in ██████ were made. Moreover, the relative scarcity of the term 'financial crisis' in the media during this period indicated the presence of financial stability in Ireland and Europe. Hence, in such a climate, investors in ██████ could reasonably expect to recover at least their initial investment within seven years. The overall optimism about the Irish economy's resilience was further underscored in a November 2007 print media coverage based on the Central Bank of Ireland's 2007 Financial Stability Report. Therefore, it would be particularly challenging for a ██████ investor to assert that they did not invest with the expectation of recouping their initial investment within seven years.*

Therefore, to summarise the key findings of this Expert Witness Report

- *The investment in ██████ is perceived as an opportunistic approach to maintaining a high risk exposure to property markets that had shown substantial price appreciation prior to ██████ establishment.*
- *Through the use of ██████, investors would have undoubtedly understood the sophistication and risk contained within this detailed investment product.*

- *The investment strategy seemed prudent for portfolio diversification given the subtle headwinds due to increasing uncertainty surrounding the United States subprime market.*
- *The leverage ratio is considered to be quite high, suggesting that [REDACTED] investors accepted considerable risk for the sole purpose of maximising potential future profits.*
- *The clear, unhindered growth in primary market liquidity conditions serves as an appropriate proxy to represent and indicate that there existed a strong secondary market for unquoted, property-based funds in Ireland in June 2007.*
- *The fact that [REDACTED] was initially oversubscribed further validates the view that there existed a strong, liquid secondary market to which [REDACTED] investors could have sold their respective assets.*
- *On 29 June 2007, it would have been reasonable for an investor to expect the realisation of their initial investment's value within seven years."*

Cross examination

76. Under cross-examination by the Appellant, it was put to the Expert that the only information relating to the performance of property funds which was available to a lay investor in Ireland at the time of the investment was that which was published in the Irish Independent on a bi-weekly basis. This information, it was put to the Expert, was restricted to two property funds which related to European funds.
77. The Expert agreed that this was information which had been published in one newspaper, the Irish Independent, at the time. However, he disagreed with the Appellant's overall assertion, stating that in carrying out his research for his Report, he had been able to access open source information relating to 300 such European funds with seven of those having explicit Eastern European exposure. He stated that such information was available on a weekly basis in the Financial Times which was available in Ireland at that time.
78. When asked by the Commissioner what percentage of the two property funds which were reported in the Irish Independent was invested in the [REDACTED] property market, the Appellant accepted that he did not know.

79. The Expert stated that he would expect that an investor in the Fund would have carried out research relating to the investment prior to making the investment. In addition, he stated that he would expect that this research would not be restricted to one newspaper source. He stated that, at the time of the investment in the Fund, he would not have expected that information relating to the [REDACTED] commercial property market would have been contained in Irish newspapers. In addition, he stated that when investing a significant amount of money, he would expect that investors would have exercised a high level of due diligence prior to making the investment.
80. The Appellant also put an article dated 7 June 2007 which was published in the Irish Independent to the Expert entitled "*ISEQ sheds €6bn in two-day slump*" and asked the Expert whether he accepted this article as accurate. The Expert stated that he did accept the information contained in the article but noted that it related to the Irish Stock Exchange and in particular related to the US sub-prime market. The Expert stated the article reported a one-day slump. He also stated that, at the date of the oral hearing, there had been three one-day slumps in the previous three months, albeit each being smaller than the one reported on 7 June 2007. The Expert further stated that he had dealt with this issue in his Report and stated that in June 2007 it was reasonable to expect that the value of the investment in the Fund would be realised within seven years of the investment.
81. The Expert also pointed the Commissioner to an article published on 13 June 2007 in the Irish Independent which the Appellant had submitted in support of his claim and which is entitled "*Irish to put €12bn into commercial property*". The Expert stated that this article was an example of the dynamism of markets, pointing out that it was published six days after the article which had noted a slump in the Irish stock market.
82. A number of articles were put to the Expert by the Appellant which fell outside of the timeframe of the investment and which would not have been available to an investor in the Fund prior to making the investments. In addition, articles relating to funds which did not relate to Central European commercial property were put to the Expert.
83. The Appellant put it to the Expert that the Fund had not, in fact, been oversubscribed. It was put to the Expert that there had been a delay in the closing date for investing in the Fund of 23 days and that the Fund had reached its original investment target of €200m by delaying its closing date.
84. The Expert disagreed with this assertion, pointing to the [REDACTED] article of [REDACTED] 2007 which he had included in his report and which stated that:

“
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]”

85. It was put to the Expert that, in an Information Memorandum dated 25 May 2007, the original proposed closing date for the Fund was 6 July 2007 but that it had closed on 30 July 2007. It was further put to the Expert that in the Information Memorandum the maximum fund size was identified as being “€150 million / €200 million”. It was also put to the Expert that, as the Fund had raised €200m, it is not possible to state that the Fund was oversubscribed.
86. In response, the Expert stated that the Information Memorandum provided for the possibility of an extension of the closing date for the fund. He also stated that the fact that the Fund had reached its maximum size of €200m meant that not one additional Euro of investment could be made in the Fund by anyone seeking to do so. This, he stated, meant that the Fund was oversubscribed.
87. It was put to the Expert that, even if a person selling their investment in the Fund could have realised the Net Asset Value (from here on referred to as the “NAV”) of their investment, selling fees or commissions would have been incurred which would have meant that the seller could never realise the NAV. In response, the Expert surmised that the fees incurred by a seller would be open to negotiation.
88. It was put to the Expert that the following clauses in the Information Memorandum of 25 May 2007 meant that a person investing in the Fund could not divest themselves of the investment for at least seven years:
89. At page 10 of the Information Memorandum dated 25 May 2007 “Term” is stated as:
- “Investors should not expect to realise their investment for at least 7 years.*
- The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of investments.”*
90. At section 12.3 of the Information Memorandum dated 25 May 2007 it states:
- “Based on current Irish tax law and practice the Participating Shares in the Company should not be considered a material interest in an offshore fund on the*

basis that the shareholders in the Company should not be considered to have a reasonable expectation to realise their investment at or close to net asset value within seven years of making the investment. This is due to the expected seven to eight year life of the investment and the requirement to obtain the approval of the Directors for any transfers of shares. As a result the investment in the Company should fall within the capital gains tax (“CGT”) regime for Irish tax resident investors (other than those who are exempt from tax or hold the investment on trading account – see below).”

91. At section 13.6 of the Information Memorandum dated 25 May 2007 it states:

“The Investors’ interests in Participating Shares may not be transferred. There is currently no public market in the Participating Shares, and it is highly unlikely that one will develop. Investors should not expect to realise their investment for at least 8 years.”

92. The Expert did not agree with the Appellant’s contention stating that:

- 92.1. At the time of the publication of this Information Memorandum the Fund did not exist, there was at that time no primary market and therefore no secondary market relating to the Fund could have existed.
- 92.2. He would expect that a person investing in this Fund would have carried out due diligence on the Fund.
- 92.3. The Information Memorandum did not contain a prohibition on the sale of their investment.

Submissions

Appellant

93. In summary, the Appellant submitted that:

- 93.1. He did not hold a material interest in the Fund;
- 93.2. The prospectus, that is to say the Information Memorandum, produced in advance of the creation of the Fund, along with letters of tax advice issued, would lead a rational investor to believe that there was no ability for investors to offload their shares in the Fund.
- 93.3. The Information Memorandum contained a prohibition on the transfer of shares.
- 93.4. No secondary market in the Fund could have existed as:

93.4.1. Had it been possible for a holder of shares in the Fund to sell them, the person purchasing them would have been liable to income tax on any gains which may have arisen without the ability to offset any costs or losses against such income tax. This would have resulted in a seller of shares in the Fund being unable to realise the NAV of the shares.

93.4.2. A purchaser of shares in the fund would also have been acquiring a long term loan liability.

93.4.3. The fund was not oversubscribed and this was evidenced by the fact that the closing date for the Fund was extended from 8 July 2007 to 31 July 2007.

Respondent

94. The material arguments made by the Respondent may be summarised as follows:

94.1. The Respondent submitted that the interest which the Appellant held in the Fund was a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA 1997.

94.2. The Respondent submitted the payments made to the Appellant by the Fund during 2017 and 2019 by way of liquidation distributions are consideration for the Appellant's disposal of a material interest in an offshore fund.

94.3. In accordance with section 745 of the TCA 1997, gains arising from the disposal of a material interest in an offshore fund are chargeable to income tax under Schedule D, Case IV, and as this is income determined in accordance with Chapter 2 of Part 27 of the TCA 1997, USC and PRSI apply.

94.4. It is therefore the Respondent's position that as the Fund was an offshore fund located in [REDACTED], and as the terms of the Appellant's investment make it a material interest in such an offshore fund, the payments received by the Appellant from the fund by way of liquidation distributions fall to be treated as offshore income gains having regard to the provisions of sections 743 and 745 of the TCA 1997.

Uncontested Material Facts

95. The following material facts are not at issue in the within appeal and the Commissioner accepts the following as material facts:

- 95.1. The Appellant is a taxpayer who, in 2007, made an investment in the Fund.
- 95.2. The Fund was incorporated in [REDACTED] on 30 April 2007 and was not tax resident in Ireland. The Fund was promoted by the Bank and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.
- 95.3. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which he entered into for a total amount of €102,500. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant.
- 95.4. As a result of the Capital Commitment Agreement entered into by the Appellant, he invested in and was issued 25 Participating Shares at a value of €1,000 per share, representing a value of €25,000. The Commissioner has not been furnished with documentary evidence of the share certificates issued to the Appellant as a result of entering into the Capital Commitment Agreement.
- 95.5. In addition, as part of the Capital Commitment Agreement entered into by the Appellant, he advanced a total of €77,500 to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Loan Notes were fully repaid to the Appellant. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
- 95.6. The Fund was wound up voluntarily by resolution on 31 July 2015 with the Liquidator being appointed as Liquidator.
- 95.7. In 2017 the Appellant received distributions totalling €85,815 in respect of liquidation distribution.
- 95.8. In addition, in 2019 the Appellant received distributions totalling €4,720 in respect of the liquidation distribution.
- 95.9. On 10 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as "*Schedule D - Offshore Income Gain*" in the amount of €62,118. The tax payable in the Notice of Amended Assessment to income tax for 2017 is €31,680.48.
- 95.10. On 10 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the

liquidation distributions received by the Appellant in 2019 as “*Schedule D - Offshore Income Gain*” in the amount of €3,417. The amount of income tax relating to the “*Schedule D - Offshore Income Gain*” for 2019 is €1,742.25.

Contested Material Facts

96. The following material facts are at issue in the within appeal:

96.1. Whether a secondary market existed for investments in the Fund in June 2007.

96.2. Whether, at the time of the acquisition of the Appellant’s interest in the Fund in May / June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest whether by transfer, surrender or in any other manner.

96.3. Whether the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund’s permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares.

96.4. Whether the NAV of the Fund could have been proportionately realised by an investor if he or she had the right to approach the Fund to sell their Participating shares in the Fund.

97. The appropriate starting point for the examination of material facts is to confirm that in an appeal before the Commissioner, 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 the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49 (from here on referred to as “*Menolly Homes*”), at paragraph 22, Charleton J. stated:

“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”.

98. More recently the High Court has confirmed the position as set out in *Menolly Homes* in the decision of Barr J. in *Thomas McNamara v The Revenue Commissioners* [2023] IEHC 15 (from here on referred to as “*McNamara*”), at paragraph 46 where he stated:

“In relation to the onus of proof at an appeal hearing before the TAC, case law makes it clear that the onus of proof rests on the taxpayer who is challenging the assessment.

As noted above, in Menolly Homes Limited v. the Appeal Commissioners and the Revenue Commissioners [2010] IEHC 49, Charleton J. stated at para. 22, that the burden of proof in the appeal process, was, as in all taxation appeals, on the taxpayer. He stated that it was not a plenary civil hearing. It was an inquiry by the Appeal Commissioners as to whether the taxpayer had shown that the relevant tax was not payable. That dictum was adopted with approval by Twomey J. in Byrne v. The Revenue Commissioners. In the course of that judgment, he referred to the decision of Sanfey J. in O’Sullivan v. Revenue Commissioners [2021] IEHC 118, where the judge had stated as follows at para. 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...””

99. This has most recently been confirmed by the Court of Appeal by McDonald J. in *JSS & Ors v A Tax Appeal Commissioner and the Criminal Assets Bureau* [2025] IECA 96 when he stated at paragraph 34 that:

“Both s. 949AK(1) of the 1997 Act and s. 50(6) of the 1970 Statute proceed on the basis that the assessment will stand unless it is established that the assessment is wrong. As outlined above, there is a long line of case law on both sides of the Irish Sea which has taken the consistent view that, under the provisions of these sections (and their respective predecessor provisions), the taxpayer bears the burden of demonstrating that a tax assessment is wrong...”

100. The Commissioner also notes the decision of the Supreme Court in *Donegal Investment Group Plc v Danbywiske and Others* [2017] IESC 14 wherein Clarke J. (as he was then) stated at paragraph 9.1 in relation to expert testimony:

“For the reasons set out in this judgment I am satisfied that it is open to a trial judge to adopt a methodology or approach which differs from each of the approaches advocated in the expert testimony tendered by the parties. However, where a trial judge is persuaded to adopt a different approach, it is necessary for the judge to structure the judgment in such a way that either expressly explains why the approach adopted is considered to be appropriate notwithstanding the expert evidence tendered or that, at a minimum, the reasoning of the trial judge in that regard can be inferred with some reasonable level of confidence.”

Whether a secondary market existed for investments in the Fund in June 2007:

101. The Commissioner heard evidence from the Expert that, in his opinion, a secondary market existed for investment in the Fund in June 2007. The basis for the Expert's opinion is that:

101.1. the Fund was oversubscribed;

101.2. there was no evidence of escalating international liquidity risks in June 2007; and

101.3. the Fund documentation made direct reference to the expected process to follow when transferring ownership.

Whether the Fund was oversubscribed:

102. It was put to the Expert under cross examination that the basis for his opinion that the Fund was oversubscribed was the single article published in the [REDACTED] on [REDACTED] [REDACTED] 2007. The Expert denied that this was the only article on which he utilised to form the opinion that the Fund was oversubscribed, however the Commissioner notes that the Expert did not directly refer to any other specific articles or sources of information in support of this element of his opinion.

103. The Expert stated that the article had led him to form an opinion that the Fund was oversubscribed, based on the fact that the Fund had raised €200m in circumstances where it had originally been intended to raise between €100m and €150m. It was put to the Expert that he could not be certain that the raising of an additional €50m to €100m meant that the fund was oversubscribed.

104. The Commissioner notes that the Appellant in his submissions gave examples as to why a third party might be reluctant to purchase an investor's interest in the Fund, however no evidence was adduced to support this submission.

105. In addition, the Appellant did not adduce any evidence as to whether the Fund was oversubscribed.

106. The Commissioner has considered the article published in the [REDACTED] on [REDACTED] [REDACTED] 2007 which states:

“ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

107. The Commissioner does not accept the Appellant's submission that the fact that the Information Memorandum identified the maximum fund size as being "€150 million / €200 million" and the fact that the fund ultimately raised €200 million as being indicative that the Fund was not oversubscribed. The Commissioner accepts the Expert's opinion that, as the Fund had reached its maximum limit, it was not possible for any further investments to be made in the Fund and, therefore, the Fund was oversubscribed.

108. The Commissioner notes that it was open to the Appellant to call evidence from the Bank or from the Directors of the Fund in relation to this material fact but that he did not do so.

109. As a result, the Commissioner accepts that at the date of closing, the Fund was oversubscribed.

Whether there was evidence of escalating international liquidity risks in June 2007:

110. The Appellant contested the Expert's evidence that there was no evidence of escalating international liquidity risks in June 2007 pointing to an article dated 7 June 2007 which was published in the Irish Independent to the Expert entitled "*ISEQ sheds €6bn in two-day slump*" and asked the Expert whether he accepted this article as accurate.

111. The Expert stated that he did accept the information contained in the article but noted that it related to the Irish Stock Exchange and, in particular, that it related to the US sub-prime market. The Expert stated the article reported a one-day slump. He also stated that, at

the date of the oral hearing, there had been three one-day slumps in the previous three months, albeit with those being smaller than the one reported on 7 June 2007.

112. The Expert further stated that he had dealt with the question of escalating liquidity risks in June 2007 in his Report the details of which are set out earlier in this Determination.

113. The Expert also pointed the Commissioner to an article published on 13 June 2007 in the Irish Independent which the Appellant had submitted in support of his claim and which is entitled “*Irish to put €12bn into commercial property*”. The Expert stated that this article was an example of the dynamism of markets, pointing out that it was published six days after the article which had noted a slump in the Irish stock market.

114. Having considered the documentation received, the evidence adduced and the submissions made, the Commissioner prefers the evidence and in particular the extensive research contained in the Expert’s Report, which outlines that there was no evidence of escalating international liquidity risks in June 2007.

Whether the Fund documentation made direct reference to the expected process to follow when transferring ownership:

115. It is not contested by the Parties that the Fund documentation, that is to say the Articles of Association, made direct reference to the expected process to follow when transferring ownership of Participating Shares or Loan Notes in the Fund.

116. The Commissioner notes that both of the the Information Memoranda published contained a statement on the first page of the document as follows:

“The information contained in this Information Memorandum relates to the Offer of Participating Shares at €1,000 per Participating Share and Loan Notes. The sole purpose of this Information Memorandum is to assist the recipient in deciding whether he/she wishes to proceed with making a Capital commitment to the Company and is not intended to form the basis of any investment decision.

Prospective investors must rely on their own examination of the Company and consider the risks involved before making a Capital Commitment to the Company. The capital of the Company will not be quoted on any recognised or designated investment exchange and, accordingly there will not be an established or ready market for them. Capital Commitments to the Company will therefore not be easily realisable and the ability to transfer Shares is restricted by the Company’s Articles.”

117. The Commissioner notes that the Articles of Association for the Fund are dated 30 April 2007. The Articles of Association for the Fund were amended by special resolution on 25 May 2007 and again on 20 May 2008. The Information Memorandum specified that the ability to transfer Participating Shares was restricted by the Articles of Association.

118. The Appellant did not adduce any third party or expert evidence which specifically addressed the question of whether a secondary market for Participating Shares and Loan Notes in the Fund existed.

119. On the other hand, the Commissioner notes that the Expert gave evidence as to the direct reference in the Capital Commitment Agreement and the Articles of Association to the expected process when transferring ownership.

120. As a result of the above, the Commissioner finds as a material fact that, on the balance of probabilities, a secondary market for the Participating Shares and Loan Notes in the Fund did exist in June 2007.

Whether at the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

121. The Appellant argued that, at the time of the Appellant's investment in the Fund in June 2007, it could not have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

122. In considering this material fact, the Commissioner must first consider the meaning of "reasonably expected" in section 743(2) of the TCA 1997.

123. In the judgment of the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (from here on referred to as "Perrigo"), McDonald J. reviewed the jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

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

Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

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

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

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

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

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

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

*(g) Although the issue did not arise in *Dunnes Stores v. The Revenue Commissioners*, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in *Revenue Commissioners v. Doorley* [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary

canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.”

124. These principles have been confirmed in the more recent decision of the Supreme Court in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 (from here on referred to as “*Heather Hill*”).

125. The Commissioner notes that the word “*reasonably*” is defined in the Oxford English Dictionary as meaning “*fairly or pretty well; sufficiently, suitably; moderately, fairly*”. The Commissioner further notes that the word “*reasonably*” is defined in the Cambridge Dictionary as meaning “*using good judgment*”.

126. The Commissioner notes that the word “*expected*” is defined in the Oxford English Dictionary as meaning “*to regard as probable or imminent; to envisage; to anticipate*”. The Commissioner further notes that the word “*expected*” is defined in the Cambridge Dictionary as meaning “*believed to be going to happen or arrive*”.

127. Having regard to the principles of statutory interpretation affirmed by McDonald J. in *Perrigo* and confirmed in the more recent decision of the Supreme Court in *Heather Hill*, the Commissioner finds that the ordinary, basic and natural meaning of the words “*reasonably expected*” in section 743(2) of the TCA 1997 is: something which is regarded as probable, or could have been envisaged, when good judgment is used.

128. The question which the Commissioner must therefore consider is whether, in June 2007, using good judgment, it was probable, or could have been envisaged, that at some time during the 7 years following the investment, a person investing in the Fund would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

129. No expert evidence was adduced on behalf of the Appellant.

130. The Commissioner heard evidence from the Expert to the effect that:

130.1. In the period between 30 April 2007 and 30 June 2007, the [REDACTED] economy and property markets were performing very well;

130.2. In the period between 30 April 2007 and 30 June 2007, media in Ireland were not widely reporting on an economic and/or property market downturn or crash;

130.3. In the period between 30 April 2007 and 30 June 2007 there were no negative United States or European financial signals available when observing the VIX and VSTOXX indices, the so called “*fear gauges*” of the United States and European financial markets.

131. The Commissioner notes that the Information Memorandum contained economic information relating to the [REDACTED] economy and to the [REDACTED] property market. This information was set out over two Parts in the Memorandum as follows:

132. Part 3 entitled “*Economic Profile of [REDACTED]*” which is sub-divided as follows:

- “3.1 *Summary*
- 3.2 *Political and Economic Transformation from the early 1990s*
- 3.3 *Industry Transformation*
- 3.4 *European Union Accession*
- 3.5 *Overview of the Economy in 2006*
 - 3.5.1 *Summary*
 - 3.5.2 *Summary*
 - 3.5.3 *Foreign Direct Investment*
- 3.6 *Prospects for 2007 and 2008*”

133. Part 4 entitled “*An Overview of the [REDACTED] Property Sector*” which is sub-divided as follows:

- “4.1 *Overview*
- 4.2 *Investment Market Overview*
- 4.3 *Residential Market Overview*
- 4.4 [REDACTED]
 - 4.4.1 *Office Market*
 - 4.4.2 *Retail Market*
 - 4.4.3 *Warehouse Market*
- 4.5 [REDACTED]

- 4.5.1 *Office Market*
- 4.5.2 *Retail Market*
- 4.6 [REDACTED]
- 4.6.1 *Office Market*
- 4.6.2 *Retail Market*
- 4.6.3 *Warehouse Market*
- 4.7 [REDACTED] *Market*
- 4.7.1 *Office Market*
- 4.7.2 *Retail Market*
- 4.7.3 *Industrial Market*
- 4.8 [REDACTED] *Market*
- 4.8.1 *Office Market*
- 4.8.2 *Retail Market*

134. Having considered the market information available in June 2007, the Information Memorandum and the Expert's Report, the Commissioner finds as a material fact, on the balance of probabilities, that in June 2007, using good judgment, it was probable, or could have been envisaged, that at some time during the 7 years following the investment, a person investing in the Fund would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

135. This finding of material fact is on the basis that:

135.1. The economic information available in May / June 2007 suggested that the growth of the [REDACTED] economy and in particular the growth of the [REDACTED] property market would continue as it had been growing in the years prior to the investment. This was set out in the Information Memorandum and was also set out by the Expert.

135.2. [REDACTED] national rental price performance had increased by approximately 20% during the period 2005 to 2007.

135.3. The [REDACTED] property price-to-income index value had increase from 100 in early 2006 to 180 mid-way through 2007.

135.4. No negative United States or European financial market signals were evident when observing the VIX and VSTOXX indices in May / June 2007.

135.5. There was no evidence of an elevation in the use of negative language relating to the economy generally or to the property market specifically in the Irish media in the period ending in June 2007.

135.6. No evidence contesting or contradicting the economic analysis carried out by the Expert has been adduced to the Commissioner. The Commissioner found the Expert's evidence to be credible and well researched.

136. The Commissioner, therefore, finds as a material fact that in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares:

137. The Appellant has submitted that there were restrictions on the transfer and redemption of the Participating Shares and Loan Notes in the Fund which required the Fund's permission for the transfer and/or redemption of same such that these restrictions amounted to an effective prohibition on the transfer of the Participating Shares.

138. It is not disputed between the Parties that the Articles of Association contained restrictions on the transfer and redemption of Participating Shares in the Fund. What the Commissioner must consider is whether the restrictions on the transfer and redemption of Participating Shares in the Fund amounted to an effective prohibition on the transfer of the Participating Shares.

139. Article 6 of the Articles of Association as amended on 25 May 2007 is entitled "*The Shares*" and provides that:

"6.1 *Participating Shares shall:*

...

6.1.5 *be transferable in accordance with Article 17;*

..."

140. Article 8 of the Articles of Association as amended on 25 May 2007 is entitled "*Issue and Redemption of Shares*" and provides as follows:

"...

8.13 *The Directors shall have the power (but shall not be under any duty) to impose such restrictions as they may think necessary for the purpose of ensuring that no shares or Loan Notes of the Company are acquired or held by or transferred to any person in breach of the law or requirements of any country or governmental or regulatory authority or in circumstances which in the opinion of the Directors might result in the Company incurring any liability to taxation or suffering any other pecuniary or other disadvantage which the Company might not otherwise have incurred or which may cause the Company to be classified as an “investment company” under the United States Investment Company Act of 1940.*

8.14 *Subject to the provision of the Laws the redemption of Participating Shares shall be at the sole discretion of the Directors and redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine.*

...”

141. Article 17 of the Articles of Association as amended on 25 May 2007 is entitled “*Transfer and Transmission of Shares*” and provides as follows:

“17.1 *All transfers of shares and Loan Notes shall be effected by transfer in writing in any usual or common form in use in the [REDACTED] or in any form approved by the Directors but need not be under seal, and every form of transfer shall state the full name and address of the transferor and transferee and be signed by our on behalf of the transferor. The transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register in respect thereof.*

17.2 *The Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-*

17.2.1 *if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;*

17.2.2 *if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any*

liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940;

17.2.3 if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.

17.3 The Directors shall decline to recognise any transfer of shares unless:-

17.3.1 the instrument of transfer is deposited at the Office or such other place as the Directors may reasonably require, accompanied by such evidence as the Directors may reasonably require to show the right of the transferor to make the transfer; and

17.3.2 the instrument of transfer relates to shares of one class only.

17.4 If the Directors decline to register a transfer of any share they shall, within one month after the date on which the transfer was lodged with the Company send to the transferee notice of the refusal.

17.5 The registration of transfers may be suspended at such times and for such periods as the Directors may from time to time determine, PROVIDED ALWAYS that such registration of transfers shall not be suspended for more than 30 days in any year.

17.6 The Directors may, by notice to a Member, at any time request a Member to furnish a declaration, in a form satisfactory to the Directors, as to his place of residence, citizenship or domicile and any such information as may be reasonably required by the Directors to satisfy themselves that such person is qualified to hold shares in the Company.

17.7 All instruments of transfer which shall be registered shall be retained by the Company, but any instrument of transfer which the Directors may decline to register shall (except in any case of fraud) be returned to the person depositing the same.

17.8 In case of the death of a member, the survivors or survivor where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole or only surviving holder, shall be the only persons recognised by the company as having title to his interest in the shares, but nothing in this

Article shall release the estate of the deceased holder whether sole or joint from any liability in respect of any share solely or jointly held by him.

17.9 *Any Guardian of an infant Member and any Guardian or other legal representative of a Member under a legal disability and any person entitled to a share in consequence of the death or insolvency of a Member shall, upon producing such evidence of his title as the Directors may require, have the right either to be registered himself as the holder of the share or to make such a transfer thereof as the infant, deceased or insolvent Member could have made.*

17.10 *A person becoming entitled to a share in consequence of the insolvency of a member shall have the right to receive and may give a discharge for all moneys payable or other advantages due on or in respect of the share, but he shall not be entitled to receive notice of or to attend or vote at meetings of the Company, nor save as aforesaid, to any of the rights or privileges of a Member unless and until he shall be registered as a Member in respect of the share PROVIDED ALWAYS that the Directors may at any given time give notice requiring any such person to elect either to be registered himself or to transfer the share and if the notice is not complied with within ninety days the Directors may thereafter withhold all moneys payable or other advantages due in respect of the share until the requirements of the notice have been complied with."*

142. The Commissioner has also considered the contents of the Information Memorandum as it relates to transfers of Participating Shares and Loan Notes.

143. At Part 2 of the Information Memorandum it states that *"Investors should not expect to realise their investment for at least 7 years. The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of the investments."*

144. Section 3.7 of the Information Memorandum is entitled *"Rights attaching to the Participating Shares"* and section 3.7.3 of the Memorandum entitled *"Redemption"* provides that *"The Participating Shares do not carry a right to redemption by Shareholders. Redemption of Participating Shares and the repayment of Loan Notes are at the absolute discretion of the Directors."*

145. Section 8.3.8 of the Memorandum is entitled *"Form and transfer of shares"* and provides that:

"Subject to the laws of [REDACTED], the Board may issue shares, and Loan Notes as certificated or uncertificated shares in its absolute discretion.

Subject to any restrictions on transfers described below:

8.3.8.1 Any Shareholder may transfer all or any of his certificated shares by an instrument of transfer in any usual form, or in any other form which the Board may approve, signed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee.

The Directors may, subject to the Articles, refuse to register a transfer of shares unless: it is delivered for registration to the registered office of the Company or such other place as the Board may decide, accompanied by such evidence as the Board may reasonably require.

The Director's [sic] may also refuse in their absolute discretion and without providing any reason therefore, to register a transfer, including without limitation if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating Shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors from time to time or if it appears to the Directors that the transferee is not qualified to hold Participating Shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940 or if the transferee fails or refuses to furnish the directors with such information or declarations as they may require."

146. It is not disputed by the Parties, and the Commissioner notes, that Article 8.14 of the Fund's Articles of Association provides that the redemption of Participating Shares shall be at the sole discretion of the Directors of the Fund and that redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine. Therefore, the Commissioner finds that there was a restriction on investors' ability to call for a redemption of their investment in the Fund.

147. The Commissioner also notes that Article 17 of the Fund's Articles of Association is entitled "*Transfer and Transmission of Shares*" and sets out the process which must be followed when transferring shares in the Fund.

148. The Commissioner notes that the Appellant did not adduce any evidence in support of his claim that the Fund documentation contained restrictions on the transfer of funds such that those restrictions amounted to an effective prohibition on the transfer of Participating Shares. The Commissioner notes that it was open to the Appellant to call evidence from the Bank or from the Directors of the Fund or from other investors in relation to this material fact but that he did not do so.

149. The Commissioner, having considered the evidence adduced, the submissions received, and the documentation submitted, notes that Article 17 of the Articles of Association sets out the process which must be followed when transferring Participating Shares and Loan Notes in the Fund. The Commissioner considers that the transfer process contained in Article 17 does not establish that an effective prohibition on the transfer of Participating Shares and Loan Notes existed. This is on the basis that:

149.1. Article 17 does not state that the transfer of Participating Shares is prohibited;

149.2. Article 17 states the format and mechanism for the making and registration of transfers;

149.3. Article 17.2 sets out that the Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-

“17.2.1 if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;

17.2.2 if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an “investment company” under the United States Investment Company Act of 1940; and

17.2.3 if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.”

149.4. No evidence was adduced by the Appellant which tends to establish that the restrictions contained in the Fund Documentation on the transfer of Participating

Shares and Loan Notes amounted to an effective prohibition on the transfer of Participating Shares and Loan Notes.

150. The Commissioner therefore finds as a material fact that the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.

The NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund:

151. Section 743(3) of the TCA 1997 provides:

“For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

152. It was submitted that even if there was a secondary market, it would be impossible for an investor selling Participating Shares to realise a value proportionate to the NAV on such a secondary market. The Appellant submitted that, even if there had been a secondary market, in circumstances where he could not realise a value proportionate to the NAV on the secondary market, it follows that his investment in the Fund could not be a material interest in an offshore fund as set out in section 743 of the TCA 1997.

153. In considering this material fact, the Commissioner notes that the Expert gave evidence under cross examination at the oral hearing that the NAV of a primary market product, such as a publicly quoted share, is easy to establish in that all of the information pertaining to the asset and the market will be built in to the share price by the primary market. The Expert stated under cross examination that the calculation of the NAV of construction property, a portfolio of property or portfolios of rental income is more difficult. He stated that in order to establish the NAV of such a portfolio a valuation for each property would need to be established.

154. The Commissioner notes that Article 11 of the Articles of Association of the Fund is entitled “*Determination of Net Asset Value*” and provides as follows:

“11.1 The Net Asset Value shall be determined by the Directors as at the Accounting Date and/or on such other occasions as the Directors may direct from time to

time, and shall be determined in accordance with the provisions of this Article. The Gross Asset Value shall also be calculated by adding to the Net Asset Value the amount of any debt drawn down by the Company.

11.2 The assets of the Company shall be deemed to include:-

11.2.1 all cash in hand, on loan or on deposit, or on-call including any interest accrued thereon;

11.2.2 all bills, demand notes, promissory notes, certificates of deposit and accounts receivable;

11.2.3 all bonds, time notes, shares, stock, debentures, debenture stock, subscription rights, warrants, options, futures and all other investments in securities owned or contracted for by the Company, other than rights and securities issued by it;

11.2.4 all stock and cash dividends and cash distributions to be received by the Company and not yet received by it but declared payable to stockholders of record on a date on or before the relevant determination of the Net Asset Value;

11.2.5 all interest accrued on any interest-bearing securities owned by the Company except to the extent that the same is included or reflected in the principal value of such security;

11.2.6 all other Investments of the Company;

11.2.7 the preliminary expenses of the Company in so far as the same have not been written off; and

11.2.8 all other assets of the Company of every kind and nature including prepaid expenses as valued and defined from time to time by the Directors.

11.3 The assets of the Company shall be valued as follows:-

11.3.1 the value of any collective investment scheme shall be the price as notified to the Directors by the Directors or administrator thereof;

11.3.2 the value of any investment which is quoted, listed or normally dealt in on a securities market will normally be based on the middle market price (if calculable, being the mean price between the bid and offer prices) for such security last available to the Directors on the calculation date.

Where such investment is listed or dealt in on more than one securities market, the Directors may select any one of such markets for the foregoing purposes, which shall be the market which, in the opinion of the Directors, constitutes the main market in relation to such investment or the market, which in relation to such investment, the Directors in its absolute discretion considers most accurately reflects the true value of such investment. Notwithstanding the generality of the foregoing, the Directors may adjust the value of any such investment if, having regard to currency exchange costs, marketability and/or such other considerations as it may deem relevant, it considers that such adjustment is required to reflect the probable realisation value thereof;

11.3.3 the value of any investment which is not listed or dealt in on a securities market or which is normally listed or dealt in on a market but in respect of which no price is currently available will be the market value of such investment;

11.3.4 the value of any cash in hand or on deposit, prepaid expenses, cash dividends and interest declared or accrued as aforesaid and not yet received shall be deemed to be the face value thereof unless, in any case, the Directors is of the opinion that the same is unlikely to be paid or received in full, in which case the value thereof will be arrived at after making such adjustment as the Directors considers appropriate in such case to reflect the true value thereof;

11.3.5 the value of any demand notes, promissory notes and accounts receivable will be deemed to be the face value or full amount thereof after making such adjustment as the Directors considers appropriate to reflect the true current value thereof;

11.3.6 certificates of deposit, Treasury bills, bank acceptances, trade bills and other negotiable instruments shall each be marked to market as at the calculation date;

11.3.7 if extraordinary circumstances render a valuation pursuant to the above principles impracticable or inadequate, the Directors will determine whether alternative methodologies should be adopted and, if so, decide what these alternative methodologies should be. The relevant assets would then be valued accordingly. Notices of the Net Asset Value sent

to the Members will describe any such alternative methodology used which is material in the circumstances;

11.3.8 if in any case a particular value is not ascertainable in accordance with the above principles or if the Directors consider that some other method of valuation better reflects the fair value of the relevant investment, then in such circumstances the method of valuation of the relevant investment will be such as the Directors, in its absolute discretion, determines; and

11.3.9 notwithstanding the foregoing, where at the time of any valuation any asset has been realised or contracted to be realised, there will be included in the assets in place of such asset the net amount receivable by the Company in respect thereof provided that, if such amount is not then known exactly, its value will be the net amount estimated by the Directors to be receivable by the Company provided that if the net amount receivable is not payable until some future time after the time of any valuation the Directors will make such adjustment as it considers appropriate to reflect the true current value thereof.

11.4 The liabilities of the company shall be deemed to include:-

11.4.1 all bills, notes and accounts payable;

11.4.2 all administrative expenses payable and/or accrued (the latter on a day-to-day basis);

11.4.3 all known liabilities present and future including the amount of any unpaid dividends declared upon the Participating Shares, contractual obligations for the acquisition of investments or other property or for the payment of money and outstanding payments on any Participating Shares previously redeemed;

11.4.4 an appropriate provision for taxes as determined from time to time by the Directors;

11.4.5 all other liabilities of the Company of whatsoever kind and nature except liabilities represented by shares in the Company and reserves (other than reserves authorised or approved by the Directors); and

11.4.6 such allowance as the directors consider appropriate for contingent liabilities.

In determining the amount of such liabilities, the Directors may calculate administrative and other expenses of a regular or recurring nature on an estimated figure for yearly or other periods in advance and accrue the same in equal proportions over any such period.

11.5 *The Net Asset Value shall be calculated by deducting the total of the Company's liabilities from the gross value of the Company's assets.*

11.6 *Any valuations made pursuant to this article shall be binding on all persons."*

155. As previously set out, the burden of proof rests on the Appellant in this appeal. The Appellant has not called any expert evidence in support of this material fact and has not submitted any documentary evidence in support of this claim. Pursuant to the provisions of Article 11 of the Articles of Association of the Fund, the NAV of the Fund was required to be determined by the Directors of the Fund on the Accounting Date, that being 31 December annually commencing on 31 December 2007. There is no reference in the Articles of Association of the Fund as to whether an investor could request a NAV from the Directors at any other time during the year.

156. It was open to the Appellant to call evidence from the Directors of the Fund in relation to this material fact but he did not do so.

157. As a result of the foregoing, the Commissioner finds as a material fact that an investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund on the secondary market by way of the acquiring the NAV which the Fund determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.

Findings of Material Facts:

158. For the avoidance of doubt, the Commissioner makes the following findings of material facts in this appeal:

158.1. The Appellant is a taxpayer who, in 2007, made an investment in the Fund.

158.2. The Fund was incorporated in [REDACTED] on 30 April 2007 and was not tax resident in Ireland. The Fund was promoted by the Bank and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.

- 158.3. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which he entered into for a total amount of €102,500. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant.
- 158.4. As a result of the Capital Commitment Agreement entered into by the Appellant, he invested in and was issued 25 Participating Shares at a value of €1,000 per share, representing a value of €25,000. The Commissioner has not been furnished with documentary evidence of the share certificates issued to the Appellant as a result of entering into the Capital Commitment Agreement.
- 158.5. In addition, as part of the Capital Commitment Agreement entered into by the Appellant, he advanced a total of €77,500 to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Loan Notes were fully repaid to the Appellant. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
- 158.6. The Fund was wound up voluntarily by resolution on 31 July 2015 with the Liquidator being appointed as Liquidator.
- 158.7. In 2017 the Appellant received distributions totalling €85,815 in respect of liquidation distribution.
- 158.8. In addition, in 2019 the Appellant received distributions totalling €4,720 in respect of the liquidation distribution.
- 158.9. On 10 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as "*Schedule D - Offshore Income Gain*" in the amount of €62,118. The tax payable in the Notice of Amended Assessment to income tax for 2017 is €31,680.48.
- 158.10. On 10 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2019 as "*Schedule D - Offshore Income Gain*" in the amount of €3,417. The amount of income tax relating to the "*Schedule D - Offshore Income Gain*" for 2019 is €1,742.25.
- 158.11. A secondary market existed for investments in the Fund in June 2007.

158.12. It could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

158.13. The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.

158.14. An investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund on the secondary market by way of acquiring the NAV which the Fund determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.

Analysis

159. Section 745 of the TCA 1997 is entitled "Charge to income tax or corporation tax of offshore income gain" and provides that:

"(1) Where a disposal to which this Chapter applies gives rise, in accordance with Schedule 20, to an offshore income gain, then, subject to this section, the amount of that gain shall be treated for the purposes of the Tax Acts as -

(a) income arising at the time of the disposal to the person making the disposal, and

(b) constituting profits or gains chargeable to tax under Case IV of Schedule D for the chargeable period (within the meaning of section 321 (2)) in which the disposal is made.

..."

160. The issue which the Commissioner must consider is whether the investment which the Appellant made in the Fund was a material interest in an offshore fund as set out in section 743 of the TCA 1997.

161. It is agreed between the Parties, and the Commissioner has found as a material fact, that the Fund was an offshore fund for the purposes of section 743(1) of the TCA 1997.

162. Section 743(2) of the TCA 1997 provides that:

“(2) Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).”

163. The Commissioner has already found as a material fact that at the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

164. It therefore follows that the Appellant's interest in the Fund was a material interest subject to the provisions of sections 743(3) to 743(9) of the TCA 1997.

165. Section 743(3) of the TCA 1997 provides that:

“(3) For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

166. Section 743(3) of the TCA 1997 is a deeming provision and sets out one circumstance in which a person shall be deemed to be able to realise the value of an interest in an offshore fund. The Commissioner considers that the provisions of section 743(3) do not provide that if an investor does not fall within the provisions of section 743(3) then their interest in a fund or company cannot or will not be a material interest pursuant to the provisions of section 743(2) of the TCA 1997.

167. The Commissioner has already found that the Appellant has not established on the balance of probabilities that the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.

168. The NAV was, pursuant to Article 11 of the Articles of Association of the Fund, available to investors and to the Appellant on an annual basis from 31 December 2007.

169. The Appellant has therefore not discharged the burden of proof to establish that an investor could not realise an amount which was reasonably approximate to that portion

which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund as provided for in section 743(3) of the TCA 1997.

170. As a result of the foregoing, the Commissioner finds that the Appellant's interest in the Fund was a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA 1997.

171. Having made that finding, it follows that the Commissioner must find that the gains of €62,118 in 2017 and €3,417 in 2019 relating to the Fund were offshore income gains and are therefore subject to income tax pursuant to the provisions of section 745(1) of the TCA 1997.

Determination

172. As such and for the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the Respondent was incorrect to issue the Notice of Amended Assessment to income tax for the tax year 2017. The Notice of Amended Assessment to income tax raised by the Respondent on 10 December 2022 for the tax year 2017 shall therefore stand.

173. The Commissioner also determines that the Appellant has not succeeded in showing that the Respondent was incorrect to issue the Notice of Amended Assessment to income tax for the tax year 2019. The Notice of Amended Assessment to income tax raised by the Respondent on 10 December 2022 for the tax year 2019 shall therefore stand.

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

Notification

175. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) of the TCA 1997 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 shall not receive any other notification of this determination by any other methods of communication.

Appeal

176. Any party dissatisfied with the determination has a right of appeal on a point or points of law only to the High Court 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.



Clare O'Driscoll
Appeal Commissioner
24 March 2026