APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Numbers: 2022/294

2022/307

Faherty J.

Allen J.

Butler J.

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 OF THE TAXES CONSOLIDATION ACT, 1997

BETWEEN

BRENDAN THRONTON

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

AND

BETWEEN

PAUL MCDERMOTT

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 21st day of December, 2023.

Introduction

1. This is a judgment on two appeals, by Dr. Brendan Thornton and Mr. Paul McDermott, against the judgment of the High Court (Egan J.) delivered on 1st July, 2022 ([2022] IEHC 396) and consequent orders made on 1st December, 2022 which upheld a Determination of the Tax Appeals Commission *("TAC")* dated 13th December, 2019 that Schedule D income tax assessments raised by the Revenue Commissioners in respect of the tax years of assessment 2009 and 2010 should stand.

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

3. The TAC dealt, together, with 32 appeals. The case stated to the High Court was sought on behalf of all 32. Some of the appellants dropped out before the case stated was heard by the High Court. Of the original 32, twenty of the appellants filed notices of appeal to this court. Of the twenty, three more had dropped out by the time the appeal was heard.

4. As in the High Court, it was agreed that two appeals would be argued as lead cases and that the outcome would bind the others.

Background

5. The High Court judge identified the issues common to all of the appeals by reference to Dr. Thornton's 2009 investment in the first syndicate, Liberty Syndicate, and I adopt the statement of the background from the judgment of the High Court:-

> *"8. The appellant signed up for and contributed funds to the syndicate. Documents provided to the appellant pre-contribution, confirmed that persons who wished to participate in the syndicate must be individuals resident or ordinarily resident in Ireland for tax purposes, that the opportunity would be best suited to higher rate tax payers and that the initial capital contribution would not be returned. In the case of the appellant, his initial capital contribution was €25,000, half of which was immediately deducted by way of fees and charges. The appellant also contributed to other Liberty syndicates in the following tax years resulting in an overall investment over a period of five years of €100,000 in such syndicates.*
>
> *9. Among the transactions in which the syndicates engaged was the purchase of the right to receive a dividend payable by a company incorporated in the BVI, Astratide Limited ('Astratide'). The vendor of these dividend rights was also a company incorporated in the BVI, Candle Maze Limited ('Candle Maze'). The syndicate did not purchase the shares on which the dividend was payable. The vast majority (over 90%) of the funds which the appellant and the other syndicate members ('the members') contributed to the syndicate was applied towards the purchase of dividend rights. The purchase was funded by a limited recourse loan from a third BVI company, Burgos Investments Limited ('Burgos') to the members. The loan*

agreement with Burgos provided for a term of no more than 30 days and the loan was repayable only if, and to the extent that, dividends from Astratide were actually paid to the members. The monies lent by Burgos to the members were drawn down by a transfer of funds directly to the vendor of the dividend, Candle Maze, as consideration for the purchase of the dividend right. Burgos also advanced a loan to Candle Maze in an amount which was slightly higher (by less than 0.1%) than the amount of the dividend which was purchased by the members. The proceeds of the loan from Burgos to the vendor of the dividend, Candle Maze, were used to make a capital investment in its subsidiary, Astratide, which duly declared the dividend. The vendor of the dividend, Candle Maze, used the proceeds of sale of the dividend right to repay the vast majority of the loan which it owed to Burgos, leaving a small deficit. The members repaid the loan and discharged fees levied by Burgos under the loan agreements by paying the dividend amounts directly to Burgos.

10. Prior to his involvement in the syndicate, in the year ended 31st December, 2008, the appellant had claimed trading losses of €12,492. In the year ended 31st December, 2009, the appellant claimed a trading loss, including the cost of purchasing the dividend right, of €267,510.

11. Alongside these dividend right transactions, what remained of the appellant's initial investment of €25,000 in 2009 (after deduction of fees and charges) was available for the purchase of a portfolio of transactions in financial securities ('portfolio transactions'). In the ensuing tax years, the appellant contributed €20,000 per annum from his own resources to the syndicate which funds were similarly applied to the above.

12. The profit returned by the appellant in respect of these portfolio transactions was €19 in respect of the 2013 tax year, €28 in respect of the 2014 tax year and €16 in respect of the 2015 tax year. In his evidence to the TAC, the appellant asserted that he had entered into the syndicates with a view to making a trading profit. He denied that the fact that he would not receive back any of his initial contribution was inconsistent with a profit motive. Although the appellant accepted that the gains generated on foot of the portfolio transactions were minimal, if not negligible, in value, he stated that he was not a specialist in financial trades and was hoping that eventually these portfolio transactions would realise a profit. The appellant was unable to explain why, if the purpose of the scheme was not tax related, the background documentation pertaining to the syndicate would refer to the tax residency or tax band of the syndicate members. The appellant maintained that he was unaware that the dividend purchase transactions would produce a tax loss. Although he could not deny that the only real advantage arising from his participation in the syndicate was this tax loss, the appellant contended that this was not its intention."

6. To the judge's summary of the background I would add that each of the appellants – by their tax agents and advisors – and the promoter of the syndicates filed a mandatory disclosure form in accordance with the Mandatory Disclosure of Certain Transactions Regulations, 2011 which identified his or her participation in the syndicates as a *"Standardised Tax Product (Reg. 10)"* and a *"Loss Scheme – Individual (Reg. 11)"*.

7. The premise of each of the appellants' income tax returns was firstly, that by his or her participating in the syndicate he or she was carrying on a trade in financial instruments and securities which had resulted in losses which could be set off against all taxable income, and secondly, that – by the operation of s. 812 of the Taxes Consolidation Act, 1997 – the

dividend income was deemed to have been received by the vendor of the dividend rights – Candle Maze – and not by the appellants.

8. With a view to – or at least in the hope of – limiting their exposure to Revenue in case they were found to be wrong on either position, some but not all of the appellants' returns included an expression of doubt. If the expressions of doubt were sufficient, the appellants are liable to pay the tax but not any interest or penalties.

9. The premise of the revised assessments raised by Revenue was that the appellants were not engaged in trade and that the dividend income which had been paid to them was not to be deemed to be that of Candle Maze.

The issues

10. The issues, then, are:-

1. Whether the dividend purchase transactions were part of a trade in financial instruments;
2. Whether – by the operation of s. 812 – the dividend income received by the appellants is to be deemed not to have been so received; and
3. If the appellants fail on either or both of those issues, whether the expressions of doubt were sufficient to avoid the imposition of penalties.

The appeals

11. The TAC found against the appellants on all three issues but at their request stated a case for the opinion of the High Court on eight questions of law.

12. The High Court judge found that the TAC had been correct in its conclusion that the appellant was not trading and in its conclusion that the expressions of doubt failed to meet the requirements of s. 955(4) of the Taxes Consolidation Act, 1997 but that the TAC had erred in

law in its approach to s. 812 and that the section applied to deem the dividend income to have been that of Candle Maze.

13. The appellants appealed to this court on the trading issue, as well as on the expression of doubt issue. Revenue cross-appealed against the judge's conclusions on the s. 812 issue.

14. The run of the appeal was that the appellants first made their case on their appeals, to which Revenue responded, and then Revenue made its case on the cross-appeal, to which the appellants responded, leaving Revenue with the last word on the cross-appeal only. However, it is not only more convenient but logical that I should deal first with the two issues as to the appellants' entitlement to a set off in respect of the losses claimed. If the appellants succeed on the trading issue and Revenue fails on the s. 812 issue, any doubt – whether sufficiently expressed or not – will not have been realised. Otherwise, the analysis and conclusions in relation to the trading and s. 812 issues will inform the arguments and conclusions as to the sufficiency of the expressions of doubt.

Whether the appellants were trading

15. The Determination of the TAC – by reference to the arguments made by the parties – identified the issues as being whether the appellants were trading or investing, and whether s. 812 applied. The submissions of the parties on the first issue were summarised as:-

> *"Trade v Investment*
>
> *The appellant submitted that in terms of the appellant's involvement in the Liberty Syndicate, he/she was at all times carrying on a trade in financial instruments and securities. The appellant did not accept the respondent's submission that involvement in the syndicate constituted investing and not trading.*

The respondent submitted that the appellant's capital contribution to the Liberty Syndicate(s) was an investment. The respondent refuted the appellant's suggestion that he/she was carrying on a trade."

16. The Determination then identified the documentary evidence and summarised the witness evidence adduced by the parties. Three of the appellants gave evidence as to their participation in the syndicates, as did the promoter of the syndicates, Mr. Joe Diggins of Foresight Tax Specialists, on their behalf. Mr. Marcus Staunton – an accountant with experience in corporate finance, banking, structured finance and capital markets – was called by Revenue as an expert witness.

17. The Commissioner found – and I do not understand it ever to have been in controversy – that in order to establish that the losses were trading losses and that they were deductible under Case I of Schedule D, the appellants must establish in the first instance that they were trading.

18. The Commissioner cited the *dictum* of Nourse J. in *Cooper v. C & J Clarke Ltd.* [1982] STC 335, at 341 that:-

> *"The question whether a given state of affairs does or does not amount to a trade is one of fact and degree."*

19. That, also, was (and is) common case.

20. The Commissioner then identified three English authorities on the issue of whether dealing in financial securities constituted a trade: *Emanuel & Son Ltd. v. White* (1965) 42 TC 369 – in which it was found that a company was carrying on the trade of dealing in securities – and *Cooper v. C & J Clarke Ltd.* and *Salt v. Chamberlain* [1979] STC 750 – in which it was said that participation in the purchase of stocks, shares and securities did not typically

bear the hallmarks of trade. The appellants, she said, must overcome that hurdle and demonstrate that the relevant transactions were trading transactions.

21. That, too, is more or less common case. In principle, dealing in financial securities can constitute trade; but typically it does not.

22. As is apparent from the summary which I have quoted, the appellants' argument before the TAC was that they were trading in financial instruments with a view to making a profit. Revenue, however, argued that their involvement in the syndicates was in the nature of an investment and, further, that the object of the investment was to generate tax losses which could be set off against taxable income.

23. The Determination shows that before the TAC – as later in the High Court and again before this court – Revenue's submission that the object of the transaction was to obtain a tax advantage was countered with an argument on behalf of the appellants that Revenue was seeking to persuade the TAC to follow what was referred to as the *Ramsay* line of authority: that is the line of authority established in England by the judgments of the House of Lords in *Ramsay v. Inland Revenue Commissioners* [1982] A.C. 300 and *Furniss (Inspector of Taxes) v. Dawson* [1984] A.C. 474. Revenue, in response, was emphatic that it was not relying on *Ramsay* or asking the TAC to apply or follow it.

24. *Ramsay*, it will be recalled, was a decision of the House of Lords in England which introduced into English law the so-called doctrine of fiscal nullity. In *McGrath v. McDermott* [1988] I.R. 258 a unanimous full Supreme Court declined to follow it. It is not the law in Ireland. Yet, while Revenue, the TAC, and the High Court judge, all made it quite clear that they were not relying on *Ramsay*, the appellants insisted that they were.

25. The declared approach of the TAC was not to examine the end result but to examine each step in the transaction and to examine all of the evidence and documentation in order to

ascertain whether the transaction was set up with a view to carrying on a trade. The approach, said the Commissioner, was to ask whether as a matter of fact the transaction in question was a trading transaction. That, she said, did not involve any application of what she referred to as the *Ramsay* principle.

26. The Commissioner considered in some detail the judgments of the English High Court, Court of Appeal and House of Lords in *Lupton v. F.A. and A.B. Ltd.* which are reported together at (1972) 47 T.C. 580. *Lupton*, said the Commissioner, predated *Ramsay* – which it did by about ten years. The principles applied in *Lupton*, she said, were not based on *Ramsay* and were accepted in Ireland by the High Court in *MacCarthaigh v. D.* [1985] I.R. 73.

27. The Commissioner quoted from the judgment of O'Hanlon J. in *MacCarthaigh v. D*, at p. 81 of the report, where he said:-

> *"Of more direct relevance to the present case is the judgment* of *Megarry J. in the case of Lupton v FA & AB Ltd [1968] 1 W.L.R. 1401, where a complicated inter-company arrangement was entered into which produced a loss on paper for the taxpayer company of £170,000. It claimed this as a loss sustained in its trade as a dealer in stocks and shares. The following passage appears in the judgment of Megarry J at p 1423 of the report:–*
>
> > *'If at the end of the day a transaction, viewed as a whole, appears to be merely, or substantially, a trading transaction, then despite the presence of fiscal elements or fiscal motives a trading transaction it remains. If, on the other hand, the transaction as a whole appears to be no trading transaction but an artificial device remote from trade to secure a tax advantage, then the*

presence of trading elements in it will not secure its classification as a trading transaction.'"

28. The Commissioner then turned to examine what she identified as the objective facts in relation to the transactions under consideration which, she said, were:-

1. The background information document;
2. The pattern of dividend purchase transactions;
3. That the dividend purchase transactions were inherently loss making;
4. That the dividend purchase transactions were not market transactions;
5. The production of tax losses; and
6. Mandatory disclosure.

29. Commencing at p. 48 of the Determination, the Commissioner considered the submissions of the parties in relation to the badges of trade identified in 1954 by the Royal Commission on Taxation of Profits and Income and extended and updated by the decision of the High Court in England in *Marson v. Morton* [1986] STC 463. Those *"badges of trade"*, she said, were relevant to the appeal before the TAC. I pause here to say that it was common case in argument before the TAC, in the High Court, and on the appeal to this court, that the badges of trade – all of them – were relevant to the appeal.

30. They are:-

1. The subject matter of the transaction;
2. The length of period of ownership;
3. The frequency or number of similar transactions by the same person;
4. Supplementary work on or in connection with the property realised;
5. The circumstances which were responsible for the realisation; and
6. Motive.

31. While accepting that the TAC was entitled to look at motive, the appellants' argument was that it was not entitled to look at the purpose of the appellants' participation in the syndicates if that purpose was to avoid tax.

32. The Commissioner identified a number of features which, she said, led to the conclusion that the appellants were not involved in the carrying on of a trade in financial instruments and securities. These were, firstly – noting that a one-off transaction is in law capable of being an adventure in the nature of trade but typically is not – that the fact that the dividend purchase transactions were isolated transactions made it less likely that they were trading transactions. Secondly – noting the decision in *Incorporated Council of Law Reporting for England and Wales* (1888) 22 Q.B.D. 279 that there is no absolute requirement for a profit motive – the absence of any evidence of a profit motive. The Commissioner appears to have coupled with this the fact that the appellants hoped that the operation of s. 812 would convert a modest commercial loss into a much larger tax loss which could be offset against other income. Thirdly, the inability of the appellants to identify a commercial rationale for the dividend purchase transactions. Fourthly, the statement in the information document that syndicate members would never receive a return of their initial contribution. Fifthly, the fact that approximately 90% of the appellants' investment capital was funded by limited recourse loans from a BVI company, secured by a charge over the appellants' interest in the sale contract and the dividends. And sixthly, the mandatory disclosure by the promoter that the transaction was a *"standardised tax product"* and a *"loss scheme"* for the purposes of the Mandatory Disclosure of Certain Transactions Regulations, 2011.

33. At pp. 55 and 56 of her Determination, the Commissioner listed thirteen *"Findings including material findings of fact"*. I will come back to the findings but for the moment observe that one of the thirteen was that the object and purpose of the dividend purchase transactions was that it converted a loss-making transaction into a valuable transaction from a

tax perspective for each of the appellants by means of the generation of tax losses which were utilised by the appellants to reduce taxable income.

34. The conclusion of the TAC was that as far as the dividend purchase transactions were concerned, the appellants were not engaged in trade and that the appellants' capital contributions to the syndicates were in the nature of an investment.

35. In a careful and comprehensive written judgment, Egan J., having identified the three issues to be determined by the High Court and set out the background, considered the jurisdiction of the court on an appeal by way of case stated. While it is not suggested that the judge did not correctly identify the approach to be taken, it is nevertheless useful to recall what it is. At para. 13 of her judgment, Egan J. said that:-

> *"13. The correct approach to be taken by the High Court in considering a case stated on a question of law is set out in Blayney J.'s judgment in Ó Culachain v. McMullan Brothers Ltd [1995] 2 I.R. 217:*
>
> > *'(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
> >
> > *(2) Inferences from primary fact are mixed questions of fact and law.*
> >
> > *(3) If the judge's conclusions show that he has adopted the wrong view of the law, they should be set aside.*
> >
> > *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
> >
> > *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be*

disturbed (even if the Court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.'

36. At para. 14 of her judgment, Egan J. noted – and again it is useful to recall – that the appellants did not challenge the findings of primary fact of the TAC , or the TAC's inferences from primary fact. Rather, the appellants' case was that, in applying the law to those facts, the TAC erred in law.

37. The arguments advanced on the appeal were much the same as those made in the High Court and it is convenient to examine the conclusions of the trial judge and the arguments as to the correctness of those conclusions together.

38. In her introduction to her analysis of the trading issue, the High Court judge said that in the absence of any comprehensive statutory definition of trade, the question of whether particular transactions form part of a trade for tax purposes requires consideration on a case by case basis of the specific facts and underlying circumstances. That is common case.

39. The judge went on to say that in carrying out this analysis, guidance may be obtained from the 1955 report of the Royal Commission on Taxation of Profits and Income which sought to identify a number of indicia of trading or badges of trade. That is common case.

40. The judge identified that these factors – which are no more than a guide – include the subject matter, the length of the period ownership, the frequency of similar transactions, whether supplementary work was undertaken in connection with the property prior to its disposal, the circumstances that were responsible for the realisation and – critically, she said, in the present case – motive. The weight to be attached to each of these factors will vary according to the facts and circumstances of each case. Again, all this was and is common case.

41. Egan J. then set out in full the TAC's findings and determination on the trading issue.

> *"1. It was a matter of undisputed fact that, as per the background information document and the syndicate agreement, the initial contribution would not be returned to the appellants.*
>
> *2. I find as a material fact that there was no risk undertaken by the appellants in respect of the dividend purchase transaction. The documentation provided and the appellants knew and were on notice of the fact that their capital would not be returned. They each made capital contributions to participate in the syndicate in the knowledge that their capital would not be returned. They were not at risk of not having their capital returned. They consented to not having their capital returned.*
>
> *3. In relation to the dividend purchase transactions, I am satisfied that there was no risk for the syndicate participants in respect of these transactions as the loan funding the transactions was limited recourse. The syndicate granted a charge to Burgos Investments Limited over the dividends payable. In addition, the dividend was not paid directly to the syndicate members but was paid to Burgos Investments Limited.*
>
> *4. I find that the fees and charges incurred by the appellants were significantly referable to the dividend purchase transaction, which was inherently loss making.*
>
> *5. I find that the complex structured arrangements underlying the syndicates point away from the existence of real, market driven commercial transactions and away from the existence of a genuine and authentic trade. In addition, the strategic design of these complex transactions points towards an objective other than trading and other than profit namely, tax advantages in the form of substantial tax losses generated by the syndicates.*

6. I find that an analysis in accordance with the badges of trade supports a finding that the appellants were not involved in the carrying on of a trade in financial instruments and securities.

7. On consideration of the relevant case law, the badges of trade analysis and the six objective facts their cumulative weight and effect, I find as a material fact that the appellants were not carrying on a trade. I find as a material fact that the nature of the appellant's involvement in the syndicate(s) was that of investor and that each capital contribution to the syndicate was in the nature of an investment.

8. I find that the appellants failed to identify a commercial rationale for the syndicate transactions and failed in their assertions that the commercial rationale was to generate a profit through trade.

9. I find as a matter of fact that the syndicate documentation contained references which suggested that the purpose and object of the syndicate was the generation of a tax advantage for its participants.

10. I find that the appellant's evidence that the principal object of the syndicate was to generate profits over the lifetime of the syndicate to be unsupported by the syndicate documentation and lacking in credibility.

11. The appellants repeatedly submitted that the generation of tax losses was not the purpose of the transaction, that they were unaware of the tax losses when they entered into the transaction and that the tax losses came as a complete surprise to them when they were filing their respective tax returns. I find their evidence in this regard to be completely lacking in credibility. I find that their evidence in this respect (bearing in mind that they were furnished with tax computations by Foresight setting out the losses they had generated) to be simply and plainly untrue.

12. I do not accept that the appellants were unaware that this transaction was geared to deliver them a valuable tax advantage in the form of substantial tax losses that they would (and did) offset against their respective taxable incomes.

13. I find that the object and purpose of the dividend purchase transaction was that it converted a loss-making transaction into a valuable transaction from a tax perspective for each of the appellants by means of the generation of tax losses which were utilised by the appellants to reduce taxable income."

42. There is obviously a fair amount of overlap in the thirteen findings – between Nos. 2 and 3 as to the absence of risk, between Nos. 6 and 7 as to the badges of trade analysis, between Nos. 11, 12 and 13 as to motive – and, as the judge observed, some looseness of language in the expression of the Commissioner's conclusion that the appellants were not engaged in trade as a finding of fact. However, it is quite clear from the findings and from the Commissioner's earlier analysis of the parties *"badges of trade"* submissions that – as the High Court judge put it – the Commissioner was first of all identifying and then weighing and assessing the various characteristics of the syndicates and dividend purchase transactions with a view to determining whether the appellants were or were not engaged in trade.

43. As I will come to, the High Court judge found that the TAC did not err in its finding that the dividend purchase transactions did not constitute trade but expressed some doubt as to whether it had been correct to conclude that the appellants' involvement in the syndicates was in the nature of investment.

44. By notice of appeal filed on 22nd December, 2022 the appellants appealed against the judgment and order of the High Court on ten grounds; seven directed to the trading issue and three to the expressions of doubt. Without getting ahead of myself, I do not think that it is

unfair to say that on the trade issue the grounds of appeal did not engage with the judge's reasoning.

45. The first of what I will refer to as the trade grounds was that:-

> *"The learned judge erred in failing to overturn the Tax Appeal Commission's ('TAC') determination that the appellant's participation in the dividend purchase transactions together with the participation in other financial trading transactions did not constitute a trade."*

46. This was not really developed in either the appellants' written submissions or in oral argument but what appears to be behind it is the proposition that the dividend purchase transactions were the same as the portfolio transactions, or, perhaps, that because the appellants' participation in the syndicate portfolio transactions amounted to trade, all of the activities of the syndicate amounted to trade.

47. The focus of the arguments before the TAC, and the High Court, and this court, was almost exclusively on the dividend purchase transactions: to the point that it does not appear to have been separately argued that the syndicates' dealings in portfolio transactions was in the course of trade. However, the Determination of the TAC did examine the portfolio transactions and distinguished them from the dividend purchase transactions.

48. The TAC found that the vast majority of the funds contributed by the appellants to the syndicate (about 90%) were funded by a limited recourse loan from Burgos Investments Limited. The dividend purchase transactions were, for all practical purposes, completed within less than a month. The portfolio transactions, by contrast, were funded by what was left of the participants' cash contributions after the deduction of fees and commissions – about half. The TAC found that a pattern which showed that the syndicates were put together to enter into the dividend purchase transactions; that the dividend purchase

transaction was always the first transaction entered; that it was always done at the end of the tax year; and that the value of the dividend purchase transaction was vastly different in scale to the portfolio transactions. Moreover, the dividend purchase transactions were inherently loss making, were not market transactions and were – at least from the point of view of the return on expenditure – risk free.

49. The Determination of the TAC, at p. 54, referenced the uncontested evidence of Mr. Staunton – the expert called by Revenue – that there was little or no economic linkage between the dividend transactions and the portfolio transactions, in that either might have been done without the other. It also referenced – and implicitly accepted – the submission of counsel for the Revenue (borrowing from Kelly J.) that the portfolio transactions were no more than a bagatelle, devoid of substance, where the real beneficiaries were not the appellants but the promoter of the syndicates.

50. The High Court judge, at para. 39, noted the differences identified by the TAC between the dividend transactions and the portfolio investments which, she said, comprised a careful analysis of the objective facts concerning the dividend purchase transactions. The judge concluded, at para. 48, that the TAC was entitled to have concluded that the features of the transactions under consideration – that is the dividend purchase transactions – such as the generation of a tax advantage over ten times the value of any trading profits, the absence of any risk, and the limited recourse loan, were not indicative of ordinary trade.

51. The TAC plainly considered the relevance – if any – of the fact that the syndicates were also involved in portfolio transactions and concluded that the dividend purchase transactions were different to the portfolio transactions. The High Court found that the TAC was entitled to have reached that conclusion and the ground of appeal amounts to no more than a bald assertion that she erred in doing so.

52. The sixth ground of appeal – to get it out of the way – was that:-

> *"6. The learned judge erred in law in finding that the TAC was entitled to conclude that features of the transactions under consideration were non-indicative of ordinary trade."*

53. Again there is a failure to engage with the judgment of the High Court or to attempt to identify which of the features of the transactions were found by the TAC to have been, but which the appellants would argue were not in fact, non-indicative of ordinary trade.

54. The High Court judge, at para. 27, was careful to emphasise that the evaluation of whether a particular transaction is or is not a trading transaction is itself based on an assessment of the interplay between a number of factual considerations, none of which is by itself necessarily decisive. If, for example, the absence of a profit motive, or the absence of risk, or the infrequency of the dividend purchase transactions, did not by themselves mean that the transactions were not in the way of trade, they were all obviously features of the transactions under consideration that would not ordinarily be features of trade.

55. The substance of the appeal – which reflected the main arguments made in the High Court – was in the overlapping grounds that the High Court judge erred:-

> *"2. ... in determining that a consideration of tax avoidance motivations was permissible in determining whether the appellant was engaged in a trade. Rather, regard should be had to the objective nature of the transactions following the Supreme Court decision in McGrath v. McDermott [1988] I.R. 258.*
>
> *3. ... in failing to determine that regard should be had only to a taxpayer's potential tax avoidance motivations in the context of a Revenue challenge pursuant to either (i) the general anti-avoidance provision currently contained in section 811C TCA 1997 (previously section 811 TCA 1997); or (ii) to specific anti-avoidance*

provisions contained in other sections of the TCA 1997 where applicable (eg, section 586(3)(b) TCA 1997).

4. … in failing to determine that the TAC erred in law in applying the case of Lupton v. F.A. & A.B. [1971] 3 All E.R. 948 to the appellant's case. The learned judge erred in finding that Lupton was not based on the application of the Ramsay principle of fiscal nullity which was rejected in McGrath v. McDermott [1988] I.R. 258.

5. By contrast, the learned judge should have applied the case of J.P. Harrison (Watford) Ltd. v. Griffiths [1961] EWCA Civ. J0505-1 to the appellant's case in determining that the appellant was engaged in a trade …

7. … erred in law in finding that the TAC was entitled to conclude that the transactions under consideration, excluding the facts and inferences drawn from such facts of the existence of a tax avoidance and fiscal motivation, did not amount to a trade."

56. This way and that – if I can be forgiven another cliché – the proposition is that the TAC was obliged to ignore altogether the elephant in the room, and that the High Court judge erred in failing to say so. I will come to the arguments advanced in support of the appeal but the grounds of appeal certainly conveyed to me that appellants' case was that their tax motivations ought to have been disregarded entirely.

57. Moreover, on its face, the proposition in ground 2 that regard should have been had only to the objective nature of the transactions begs the question of what that was and how it was to be determined. As I will come to, it was accepted at the oral hearing of the appeal that the appellants' tax avoidance motivation was a factor to which the TAC could properly have had regard and the argument was that undue weight was attributed to this factor.

58. The recurring theme of the appellants' submissions before the TAC, the High Court, and this court, is that Revenue's argument, and the English authorities relied on by Revenue, were all poisoned by *Ramsay*. From the outset, counsel for Revenue – for the good and sufficient reason that it is not the law in Ireland – disclaimed any reliance on *Ramsay* or on anything later said by the English courts that could be traced back to *Ramsay.*

59. The High Court judgment, at para. 29, summarised the appellants' primary argument as being that the TAC erred in law in considering that the purpose and motive of the appellants' participation in the syndicates, and in the dividend purchase transactions in particular, was the generation of a tax advantage because, it was said, the presence or absence of tax avoidance purposes can only be considered in the context of the general anti-avoidance provisions of s. 811 of the Taxes Consolidation Act, 1997.

60. The High Court judge rejected that argument by simply looking at, and explaining, section 811. The appellants now contest the correctness of the judge's analysis and conclusion without engaging with it and without attempting to demonstrate how or why it is said to be erroneous. The case argued on the appeal was simply a repetition of the case argued in the High Court.

61. Section 811(2) of the Act of 1997 – as it stood at the relevant time – provided that:-

> *"(2) For the purposes of this section and subject to subsection (3), a transaction shall be a 'tax avoidance transaction' if having regard to any one or more of the following –*
>
> *(a) the results of the transaction,*
>
> *(b) its use as a means of achieving those results, and*

(c) any other means by which the results or any part of the results could have been achieved,

the Revenue Commissioners form the opinion that –

(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and

(ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,

and references in this section to the Revenue Commissioners forming an opinion that a transaction is a tax avoidance transaction shall be construed as references to the Revenue Commissioners forming an opinion with regard to the transaction in accordance with this subsection."

62. The High Court judge, at para. 33, succinctly and clearly dealt with the appellants' argument. The appellants' submission, she said, focussed exclusively on s. 811(2)(c)(ii) – the purpose of the transaction. However, she said, s. 811(2)(c)(i) is also crucial. It is clear, said the judge, from s. 811(2)(c)(i) – and so it is – that in order to constitute a *"tax avoidance transaction"* within the meaning of s. 811, Revenue must have formed the opinion that the transaction gives rise to, or but for the section would give rise to, a tax advantage. In common parlance, Revenue must have formed the opinion that the scheme *"works"*.

63. I cannot see how the point might be made more clearly. Revenue's position from the outset – and the basis of the revised assessments – was that the appellants' participation in the syndicates <u>did not</u> give rise to the tax advantage claimed.

64. In argument, counsel for the appellants sought to contrast a number of other anti-avoidance provisions of the Taxes Consolidation Act, 1997, which included savers for

transactions effected for *bona fide* commercial reasons, with s. 811, which does not. This goes nowhere. The premise of the several savers is that the transactions in question might be undertaken for *bona fide* commercial reasons. The premise of s. 811 – specifically in s. 811(2)(c)(ii) – is the opinion of the Revenue Commissioners that the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage. If, perhaps, the double negative is a bit awkward, the foundation of s. 811 is the absence of *bona fide* commercial reasons. It would not make sense that there might be a saver for something that was already ruled out.

65. This disposes of ground No. 3 – that any consideration of tax avoidance motivations is limited to anti-avoidance cases. It is not.

66. The second leg of the argument advanced in the High Court was identified at para. 29 of the judgment of Egan J. as being that the underlying purpose or motive of a transaction either was of no relevance or of little relevance to the issue of whether a transaction constitutes trading but at para. 36 the judge noted that – for the good and sufficient reason that it is well established that motive is never irrelevant – the appellant did not go so far as to argue that purpose or motive was entirely irrelevant.

67. Whatever about the merits, the submission based on s. 811 argument was clear: it was that no account whatsoever could be taken on a tax avoidance motive. It seems to me that the proposition that little or no relevance should be attached to motive encompasses two alternative propositions: not much, and none at all.

68. To dispose of any argument that fiscal motive is irrelevant, it is not necessary to look beyond the judgment of O'Hanlon J. in *MacCarthaigh v. D* [1985] I.R. 73 who approved the statement of McGarry J. in *Lupton* that:-

"If at the end of the day a transaction, viewed as a whole, appears to be merely or substantially, a trading transaction, then despite the presence of fiscal elements or fiscal motives a trading transaction it remains. If, on the other hand, the transaction as a whole appears to be no trading transaction but an artificial device remote from trade to secure a tax advantage, then the presence of trading elements in it will not secure its classification as a trading transaction."

69. This disposes of the first disjointed element of ground No. 2 – that the judge erred in determining that a consideration of tax avoidance motivations was permissible in determining whether the appellant was engaged in trade – as well as ground No. 7 – that the TAC ought to have excluded from consideration the facts and inferences in relation to tax avoidance and fiscal motivation.

70. As to the argument that the TAC ought to have given little weight to motive – or that the TAC ascribed excessive weight to motive – this, it seems to me, leads inexorably to the proposition that the High Court judge ought to have examined the relative weight attached by the TAC to all of the factors identified as being relevant to the determination as to whether the appellant was trading in and come to her own conclusion.

71. The High Court judge, at paras. 26 to 28 of her judgment, set out three considerations which she said informed the approach of the court to the trading issue, which were:-

"26. First, whilst bound by any findings of primary fact or inferences from primary fact subtending this Determination, the court will nonetheless set it aside if based on a mistaken view of the law.

27. Second, the court must be cognisant that the evaluation of whether a particular transaction is or is not a trading transaction is itself based upon an assessment of the interplay between a number of factual considerations derived from the relevant

findings of fact. Not only is it no part of this court's jurisdiction to revisit the findings of facts and inferences therefrom, but it is also no function of the court to second guess the approach of the TAC to its assessment of this factual interplay.

28. Third, the assessment of the trading issue is, to a large extent, a matter of degree and judgment, which has been vested by the legislature in the TAC."

72. There is no suggestion of any error of principle in the approach taken by the High Court judge – specifically, that it was no part of the function of the High Court to second guess the TAC's assessment of the trading issue. But it seems to me that that is precisely – and only – where any argument as to the weight attached by the TAC to fiscal motive must go. The TAC clearly identified the generation – or hope – of a tax advantage as the only purpose of the dividend purchase transactions, and clearly took this into consideration. However, the Determination also correctly identified – by reference to established authority – that if, objectively, the transactions amounted to trade, the tax avoidance motivation would not transform them into anything else.

73. By the way, the appellants did not suggest how, if the weight attached to motive were to be reduced, it might be redistributed. If any reduction of the weight attached to motive were redistributed rateably – or if, by elimination without redistribution, any such reduction might increase the weight afforded to the other factors identified by the TAC as relevant to the assessment – it is difficult to see how the outcome might have been different.

74. The fourth ground of appeal is that the High Court judge erred in failing to find that the TAC erred in applying *Lupton* and erred in finding that *Lupton* was not based on *Ramsay*.

75. The fact is that *Ramsay* – which represented a very significant development in English law (correctly characterised in the appellants' written submissions as a landmark decision) – post-dated *Lupton* by ten years which makes it inherently unlikely that it could

have been the basis of the decision in *Lupton*. More to the point, perhaps, it is plain beyond argument from reading *Lupton* that it had nothing to do with fiscal nullity.

76. The proposition that *Lupton* was based on *Ramsay* was, in truth, a mere assertion. The appellants did not endeavour to show that it was and both the TAC and the High Court took some trouble to demonstrate that it was not. The Determination of the TAC quoted extensively from the judgments of Megarry J. and Lord Morris in *Lupton* before finding that the approach set out in *Lupton* was that she should conduct an examination of the objective facts and then reach a determination as to whether in fact a transaction was put in place for trading purposes or for some other purpose. The Commissioner noted that *Lupton* predated *Ramsay* and that – as she had previously demonstrated – that the principles in *Lupton* had been cited with approval in Ireland in *MacCarthaigh v. D.*

77. The High Court judge similarly quoted extensive passages from *Lupton* to demonstrate the principles applied by the English courts, and the passage from the judgment of O'Hanlon J. in *MacCarthaigh* in which the approach was adopted. The High Court judgment suggests that there was a further argument – or perhaps a refinement of the same argument – that *Lupton* and possibly *MacCarthaigh* could no longer be considered good law in light of *McGrath*. This was dealt with shortly by Egan J. Since *Lupton* was not based on *Ramsay*, the rejection in *McGrath* of the doctrine of fiscal nullity could not have impacted on either *Lupton* or *MacCarthaigh*.

78. The doctrine of fiscal nullity in *Ramsay* as well as the applicability of the anti-avoidance provisions of the Act of 1997 are both premised on the proposition that the scheme works. The principles laid down in *Lupton* – and applied in *MacCarthaigh* – are directed to determining whether the scheme works. While motive was in the mix, the issue in this case

was not whether the transactions were a tax avoidance scheme but whether they amounted to trading.

79. The appellant's argument that *Lupton* was based on *Ramsay* was misconceived from the outset. The TAC was correct to reject it and the High Court judge was correct in upholding that conclusion.

80. The last of the grounds of appeal on the trading issue is that the High Court judge erred in not applying *Griffiths v. J.P. Harrison, Ltd.* [1962] 1 All E.R. 909 to the appellant's appeal.

81. *Harrison*, as the judge put it, was the first of a triumvirate of cases which considered the tax treatment of dividend stripping schemes. The other two were *Finsbury Securities Ltd. v. Inland Revenue Commissioners* [1966] 1 W.L.R. 1402 and *Lupton.* The issue in each case was whether the taxpayers – or as they were described in *Lupton* by the inimitable Lord Denning M.R., the strippers – were engaged in trade.

82. In *Harrison,* the first of the three, decided in 1962, the House of Lords, by a majority including Lord Morris, upheld a majority decision of the Court of Appeal which, in turn, had upheld a decision of the High Court, that the transactions under review had in reality the features of an adventure in the nature of trade. Lord Denning, dissenting, characterised the taxpayers – to whom in that case he referred as *"these people"* – as *"prospectors digging for wealth in the subterranean passages of the Revenue, searching for tax repayments."*

83. In *Finsbury Securities*, decided in 1966, the House of Lords, for the reasons given in the speech of Lord Morris, unanimously reversed the Court of Appeal and distinguished *Harrison*, finding that the transactions under review in that case were not *"an adventure or concern in the nature of trade"* but a wholly artificial device remote from trade to secure a tax advantage. It is worth emphasising that the issue was not whether the transactions were a

tax scheme but whether they were an adventure or concern in the nature of trade. The appeal in *Lupton* failed because the taxpayers were not engaged in trade and not because it was a tax scheme.

84. In *Lupton*, decided in 1971, the House of Lords (including Lord Morris) unanimously dismissed an appeal from a decision of the Court of Appeal, which by a majority had upheld the judgment of Megarry J. reversing the decision of the Special Commissioners on five dividend stripping transactions. Lord Morris, in the first of the speeches in the House of Lords, distinguished *Harrison* on the basis that the transactions in that case were solely and unambiguously trading transactions.

85. In this case, the submission that the High Court judge erred in law in not applying *Harrison* appears to be a refinement or restatement of the argument made in the High Court that even if *Lupton* was correctly decided, the TAC misapplied it. The appellants' submission, as it was put in oral argument, is that this case fell on the *Harrison* side of the line rather than the *Lupton* side. This, in my view, goes nowhere. The line in each of *Harrison* and *Lupton*, as well as in this case, is whether the dividend purchase transactions were undertaken in the way of trade. In *Harrison* it was found on the facts that they were, and in *Lupton* it was found on the facts that they were not. They, and *Finsbury Securities*, turned on an examination and analysis of the transactions under consideration. The appellants' obvious preference for *Harrison* was that it fell on that side of the line where they wanted to be but they were unable to identify any difference in principle between it and *Lupton*.

86. *Lupton*, it was argued, was decided against the taxpayer because the seller and purchaser were involved in a joint venture, whereas these appellants had no connection with the BVI companies. It is the fact that in *Lupton* the seller and the buyer were involved in a

joint venture. I am far from convinced that it can truly be said that there was no connection in this case between the appellants and the BVI companies but even if that were so, the connection between the seller and the buyer in *Lupton* was one only of a number of factors which pointed to the fact that the transactions had not been undertaken in the way of trade.

87. There were echoes in the appellants' attempt to distinguish *Lupton* from *Harrison* on the facts of a submission in *Lupton* that *Finsbury Securities* should be distinguished from *Harrison* on the facts. Megarry J. was unimpressed. He said, at p. 599 of the report in the Tax Cases:-

> *"As I conceive it, my duty is to distil from the authorities the principles of law laid down in them and then to apply those principles to the case before me, whatever the facts. Principles, not facts, are the life of the doctrine of precedent; and to those who seek to apply the doctrine by matching fact against fact, I would say qui haeret in litera haeret in cortice. Certainly I do not read the Finsbury decision as saying that, when the particular facts of that case exist, then to that extent, and to that extent only, an inroad is made upon the Harrison rule. That would accord to the Harrison case an unwarranted paramountcy; ... As I see it, my duty is to apply the principles that I find in the two cases when fairly read together. As I have already indicated, I consider that the Finsbury case is far broader in its principles than [counsel for the taxpayer] would have me recognise. The facts of that case… were the foundation for the decision of the House of Lords that the transactions were not in the nature of trade but were solely artificial devices remote from trade to secure a tax advantage. Other facts in other cases may well reveal that other transactions merit the same classification; and if they do, I conceive it the duty of any court or tribunal, however lowly, to say so. It would be wrong to confound the facts of a case in which a principle emerges with the principle itself."*

88. Counsel for the appellants was unable to identify any difference in principle between *Lupton* and *Harrison*. The mere assertion that *Lupton* was based on *Ramsay* was unsupported by cogent argument: and plainly wrong.

89. As to the relevance of tax considerations, the appellants, in their written submissions cited para. 4-102 from *Maguire Irish Income Tax, 2022* in support of the proposition that:-

> *"… the fact that the syndicate participants gained tax benefits from participating in the scheme should not prejudice a finding that the party would otherwise be trading.*
>
> *There is a clear line of case law supporting this point which it is submitted has been overlooked by the TAC and the High Court. For example, in MacCarthaigh v. Daly …"*

90. Of course the proposition that the appellants gained tax benefits begs the question whether the transactions were otherwise trading.

91. The passage cited from *Maguire* – that an activity does not lose its trading character merely because it would not have been undertaken in the absence of tax considerations, or because it has been structured in such a way as to maximise available tax benefits – expressly refers to the *dictum* of Megarry J. in *Lupton* and to the fact that it was cited with approval by O'Hanlon J. in *MacCarthaigh v. Daly* III ITR 253. The proposition appears to be that the case reported as *MacCarthaigh v. Daly* in the Irish Tax Reports is a different case to *MacCarthaigh v. D.* reported in the Irish Reports. I will say no more.

92. In his oral submission, counsel for the appellants suggested that the High Court judgment gave insufficient weight to two Irish authorities, *MacCarthaigh* and *Airspace Investments Ltd. v. Moore* [1994] 2 I.L.R.M. 151.

93. As to *MacCarthaigh* I simply do not understand the submission. The High Court judge not only referred to it but quoted the approval by O'Hanlon J. of the *dictum* of Megarry J. in *Lupton*, upon which the TAC relied, and which in turn is quoted by *Maguire*.

94. Nor do I understand the significance which the appellants would attach to *Airspace*. *Airspace* was almost entirely fact specific. In that case, on the first question raised by the case stated, Lynch J. found that whether or not the taxpayer was carrying on a trade was a mixed question of fact and law. That is entirely uncontroversial. He then found that the conclusion of the Circuit Court judge that the company was carrying on a trade was clearly justified by the facts found. The second question was whether the Circuit Court judge had erred in law in finding that the capital expenditure of the company of IR£910,000 – which had been funded in part by cash and in part by a loan from the vendor – should be restricted to the amount of the cash payment because, in the event, the loan had not been repaid. The Circuit Court judge had found as a fact that the company paid the vendor IR£910,000. The report shows that Revenue's submission was that the loan of IR£693,000 was not really repayable on any view of the transaction. Lynch J. disagreed. He found that the fact that – in the events as they transpired – the loan was not repayable, did not mean that was never intended to have been repayable. He held that the judge's finding that the entire IR£910,000 had been paid – in part by a loan from the vendor – was supported by authority such as the decision of the High Court in England in *Ensign Tankers*, disregarding the concept of fiscal nullity introduced by the House of Lords.

95. Counsel for the appellants in his oral submissions referred to and opened a number of passages from the judgment of the House of Lords in *Ensign Tankers v. Stokes* [1992] STC 226. This was – as counsel said – referred to in *Airspace* but I failed utterly to understand what counsel's point was. There was some similarity in the facts in *Ensign Tankers* and *Airspace* but none between them and the instant case. The decision of the House of Lords in

Ensign Tankers turned on an application of *Ramsay* and *Furniss v. Dawson* which, everyone agrees, have no application in Ireland. I cannot see what principle *Airspace* established that warranted any consideration.

96. It will be recalled that the appellants' argument before the TAC was that they were engaged in trade and Revenue's argument was that the transactions were not undertaken in the way of trade but by way of investment. The High Court judge – for the reasons given – found that the TAC did not err in its finding that the transactions did not constitute trading but expressed some doubt as to whether the appellants' participation in the syndicate was an investment.

97. This gave rise to a new argument which first surfaced in the oral submissions to this court to the effect that if the transactions were not investments, the judge fell into error in not considering whether they fell into a third category, which, it was said, was identified in two English cases – *Lewis Emmanuel & Son Ltd. v. White (H.M Inspector of Taxes* (1965) 42 T.C. 369 and *Salt v. Chamberlain* [1979] STC 750 – namely, gambling.

98. The first thing to be said about this argument is that it was not among the grounds of appeal and I cannot see how it might be accommodated in the grounds. Secondly, I find it difficult in principle to contemplate that the judge might have erred in failing to do something which she was not asked to do. Thirdly – as the judge correctly observed – the question for the High Court was whether or not the appellant was trading and not what other label might be applied to his activities.

99. The argument can be traced back to an observation in the judgment of Pearce L.J. in *Harrison* who contemplated that in a case – such as that – involving a company whose object was to deal in shares, and which had entered a commercial transaction, and in which there

was nothing to suggest that it was not a trading transaction, might ask *"… if it is not trade, what is it?"*

100. In *Lewis Emmanuel* Pennycuick J. was prepared to contemplate that an individual might carry on a whole range of financial activities which could not amount to trade but equally could not be described as an investments. Those activities, he said, included betting and gambling and all sorts of stock exchange transactions, which, for want of a better phrase, he grouped together as gambling transactions.

101. *Salt v. Chamberlain* was an appeal to the High Court in England against a determination by the General Commissioners that a taxpayer who was engaged in speculative dealings in securities was not carrying on a trade.

102. It seems to me that even if it was in the case, there is no substance to this argument. The premise of it is that a transaction must necessarily fall into the category of trade, investment or gambling. That is not only unsupported but contradicted by the observation of Pennycuick J. in *Lewis Emmanuel* that an individual might carry on a whole range of financial activities other than trading or investing which include gambling. The range is not a range between trading at one end and investing at the other. Pennycuick J. clearly did not set out to write a list, still less an exhaustive list.

103. The *dictum* relied on by the appellants was not put in context. In *Lewis Emmanuel*, immediately before referencing the question previously asked by Pearce L.J. and later by Viscount Simons in *Harrison*, Pennycuick J. said that he accepted the submission of counsel for the taxpayer that having regard to the number and size of the purchases of securities and the rapid and continuous turnover, the only legitimate conclusion was that the company was carrying on a trade. At its height, the question contemplates the testing or confirmation of a *prima facie* impression of the transactions. It is not authority for the proposition that a

taxpayer can somehow sidestep or shift the onus of establishing that he was engaged in trade by posing the entirely open question *"What is it?"*

104. It was suggested in argument that there was no evidence that the transactions under consideration were gambling. That is unsurprising. There was never an issue as to whether the appellant's participation in the syndicates was or was not gambling. While in oral argument of the appeal to this court, counsel suggested that it was not gambling, Revenue never suggested that it was. That said, the fact is that the appellants put up significant sums of money which they were never going to get back in the hope or against the chance that they would secure significant tax advantages, and those who filed expressions of doubt did so against the chance that they would not. If there was no risk in the dividend purchase transactions, it seems to me that the same cannot be said about their participation in the syndicates.

105. It seems to me that any attempt to establish that an activity amounts to trade by eliminating all other possibilities is doomed to failure. It is accepted that the onus was on the appellants to establish that the transactions were undertaken in the way of trade. That onus was unaffected by the argument advanced on behalf of Revenue that they were an investment. It was for the appellants and not for Revenue to establish what they were. The emphasis that the appellants would put on Revenue's submission that the transactions were in the nature of an investment risks a loss of focus on the acknowledged onus of proof.

106. I record for completeness that on the appeal to this court, counsel for Revenue identified in the contemporary documentation provided to the appellants by the promoter, and in the Determination of the TAC, several references to *"Investment management proposal", "Investment strategy",* and *"Investment policies"*, all of which she said justified the conclusion of the TAC that the appellants' participation was in the nature of an investment;

but Revenue agreed that the High Court judge was correct to focus on whether it was or was not trading.

107. For the reasons given, I reject the argument that the High Court judge – if unconvinced by Revenue's submission that the transactions were an investment – was bound to inquire what else they might be.

108. I would dismiss the appeal on all of the trade grounds.

Section 812 of the Taxes Consolidation Act, 1997

109. Section 812 of the Act of 1997 is an anti-avoidance provision. In very broad terms – insofar as is relevant for present purposes – it provides that where the owner of shares sells or transfers the right to receive any dividend, the dividend is to be deemed to be the income of the owner.

110. The appellants' case is that the effect of s. 812 is that the dividends received by them are deemed to have been received by the BVI registered owner of the shares – in the case of Dr. Thornton, Candle Maze – and not by them.

111. There are essentially two strands to Revenue's case. The first is that to construe s. 812 as applying to the shares in a BVI company and to the dividends paid by a BVI company would be to give it extra territorial effect. There is a presumption that the legislation is confined to persons and property within the jurisdiction and the construction for which the appellants contend is not warranted by the language of the section. The second strand to Revenue's argument is that even if the court were to find that s. 812 did apply to deem the dividend income to be that of the BVI owner of the shares, it would not follow that the income was not the appellants' income.

112. The two strands to Revenue's argument were advanced in the TAC and in the High Court as separate arguments but it seems to me that they are inextricably intertwined. Moreover, what were advanced as separate arguments in relation to extra-territoriality were to a large extent based on English cases which dealt with the construction of materially different legislation. In a nutshell, s. 812(2) provides that where the owner of shares sells or transfers the right to receive any dividend, the dividend is to be deemed to be the income of the owner: and it stops there. The various provisions of the English legislation over the years deemed the owner or settlor to be the owner of the income transferred and went on to expressly deem the income not to be the income of the transferee or recipient. In this case, the appellants' case depends on a construction of the Irish legislation which, notwithstanding the absence an express words, would deem the dividend income not to have been received by them.

113. I should at this point set out the text of s. 812 of the Taxes Consolidation Act, 1997. The shoulder note reads *"Taxation of income deemed to arise from transfers of rights to receive interest from securities."* The section, as originally enacted, provided that:-

> **"*812.***—*(1) In this section—*
>
> *'interest' includes dividends, annuities and shares of annuities;*
>
> *'securities' include stocks and shares of all descriptions.*
>
> *(2) Where in any year of assessment or accounting period an owner (in this section referred to as 'the owner') of any securities sells or transfers the right to receive any particular interest payable (whether before or after such sale or transfer) in respect of those securities without selling or transferring those securities, then, and in every such case, the following provisions shall apply:*

(a) for the purposes of the Tax Acts that interest (whether it would or would not be chargeable to tax if this section had not been enacted)—

(i) shall be deemed to be the income of the owner or, where the owner is not the beneficial owner of the securities and some other person (in this section referred to as 'the beneficiary') is beneficially entitled to the income arising from the securities, the income of the beneficiary,

(ii) shall be deemed to be income of the owner or the beneficiary, as the case may be, for that year of assessment or accounting period, as the case may be,

[(iii) shall not be deemed to be income of any other person, and]

(iv) shall, where the proceeds of the sale or transfer are chargeable to tax under Schedule C or under Chapter 2 of Part 4, be deemed to be equal in amount to the amount of those proceeds;

[(b) where the right to receive that particular interest is subsequently sold, transferred or otherwise realised, the proceeds of such subsequent sale, transfer or other realisation shall not be deemed for any of the purposes of the Tax Acts to be income of the person by or on whose behalf such subsequent sale, transfer or other realisation is made or effected;]

(c) where the securities are of such character that the interest payable in respect of the securities may be paid without deduction of tax, then, unless the owner or beneficiary, as the case may be, shows that the proceeds of any sale or other realisation of the right to receive the interest, which is deemed to be income of the owner or of the beneficiary, as the case may be, by virtue of this section, have been charged to tax under Schedule C or under Chapter

2 of Part 4, the owner or beneficiary, as the case may be, shall be chargeable to tax under Case IV of Schedule D in respect of that interest, but shall be entitled to credit for any tax which that interest is shown to have borne;

(d) where in any case to which paragraph (c) applies the computation of the tax in respect of the interest which is made chargeable under Case IV of Schedule D by that paragraph would, if that interest had been chargeable under Case III of Schedule D, have been made by reference to the amount received in the State, the tax chargeable pursuant to paragraph (c) shall be computed on the full amount of the sums received in the State in the year of assessment or in any subsequent year of assessment in which the owner remains the owner of the securities;

(e) nothing in this subsection shall affect any provision of the Tax Acts authorising or requiring the deduction of tax from any interest which is deemed by virtue of this subsection to be income of the owner or of the beneficiary or from the proceeds of any subsequent sale, transfer or other realisation mentioned in this subsection of the right to receive that particular interest.

(3) In relation to corporation tax—

(a) subsection (2)(c) shall apply (subject to the provisions of the Corporation Tax Acts relating to distributions) to any interest, whether or not the securities are of such character that the interest may be paid without deduction of tax, and as if ‘, but shall be entitled to credit for any tax which that interest is shown to have borne’ were deleted, and

(b) subsection (2)(d) shall not apply.

(4) The Revenue Commissioners may by notice in writing require any person to furnish them, within such time (not being less than 28 days from the service of the notice) as shall be specified in the notice, with such particulars in relation to all securities of which such person was the owner at any time during the period specified in the notice as the Revenue Commissioners may consider to be necessary for the purposes of this section or for the purpose of discovering whether—

(a) tax has been borne in respect of the interest payable in respect of those securities, or

(b) the proceeds of any sale, transfer or other realisation of the right to receive the interest in respect of those securities has been charged to tax under Schedule C or under Chapter 2 of Part 4.

114. The words highlighted and bracketed were deleted by s. 40(1)(a)(i) and (ii) of the Finance Act, 2006 with effect from 7th March, 2006.

115. Commencing at p. 57, the Determination of the TAC shows that both parties contended for a literal interpretation of s. 812 and that that was the approach which the Commissioner adopted.

116. The second piece of the appellants' complicated two piece jigsaw was that the effect of s. 812 was that the dividend income paid to them by Astratide – because it was deemed to be the income of Candle Maze – was not part of their income for tax purposes. Revenue countered that the owner of the shares was a BVI company and the dividend income was BVI income and that s. 182 did not apply because it did not have extra territorial effect.

117. Again I do not want to get ahead of myself but it seems to me that the real issue was not whether the income was deemed to be that of the BVI company but whether it was

deemed not to be the income of the appellants. Moreover, it seems to me that the real issue was not the effect – if any – of s. 812 on the BVI company but the effect – if any – on the appellants. The appellants argue that if the income is deemed to be that of the BVI owner of the shares, it follows that it is not their income but – as I will come to – Revenue argues that even if the dividend income is deemed to the income of the owner, it was in fact received by the appellants and it does not necessarily follow that it is to be deemed not to be the income of the appellants.

Extra territoriality

118. The TAC's analysis of this question – following the structure and order of Revenue's submission – started with the observation that the main rule in relation to the extra-territorial effect of legislation – as established in *Colquhoun v. Heddon* (1890) 25 Q.B.D. 129 – is that a statute does not have extra-territorial scope unless it explicitly provides for that.

119. It is common case that, as Charelton J. said in *The People (Director of Public Prosecutions) v. B.A.* [2018] 2 I.R. 715, at p. 735:-

> *"The laws passed in Ireland do not have extra-territorial effect unless by necessary implication or by express words the extension of the normal rule of territoriality of national legislation is clearly indicated."*

120. The issue in *Colquhoun v. Heddon* was whether the words *"any insurance company existing on the 1st November, 1844 or … [an] insurance company registered pursuant to [the Joint Stock Companies Act, 1844]"* captured a life insurance company registered in New York, with an office in London. The Court of Appeal in England held that they did not.

121. In support of the proposition that Irish tax legislation is geographically limited in its scope, the Commissioner cited the *dictum* of Lord Herschell in *Colquhoun v. Brooks* (1889) 14 App .Cas. 493, at 504, that:-

> *"The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there."*

122. Citing *Astor v. Perry* [1935] A.C. 398 and *Becker (Inspector of Taxes) v. Wright* [1966] 1 W.L.R. 215, the Commissioner rejected the appellants' argument that s. 812 could have effect to deem the dividend to be the income of the BVI vendor. The Commissioner also identified the entitlement of the Revenue Commissioners – in s. 812(4) – to require any person to furnish them with particulars in relation to all such securities of which such person was the owner as the Revenue Commissioners might consider necessary for the purposes of the section. That provision, she said, could not apply to a BVI company whose only assets and income derived from the British Virgin Islands and who was not compellable by the Irish authorities to comply with any such request.

123. The Commissioner concluded that s. 812 did not apply to deem the dividends to be the income of the owner where the owner was established outside Ireland and was neither within the jurisdiction nor within the charge to Irish tax.

124. The TAC went on to consider the argument made by Revenue that even if the dividends were to be deemed to be the income of the BVI owner of the shares, that would not preclude it from also being the income of the recipient. The Determination shows that it was common case that the effect of s. 812 before it was amended in 2006 would have been that the dividend income – if deemed to have been that of the owner of the shares – could not also have been, or have been deemed to have been, the income of the appellants. However, Revenue argued, and the TAC found, that the effect of the deletion of s. 812(2)(a)(iii) was that there was no provision which deemed the income not to be the income of the appellants:

and that the income fell within s. 18 of the Taxes Consolidation Act, 1997 and was subject to income tax accordingly.

125. The High Court judge took a different view.

126. In the High Court there was, as the judge put it, a considerable difference in emphasis between the parties as to the principles of law applicable to construing tax statutes. Both parties submitted that the section was to be literally construed. The difference between them was whether, or the extent to which, regard could be had to the purpose of the provision. The appellants argued that tax statutes must be literally construed and that little or no regard could be had to the purpose of the provision. Revenue countered that even with the literal approach, context was critical and that the object of statutory interpretation was always to give effect to the intent of the legislature.

127. As to the difference in emphasis, the High Court judge preferred the submission of Revenue. Having referred to the judgments of the Supreme Court in *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60 and *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50, the judge adopted the summary of the applicable principles set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v. John McNamara* [2020] IEHC 552, to which, she said, she would return as necessary.

128. There is no appeal against the conclusion of the High Court as to the principles to be applied. Specifically, there is no appeal against the judge's conclusion – abundantly supported by the authorities – that the meaning of the words used in a statutory provision must be understood in the context in which they were used.

129. The appellants argued that the natural and ordinary meaning of s. 812 was clear: the income was deemed to be that of the owner of the shares. It followed, they argued, that it could not also be that of any other person.

130. Revenue also argued that the meaning was clear but – referencing the English cases – submitted that *"income"* in s. 812 must be interpreted as meaning *"income chargeable to tax."* The income of a foreign company which was not chargeable to tax could not, it was said, be income for the purposes of the section. Revenue urged that the High Court should uphold the finding of the TAC that the application of s. 812 to Candle Maze give it extra-territorial effect by purportedly making Candle Maze liable to Irish Tax.

131. The High Court judge looked at each of the four cases relied on by Revenue in support of its argument that the construction of s. 812 contended for by the appellants would give it extra-territorial effect and which, in turn, had been relied on by the TAC in concluding that it would.

132. The issue in *Colquhoun v. Brooks* (1889) 14 App. Cas. 493 was whether a U.K. resident taxpayer was liable for income tax under Schedule D, Case I on all of the profits derived from a trade carried on in Australia, or under Schedule D, Case V on just so much of the profits as had been remitted to England. The report shows that the appeal was argued over five days in May and July, 1889 in the course of which – as Lord Macnaghten put it – *"[m]any topics were discussed, and properly discussed, at considerable length ..."* but the case turned on the construction of the Income Tax Act, 1853. In the principal speech, Lord Herschell said that:-

> *"The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there."*

133. That the Income Tax Acts impose a generally applicable territorial limit, as the judge observed, is uncontroversial and accepted by both parties. As far as extra-territoriality is concerned, Mr. Brooks was plainly resident in England and so within the limit.

134. The High Court judge distinguished *Colquhoun v. Brooks* on the basis that it was, she said, clear that the House of Lords determined that it had to depart from the natural and ordinary meaning of the words in respect of the territorial limits and to prevent anomalous and unworkable results. Having carefully considered the judgments I am not so sure. The reference by Lord Herschell (at the bottom of p. 503) to the imposition of limits on the broad language of enactments to bring the matters within the territorial jurisdiction and the anomalies he identified appear to me to have been related to the earlier cases dealing with the interpretation of the Legacy Duty Act and the Succession Duty Act, and not the Income Tax Act. He immediately went on to say – in the passage I have just quoted – that the Income Tax Acts imposed their own territorial limits. Lord Herschell was prepared to take into account in interpreting a taxing statute any unreasonable result that might arise, but he qualified that by saying that the alternative construction must be consistent with the ordinary canons of construction.

135. The *ratio* of *Colquhoun v. Brooks*, as I understand it, is that in construing the true meaning of a provision which appeared *prima facie* to bring the foreign profits into charge, the court was *"... entitled and indeed bound ... to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."* This, it seems to me, is not too far away from the finding of the High Court judge that the purpose of the provision, if discernible, remains a helpful guide to its interpretation.

136. All that said, I respectfully agree with the conclusion of the High Court judge that *Colquhoun v. Brooks* is not really of much assistance as far as territoriality is concerned. Mr. Brooks was resident in England and it was common case that his Australian income was chargeable to income tax. The only question was the basis on which it was chargeable.

137. The issue in *Colquhoun v. Heddon* (1890) 25 Q.B.D. 129 was whether a premium paid by the taxpayer to a New York insurance company had been paid to an *"insurance company existing on the 1st November, 1844, or ... [an] insurance company registered pursuant to [the Joint Stock Companies Act, 1844.]"* The New York Insurance Company was one which was in existence on 1st November, 1844 and had an office in London.

138. Incidentally, the amount of the premium was £6 4s. 2d. Assuming that Mr. Heddon was liable to pay income tax at what I think was the then maximum rate of two shillings in the pound, the value of the disputed deduction was 12s. 5d. By my reckoning the deduction in dispute was, in today's money, €0.79.

139. Lord Esher M.R. (with whom Lopes L.J. agreed) asked himself:-

> *"Now, supposing the words 'any insurance company' stood alone, and there was nothing else in the section to modify the view which one would take of their meaning, would it or would it not be right to say, that those words in an English Act of Parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment standing alone? It seems to me that unless parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations, the Courts of this Country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that parliament is dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is only so when parliament is regulating the person or thing which is mentioned*

in the general words. But it seems to me that our parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and, unless it does so in express terms so clear that their meaning is beyond doubt, the Courts ought always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of parliament. If, therefore, those words stood alone, I should be of the opinion that the insurance companies mentioned must be insurance companies over which our Parliament has jurisdiction and that the section would be confined to such companies."

140. Lord Esher M.R. then examined the complicated legislative history of the section under consideration and the anomalies identified by counsel that would arise in the event that it was construed one way or the other and identified a number of other reasons why he thought that it should be confined to English companies.

141. Fry L.J. confessed that he had not been able to arrive at any conclusion of which he felt at all certain but in the end was not prepared to differ from the conclusion of the majority. He did, however, disagree with what the Master of the Rolls had said as to the rule of construction that ought to be applied to the words standing alone. He said:-

"It has been strongly pressed upon us that the words 'any insurance company existing on November 1, 1844', must prima facie mean a company constituted according to the laws of the United Kingdom, and the Master of the Rolls has taken that view. I confess that I am not able to follow him in that conclusion. In construing an Act of Parliament we ought to look at the scope and object of the enactment. I have not the least doubt that, if the words, 'any insurance company,' were used in an Act which required the registration, or which regulated the

registration, of such companies, or which asserted any right, or proposed to do anything which, according to the comity of nations, could be imposed by a government only upon those who are subject to its legislation, the words would prima facie mean an insurance company according to the laws of the United Kingdom. But we are not now dealing with a case of that kind. The Act is conferring a benefit on persons – Her Majesty's subjects and others – who are liable to the payment of income tax. It creates an exemption in favour of persons who are making provision for their families by means of insurance on their lives. In such a case it does not seem to me very material whether the insurance company is a foreign one or one regulated by the laws of the United Kingdom. The legislature were thinking about the person who makes the payment, and were not, it seems to me, at all concerned with the nature and constitution of the company to which the payment was to be made."

142. Lopes L.J. expressed his agreement with Lord Esher M.R. without reservation but in his short concurring judgment focussed on the absence of any principled difference between premiums paid to foreign insurance companies who happened to have been incorporated before 1st November, 1844 and those who were incorporated after; and on the clear link – by the operative date – with the Joint Stock Companies Act, 1844. Lopes L.J. took the view that, in practical terms, it would have been anomalous to allow the deduction in respect of premiums paid to foreign insurance companies who happened to have been incorporated before 1st November, 1844 but not in respect of premiums paid to foreign insurance companies incorporated later. Thus, his focus was on the consequences of the construction contended for rather than on the place of incorporation.

143. In this case, Revenue's argument was that to apply the deeming provision of s. 812 to a BVI company would give it extra-territorial effect. The High Court judge considered that

the emphasis and meaning which Revenue would place on the *dictum* of Lord Esher M.R. in *Heddon* was potentially at odds with the judgment of Finlay-Geoghegan J. in *Re Clarks of Ranelagh Ltd. (In liquidation)* [2004] 3 I.R. 264, in which the High Court found that a reference in the State Property Act, 1954 to a *"body corporate"* encompassed a foreign company.

144. In *Clarks of Ranelagh* directions were sought from the High Court as to whether dividends which would otherwise have been payable to foreign companies which had been dissolved had become State property. The resolution of that issue turned on the question whether a company incorporated outside Ireland was a *"body corporate"* to which s. 28 of the State Property Act, 1954 applied. Finlay-Geoghegan J. cited with approval two passages from *Bennion on Statutory Interpretation* (4th Edition). The first, at p. 306, was that:-

> *"Unless the contrary intention appears, and subject to any privilege, immunity or disability arising under the law of the territory to which an enactment extends (that is within which it is law), and to any relevant rule of private international law, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters."*

145. The second passage from *Bennion* – which Finlay-Geoghegan J. noted, appeared to be a quotation from the 12th edition of *Maxwell* – was, at pp. 306 and 307:-

> *"Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language."*

146. Finlay-Geoghegan J. found that s. 28 of the State Property Act, 1954 was intended to apply to all property located in Ireland and that by providing for the transmission, upon the happening of certain events, of property located within the State which might, in accordance with the laws of Ireland otherwise be considered to be ownerless, was not purporting to apply extra-territorially.

147. In this case, Egan J. took the view that to interpret s. 812 as deeming the dividend income to be that of Candle Maze would be, to some extent – as Lord Esher M.R. put it in *Heddon* – *"dealing, directly or indirectly with a foreign person … which is outside the jurisdiction"* but that the same could be said of a construction of s. 28 which vests the ownership of the property of a dissolved United Kingdom company in the State. Yet, she said, Finlay-Geoghegan J. had not felt constrained to interpret *"body corporate"* in such a manner as to confine its effect to Irish registered companies, in order to avoid any impact on a foreign corporate entity. Egan J. found that there was no absolute rule of interpretation, such as might be suggested by focussing only on the particular passage in the judgment of Lord Esher M.R.

148. In *Astor v. Perry* [1935] A.C. 398 the issue was whether the foreign income of a foreign trust was to be deemed to be the income of the U.K. resident settlor. In 1928, under a settlement which had been made by his grandfather, Mr. Astor – a British citizen, resident in the United Kingdom – became absolutely entitled to *"certain American stocks and shares"* which he promptly transferred to American trustees, on trust for himself as he might from time to time direct, with a power of revocation.

149. Had the settlement not contained a power of revocation, the taxpayer would have been accountable under Schedule D, Case V, rule 2, on a remittance basis. However, the Crown contended that the effect of s. 20 of the Finance Act, 1922 was that the income of the trust

was *"any income ... of which any person [was] able ... without the consent of any other person by means of the exercise of any ... power of revocation ... to obtain for himself the beneficial enjoyment;"* which should be deemed for the purposes of the enactments relating to income tax to be *"the income of the person who is ... able to obtain the beneficial enjoyment thereof ... and not to be for those purposes the income of any other person."*

150. Lord Macmillan described the Crown's argument as having, at first sight, an attractive simplicity but immediately went on to say that is the critical words *"any income"* were read without any qualification, territorial or other, *"startling anomalies result."* Those startling results were said to be – in a first scenario – that the income of a revocable American settlement by an American settlor of American stocks and shares would be deemed for British income tax purposes to be his income – and in a second scenario – in which the beneficiary of the settlement might be a U.K. citizen – that the deeming of the income to be that of the settlor and not the income of any other person would have the effect that a person resident in the United Kingdom who might be entitled to it, and who might have received it, would not be liable to pay tax on it.

151. *"Incidentally,"* Lord Macmillan said, *"one asks how a British Income Tax Act can impute to an American citizen 'for the purposes of the enactments relating to' [British] 'income tax (including super-tax)' an income of which the American citizen has by the law of his own country effectually divested himself."*

152. To overcome the difficulties which Lord Macmillan saw in the interpretation contended for by the Crown, the majority of the House of Lords decided that *"any income"* in s. 20 of the Act of 1922, was to be construed as meaning any income chargeable with tax under the British Finance Act of the year, in which case:-

"... the difficulties of the Crown's interpretation to a large extent disappear. For the income of the American trustee, being the income of a foreign non-resident, is not brought into charge, while the income so far as received by the resident in this country is, consistently with the scheme of the Income Tax Acts, brought into charge under its appropriate head, in the present instance Rule 2, and is by force of s. 20 amalgamated with the resident's income derived from sources within the United Kingdom."

153. I am not immediately convinced. Section 20 of the English Act of 1922 was a deeming provision. It introduced two fictions: the first that the income of the trust was deemed for the purpose of the Income Tax Acts to be that of the settlor, and the second that it was deemed for those purposes not to be the income of any other person. Lord Macmillan was *"not much moved"* by the argument that s. 20 was not rightly to be regarded as a charging provision and ought not to be read as imposing a charge which was not created elsewhere. But it seems to me that it is clear from the rhetorical question posed earlier that the British Tax Acts could not impute income to an American citizen for the purposes of the British Tax Acts, unless the income was to be affected in some way by the British Tax Acts. To strive, as the Lords did, to reconcile s. 20 with the existing scheme, was at the very least to risk not giving effect to the words used. The existing scheme was that under Schedule D, Case V, rule 1, tax was payable on the entire foreign income arising from stocks, shares or rents, whether the income had been or would be received in the United Kingdom, and that under Schedule D, Case V, rule 2, tax was payable on income arising from possessions other than stocks, shares or rents on the full amount of the actual sums annually received in the United Kingdom. In either case, the income was foreign income of a British taxpayer. It seems to me that the purpose of the deeming provision was not to bring the income of the foreign trustee into charge but to pierce the trust so as to make the British taxpayer – who was

to be regarded by English law as effectively entitled to the income – accountable for income tax on it. As far as extra-territoriality is concerned, the income was on either view foreign income derived from foreign property. It seems to me that in the scenarios of the American settlor and American resident to whom the British Income Tax Acts did not apply, neither did the deeming provisions apply to their income.

154. An unusual feature of *Astor v. Perry* was that the settlor and the beneficiary of the settlement were the same person. Disregarding that speciality – as he put it – Lord Macmillan was of the view that *"the result of the process of 'deeming' ... is in my opinion not to bring into tax income which was not previously chargeable but to substitute one person for another as the person liable to be charged in respect of income already chargeable."* With respect, I am not at all sure that that is correct. When, on his twenty-first birthday, Mr. Astor became entitled to the American stocks and shares, he became liable for income tax on the income arising from those stocks and shares under Schedule D, Case V, rule 1. The object of the settlement was to interpose a trust so that such income as might come to him from the settlement would be income from a *"possession"*, on which he would be liable to income tax on a remittance basis under Schedule D, Case V, rule 2. It seems to me that the object of the deeming process was to bring into charge the income from the stocks and shares which was not previously chargeable.

155. In this case, Egan J. distinguished *Astor v. Perry* on the three grounds. Firstly, she said, the approach to construction evident from the speech of Lord Macmillan was quite a distance from the literal interpretation of statutes favoured by the Irish courts. Secondly, the words *"any income"* in s. 20 of the English Act of 1922 were not – as they were in s. 812 – qualified by the words *"(whether it would or would not be chargeable to tax if this section had not been enacted)."* And thirdly, she said, the construction contended for by Revenue was not necessary to give effect to the apparent purpose of section 812, which was to ensure

that the owner of shares did not avoid income tax by transferring the interest in the dividend to someone else. The difficulty, or unintended consequence, she said, merely arose because the owner if the shares was a BVI company and as a result the Irish recipient of the income was advantaged by the deeming provision.

156. Like the judge, I am not immediately convinced by the reasoning in *Astor v. Perry*. I agree that it is difficult to construe s. 812 which applies to a right to receive a dividend *"whether or not it would be chargeable to tax if this section had not been enacted"* as confined to any income chargeable to Irish income tax. However, I find that I cannot agree that it necessarily follows that the Irish recipient of the income is advantaged by the income from the shares being deemed to be the income of the owner of the shares.

157. As the judge pointed out, *Corrigan Revenue Law* (2000) traces s. 812 back to *Inland Revenue Commissioners v. Pagett* (1938) 21 T.C. 677 in which it was held that the proceeds of sale of a right to receive interest on bearer bonds – incidentally, Hungarian government bonds – was not itself interest and was not liable to taxation as such. *Corrigan*, at para. 25.219, identifies s. 812 of the Taxes Consolidation Act, 1997 as the equivalent of what was then s. 730 of the U.K. Income and Corporation Taxes Act, 1988. At para. 25-220 he suggests that for the purposes of the tax Acts, the interest:-

> *"(i) will be deemed to be the income of the owner or the beneficial owner of the securities … and not to be the income of any other person;"*

158. That is precisely what the U.K. legislation provided but the proviso in s. 812 was slightly different. Section 730 of the U.K. Act provided that the income should be deemed to be the income of the owner – which it was not – and should not be deemed to be the income of any other person – which it was. Until its repeal in 2006, s. 812(2)(iii) provided that the income deemed by s. 812(2)(a)(i) to be the income of the owner of the securities – which it

was not – *"shall not be deemed to be income of any other person"*. As I have said, it was common case on these appeals that the effect of s. 812(2)(a)(iii) until it was repealed was that the income was deemed not to have been that of the transferee of the dividend rights but to my mind, that is not what it said. The U.K. legislation introduced two fictions but as I read it, there was never any more than one in section 812.

159. On the appeal to this court, Revenue was adamant that the dividends fell squarely within the charge to income tax in s. 18 of the Act of 1997 and was critical of what was said to have been the judge's failure to acknowledge that the appellants were *prima facie* within the charge to tax under s. 18 unless s. 812 operated so as to take them outside the charge. I see no basis for that criticism. In the hot debate as to whether the appellants were deemed not to have received the dividends, it was implicit that they were liable to income tax unless they were to be deemed not to have received the income which they had received.

160. The last of the four English cases relied on by Revenue was *Becker (Inspector of Taxes) v. Wright* [1966] 1 W.L.R. 215, in which Stamp J. was called on to consider the effect of a similar double deeming provision.

161. Mr. Wright was assessed to income tax on his English resident wife's – quite modest – West Indian income, which had been received by her under deeds of covenant executed by her father, who was abroad. He successfully appealed to the Special Commissioners, arguing that the effect of s. 392 of the Income Tax Act, 1952 was that his wife's income should be deemed to be that of her father. The Inspector of Taxes appealed to the High Court. Perhaps because the amount involved was small, or perhaps because he had an assurance that the Crown would not in that event be asking for costs, the taxpayer was unrepresented.

162. In *Astor v. Perry* Lord Macmillan had described the Crown's argument as simple but delusive. In *Becker* Stamp J. described the taxpayer's argument as simple but deceptive.

163. The Crown's argument was that the deeming provision could not apply to income which, if it was applied, would cease to be *"income"* within the meaning of the Income Tax Acts. If, in that case, the income were to be deemed to be the income of the covenantor, it would be altogether outside the ambit of the Act, whereas the express words of s. 392 directed that it should be deemed to be the covenantor's income *"for all the purposes of"* the Act. If the income was not susceptible to such deeming, it could not be within it.

164. Stamp J., citing the speech of Lord Wrenbury in *Whitney v. Inland Revenue Commissioners* [1926] A.C. 37, in which Lord Wrenbury had cited the speech of Lord Herschell in *Colquhoun v. Brooks*, said that there was a territorial limit on the Income Tax Acts, which do not purport to tax income which is *"neither derived from property in the United Kingdom nor income received by a person resident in the United Kingdom."* It followed, he said, that whatever the effect of s. 392 might be, it could not be to subject the covenantor to United Kingdom income tax.

165. Having looked at *Astor v. Perry*, Stamp J. concluded that s. 392 of the English Act was concerned only with any income which, when the deeming process had taken place, could be the income of the person by whom the disposition was made. Stamp J. was prepared to contemplate that the income was susceptible of being deemed to belong to the covenantor but found that it was not susceptible of being deemed to be the income of the covenantor for all, or, indeed, any of the purposes of the Income Tax Acts.

166. Egan J. noted that in *Becker* the taxpayer was unrepresented: something, indeed, which Stamp J. regretted. This, she thought, somewhat undermined the authority of the decision. Further, she said, the deeming provision considered in *Becker* did not have any equivalent to the words in parenthesis in section 812(2)(a).

167. I have carefully considered whether the fact that the taxpayer was unrepresented undermines the authority of *Becker*. I do not believe that it does. I can readily understand that a High Court judge in such circumstances might apprehend that in a later case on the same point counsel might be able to demonstrate that something – an authority or an argument – had been overlooked. But that, in my view, does not by itself undermine the authority of the decision. If the fact that the taxpayer was unrepresented potentially gave rise to a risk that the judgment might later be shown to have been wrong, it seems to me that it is as persuasive as any other judgment unless and until it has been shown to have been wrong. It is the fact, as the Egan J. observed, that the deeming provision in *Becker* did not have any equivalent to the words in parenthesis in section 812(2)(a) but it is not clear to me what the significance of that was to Stamp J.'s reasoning and conclusion.

168. *Becker* naturally referred to and drew from *Colquhoun v. Brooks* and Stamp J. quoted extensively from *Astor v. Perry* but as I understand it, the decision turns on the impossibility of using a provision of the Income Tax Acts to deem income to be income for the purposes of the Income Tax Acts, if the result of the deeming would be that the income would not be income for the purposes of the Income Tax Acts.

169. Having looked at the four English cases relied on by Revenue, Egan J. turned to the argument made on behalf of Revenue that income for the purposes of the Tax Acts must mean income chargeable with Irish tax. I think that it is fair to say that the High Court judge comprehensively demonstrated that income may be *"income"* for the purposes of the Act without necessarily being liable to tax. I agree that the words in parenthesis in s. 812(2)(a) mean that the section can apply to income which is not chargeable to tax. I think that the judge was correct to say that one cannot simply interpret the word *"income"* or the paraphrase *"income for the purposes of the Tax Acts"* as presupposing that the income is

chargeable to tax. But in my view that does not solve the problem that income cannot be deemed for the purposes of the Act to be income to which the Act does not apply.

170. I think that it is only fair to say the High Court judge's analysis was focussed on Revenue's submission that the foreign income, if deemed to be that of the BVI company, would not be chargeable to tax – as opposed to income for the purposes of the Act – but as the judge convincingly demonstrated, income can be income for the purposes of the Act without being chargeable to tax under the Act.

171. The closest of the English cases on the facts was *Becker*. There, as here, the actual recipient of income sought to rely on an anti-avoidance provision to create an exemption from income tax. However, the terms of s. 392 of the Income Tax Act, 1952 were, in my view, materially different. In *Becker*, if the income was deemed to be that of the covenantor it would have followed – because the section said so – that the income would also be deemed not to be the income of the recipient.

172. In this case, as I have said, the real issue is whether the effect of s. 812, properly construed, is that the income is deemed not to have been that of the appellants. The TAC and the High Court judge addressed the issues and arguments as formulated and advanced but in my view the effect of the section cannot confidently be determined without first construing it. I accept, of course, that in construing the section there is a presumption against extra-territorial effect but to my mind, if it does not have the effect contended for by the appellants, the issue of extra-territoriality evaporates.

Whether the dividends are to be deemed not to be the income of the appellants

173. The second issue as formulated by counsel for Revenue is whether, even if s. 812 applies to deem the income to be that of Candle Maze, the deletion of s. 812(2)(a)(ii) meant

that there was nothing to prevent the dividend payments from also being the income of the appellants.

174. As I have said earlier, it seems to me that a simpler way of identifying the issue is whether the effect of s. 812 is that the dividend income – which was in fact received by the appellants – is to be deemed not to have been received. If left to my own devices, I would not have been at all sure that the effect of s. 812(2)(a)(iii) for as long as it stood was that the income was to be deemed not to be that of the transferee of the dividend rights, it was common case that it was.

175. Counsel for Revenue submitted that the dividend income received by the appellants was *prima facie* chargeable to tax under s. 18 of the Act of 1997. The effect of s. 812(2)(a)(iii), for as long as it was on the books, would have been that such income in that time would have been deemed not to be theirs. The effect of the repeal, it was said, was that there was nothing to take the income out of charge. And, for good measure, the court could look at the section before and after the amendment, from which it could be seen that the change was deliberate. Reference was made to *Dodd Statutory Interpretation in Ireland* para. 5.82 where the authors suggest that an omission in a later enactment may indicate a deliberate intention to change the law, and cite the authorities in support of that proposition.

176. I do not think that it is unfair to say that counsel for the appellants did not really have an answer to this submission. It was said that if the owner of the shares and the purchasers of the dividends were both subject to the Income Tax Act, both would be liable to tax: but on the construction contended for by the appellants, if the owner was a foreign corporation neither would be liable to tax. It was said that Revenue would be unjustly enriched if both the owner of the shares and the recipient of the tax were taxed on the same income: but counsel did not engage with the justice of the appellants seeking to rely on artificial losses to

avoid their liability to tax on their real income. It was tentatively suggested that the effect of the deletion of the provision amounted to the imposition of a charge by default but it was acknowledged that s. 812 was not a charging provision. Counsel accepted that the charging provision was s. 18 and that the charge which had been disapplied between 1997 and 2006 was no longer disapplied.

177. Counsel for the appellants adopted the observation of the High Court judge, at para. 105, where she said that:-

> *"It is somewhat difficult to see what the legislature intended to achieve by the deletion of the phrase 'shall not be deemed to be the income of any other person.' If the intended effect of the amendment had been to provide that the income would be that of the purchaser of the dividend if the owner of the dividend were not chargeable to tax, then why was this not expressly stated?"*

178. It was submitted that the Oireachtas did not, and ought to have, spelled out exactly what it was doing.

179. It is useful at this stage to look at the judgment of the Supreme Court in *O'Connell v. Keleghan* [2001] 2 I.R. 490 which was relied on by Revenue in the High Court but was not referred to in the judgment.

180. In *O'Connell v. Keleghan* the taxpayer had sold or swapped his shares in a company in return for loan notes. If the consideration had been paid in cash, the taxpayer would have been liable to pay capital gains tax but by what Murphy J. described as an exception or statutory fiction in para. 2 of the Second Schedule to the Capital Gains Tax Act, 1975, the exchange was deemed not to have been a disposal. In due course, the loan notes were redeemed and the issue was whether the taxpayer was liable to pay capital gains tax on the money he received. The issue identified by Murphy J. was whether the statutory fiction

required the loan notes to be treated as having retained the character and identity of the shares and to be treated as having been acquired at the same cost as the shares.

181. Having looked at the decision of the House of Lords in *East End Dwellings Ltd. v. Finsbury Borough Council* [1952] A.C. 109 and of Nourse J. in *Commissioners of Inland Revenue v. Metrolands (Property Finance) Ltd.* (1980) 54 T.C. 679, Murphy J. said, at pp. 501 and 502:-

> *"That legislation may and does from time to time deem acts or events to be what they are not is common particularly in legislation imposing taxation or seeking to prevent its avoidance. There is no reason why the courts would not enforce such legislative fictions as fully and faithfully as any other legislation or 'boggle when it comes to the inevitable corollaries' of the fiction. The courts are not unaccustomed to dealing with notional or hypothetical situations or (in the words of Danckwert J.* [recte. Danckwerts J.] *in* In re Holt *[1953] 1 W.L.R. 1488 at p. 1492) entering 'into a dim world peopled by the indeterminate spirits of fictitious or unborn sales'. If the second schedule to the Act of 1975 requires that the loan notes should be deemed to be or treated as if they were shares in Gladebrook Limited so be it. The difficulty from the appellant's point of view is that the legislation does not so provide and the only justification for accepting that fiction would be the alleged purpose of the particular legislation. It was contended that the purpose of the fiction was to permit the first transaction to escape tax on the footing that tax would be payable on a subsequent disposition as if no change had taken place in the share holdings of the parties to the original transaction.*
>
> *In my view the requirement to treat the disposal of the loan notes in February, 1993, as a disposal in substance of shares in Gladebrook Limited is in no sense a*

consequence or a corollary of the original fiction which deemed the exchange not to be a disposition or of the further 'selective' fiction requiring the cost price of the Gladebrook shares to be that of the loan notes. There was no necessary requirement in law or in logic for the extension of the fiction. The legislature might well have been content to impose tax by reference to the price which might be expected to be obtained for the asset received in exchange for the original share holding. In my view the learned trial judge was correct in concluding that the asset realised by way of redemption in February, 1993, was in law, as it was in fact, a disposition of the loan notes which had been issued to the respondent for his shares in Gladebrook Limited."

182. The effect of s. 812(2)(a)(i) – if it applied to a BVI company – was to create a statutory fiction that the owner of the shares had received dividend income which it had not received. The effect of s. 812(2)(a)(iii) was to create a separate statutory fiction that the dividend income was deemed not to be that of the recipient of the income. If the second fiction was an inevitable corollary of the first, there would have been no need to have created it.

183. As I have said, the High Court judge observed at para. 105 that it was somewhat difficult to see what the legislature intended to achieve by the deletion from s. 812 the words *"shall not be deemed to be the income of any other person"*. The formula first used in England, starting with s. 20 of the Finance Act, 1920, was that the income – whatever it was – should be deemed for the purposes of the Income Tax Acts to be the income of the disponer and not to be for those purposes the income of any other person. There were thus two fictions: the income was to be deemed to be that of the disponer – which it was not – and it was to be deemed not to be the income of the recipient – which it was. The formula in s. 812 of the Taxes Consolidation Act, 1997, as it was enacted, was different but it is common case

that the effect was the same. The income was to be deemed to be that of the owner, and it was to be deemed not to be the income of any other person.

184. The High Court judge found that the deletion of the words *"shall not be deemed to be the income of any other person"* meant that income, which the section deemed to be that of the owner, should in certain entirely unspecified circumstances also be treated as that of the purchaser of the dividends. But this, it seems to me, supposes that the fiction that the income which was not that of the owner should be deemed to be that of the owner necessarily carried with it a second fiction that the real income of the purchaser should be deemed not to have been received. If, as was common case, the effect of s. 812(2)(a)(iii) was to take the income out of charge, it seems to me to follow that the effect of the repeal was that it was no longer out of charge.

185. *R. v. Dimsey* [2001] STC 1520 was a complicated case but one in which the issue was net: it was whether a provision deeming the income of a foreign transferee to be the income of the transferor (but not expressly deeming the income not to be that of the transferee) impelled the corollary that the income should be deemed for tax purposes not to be that of the foreign transferee. The House of Lords unanimously found that it did not.

186. Lord Scott traced the legislative history of s. 739(2) of the Income and Corporation Taxes Act, 1988 back to the Finance Act, 1936, in which he identified that another section, s. 21, expressly provided that the income of a settlement paid to or for the benefit of an unmarried infant child which was deemed to be the income of the settlor was expressly deemed not to be the income of any other person. He said, at para. 48:-

> *"Confronted by the express words in s. 21(1), 'and not as the income of any other person', it seems to me very difficult, if not impossible, to argue that those words, or something similar, which are notably absent from s. 18(1) should be an implied*

> *addition to s. 18(1). A comparison between s. 18(1) and s. 21(1) suggests strongly that the omission of any such words from s. 18(1) was deliberate."*

187. Ms. Goodman, for Revenue, submits that the repeal of s. 812(2)(a)(iii) must be seen as a deliberate decision of the Oireachtas to omit the words from the post 2006 legislation. I cannot see how it could be seen otherwise. In my view the contrast between s. 812 as it stood before the deletion is as sharp as the comparison made by Lord Scott of ss. 18(1) and 21(1) of the Finance Act, 1936.

188. Mr. Clifford, for the appellants, with no disrespect, did not engage with the reasoning in *Dimsey* but sought to dismiss it by saying that it was a 2001 decision which post-dated *Ramsay*. He acknowledged that there was no reference in *Dimsey* to *Ramsay* but reprised his assertion that *Ramsay* underpinned every judicial determination as to the meaning of tax statutes. I would not disagree that care must be taken in examining English judgments to ensure that the reasoning has not been influenced by *Ramsay* but there was no attempt to demonstrate how the reasoning in *Dimsey* might have been based on, or influenced by, *Ramsay.*

189. I am persuaded that the High Court judge erred in failing to recognise the significance of the amendment of s. 182(2) of the Act of 1997 by the deletion of sub-para. (iii). In deleting the phrase *"shall not be deemed to be the income of any other person"*, there was no need for any further explanation. In my view, the intended effect of the amendment was not – as suggested by the judge – to provide that the income would be that of the purchaser of the dividend if the owner of the shares was not chargeable to tax but to remove the fiction that it was not.

190. On that ground alone, the cross-appeal must succeed.

191. The core issue being whether the dividend income actually received by the appellants should be deemed not to have been their income, the question of extra-territorial effect does not arise. Whether or not, as a matter of statutory fiction, the dividend income was to be to be that of the BVI owner of the shares, it was as a matter of fact the income of the appellants.

192. In argument, counsel for the appellants conjured the spectre that in a case in which the owner of the shares and the purchaser of the dividend were both liable to Irish income tax, both might be liable to tax but that does not arise in these appeals. I think that counsel for Revenue was probably correct in her submission that it was unlikely to arise in practice.

193. Neither, in the end, is it necessary to decide whether Candle Maze and the other BVI owners of the shares were *"an owner"* for the purposes of s. 812 of the Taxes Consolidation Act, 1997. Whatever theoretical effect the section may or may not have on foreign persons or corporations it has none on the Irish resident appellants.

194. I mention for completeness that one of the grounds of cross-appeal was that the judge erred in failing to address an argument that s. 812 does not apply to a dividend that is not a trading receipt. The TAC said that any such issue was moot which, having regard to its finding that the appellants were not engaged in trade, was clearly correct. I do not understand Revenue to have contested the conclusion of the TAC on that issue. Revenue now complains that the High Court judge did not engage with the issue at all: but having regard to the judge's conclusion on the trading issue, it did not arise. More to the point, this was not a question on which the opinion of the High Court was sought. The case stated reflects a request by the appellants for a case stated in relation to eight questions of law which the TAC had decided. The High Court judge is not to be criticised for failing to engage with an issue which was not before the court.

195. Revenue also cross-appealed against the allocation of the costs of the appeal to the High Court but the allocation of the costs of the proceedings in the High Court will depend on the outcome of the appeal to this court.

Expression of doubt

196. Over the 180 years which have elapsed since income tax became a permanent feature on the statute book – owing in large part to a combination of the ingenuity of those referred to as taxpayers but who would prefer not to be, and the determination of Revenue that the description should in all cases be fully accurate – the law governing the imposition of the tax has become very complicated. The introduction of self-assessment imposed on the self-employed taxpayer the responsibility to ensure that his or her liability was correctly calculated, declared and paid. Few such taxpayers – I guess – will have the expertise, confidence, or bravery to make their returns without professional advice and assistance. An honest mistake may prove very costly in terms of interest and penalties.

197. The legislation recognises the difficulties that taxpayers may face in making a correct calculation of his or her liability to income tax by allowing the taxpayer who is in doubt as to the law or the treatment for tax purposes of any matter to make a return to the best of his or her belief, while at the same time alerting the inspector of taxes to the matter in question by specifying the doubt. In practice this is done by ticking a tick box on the form of electronic return and giving particulars in a text box immediately below.

198. At the time they filed their tax returns in 2009 and 2010 some of the appellants – including Dr. Thornton but excluding Mr. McDermott – submitted *"expressions of doubt"*. These expressions of doubt, if valid, have the effect of relieving the taxpayer from his or her liability to pay interest and penalties in the event that the return is later found to have been incorrect.

199. Of the seventeen remaining appellants at the time of the hearing of the appeals, ten had submitted expressions of doubt with their 2009 tax returns and fifteen with their 2010 returns.

200. For the reasons already given, the appellants are not entitled to set off the losses claimed against their taxable income and so are liable to pay the underpaid income tax. While there is no evidence of what tax, if any, remains to be paid it is by no means beyond the bounds of possibility at this remove that the appellants' potential liability in respect of interest and penalties is greater than the amount of tax.

201. In the case of the appellants who expressed a doubt, they did so by ticking a box on the form of the return against the printed words *"You have indicated that you are unsure about the Tax treatment of an item in your Return"* and then, below the printed words (or perhaps in an electronic text box opened by the answer to the previous question) *"The details are:"* a short narrative referred to as a *"Form 11"*. There were some differences in the precise detail but broadly speaking there were two different formulas.

202. One of the formulas – which was that used by Dr. Thornton – was:-

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

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

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

204. One of the appellants added to this second formula:-

*"**Additional Notes** Less Dividend received of €306,022 (deemed to be income of the owner of securities under section 812 TCA '97)(Protective Notification Form PN1 submitted)".*

205. As I will come to, there is an issue as to whether the appellants – certainly those who adopted the first formula which did not refer to the protective notice – could rely on what was said in the protective notice in addition to the details given on their tax returns but in the case of those appellants who adopted the second formula, the information in the protective notices was at least arguably incorporated by reference. The text of the protective notices was:-

"***Transaction Details***

In December 2009, the client entered into a syndicate formed for the purposes of trading in financial instruments on a pooled basis. The trading strategy of the syndicate is to take advantage of short-term opportunities to make trading profits by acquiring various financial instruments or income sources with a view to realising them to make a profit in a short space of time. The syndicate uses leverage to enhance the returns to individual syndicate members.

One of the transactions undertaken by the syndicate involved the acquisitions of the right to receive a dividend payment from a company. The syndicate did not acquire the underlying shares from which the right to receive the dividend arose but instead acquired the right to receive the future dividend in exchange for a discounted payment to the shareholder up front.

While this transaction netted the syndicate members a trading profit net of costs, we have been advised that the transaction could come within s. 812 of the Taxes Consolidation Act 1997 which could result in the income received by the syndicate

members being deemed to be that of the owner of the shares from which the right to receive the dividend arose.

Relevant provisions of the Act

We have been advised that the transaction undertaken by the investment manager on behalf of the syndicate members could fall within s. 812 of the Taxes Consolidation Act 1997.

How the relevant provisions of the Acts apply to the transaction

We have been advised that the operation of s. 812 of the Taxes Consolidation Act 1997 could deem the income received by the individual syndicate members to be the income of the owner of the shares from which the right to receive the dividend arose and not the income of the syndicate members."

206. In very general terms, the appellants' case is that the expressions of doubt filed by them were valid expressions of doubt, were genuine, and were in compliance with the requirements of s. 955(4) of the Taxes Consolidation Act, 1997. Revenue contends that the expressions of doubt failed to adequately specify the doubt, were not genuine, were not in compliance with s. 955(4) of the Act of 1997 and were not valid.

207. The TAC examined the expression of doubt in two cases. The Commissioner found that those expressions of doubt failed to specify the doubt, as required by section 955(4). Further, the TAC was not satisfied that those appellants' doubt was genuine and determined that they were acting with a view to the avoidance of tax. As the Commissioner put it, the appellants had not satisfied her that their doubt was genuine.

208. The High Court upheld the TAC's determination that the expressions of doubt failed to specify the doubt as required by s. 955(4) and found that it was unnecessary to consider

whether they were genuine or whether the appellants were acting with a view to the avoidance of tax. However, as I will come to, the judge did have something to say about the approach taken by the TAC.

209. Section 955(4) of the Taxes Consolidation Act, 1997, as originally enacted, provided that:-

> *"(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law or to the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.*
>
> *(b) This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question."*

210. The TAC considered what I have referred to as the first formula and a different form of words used by one of the then appellants who has since dropped out which was:-

> *"In December 2010, the client above entered into a syndicate formed for the purposes of trading financial instruments on a pooled basis. The trading strategy of the syndicate is to ake [sic.] advantage of short term opportunities to make trading profits by acquiring various financial instruments or income sources with a view to realising them to make profit in a short space of time. The syndicate uses leverage*

to enhance the returns to individual syndicate members. FORM PN1 Protective Notification has been sent to [the appellant's] local tax office.".

211. The TAC heard evidence from the two appellants concerned, the substance of which was that they had filed their expressions of doubt because they had been advised by their tax advisors to do so. The TAC found that the appellants had not articulated what the doubt was and had given no details as to the substance of the doubt. Having considered the factual background, the evidence, the relevant documentation and the legislative provisions underlying the syndicate transactions, the TAC was satisfied that many of the appellants had no genuine doubt as to the application of the law. Rather, the Commissioner said, they paid over their capital on the erroneous view taken of s. 812 of the Act of 1997. She immediately went on to say:-

"Perhaps other appellants harboured a hope, an aspiration or an expectation, that syndicate tax arrangements would withstand scrutiny if they were to be challenged by the Revenue Commissioners at a future date. In my view, such hopes and aspirations do not equate to a genuinely held doubt as to the application of the law.

It was always going to be a challenge to succeed on the basis of the proposition that a domestic tax provision could apply extra-territorially to a British Virgin Islands company that's not to say that the question of extra-territoriality can never be the subject of genuine doubt. However, the question is not whether the matter was objectively free from doubt, but whether the appellants themselves believed that there was a genuine doubt as to the application of the law and whether they specified this doubt in their returns."

212. In the High Court, it was submitted on behalf of the appellants – and the judge agreed – that the TAC had placed excessive and inappropriate emphasis on the fact that the doubt

was that of the appellants' tax advisors, rather than their own doubt. The appellants, it was said, could not be expected to understand the minutiae of the legislation and should be entitled to act on advice. The judge found that although s. 955(4) referred to the doubt being that of *"the chargeable person"* it was sufficient if the doubt was drawn to their attention by their tax advisor who then filed the return on their behalf.

213. The High Court judge then turned to the adequacy of the expressions of doubt. She did not accept the submission of Revenue that the section required that the appellant or his agent should have set out a significant level of detail in relation to the scheme pursuant to which the dividend purchase transaction took place but found that the expression of doubt must adequately alert the inspector to the essential issues giving rise to the existence of the relevant doubt or doubts. The judge found that the reference in the expressions of doubt to s. 812 did not identify or specify the basis on which it might or might not apply but in circumstances in which the judge had found that the section did apply, she did not express any definitive conclusion on the adequacy of the expression of doubt as far as the applicability of s. 812 was concerned.

214. As to the trading issue, the relevant matter in question was whether the dividend purchase transaction constituted trading. The judge found that a valid expression of doubt ought to have provided sufficient information to allow the inspector to understand why there was a doubt, perhaps by setting out some of the factors which later became the findings of fact of the TAC. She concluded that: *"There was, however, nothing in the expression of doubt, or indeed in the tax return as a whole, which would alert the inspector to any of those factors."*

215. In the High Court, as on the appeal, the appellants sought to rely on the fact that protective notices pursuant to s. 811A had been filed and in some cases referred to in the

appellants' returns. Without getting bogged down in the detail, the judge found – and it is unquestionably the case – that the protective notifications were made at a different time and for a different purpose to the expressions of doubt. The judge did not differentiate between those appellants who had and those who had not expressly referred to the protective notices in their Firm 11 but found that, in any event, the language in the protective notifications did not alert the inspector to the essential characteristics of the syndicate or the dividend purchase transaction or any of the matters later found as facts by the TAC. In addition, reliance was sought to be placed on notices filed by the promoter of the scheme pursuant to s. 817E of the Act of 1997 but these, too, were filed at a different time and for different purposes.

216. The appellants appeal against the findings of the High Court judge in relation to the expressions of doubt on the grounds set out in three numbered paragraphs of the notice of appeal:-

> *"8. The learned judge erred in finding that the expressions of doubt filed by the appellants failed to specify the doubt as required by section 955(4). The expression of doubt so expressed did notify Revenue of the existence of a genuine doubt, as advised to the appellants, and as such satisfied the then statutory requirement.*
>
> *9. The learned judge erred in finding that a protective notification submitted on behalf of the taxpayer in addition to the expression of doubt cannot cure a defect in the expression of doubt.*
>
> *10. The learned judge erred in law in finding that the doubt was not 'specified' as the appellant disclosed information only in relation to the s. 812 TCA 1997 issue. It should not be necessary for a taxpayer to detail every limb of the legal analysis relied on. Rather, it should be possible to specify the doubt in*

broad terms. [Revenue] initially indicated that the arrangement did not work based on the principle of extra-statutory [recte. extra territorial] effect sought to be given to s. 812 TCA 1997 by the appellant."

218. I pause here to say that there is obviously overlap in the grounds but there are also gaps between the grounds of appeal and the finding of the High Court judge. Most obviously, while it is said that the judge erred in finding that the protective notifications could not cure a defect – or supply a deficiency – in the expression of doubt, it is not said that the judge erred in finding that even if regard could be had to the protective notices, it would not advance the appellants' case. Similarly, the grounds of appeal do not immediately and unambiguously engage with the judge's finding that the relevant matter in question – or at least one component element of the relevant matter in question – was the trading issue. The judge did not – as the notice of appeal suggests – find that a valid expression of doubt must set out in detail every limb of the legal analysis relied on but only sufficient information to alert the inspector to the essential issues giving rise to the existence of the relevant doubt or doubts.

219. Mr. Clifford, for the appellants, submitted that s. 955(4) does not outline the level of detail required in respect of the matter giving rise to the doubt. Nor, he submitted, did Revenue's guidance materials. It was sufficient, he said that Revenue's attention should have been drawn to the matter in question. The purpose of the section, it was said, was to alert Revenue to the existence of an issue and this, it was said, had been achieved by the expressions of doubt and the forms PN1.

220. I cannot agree. It was obvious from the fact that revised notices of assessment were raised in respect of each of the appellants that they had come to Revenue's attention but it was not clear that the inquiries were triggered by the filing of the expressions of doubt. If –

as was contended – the purpose of the expression of doubt is to alert Revenue to the existence of a doubt, it simply does not follow from the fact that the issue was identified that it was specified in the expression of doubt. If, as I am quite prepared to contemplate, the inquiries were triggered by the fact that the box was ticked, the ticking of the box by itself could only have conveyed to the inspector of taxes that the taxpayer had a doubt; but not what the doubt was.

221. It was submitted that it would be patently unfair that the expressions of doubt should afford no protection notwithstanding that they alerted Revenue to the issue and enabled Revenue to immediately raise further queries and ultimately issue the amended assessments. This, it seems to me, presupposes that the expressions of doubt were sufficient to alert Revenue to the issue(s). The appellants appealed to the rule against doubtful penalisation endorsed by the Supreme Court in *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60 and urged that the provision be given *"a strict construction which favours the taxpayer in order to avoid an unfair imposition of liability (i.e., interest and penalties) by the use of oblique or slack language."*

222. It is trite that there is no equity in tax law. If the expressions of doubt were valid, they will have effect as provided by the Oireachtas. If they were not valid, no question of unfairness can arise.

223. The scheme of the Taxes Consolidation Act, 1997 is that the taxpayer is responsible for making a full and true disclosure and to correctly calculate and pay the tax properly payable. If he or she does not, he or she will be liable for interest and penalties. Contrary to the submission on behalf of the appellants, section 955(4) does not impose a penalty. Rather, it provides a procedure which if complied with will relieve a liability which would otherwise apply. There is no question of any withdrawal of the protection afforded by the section.

Rather, the question – in the first instance – is whether the appellants brought themselves within the protection by doing what is required.

224. I am not sure that I understand what is meant by a strict construction which favours the taxpayer. In *Revenue Commissioners v. Doorley* [1933] I.R. 750 Kennedy C.J. said, at p. 766:-

> *"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."*

225. The interest and penalties to which the appellants would otherwise be liable are not tax strictly so called but I accept the argument made on behalf of Revenue that the same principle must apply to a provision which gives an exemption from interest and penalties.

226. In the case of Dr. Thornton – by way of example – Mr. Clifford emphasised that the expression of doubt was part of his tax return on which he had ticked the appropriate box to say that he had *"... indicated that [he was] unsure about the tax treatment of an item in [his] return"* and that the return identified, separately, the amount of assessable profit derived from his principal – or at least first listed – trade, profession or vocation as a doctor, and the net loss (which exceeded by one third the profit on the first) incurred on a second trade, profession or vocation of *"Trade in fin. Instruments."* Setting off his liability for PRSI and health and income levies against the amount of professional services withholding tax deducted from his fees as a doctor, the appellant claimed to have overpaid. Counsel made much of the fact that the two trades – if such they were – were returned separately and submitted that the reference to s. 812 would have conveyed to the inspector that the taxpayer had been involved with the sale of dividend rights. I accept the second proposition, but I do

not understand the first. Plainly, the appellant's dealings in financial instruments generally or dividend rights in particular were not part of his profession as a doctor. The object of listing the profit and loss separately was to allow the latter to be set off against the former.

227. The entitlement of the appellants to set off the losses was dependant on, first, the transaction being in the course of trade and secondly, on the treatment of the dividend. The expression of doubt does not convey any doubt as to whether the purchase of the dividend rights was part of the taxpayer's trade. Secondly, if the doubt was whether s. 812 applied to the computation, that is not what the form said. The reference to s. 812 was by itself, I think, probably sufficient to convey that the doubt was in relation to the tax treatment of a purchase of dividend rights, but the return of the loss claimed in respect of the appellants' participation in the syndicates as a trading loss was incorrect. If the appellants were in any doubt as to the whether the dividend purchase transaction was part of a trade, they did draw the inspector's attention to any such issue and did not specify any such doubt.

228. It was submitted on behalf of the appellants that there was support to be found for their position in the then applicable Revenue guidance material concerning expressions of doubt which, it was said, did not specify the level of detail in which the doubt was to be expressed but was primarily concerned with ensuring that Revenue was alerted to the expression of doubt. This material, I should say, was referred to as supporting the construction of the section for which the appellants contended and not material which had been relied on by them in formulating their expressions of doubt in the way which they did.

229. The court was referred to a Tax Briefing (Issue 57) issued by Revenue in October, 2004 which addressed the practical significance of new time limits for the raising of assessments. The document set out a number of examples, including, in example No. 3 a

"Genuine expression of doubt case" and, in example No. 4, an *"Expression of doubt not genuine"*.

230. The example given by Revenue of a genuine expression of doubt was of a taxpayer who, being unsure whether a particular deduction was an allowable expense, expressed her doubt as to the tax treatment of that deduction.

> *"On receipt of the return Revenue considered the matter and concluded that the doubt expressed was genuine and that the deduction was indeed revenue expenditure and thus an allowable deduction. ... Ms. White is treated as having made a full and true disclosure with her return."*

231. With all due respect, I cannot see how this helps anyone. If – as is the premise of the example – the return was correct, it followed that the taxpayer made a full and true and her expression of doubt was neither here nor there.

232. The example given by Revenue of an expression of doubt not genuine was of a taxpayer who – without ticking the box on the form or including a note with her return – put a short note in the tax computation which she included with her return expressing doubt as to the deductibility of legal fees incurred in connection with a tax appeal for a previous tax year.

> *"Twelve months later while screening returns for audit it is noticed that there was an expression of doubt which was not drawn to Revenue's attention. On perusal of Ms. Greene's file it was noticed that she had corresponded with her local Revenue office on this issue and had been advised that the legal fees were not deductible."*

233. I do not see how this helps either. The taxpayer could have been in no doubt but that the expense was not deductible and the fact that she had not ticked the box was completely irrelevant. The example tends to suggest that a genuine doubt could be sufficiently expressed by including a note with the return, without ticking the box, which I think is correct since the

relevant provision makes no reference to ticking a box. I take the reference to the drawing of attention *"to the matter in question in the return"* as requiring the taxpayer to identify the matter in the return which is in question, rather than requiring that the expression of doubt should be included in the return, or expressed as part of the return. In the cases at hand, I think that those appellants who referred in their returns to the protective notices already filed were probably entitled to draw the inspector's attention to the matter in question by the express reference in their returns to the earlier notices and to rely on the doubts previously expressed as expressions of doubt for the purposes of section 955(4). However, those of the appellants who adopted the first formula of doubt – which made no reference to the PN1 – were not entitled to rely on the information provided at a different time and for a different purpose as supplementing their expression of doubt for the purpose of section 955(4). That is what I understand the judge to have meant when she said that the protective notification could not cure any defect in the expression of doubt.

234. In any event, as I have said, there is no appeal against the judge's finding that even if regard were to be had to the wording and content of the protective notices, the expressions of doubt did not meet the requirements of the section.

235. The examples in the guidance material were relied on in support of the argument that once the box was ticked it was clearly conveyed to Revenue that the taxpayer was *"in trouble."* The ticking of the box – by itself – it was said, would – as witness what happened in the appellants' case – trigger an inquiry. If that is so, the clear purpose of s. 955(4) is not to trigger a roving inquiry but to draw attention to a specified issue or issues. If, for the sake of argument, the inspector's attention had been drawn to a doubt as to the applicability of s. 812 and the inspector had subscribed to the view taken by the High Court judge, the issue would have been resolved in the taxpayer's favour without any examination of the trading question.

236. The appellants' submission that the TAC and the High Court erred *"with respect to the alleged requirement to outline the doubt in question to a particular level of detail"* was said to be reinforced by a comparison of s. 955(4) of the Act of 1997 – which applied to the appellants' expressions of doubt – with s. 19B of the Value-Added Tax Act, 1972 – which was introduced by s. 107 of the Finance Act, 2002 – and s. 959P of the Act of 1997 – which was introduced by the Finance Act, 2012 in substitution for section 955.

237. Section 959P of the Act of 1997 – which is in substantially the same terms as s. 19B of the Act of 1972 – defines a *"letter of expression of doubt"* as a written or electronic communication which:-

> *"(a) sets out full details of the facts and circumstances of the matter,*
>
> *(b) specifies the doubt, the basis for the doubt and the law giving rise to the doubt,*
>
> *(c) identifies the amount of tax in doubt in respect of the chargeable period to which the expression of doubt relates,*
>
> *(d) lists or identifies the supporting documentation that is being submitted to the appropriate inspector in relation to the matter, and*
>
> *(e) is clearly identified as a letter of expression of doubt for the purposes of this section,*
>
> *and reference to an 'expression of doubt' shall be construed accordingly."*

238. The TAC and the High Court, it is said, in assessing the validity of the appellants' expressions of doubt, effectively applied the more demanding requirements of the later legislation. Section 959P, it is said, *"fundamentally changed the law from a position where an EOD pursuant to section 955(4) triggered an inquiry from Revenue and detailed engagement with the taxpayer on the relevant issue to the position which now operates under*

section 959P TCA where not only specific details need to be set out but also all relevant supporting documentation in respect of the EOD must be filed in parallel."

239. Revenue countered that the appellants were not entitled to rely on amending legislation in interpreting the legislation as it stood before the amendment. Counsel referred to *Cronin (Inspector of Taxes) v. Cork and County Property Company Ltd.* [1986] I.R. 559 in which Griffin J. (for the Supreme Court) said that:-

> *"… the Court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."*

240. I accept the appellants' submission that under the present regime there can be little doubt or ambiguity as to the requirements which must be met. I also accept – without regard to the amending legislation – that s. 955(4) might usefully have spelled out in greater detail what was required. However, I do not accept the argument that the purpose of s. 955(4) was limited to triggering a roving inquiry. Nor do I accept that the High Court judge applied the requirements of the later legislation as to the level of detail required. On the view taken by the judge of the application of s. 812, the issue of whether the expression of the appellants' doubt on that question was sufficient did not arise. The decision as to the sufficiency of the expression of doubt on the trading issue did not turn on the level of detail required but on the fact that the appellants had not specified any doubt in that regard.

241. It was submitted on behalf of the appellants that in circumstances in which what they had done – by ticking the box and giving such details as they gave – had the effect of

triggering an inquiry into all aspects of the transactions Revenue could have suffered no prejudice. The issue, however, is not whether Revenue was prejudiced by what the appellants did (and did not do) but whether by doing what they did the appellants had complied with the requirements for a valid expression of doubt.

242. The core finding of the High Court judge, at para. 122 was that the expression of doubt must adequately alert the inspector to the essential issues giving rise to the existence of the relevant doubt or doubts and, at para. 126, that there was nothing in the expressions of doubt which would have alerted the inspector to any doubt as to the trading status of the dividend purchase transactions. The grounds of appeal – implicitly at least – acknowledge the requirement that the doubt must be specified and do not challenge the judge's finding that the validity of the expressions of doubt depended on the identification of a doubt in relation to the trading issue as well as the s. 812 issue. Unsurprisingly, there is no appeal against the finding of the judge that the expressions of doubt did not identify any doubt as to the trading status of the dividend purchase transactions.

243. There is substance to the appellants' arguments that the TAC erred in determining that expressions of doubt were not genuine and in the argument that the disapplication of the subsection required both that the TAC should not be satisfied that the expression of doubt was genuine and that the chargeable person was acting with a view to the evasion or avoidance of tax but as the High Court judge found, no question of the disapplication of the subsection by paragraph (b) could arise unless the expression of doubt met the requirements of section 955(4)(a).

244. The appellants' last stand was to argue that in matters of complex law, any carelessness or negligence of a tax agent should not be visited on the taxpayer. Even at first

glance, that can go nowhere. The appellants could not possibly be effectively deemed to have done something they did not do because of poor advice.

245. Reliance was placed on the decision of the First Tier Tax Tribunal in England in *Mariner v. Revenue and Customs Commissioners* [2013] UKFTT 657 and the judgment of Barr J. in *McNamara v. Revenue Commissioners* [2023] IEHC 15.

246. *Mariner* was a case in which Revenue had issued a penalty in respect of an error in the taxpayer's return on the basis that she had been careless or negligent. The return had been made on the advice and with the guidance of a professional tax advisor and the question was whether the taxpayer (emphasis original) had been negligent. *McNamara* was a case in which – insofar as is relevant for present purposes – the issue was whether the TAC had been correct in concluding that the appellant had not made full and true disclosure in his tax return. Barr J. examined and distinguished a line of English authority, including *Mariner*, on what the judge identified as *"the separate question altogether"* as to whether the taxpayer had been negligent in making his return based on professional tax advice. Neither is authority for the proposition that a return which is not a full and true disclosure might be deemed to be a full and true disclosure if it was based on wrong advice.

247. I would dismiss the appeals in relation to the adequacy of the expressions of doubt on all grounds.

Summary and conclusions

217. For the reasons given, I would dismiss the appeal and allow the cross appeal.

218. The outcome of the appeal and cross appeal can conveniently be summarised by reference to the questions in the case stated and the answers given by the High Court judge.

219. The first two questions were:-

I. Whether, upon the facts proved or admitted, I was correct in law in my determination that the object and purpose of each dividend purchase transaction was to convert a loss-making transaction into a valuable transaction from a tax perspective for each of the appellants, by means of the generation of tax losses which were utilised by the appellants to reduce taxable income. ***[Yes.]***

II. Whether, upon the facts proved or admitted, I was correct in law in determining that the appellants were not carrying on a trade. ***[Yes.]***

220. The answer given by the High Court to both questions was Yes, and for the reasons given, I would affirm those answers.

221. The third question was:-

"III. Whether, upon the facts proved or admitted, I was correct in law in my determination that the nature of the appellants' involvement in the syndicate(s) was that of investor. **[Not necessary to answer in light of the answer to No. II]**

222. For the reasons given, the issue before the TAC was whether the appellants had established that their participation in the dividend purchase transactions was a trade. If – as the TAC found – those transactions did not constitute trading, it was not necessary to decide how otherwise they might have been categorised or classified. I would affirm this answer.

223. The fourth and fifth questions were:-

IV. Whether, upon the facts proved or admitted, I was correct in law in determining that section 812 does not apply to deem a dividend to be the income of 'the owner' of the underlying securities where the owner is established outside the State and is neither within the jurisdiction of the Oireachtas nor within the charge to Irish tax. ***[No.]***

V. Whether, upon the facts proved or admitted, I was correct in law in my determination that the appellants who are Irish resident, fall squarely within the charge to tax in section 18 TCA 1997, in respect of their foreign dividend income. ***[No, in light of the answer to No. IV]***

224. For the reasons given, the answer to the fourth question is slightly nuanced. I would answer that the TAC was correct in determining that s. 812 does not apply to deem a dividend to be the income of the owner of the underlying securities in circumstances in which the income could not, by the application of the deeming provision, be deemed to be income for the purposes of the Taxes Consolidation Act, 1997.

225. Although, I think that the real issue before the TAC was not whether the appellants fell squarely within the charge to tax in s. 18 of the Act of 1997 but whether they were taken out of charge by the deeming provision of s. 812, nevertheless I would answer question V Yes.

226. The sixth and seventh questions and the High Court judge's answers were:-

VI. Whether, upon the facts proved or admitted, I was correct in law in my determination that the expressions of doubt filed by appellants No. 5 and No. 27 failed to specify the doubt as required by section 955(4)(a) of the Taxes Consolidation Act 1997 as amended. ***[Yes.]***

VII. Whether, upon the facts proved or admitted, I was correct in law in my determination that the expression of doubt provision did not apply pursuant to section 955(4)(b) on the basis that, appellants No. 5 and No. 27 had not satisfied me that their doubt was genuine and also, on the basis that I determined that the appellants were acting with a view to the avoidance of tax. ***[Not necessary to answer in might of the answer to No. VI]***

227. For the reasons given I would affirm the answers given by the High Court judge.

228. The eight question and the judge's answer were:-

VIII. Whether, upon the facts proved or admitted, I was correct in law to find that the provisions of section 811A TCA 1997 do not apply in respect of the appellants' tax returns." ***[Yes.]***

229. For the reasons given, I would affirm the answer.

230. I would propose that the appeals be listed at a convenient time for a brief hearing of any submissions in relation to the final order and costs.

231. As this judgment is being delivered electronically, Faherty and Butler JJ. have authorised me to say that they agree with it.