22TACD2020

REDACTED

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The issue in this appeal is whether there is an entitlement to use trading losses against tax due on rental income received by the Appellant in respect of a number of properties over which the Appellant acts as mortgagee in possession or as a consequence of appointing a receiver.

2. The amount of tax at issue is made up as follows:

Year of Assessment	**Tax**
2011	€ 90,510
2012	€ 250,322
2013	€1,148,195
Total	**€1,489,027**

Background

3. The trade of the Appellant is that of a retail bank that provides mortgage loans to customers secured on property. In circumstances where the borrower does not adhere to the terms and conditions of the loan agreement and does not make repayments in accordance with the agreement the bank may enforce the debt by taking possession of the property provided as security for the loan under the terms of the mortgage. The bank may take possession of the property directly or may appoint receivers. In some cases, rental income may be collected by the lender (as mortgagee in possession) or by the receiver. The amount of rental income (net of any expenses incurred) is applied directly to the loan account reducing the amount owed by the borrower to the bank and is effectively treated as a repayment on the loan. The level of enforcement activity by the bank/lender increased as a result of the global financial crisis that commenced in late 2007.

4. The Appellant in respect of a number of those properties has received rental income.

5. In respect of the appeal period, the tax computation submitted by the Appellant has calculated the taxes due on such rental income in accordance with Taxes Consolidation Act 1997 (TCA) section 96(3) but has sheltered this liability using its own banking trade losses for the current year, pursuant to the provisions of TCA, section 396B.

6. The Respondent informed the Appellant that the liability computed under TCA, section 96(3) is not corporation tax chargeable on the Appellant, for an accounting period and therefore the amount of tax due under TCA, section 96(3), cannot be relieved under the provisions of TCA, section 396B. The relief in respect of the losses was therefore refused and as a consequence the Respondent entered assessments to withdraw the loss relief and the Appellant appealed those assessments accordingly.

Relevant sections of the legislation

7. The definitions for the interpretation and application of corporation tax are set out at TCA, section 4(1). Profits are defined "*income and chargeable gains".*

8. The charge to corporation tax is pursuant to TCA, section 21 and

> "*shall be charged on the profits of companies...".*

9. In accordance with TCA, section 21(2):

> "*The provisions of the Income Tax Acts relating to the charge of income tax shall not apply to income of a company (not arising to it in a fiduciary or representative capacity) if –*
>
> *(a) the company is resident in the State, or ..."*

10. The general scheme of corporation tax is set out at TCA, section 26 and provides

> *(1) "Subject to any exceptions provided for by the Corporation Tax Acts, a company shall be chargeable to corporation tax on all its profits wherever arising."*
>
> *(2) "A company shall be chargeable to corporation tax on profits accruing for its*

benefit under any trust, or arising under any partnership, in any case in which it would be so chargeable if the profits accrued to it directly, and a company shall be chargeable to corporation tax on profits arising in the winding up of the company, but shall not otherwise be chargeable to corporation tax on profits accruing to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in those profits".

11. The computation provisions for corporation tax purposes are in accordance with TCA, section 76(1) which states:

"*Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment".*

12. Section 76(6) TCA 1997 provides:

"Without prejudice to the generality of subsection (1), any provision of the Income Tax Acts, or of any other statute, which confers an exemption from income tax, provides for the disregarding of a loss, or provides for a person to be charged to income tax on any amount (whether expressed to be income or not, and whether an actual amount or not), shall, except where otherwise provided, have the like effect for the purposes of corporation tax".

13. The basis of assessment for Case V purposes is set out at TCA, section 75 and provides

"(1) Without prejudice to any other provision of the Income Tax Acts, the profits or gains arising from –

(a) any rent in respect of any premises, and

(b) any receipts in respect of any easement,

shall, subject to and in accordance with the provisions of the Income Tax Acts, be deemed for the purposes of those Acts to be annual profits or gains within Schedule D, and the person entitled to such profits or gains shall be chargeable in respect of such profits or gains under Case V of that Schedule;

but such rent or such receipts shall not include any payments to which section 104 applies".

(3) "*Tax under Case V of Schedule D shall be computed on the full amount of the profits or gains arising within the year of assessment.*

(4) ….

(5) Section 96 shall apply for the interpretation of this section as it applies for the interpretation of Chapter 8 of this Part."

14. The primary issue of dispute between the parties is the interpretation and application of TCA, section 96(3) which provides: -

"Where the estate or interest of any lessor of any premises is the subject of a mortgage and either the mortgagee is in possession or the rents and profits are being received by a receiver appointed by or on the application of the mortgagee, that estate or interest shall be deemed for the purposes of this Chapter to be vested in the mortgagee, and references to a lessor shall be constructed accordingly; but the amount of the liability to tax of any such mortgagee shall be computed as if the mortgagor was still in possession or, as the case may be, no receiver had been appointed and as if it were the amount of the liability of the mortgagor that was being computed."

15. Finally, the Appellant has sought relief for its corporation tax trading losses in accordance with the following provisions of TCA, section 396B:

"(1) In this section—

"relevant corporation tax", in relation to an accounting period of a company, means the corporation tax which would be chargeable on the company for the accounting period apart from—

(a) this section and sections 239, 241, 420B, 440 and 441, and

(b) where the company carries on a life business (within the meaning of section 706), any corporation tax which would be attributable to policyholders' profits;

"relevant trading loss" has the same meaning as in section 396A.

(2) Where in any accounting period a company carrying on a trade incurs a relevant trading loss and the amount of the loss exceeds an amount equal to the aggregate of the amounts which could, if a timely claim for such set off had been made by the company, have been set off in respect of that loss for the purposes of corporation tax against income of the company of that accounting period and any preceding accounting period in accordance with section 396A(3), then the company may claim relief under this section in respect of the excess.

(3) Where for any accounting period a company claims relief under this section in respect of the excess, the relevant corporation tax of the company for that accounting period...shall be reduced...by an amount determined by the formula...".

Appellant's Submissions

16. TCA, sections 21 and 26, interpreted in accordance with TCA, section 96(3), impose on the Appellant a charge to corporation tax in respect of the rental income which is the subject of these appeals.

17. The Appellant is thus liable to corporation tax thereon and as such the corporation tax thereon falls within the definition of "*relevant corporation tax*" under TCA, section 396B(1), and can be relieved on a value basis.

18. This conclusion follows the legislation whereby certain trading losses are permitted to reduce the "*relevant corporation tax*" of the Appellant. *"Relevant corporation tax*" for this purpose includes corporation tax chargeable on the company. The Appellant, as a company, is charged to corporation tax on its income, the computation of which is determined by income tax law. The relevant piece of income tax law in this instance provides that the person entitled to rent in respect of any premises is chargeable to tax. In determining the identity of the person so entitled, regard must be had to TCA, section 96(3) as an interpretation provision.

19. Pursuant to TCA, section 96(3), the Appellant is the person so "*entitled*" in respect of the rents and is therefore chargeable to corporation tax in respect of the rents. The latter portion of TCA, section 96(3) provides direction as to how such corporation tax is to be computed, but this does not take away from the fact that the Appellant is chargeable to corporation tax in respect of the rents. Such corporation tax falls within the definition of

"*relevant corporation tax*" for the purposes of TCA, section 396B and accordingly, the provisions of TCA, section 396B should apply to reduce such corporation tax.

20. Whilst the latter part of TCA, section 96(3) determines how the amount of the liability is calculated, the reference to such calculation does not mean that once calculated the Appellant cannot also avail of relief under TCA, section 396B nor that the wording in the latter part of that provision is sufficient to prohibit the application of TCA, section 396B in the circumstances.

21. The Respondent seems to be making a "*substance over form*" argument by distinguishing the rents deemed to be received by TCA, section 96(3) from rent normally received by the Appellant outside of the scope of TCA, section 96(3). This is not what is deemed to happen for the purposes of corporation tax.

22. The interpretation of TCA, section 96(3) rests on the interpretation of the following three key phrases:

    (a) "*Liability to tax*" under TCA section 96(3) should equate to "*corporation tax*" of the Appellant under TCA, section 21 rather than, for example, the final amount of tax payable by the taxpayer.

    (b) "V*ested*" in the context of TCA, section 96(3) equates to "*entitled*" in the context of TCA, section 75.

    (c) "*Deemed* as a result of the 'deeming' wording of TCA, 96(3), the Appellant is permitted to use the losses to reduce the corporation tax in respect of the rents by virtue of TCA, section 396B.

Liability to tax

23. The phrase "*liability to tax*" is not defined for the purposes of TCA, section 96(3) and so it falls to be interpreted using the general principles of interpretation of tax statutes.

24. A distinction is to be drawn between "*corporation tax...chargeable*" on the Appellant pursuant to TCA, section 396B and the final corporation tax payable by the Appellant. Under TCA, section 396B, the losses are permitted to be deducted from the former.

25. TCA, Section 959A helpfully sets out definitions of "*amount of tax chargeable*" and "*amount of tax payable*" as follows:

""amount of tax chargeable", in relation to a person and an Act, means the amount of tax chargeable on the person under the Act after taking into account—

(a) each allowance, deduction or relief that is authorised by the Act to be given to the person against income, profits or gains or, as applicable, chargeable gains..."

"amount of tax payable", in relation to a person and an Act, means the amount of tax payable by the person after reducing the amount of tax chargeable on the person under the Act by the amount of any tax credit that is authorised by the Act in relation to that person."

26. While these definitions only apply for the purposes of TCA, Part 41A and did not apply to the periods relating to the 2011 Assessment and 2012 Assessment, they are nevertheless useful in understanding the general scheme of tax assessment. In this submission, the Appellant will refer to the term '*tax payable'* in that context.

27. The Appellant submits that the "*liability to tax*" computed in accordance with TCA, section 96(3) falls within the meaning of "*corporation tax...chargeable*" for the purposes of TCA section 396B and that, accordingly, the losses can be deducted from such "*liability to tax*" in arriving at the final tax payable by the Appellant.

Charging sections in respect of corporation tax - Statutory context

28. The importance of the statutory context in interpreting tax provisions is well established in Irish law. As such regard must be had to the context of TCA, section 96(3) which is an interpretation section which determines the meaning of the provisions in TCA, section 75, which in turn, determines the amount of income on which corporation tax is charged under TCA section 21 and 26.

29. In the Supreme Court judgment of *IOT v Kiernan*, III ITR 1913, Henchy J observed that:

"*A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to the extent that will truly effectuate the particular legislation or a particular definition therein".*

30. McCarthy, J, delivered similar comments in the Supreme Court in *McCann Ltd v O'Culachain*, III ITR 304.

> "*One must in aid of the construction of the particular word as used in the Statute look to the scheme and purpose as disclosed by the Statute...The scheme and purpose of the relevant part of the statute appear to me to be the very context within which the word is used and the requirements of which must be examined in order to construe it...*"

31. TCA, section 96(3) specifies how a liability to tax is to be computed, in specific circumstances, but it is not a charging section in its own right and cannot be divorced from its context. Accordingly, TCA section 96(3) should be construed in such a way as to be consistent with the scheme and purpose of the charge to corporation tax and the statutory pattern as a whole. Where an amount of corporation tax charged by TCA, sections 21 and 26 is interpreted in line with TCA, section 96(3), its character as corporation tax charged should not change. Indeed, the Respondent's Guidance appears to support such an approach by stating that "*rental profit* [not final tax payable] *should be calculated as if the borrower was still in possession*". [emphasis added]

32. The tax in respect of the rents is charged on the Appellant by virtue of TCA, sections 21 and 26, the Appellant submits that such tax is "*corporation tax...chargeable on the company for the accounting period*" in line with the definition of "*relevant corporation tax*" in TCA, section 396B. If this was not the case, then the "*liability to tax*" would not be covered by any charging section and could not be chargeable on the Appellant. As such, "*liability to tax*" under TCA, section 96(3) necessarily equates to "*corporation tax*" of the Appellant under TCA sections 21 and 26 rather than the amount of final tax payable.

33. On the basis that "*liability to tax*" under TCA, section 96(3) equates to "*corporation tax*" of the Appellant under TCA, sections 21 and 26 rather than the amount of final tax payable, it therefore falls within the wording of "*corporation tax...chargeable*" for the purposes of TCA, section 396B and should therefore be permitted to apply to reduce such corporation tax.

TCA, Section 396B

34. The wording and purpose of TCA, section 396B supports a conclusion that "*liability to tax*" under TCA section 96(3) should equate to "*corporation tax...chargeable*" of the Appellant under TCA, section 396B rather than the final amount of tax payable.

35. By specifying that there are a limited number of provisions that can affect the calculation of "*relevant corporation tax*" ("*tax which would be chargeable...apart from*"), TCA, section 396B indicates that the envisaged starting point of that calculation is the final tax payable by the Appellant which would include any liability to tax calculated pursuant to TCA, section 96(3) which is then adjusted by removing the impact of particular provisions. This is supported by the version of TCA, section 396B that applies in respect of the 2011 Assessment.

36. Before TCA, section 396B(5) was subsequently amended, the formula contained in subsection (5)(b)(ii) referred to *"the amount by which the relevant corporation tax payable is reduced by virtue of subsection (3)(b)"*. By not also explicitly removing the impact of TCA, section 96(3), the clear indication is that the amount of tax which is reduced under TCA section 396B includes any tax resulting from rent charged to tax in accordance with the provisions of TCA, section 96(3).

37. In the leading Irish textbook, The Taxation of Companies 2018, Michael Feeney, at page 422, Feeney lends support to such an interpretation when he describes TCA, section 396B as follows, "*The tax which may be so reduced...is the company's corporation tax otherwise payable for the accounting period in question, after reduction by virtue of section 243B but before reduction by virtue of sub-sections (a) and (b) set out above".*

38. Therefore, pursuant to TCA, section 396B, the first step is to compute the liability to tax of the Appellant as referred to in TCA, section 96(3) and the second step is to reduce that tax by reference to TCA, section 396B.

Principles of statutory interpretation

39. If the statutory context alone is not sufficient to demonstrate that the losses should be available to reduce the corporation tax in respect of the rents, the Appellant submits that it is necessary to have reference to the various principles of the interpretation of tax statutes in interpreting the reference to the computation of the "*liability to tax*" in TCA, section 96(3).

Principles of legal certainty in interpreting tax statutes

40. The Appellant submits that "*liability to tax*" is necessarily a calculation of the corporation tax chargeable on the Appellant, that calculation being based on the gross rents received, as adjusted according to the information within the Appellant's knowledge in respect of the borrower's tax position.

41. This approach is mirrored by the Guidance and the difficulties in this regard are recognised by the Respondent:

> "*Revenue recognises that, in certain instances, there may be difficulties in obtaining the information required to prepare an accurate rental computation. However, Revenue will not seek to challenge a computation provided reasonable endeavours are undertaken in the calculation of tax due and all assumptions underpinning the calculation are clearly set out and retained by the mortgagee."*

42. The Respondent may supply information to the Appellant in this respect but it is clear that such information may not be sufficient, which is, again, recognised in the Guidance:

> *"On the general question of access to Revenue held information, Revenue would caution against any expectation that the information it possesses can be made available other than for the limited purposes provided for under section 851A(8)(h), or that the information will provide the solution to all of the receiver-related information gaps. The information Revenue holds is largely dependent on tax returns submitted under the self-assessment system and certain other sources and may not be held in a form, or to the level of disaggregation, that would necessarily be useful for the particular purpose envisaged."*

43. The Respondent specifically states that they will not provide certain of the information that may be required:

> *"Personal information, including PPSNs and personal tax allowances, can never be disclosed by Revenue. Neither can information relating to assets over which the receiver has not been appointed. This may result in Revenue being unable to provide details of, for example, rental tax losses forward unless the receiver has been appointed over all properties of the entity."*

44. The alternative interpretation of calculating the final tax which would be payable by the mortgagor but for TCA, section 96(3) and imposing on the Appellant an obligation to pay

that exact sum would be contrary to the fundamental principles of the interpretation of tax statutes. TCA, Section 96(3) must be interpreted in light of the principle that tax legislation must provide legal certainty to the taxpayer.

45. If TCA, section 96(3) is to be interpreted so as to create an obligation on the Appellant to calculate the final tax which would otherwise have been payable by the mortgagor, it would create obligations on the Appellant as follows:

    (a) An obligation to determine the borrower's tax position, which could only be achieved by obtaining detailed information in respect of the borrower (for example, including in relation to Case V losses forward, capital allowances, "Section 23" relief, personal tax allowances, personal tax status (ie, married or single)).

    (b) An obligation to file a tax return and pay tax on the basis of information that is impossible to verify, or in some cases, impossible to obtain.

46. The approach set out above requires the Appellant to calculate the final tax payable of the borrower, which is an obligation which is impossible to fulfil. The information underpinning such a calculation (for example, the current marital status of the borrower) is not within the Appellant's possession, nor is it within its power or procurement, particularly in light of the data protection concerns alluded to in the Guidance. In a security enforcement scenario, it is natural that the relationship between the Appellant and the borrower would break down and that such information would not be forthcoming from the borrower, nor might it be available from other sources.

47. The Appellant submits that the approach set out at in relation to the interpretation of TCA, section 96(3) is incompatible with the principle of legal certainty in relation to tax statutes. Further, this approach renders it impossible for the Appellant to comply with its obligations to submit a correct return and pay the correct amount of tax as required by the TCA. For these reasons, the Appellant submits that TCA, section 96(3), must be interpreted in a way that offers legal certainty.

Unjust attack on property rights

48. It is generally accepted that taxes are an attack on constitutional property rights, however, not all taxes are an unjust attack on those same rights. In this regard, Forde, Constitutional Law of Ireland, Third Edition (2013) (at page 759) notes:

    "By their very nature, taxes are an interference with private property rights because they require persons to pay specified sums to the State. However, the State has

implied authority under the Constitution to levy taxes, and the courts are reluctant to strike down tax laws on the basis of the nature of the tax, as distinct from procedures for assessing and for recovering them. Nonetheless, tax laws may be unconstitutional for reasons other than being described as tax equity...Taxes are unconstitutional inferences with property rights where they discriminate in an entirely arbitrary fashion: what may have been described as contravening the principal of egalité devant les charges publiques."

49. Furthermore, it is also accepted that there is judicial reluctance to hold that tax laws amount to an unjust attack on property rights.

50. However, JM Kelly: The Irish Constitution, Fifth Edition notes that the courts have also held that restrictions on property rights which are irrational, absurd or excessive are unjust, and provides:

"[A] good example of a finding of unjust attack based on arbitrariness can be seen in Brennan v Attorney General, in which the 'injustice' resulted from the sheer irrationality, in modern conditions, of an antique system of taxation, the system of levying rates on agricultural land, which was based on a valuation mechanism over a century old....

51. Kelly further notes at page 240:

"In the subsequent case of Brady v Donegal County Council, the standard of reasonableness was used to determine the validity of a restriction on property rights. Here Costello J (as he then was) held that a statutory limitation period of two months containing no saver in favour of plaintiffs whose ignorance of their rights during this limitation period was caused by the defendant's wrong-doing was unreasonable and consequently unconstitutional."

52. Taxes by their very nature are equivalent of appropriation, and as such are an attack on the property rights of a company. However, it is rarely the case that a tax would constitute an appropriation without any compensation. It is for this reason that it can be said that not all taxes are an unjust attack on property rights.

53. While TCA, section 96(3) by its very nature is an attack on property rights it is accepted that this tax is not *per se* an unjust attack on such rights. It is submitted, however, that an interpretation and application of the provisions of TCA, section 96(3) which seeks to calculate an amount representing the final tax payable of the mortgagee by reference to unknown amounts is both arbitrary and an unjust attack on the Appellant's property

rights. However, the Appellant submits that an approach of calculating the amount chargeable to tax on the Appellant in accordance with the information within the control of the Appellant would not be such an attack.

The purposive approach

54. It is necessary to adopt the purposive approach in interpreting the reference to the computation of the "*liability to tax*" in TCA, section 96(3) on the basis that the term is ambiguous and in addition, if the term is interpreted as a reference to the final tax otherwise payable by the mortgagor but for TCA, section 96(3), it would be absurd.

55. The purposive approach to statutory interpretation requires a consideration of the purpose of the legislation in order to identify the intention of the legislature. This approach will only be used when the literal approach does not give a plain meaning to the legislation. Section 5 of the Interpretation Act 2005 (the "2005 Act") now codifies a purposive type approach providing that:

> "*In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

56. In recent times the courts have been more willing to adopt the purposive approach in tax cases. *In McGrath v McDermott (Inspector of Taxes*) [1988] IR 258., at p.276, it was noted that:

"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to consideration of the purposes and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable'.

57. In addition, the Irish Supreme Court adopted a purposive type approach to the Irish general anti-avoidance provision in the *O'Flynn Construction Limited v The Revenue Commissioners* [2011] IESC 47 decision, using both the 2005 Act and the *McGrath* decision as support for this position.

58. Finally, Geoghegan J in the Supreme Court in *Harris v Quigley* [2006] 1 IR 165 at p.183, subsequent to the enactment of the 2005 Act, noted that while a taxing statute should be interpreted in the same way as any other statute and should not be interpreted, if at all possible, as to create an absurdity, there is nevertheless:

"a countervailing principle that where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer'.

59. To interpret "*liability to tax*" as the final tax otherwise payable by the mortgagor (but for TCA, section 96(3)) would not reflect the plain intention of the Oireachtas. It is clearly the intention of the legislature that when a mortgagee is in possession of or has appointed a receiver over a premises, the mortgagee would be chargeable to corporation tax or income tax in respect of any rents received, calculated in accordance with that section. TCA, section 96(3) was intended to ensure that the tax that would otherwise be chargeable on mortgagors, who may not be in the position to pay tax out of the proceeds of rental income due to the enforcement of the security, is chargeable on the mortgagee instead. The natural consequence of creating a charge to tax which applies to the Appellant is that the Appellant can avail of the various reliefs which apply to tax charged on it. Interpreting "*liability to tax*" as the final tax otherwise payable by the mortgagor but for TCA, section 96(3), and denying relief on that basis, would not reflect the most basic intention of TCA section 96(3) to the extent that the charge to tax now rests with the Appellant and not the mortgagor.

60. As regards the interaction of TCA sections 396B and 96(3), the theme of the legislation is to allow a taxpayer to deduct their losses from their gains before arriving at the final tax payable. This is clear in the context of income tax, corporation tax and the USC. To prevent the Appellant from using the losses to reduce tax charged on it by virtue of TCA,

section 96(3) would lack credibility and lead to a strange and unusual result. A tax should not be levied on the basis of a calculation from which genuine losses cannot be deducted and this would be inconsistent with the intention of the TCA as a whole. Accordingly, in order to interpret the phrase "*liability to tax*" in a manner compatible with the intention of the legislature, it is necessary to interpret it as meaning '*tax chargeable'* rather than final *'tax payable'.*

Ambiguity

61. If the meaning of the term *'liability to tax'* is not to be interpreted by reference to its statutory context as set out above using the general principles of interpretation, it is ambiguous. As noted above, where there is an ambiguity in a taxing statute, it should be interpreted in favour of the taxpayer. Black J stated that if there are two reasonable interpretations of legislation, it should be interpreted in favour of the taxpayer in *O'Dwyer v Dublin United Transport,* [1949] IR 295 at 321:

> *"If the words by themselves alone leave the court in hopeless doubt as to which of two possible meanings was intended, then, where a taxing statute is concerned, I think it is in accordance with principle that the benefit of the doubt should be given to the contention of the party on whom the pecuniary burden authorised by the statute is sought to be imposed."*

In *Stokes v Christian Brothers High School*, [2015] IESC 13, Hardiman J considered the meaning of '*ambiguous*', and considered it to be as follows:

> *"Admitting more than one interpretation or explanation; having a doubtful meaning; equivocal".*

Mechanics of TCA, section 96(3) and the interpretation of "liability to tax"

62. TCA section 96(3) is a short and sparse provision which is not sufficient to create certainty in relation to the complex topic that it addresses. The level of detail provided in the Guidance which is not referenced in the legislation is an indication that the Respondent agrees with the need for further clarity. For example, the Appellant submits that it is not reasonable to suggest that it is clear from the wording of TCA, section 96(3) that one must apply the tax rate of the mortgagor and gross-up the tax payable in the tax return of the mortgagee (as suggested by the Guidance).

63. This conclusion is supported by the contrasting wording of the sections which apply to capital gains tax in security enforcement scenarios. TCA, section 537 is clear in creating a fiduciary relationship as regards capital gains tax. It calls out that the "*person entitled to an asset as security*" (the "Secured Person") shall be treated as a nominee of the borrower in question. TCA, section 571(5) specifically calls out the mechanics by which the capital gains tax which is assessable on and recoverable from the Secured Person (ie, by making them accountable under Case IV of Schedule D) and provides that the payment of tax by such Secured Person will discharge a corresponding amount of liability to capital gains tax of the debtor. The capital gains tax regime applies in a clear manner and serves to highlight that TCA, section 96(3) is ambiguous by contrast.

"Liability to tax"

64. The ambiguity inherent in the phrase "*liability to tax*" is clear from an examination of how that term is used in the various sections of the TCA.

65. In various places in the TCA, the phrase "*liability to tax*" is used to refer to liability under a particular schedule or section. For example, the heading of TCA, section 817 refers to "Schemes to avoid liability to tax under Schedule F", TCA, section 729 (Income tax, foreign tax and tax credit) addresses the "liability to tax of an overseas life assurance company in respect of the investment income of its life assurance fund*"* and TCA section 634 (Credit for tax) refers to the computation of a *"liability to tax*" in respect of a particular transfer. The phrases "*liability to tax*" in those contexts are necessarily not references to the final amount of tax payable by the taxpayer, but rather components of the corporation tax calculation (which would amalgamate the tax charged under different schedules and sections and calculate the tax liability prior to deducting losses on a value basis under TCA, section 396B). On that basis, "*liability to tax*" in those instances would more accurately fit within the meaning of "*corporation tax...chargeable*" rather than the final amount of tax payable.

66. On the other hand, sections such as TCA, section 811C (Transactions to avoid a liability to tax) / TCA, section 811A (Transactions to avoid liability to tax: surcharge, interest and protective notification) and TCA, section 905 (Inspection of documents and records) could indicate that "*liability to tax*" refers to the final amount of tax payable by the taxpayer.

67. In TCA, section 959P (Expression of doubt), reference is made to any matter in a return which could "*affect that person's liability to tax or entitlement to an allowance, deduction, relief or tax credit*". The Appellant submits that if "*liability to tax*" in this instance was a reference to the final amount of tax payable, there would be no need to

refer to allowances, deductions, reliefs or credits as alternatives, as they would necessarily already be accounted for by the phrase "*liability to tax*". Accordingly, a reasonable interpretation of "*liability to tax*" for the purposes of TCA, section 959P would be that it means the amount of tax before applying any allowances, deductions, reliefs or credits.

68. Given the varying potential interpretations of "*liability to tax*" as set out above, the Appellant submits that the phrase does not have a prescribed meaning in the TCA and, as such, is ambiguous.

Summary in relation to the interpretation of the term "liability to tax" in TCA section 96(3)

69. As set out above, the meaning of "*liability to tax*" is determined by its statutory context in this case, but if that argument is not accepted, should be interpreted in accordance with the Appellants reasoning using the fundamental principles of interpretation of tax statues. If those two arguments are not accepted then the Appellant submits that the phrase "*liability to tax*" in the context of TCA, section 96(3) is ambiguous and should be interpreted in favour of the taxpayer as meaning the amount of corporation tax chargeable within the definition of "*relevant corporation tax*" set out in TCA, section 396B.

Principles of statutory interpretation – the literal approach

70. The Respondent appears to argue that the Appellant is chargeable to corporation tax in respect of the rents in a fiduciary capacity or that the benefit of TCA, section 396B is not available to the Appellant on the basis of a 'substance over form' style argument. The term "*deemed...to be vested*" overrides any such arguments and creates a legal fiction, for the purposes of corporation tax, which is effective in ensuring that the Appellant is the only party to have an interest in the rents for Irish tax purposes, and is taxable accordingly.

71. It is an established principle that the courts must not trespass outside the letter of the statute in order to extend its scope to transactions which they believe fall within its '*spirit' or 'intendment'* or which they believe fairness demands should be covered.

72. In *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, Rowlatt J stated as follows:

> *"In a taxing act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax.*

Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

73. This has been cited with approval in the Irish Supreme Court decision of *Texaco (Ireland) Limited v Murphy* [1991] 2 IR 449.

74. In *McGrath v McDermott*, [1988] IR 258 it was stated that:

"The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable."

75. The Appellant submits that it is necessary to follow the literal approach in interpreting the word "*vested*" in section TCA, 96(3).

76. With reference to the extract of the 2005 Act above, a provision must not be obscure or ambiguous, and must not give an absurd result or a result which would fail to reflect the plain intention of the legislature, if interpreted literally. If a provision falls at either of these hurdles, a purposive approach must be followed.

Obscure/ambiguous

77. The first limb of section 5 of the 2005 Act requires consideration of whether a provision is obscure or ambiguous. In *Stokes v Christian Brothers High School*, [2015] IESC 13, Hardiman J considered the meaning of both 'obscure' and 'ambiguous', and stated that the most relevant meaning of 'obscure' in respect of the 2005 Act is:

"Not clear or plain, hidden, doubtful, vague, uncertain."

78. As mentioned above, Hardiman J further held that the most relevant meaning of 'ambiguous' in this context is:

"Admitting more than one interpretation or explanation; having a doubtful meaning; equivocal".

79. In *DPP v Ottwell*, [1968] 3 ALL ER 153., Lord Reid stated as follows:

"It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings. The imprecision of the English language ... is such that it is extremely difficult to draft any provision which is not ambiguous in that sense."

80. It is clear that even if there are multiple interpretations of a provision, the provision will only be found to be '*ambiguous*' when after full enquiry and consideration, the court is left in doubt as to which interpretation gives effect to the legislature's intention. Further, it has been accepted that if there are two reasonable interpretations of legislation, it should be interpreted in favour of the taxpayer. As stated by Black J in *O'Dwyer v Dublin United Transport*, [1949] IR 295 at 321:

> *"If the words by themselves alone leave the court in hopeless doubt as to which of two possible meanings was intended, then, where a taxing statute is concerned, I think it is in accordance with principle that the benefit of the doubt should be given to the contention of the party on whom the pecuniary burden authorised by the statute is sought to be imposed."*

81. When correctly read having regard to its statutory context, the word "*vested*" in TCA, section 96(3) is not obscure or ambiguous and this is supported by the arguments set out below.

Would fail to reflect the plain intention

82. In *IRC v Hinchy*, [1960] A.C. 748. in the House of Lords, Lord Reid commented at 767 *as follows:*

> *"What we must look for is the intention of the Parliament...But we can only take the intention of the Parliament from the words which they have used in the Act...however strongly we may suspect that this was not the real intention of Parliament".*

83. Irish Income Tax 2018, Tom Maguire, at page 30 comments that ascertaining the overriding intention of the Oireachtas may be particularly difficult in the context of a tax statute.

84. With reference to the submissions above in relation to the intention of the legislature in relation to TCA, section 96(3), a literal interpretation of "*vested*" in TCA, section 96(3) is not absurd nor does it fail to reflect the plain intention of the Oireachtas, to the extent that the tax in respect of the rents should be charged on the mortgagee.

85. In summary, a literal approach should be taken when interpreting the word "*vested*" in TCA, section 96(3) and as such, it would be contrary to the fundamental principles of the interpretation of tax statues to interpret the term "*vested*" by taking into account any

arguments by the Respondent based on '*payment of tax as a fiduciary'* or '*substance over form'*.

Meaning of "vested"

86. The Oxford English Dictionary, 3rd edition, 2010, as updated quarterly defines '*vest*' as to "*confer or bestow (power, authority power, etc.) on someone*". It defines '*vest in'* as to "*come into the possession of*" power, property etc.

"*Vested*"

87. "*Vested"* in the context of TCA, section 96(3) equates to "*entitled*" in the context of TCA, section 75. "*Vested"* is not defined for the purposes of TCA, section 96, nor is it defined elsewhere in the TCA and so it falls to be interpreted using the general principles of interpretation of tax statutes.

88. In *Central Applications Office Limited v The Minister for Community, Rural and Gaeltacht Affairs and Others*, [2008] IEHC 309, MacMenamin J quoted the Shorter Oxford English Dictionary (3rd edition) and commented that:

> *"The term 'vested' in the English language in its legal meaning may be defined as "established, secured, or settled in the hands of, or definitely assigned to a certain possessor; esp. with right or interest."*

89. Murdoch's Dictionary of Irish Law, defines vest as to "*clothe with legal rights*" and explains '*vested*' with an example, "*An estate is said to be vested when there is a present right to its ownership*".

90. "*Vested*" is used in various places in the TCA. In these sections, varying rights are referred to as being *"vested*" in the relevant parties. For example, TCA, section 574 (Trustees of settlement) refers to a scenario where property is "*vested*" in a trustee. On the other hand, TCA, section 513 (Capital receipts in respect of scheme shares) refers to a "*person in whom...the beneficial interest...is vested*". TCA, Section 730E (Declarations) (which sits in Part 26 of the TCA 1997 which deals with Life Assurance Companies) refers to a scenario where "*rights conferred by the life policy are vested at that time in a person as beneficial owner"*. In TCA, Schedule 2A, which relates to dividend withholding tax, trust assets are described as "*vested*" in a trustee.

91. It would appear from the above that the word '*vested*', in and of itself, does not determine which exact property or rights are bestowed upon or assigned to the

Appellant and come into the Appellant's possession by virtue of TCA, section 96(3). It is clear from the above that "*vested*" is not restricted to being clothed with fiduciary rights, unless the legislation expressly specifies that to be the case.

92. Helpfully, TCA, section 96(3) does clarify the interest that is assigned to the Appellant. TCA, Section 96(3) provides that *"Where the estate or interest of any lessor of any premises is the subject of a mortgage....that estate or interest shall be deemed for the purposes of this Chapter to be vested in the mortgagee*". It is common ground between the Appellant and the Respondent that, in this case, the relevant borrowers / lessors would be, but for TCA, section 96(3) the persons *"entitled*" pursuant to TCA, section 75. Accordingly, the interests which create those entitlements are deemed to come into the possession of and vest in the Appellant. In the reverse, the plain wording of TCA, section 96(3) is such that a fiduciary interest cannot be bestowed upon the Appellant unless such a fiduciary interest is first held by the lessor. The legislature chose to implement a completely different drafting approach in respect of rental income is a clear indication that the two regimes are not intended to achieve the same effect.

93. In summary, the term "*vested"* in section 96(3) TCA 1997 is clear and unambiguous in ensuring that the Appellant is chargeable to corporation tax on the rents in its own right, and not in a fiduciary capacity.

Deeming provisions

94. As stated above, TCA, section 96(3) is effective in deeming that the Appellant is entitled to the rents and that, therefore, the Appellant is chargeable to corporation tax in respect of the rents.

95. Deeming provisions represent an established drafting technique. In the Irish Income Tax 2018, Tom Maguire, at page 47 discusses the Irish Supreme Court VAT case *Erin Executor and Trustee Co v Revenue Commissioners*, [1998] 2 IR 287and comments:

> *"Where a deeming provision is expressly stated to be for the purposes of a particular section, then it will normally be the case that the deemed state of affairs will apply only in respect of that section. This proposition may however need to be qualified where the section in question controls the operation of other sections."*

96. It is clearly stated that section TCA, 96(3) applies for the purposes of Part 4, Chapter 8 of the TCA 1997 (Taxation of rents and certain other payments). TCA, section 75(5) also states that TCA, section 96 applies for the interpretation of that section. While it might

appear that the deeming provision is limited to the interpretation of the above mentioned sections, TCA, section 396B is directly linked with and relies upon these sections as interpreted in line with TCA, section 96(3). The approach to interpreting deeming provisions was stated by the UK Court of Appeal in *Marshall v Kerr,* [1993] STC 360., where Peter Gibson J stated at p. 366 that:

> *"Because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."*

97. Similarly, in the case of *East End Dwelling Company Limited v Finsbury B.C.,* [1951] 2 All ER 587. (a House of Lords case which related to compensation for a compulsory acquisition), Lord Asquith stated at 599:

> *"If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it...The statute says that you must imagine a certain state of affairs. It does not say that having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs."*

98. Applying TCA, section 396B to the corporation tax in respect of the rents is a natural consequence which inevitably flows from the deemed state of affairs under TCA, section 96(3) and does not lead to an unjust or absurd result. Disallowing the deduction of the losses from the corporation tax in respect of the rents would be an unjust interpretation of the deeming provision, as the clear purpose of the deeming provision in TCA, section 96(3) is to create a charge to corporation tax by virtue of altering the interpretation of TCA, section 75.

99. Accordingly, as a result of the '*deeming*' wording of TCA, section 96(3), the Appellant is permitted to use the losses to reduce the corporation tax charged in respect of the rents by virtue of TCA, section 396B.

Interpretation of TCA, section 96(3) – summary

100. The correct interpretation of the terms "*liability to tax", "vested" and "deemed*" in the context of TCA, section 96(3) can only lead to the conclusion that the Appellant is charged to corporation tax in its own right in respect of the rents under TCA, sections 21 and 26 and that such tax is computed by reference to TCA section 96(3). The impact of

this '*deeming*' provision is that the Appellant is permitted to use the losses to reduce the corporation tax in respect of the rents by virtue of TCA, section 396B.

Interpretation of TCA, section 396B

101. A plain reading of the provisions of TCA, section 396B supports the position that the losses should be available to reduce the corporation tax in respect of the rents. This is evidenced by the definition of "*relevant corporation tax*" in TCA, section 396B, which refers to "*corporation tax which would be chargeable on the company for the accounting period apart from...*".

102. It is common ground between the parties that the Appellant is subject to a charge to corporation tax in respect of the rents by virtue of TCA, section 96(3) regardless of how such an amount may be calculated. Such a charge is necessarily imposed by TCA, sections 21 and 26 because section TCA 96(3) is not a charging section in its own right, it merely directs how the charge to corporation tax contained in TCA, sections 21 and 26 is to be interpreted. Given then, that the tax in respect of the rents is charged on the Appellant by virtue of TCA, sections 21 and 26, it is "*corporation tax...chargeable on the company for the accounting period"*. It is common ground between the parties that corporation tax charged under TCA, sections 21 and 26 fits into the definition of "relevant corporation tax" under TCA, section 396B.

103. While the definition of "*relevant corporation tax*" in TCA, section 396B specifically excludes tax charged under certain sections of the TCA, importantly, it does not exclude tax charged by virtue of TCA, section 96(3). The Appellant submits that, as a result, tax charged by virtue of TCA, section 96(3) is quite clearly within, and intended to be within, the scope of the definition of "*relevant corporation tax*". TCA, section 96(3) was in place for a number of years prior to the introduction of TCA, section 396B. The legislature would have been aware of the provision and specifically chose not to exclude it from the ambit of TCA, section 396B.

Rents not received in a fiduciary capacity

104. As stated above, the Appellant is subject to a corporation tax charge in respect of the rents on the basis of Revenue's published guidance and the fact that the assessments relate to corporation tax. Such corporation tax is not charged on the Appellant in a fiduciary capacity.

105. The Irish legal position is that it is not possible for the Appellant to pay such corporation tax in a fiduciary capacity under the TCA entirely independent of what the Appellant submits is the correct interpretation of the word "*vested*" in TCA, section 96(3).

106. Firstly, TCA, section 26(2) is clear in stating that the Appellant is not chargeable to corporation tax on profits accruing to it in a fiduciary capacity. TCA, Section 26(2) provides "*A company shall be chargeable to corporation tax on profits accruing for its benefit...but shall not otherwise be chargeable to corporation tax on profits accruing to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in those profits*".

107. Accordingly, the Appellant cannot pay corporation tax on rents arising to it in a fiduciary capacity as a matter of law.

108. Secondly, with regard to corporate borrowers specifically, according to *In re Wayte (Holdings) Limited (In Receivership),* [1986] IR 448. 4 the Irish corporation tax provisions do not permit a situation where the corporation tax of a company, corporation tax of a corporate borrower in respect of rents received, can be charged on, or assessments in that regard made on, any party other than that company. In finding that TCA, section 105 of the Income Tax Act 1967, the predecessor of the current TCA, section 52 could not impose upon a receiver an obligation to pay the corporation tax of a borrower, Mr. Justice Costello stated that

> *"the 1976 Act expressly and unambiguously declared that companies are chargeable for the new tax on all their profits, and assessments are to be made on companies, and no one else. This being so, provision having been made for charging and assessing companies themselves, it cannot be said that the section operates to adopt into the code an entirely different provision which would entitle an Inspector to assess a person who "receives" the company's income and make such a person liable to pay the tax".*

109. The corporation tax legislation in respect of the periods covered by the assessments aligns with the provisions to which Mr. Justice Costello referred. TCA section 26 states that "*a company shall be chargeable to corporation tax on all its profits*".

110. The second part of TCA, section 96(3) "*but the amount of the liability to tax...shall be computed as if the mortgagor was still in possession*" simply determines the measurement of the tax to be charged; it does not determine who is to be charged and in what capacity. The use of the word "*but*" would indicate some apparent conflict between the two elements of TCA, section 96(3) and the Appellant submits that this is

indeed the case, with the tax of the Appellant being computed, counter-intuitively, according to the information available to the Appellant in respect of the borrower. The words "*as if*" further support the proposition that it is not in fact the tax of the borrower that is being calculated, it is the tax of the Appellant, measured by reference to the rate of tax applying to the borrower.

111. Accordingly, in reading the plain wording of TCA section 96(3) in a manner compatible with *Wayte* and the wider TCA, the Appellant submits that TCA, section 96(3) cannot impose on the Appellant an obligation to pay corporation tax in a fiduciary capacity.

Appellant's Conclusion

112. The correct interpretation of TCA, section 96(3) is that the Appellant is charged to corporation tax in its own right in respect of the rents under TCA, sections 21 and 26 and that such tax is computed by reference to TCA, section 96(3).

113. Furthermore when the wording of TCA, section 96(3) is considered correctly in its statutory context (or alternatively, using the fundamental principles of the interpretation of tax statues, or alternatively interpreting the ambiguity in the section in favour of the taxpayer) the tax charged by virtue of TCA, section 96(3) falls within the definition of "*corporation tax...chargeable*" in TCA, section 396B and the Appellant is therefore permitted to use the losses to reduce the corporation tax charged in respect of the rents by virtue of section TCA, 396B.

114. TCA, section 96(3) does not impose upon the Appellant an obligation to pay tax in a fiduciary capacity on behalf of borrowers. Indeed, as set out above, it would not be possible for TCA, section 96(3) to impose on the Appellant an obligation to pay corporation tax in a fiduciary capacity. It would be contrary to the fundamental principles of the interpretation of tax statues to take into account any arguments by the Respondent based on payment of tax as a '*fiduciary*' or '*substance over form'*.

Respondent's submission

115. TCA, section 96(3) deals with the taxation of rental income where the property 'is *the subject of a mortgage and either the mortgagee is in possession or the rents and profits are being received by a receiver'*. In effect the section provides that the mortgagee in possession or receiver is the person who must account for tax on the rent received. The calculation of the amount of tax due is effected by reference to the individual circumstances of the debtor/mortgagor. In calculating the liability, the mortgagee in possession (or receiver) must therefore take into account whether that debtor/mortgagor has capital allowances, losses, tax credits, etc. Below is a simple example for illustrative purposes:

		Eur
Borrower	Ms. A.N. Other	
Property Details	123 Main Street, Greentown, Co. Dublin	
Gross Rent		1,000
Allowable expenses		(200)
Net Rent		800
Less capital allowances		(100)
Taxable Rent after capital allowances		700
Tax at 41%		287
Less Tax credits		(80)
Tax due under section 96(3)		***207***

116. TCA, section 96(3) makes the mortgagee in possession/receiver the person chargeable to tax. Where the debtor/mortgagor is an individual, the tax liability accounted for by the mortgagee in possession (or receiver) is based on income tax rates (with re-grossing applying to ensure that the correct amount of tax is collected when the company accounts for the higher rate of corporation tax (25%) on its corporation tax return). An illustrative example is:

Mortgagor/ Debtor	***Net rental income***	***Tax rate***	***Regrossing Factor***	***Taxable Income at Regrossed Rate (Eur)***
Individual	100	41%)	41%/25%	164
Corporate	100	25% (CT)	25%/25%	100
			Total	264
			Tax Due at 25%	66

117. The effect of TCA, section 396B is to allow a company to claim relief in respect of its trading losses against non-trading income. Relief is claimed by reducing its '*relevant corporation tax*' i.e. corporation tax which would be chargeable on the company for the accounting period to take account of the loss. Relief under this section is generally referred to as loss relief on a value basis since relief is limited to the tax value of the loss incurred in a trade where profits are subject to tax at 12.5%.

118. The Taxes Acts allow a company to claim relief for its trading losses against its profits. Prior to Finance Act 2001 relief was provided for in TCA, section 396. However, when separate corporation tax rates were introduced for trading income and non-trading income, loss relief had to be provided for in two separate sections:

(a) In simple terms, TCA, section 396A allows for the 'Euro for Euro' use of trading loss against other trading income. In other words, the loss is set against the profit and tax due is calculated on the balance,

(b) whereas TCA, section 396B allows relief on a value basis for trading losses of a company against its non-trading income (i.e. income chargeable at 25% such as rental income, investment income, etc). First, tax is calculated on the profits (i.e. the non-trading income) at the higher rate of corporation tax and then, relief is allowed by reducing that corporation tax to provide relief for the loss on a value basis, that 'value' being the 12.5% tax rate applied to the trading loss. A simple illustrative example is as follows:

Trading Position

Trading Loss	€1,000
Non-Trading Income	€2,000

Tax due on Non-Trading Income

€ 2,000 by 25%	€500

TCA, s.396B trading loss

€ 1,000 at 12.5%	125
Balance of tax due	€375

119. The mechanics of TCA, section 396B are such that it provides relief for trading losses against 'relevant corporation tax' as defined in subsection (i) of that section. In drafting this section, the clear intention of the Legislature was to allow a measure of relief to companies in respect of their trading losses against both their trading and non-trading income. This section never intended to allow relief for a Bank's own trading losses where the Bank is merely acting as a 'collection agent' to secure payment of the tax on that rental income for the Exchequer. (para 13 page 6 of the Respondent's submission)

120. This section, which appears in Chapter 8 of Part 4 regarding the taxation of rents and certain other payments, provides a collection mechanism for tax in respect of rents received by the mortgagee in possession/receiver. The liability to tax arising in respect of the rental receipts is calculated on the basis of the mortgagor/debtor's position.

121. The word *"liability*" is significant in TCA, section 96(3). It indicates clearly that the liability to tax is calculated as a final figure after all reliefs or allowances taken into account. These are of course the reliefs and allowances referable to the mortgagor. That liability is then made the responsibility of the mortgagee having been deemed to be vested in the mortgagee and remitted to the Respondent. No further allowance or relief can be deducted to such a liability to tax. The attempt to do so by the Appellant is to seek a second set of reliefs which is a wholly constrained and artificial interpretation of the section and clearly not within the intention of the legislature as evidenced by the words used in TCA, section 96(3).

122. The section deems the estate or interest for the purposes of the Chapter, i.e. for the purpose of the taxation of rents (and other payments), to be vested in the mortgagee.

123. As with every deeming section, it must be construed strictly and in relation to the matter in the section. In *Erin Executor and Trustee Co Ltd (as Trustee for IPFPUT) v Revenue Commissioners* Vol V ITR 76, the court was clear that a deeming provision is not to be extended beyond its purpose. That case concerned VAT legislation in particular section 4(4) and 3(1)(f) of the Value Added Tax 1972. Section 4(4) deems a reversion, where a disposal of an interest was made, to be an appropriation for the purposes of section 3(1)(f). That is, it was deemed a self-supply, which is a supply for non-business purposes. Erin Executor claimed that the purpose of section 4(4) was to ensure the value of the reversion which was not in fact supplied and which would not ordinarily therefore have been subject to VAT, taxable but that such was only for the purposes of the section. The Revenue had argued that once there was a supply (deemed in the case) then the reversion ceases to be in the tax net for VAT purposes.

124. Mr Justice Barron, finding for the Erin Executor set out how a deeming provision is to be approached. This applies equally to the TCA as it does to the Value Added tax Acts. He stated; -

> *"The reversion is deemed to have been supplied. This makes it taxable but it is not being supplied in fact. It still remains part of the business assets of the taxpayer.*
>
> *When something is deemed by a statutory provision to be so it becomes a matter of construction of that provision to determine to what extent it is deemed to be so. Is it deemed to be so for all purposes or only for some purposes? In the present case s 4(4) clearly says that it is to be so deemed for the purposes of s 3(1)(f). In other words it is deemed to have been supplied so that tax becomes payable in respect of it. It is not deemed to have been supplied for any other purpose. This is in accord with the principle of strict construction of taxing statutes. If the Legislature had intended the result contented for by the respondents, it would have said so in clear terms.*
>
> *It seems to me that the reality is that the purpose of s 4(4) is to ensure that on the grant of a lease for more than ten years value added tax when chargeable shall be charged on the whole value of the property that are both leased and that retained. There is nothing in the provision which suggests that once the tax has been paid on the reversion that the reversion should no longer be regarded as being in the ownership of the taxpayer."*

125. It is noteworthy that in TCA, section 96(1) the definition of "*the person chargeable*" means:

> *"the person entitled to the profits or gains arising from –*
>
> *(a) any rent in respect or any premises,"*

126. Without the provision in TCA, section 96(3) the person chargeable would be the owner of the property or lessor of the property. Thus, it was essential in a situation where the Bank has become mortgagee in possession or has appointed a receiver that the person actually receiving the rents, although not being the person entitled to the profits or gains by way of the position as lessor, be deemed to have the interest or estate for the purpose of the taxation of the rents.

127. The fact that that liability to tax is then calculated based on the position of the mortgagor (the debtor) confirms that it is the collection of tax in respect of the rent due to the mortgagor but being collected by the mortgagee in possession/receiver. Rental

income, as collected in such circumstances, would clearly not amount to income of the Appellant.

128. Regard should be had as to how the Appellant comes to be mortgagee in possession or appoints a receiver. As such, the Appellant would have lent monies to either individuals or companies and where those individuals or companies have fallen into arrears it may become mortgagee in possession or it may appoint a receiver. This is done as a means of enforcing its security over the underlying debt. Thus, any rental receipts received by the Appellant will be set off against the balance on the loan account of the debtor (the owner of the property and the person to whom the money was lent by the Bank). These receipts are treated in the same way as a mortgage payment from the debtor would be treated. One would expect that it would feed into the Banks' profit and loss account as receipts coming off the debtor's account.

129. The Appellant in its accounts treats these receipts differently to rental income that it would receive in respect of property it rents out or earns from its own non-mortgagee in possession/non-receiver properties. The rental income received on the property and the TCA, section 96(3) liability paid by the Bank is booked to the original mortgagor/debtor's account in the Bank's ledger. This is the same for any local property tax paid on the property by the Bank. All cash flows to do with the rented property will ultimately end up on the original mortgagor/debtors account in the Bank's ledger, as do the receipt of the sales proceeds should the Bank sell the property, thus enabling the bank to assess the net result of the situation on a per mortgagor/debtor basis.

130. The quantum of relief is determined in accordance with subsections (3) to (5) of that section and claims for relief under this section must be made in accordance with the time limit set out in subsection (6). TCA, section 396A deals with usual losses with TCA, section 396B introduced to deal with value based losses. A claim for loss relief under TCA, section 396B may only be made where the loss may not be relieved under any other provision of the TCA. This means, in effect, that a claim for loss relief under this section may only be made when maximum relief has been claimed under TCA, section 396A. So, a relevant trading loss must first be offset against relevant trading income and, in the event that there is an excess after this offset, this excess i.e. the unutilised trading loss may be set against the corporation tax payable on other profits e.g, case III, case V or on a value basis under the provisions of TCA, section 396B.

131. The rents collected by the Bank as mortgagee in possession through a receiver do not constitute 'its profits' for the purposes for TCA, section 26 i.e. it is not the person entitled to the profits under that section. Since the rental income received in such circumstances does not constitute 'its profits', it cannot be said that the Bank is

chargeable to corporation tax on that income. Accordingly, the tax due under TCA, section 96(3), is not '*relevant corporation tax*' for the purposes of TCA, section 396(B). This being the case the tax due under TCA, section 96(3) cannot be relieved under that section.

132. Case V basis of assessment is set out in TCA, section 75 and provides that the profits or gains arising from any rent in respect of any premises are deemed to be annual profits or gains within Schedule D and the person entitled to those profits or gains is to be chargeable in respect of the profits or gains under Case V of that schedule. TCA, section 75(5) provides that TCA, section 96 shall apply for the interpretation of TCA, section 75 as it applies for the interpretation of Chapter 8, Part 4. TCA, section 75 is the charging section for the rents. TCA, section 96 is not a charging section; it is an interpretative section. Without TCA, section 96(3) the person entitled to the rent would continue under section 75 to be the person chargeable albeit the property was now in the hands of the mortgagee or receiver.

133. TCA, section 96(3) moves the obligation to account for tax on the rent to the mortgagee but it does not change the Case under which the rent is to be charged from Case V (rents) to Case I (trading income).

134. Notwithstanding that this analysis is sufficient to dispose of the issue, there are further arguments which support the Respondent's position. TCA, section 76A sets out the statutory requirement with regard to companies. In calculating Case I income, companies are obliged to follow their accounts prepared in accordance with generally accepted accounting practice unless an adjustment is required or allowed / authorised by law. TCA, Section 76A(1) provides: -

> *"For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes."*

135. The Courts are slow to accept an argument that accounts prepared in accordance with accepted principles of commercial accounting are not sufficient for tax purposes as a true statement of the profits for the period. This was the conclusion of the courts in *Johnston v Britannia* (1994) 67 TC 99 3 and *Threlfall v Jones* (1994) CH 107. The importance attaching to accounting treatment was underlined in *Revenue and Customs Commissioners v William Grant & Sons Distillers Limited*; *Small (Inspector of Taxes) v Mars UK Limited*[2007] STC 680.

136. In a case before the TAC, the Appeal Commissioner emphasised the importance of accounting treatment and referred to the cases of *AB Limited v MacGiolla Riogh and Dolan (Inspector of Taxes) v AB Company Limited* 2 ITR 602 and at [1969] IR 282 wherein Budd, J. stated: -

> "*In my view, the uncontradicted evidence of what is proper to be done from the point of view of business accountancy is a factor weighing heavily in favour of the Appellants unless and until it is shown that the deductions may fall under some prohibition contained in the Income Tax Code.*"

137. It is the Respondent's understanding that the Bank books rents received under a mortgagee in possession/receivership arrangement differently from its normal business income including any rental income on properties owned by the Bank. Rents received on a mortgage in possession are credited against the mortgagor's liabilities with the Bank, whereas any rental income that a Bank receives on its own rental properties is booked as part of the Bank's income.

138. TCA, section 537 expressly provides that the conveyance or transfer as security of an asset by way of mortgage or charge is not a disposal for the purpose of capital gains tax. TCA, section 537 (2) provides: -

> *" Where a person entitled to an asset as security or to the benefit of a charge or incumbrance on an asset deals with the asset for the purpose of enforcing or giving effect to the security, charge or incumbrance, such person's dealings with the asset shall be treated for the purposes of the Capital Gains Tax Acts as if they were done through such person as nominee by the person entitled to the asset subject to the security, charge or incumbrance, and this subsection shall apply to the dealings of any person appointed to enforce or give effect to the security, charge or incumbrance as receiver and manager or judicial factor as it applies to the dealings of the person so entitled."*

Statutory Interpretation

139. The Irish courts have not considered section TCA, 96(3). Therefore, the principles relating to statutory interpretation of taxing statutes need to be considered.

140. It is well established that liability for tax must be clearly imposed and that the provisions of tax statutes are strictly construed. In *Inspector of Taxes v Kieran* [1981] IR 117. Henchy, J. set out three principles of construction. These may be summarised as follows: -

a) Words are to be construed as having a particular meaning if the Act is passed with reference to that particular trade business or transaction, though it may differ from the common ordinary meaning of the words. Otherwise the words should be given the meaning which an ordinary member of the public would intended to have when ordinarily using it.

b) Where a word or expression is used in the statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language.

c) Where a word which requires to be given its natural and ordinary meaning is a simple word which has widespread and unambiguous currency, the Judge construing it should draw primarily on his own experience of its use.

141. In *McGrath v McDermott* [1988] IR 258 the Supreme Court reaffirmed at 276 that the principles of statutory construction applicable to Finance Acts as follows:

> *"It is clear that successful tax avoidance schemes can result in unfair burdens on other taxpayers and that unfairness is something against which courts naturally lean. The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from the express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective ..."*

142. In *Texaco (Ireland) Ltd v Murph*y [1991] 2 IR 4491 McCarthy, stated that:

> *"[I]t is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly imposes the obligation."*

143. In this context, he adopted the following observations in the judgment of Rowlatt, J. in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 K.B. 64 at 71

". . . in a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

144. McCarthy, J. also referred to the following passages from the judgment of Kennedy, C. J. in *Revenue Commissioners v Doorley* [1933] IR 750 at 765.

> "*The duty of the Court … is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.*
>
> *I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."*

145. The principles stated in *Cape Brandy Syndicate* and *Doorley* were also reaffirmed by the Supreme Court in *Saatchi & Saatchi Advertising Ltd v McGarry* [1998] 2 IR 562.

146. There have been suggestions made that the Supreme Court altered the literal approach to statutory interpretation in the case of *O'Flynn Construction* in favour of a purposive approach. In *Revenue Commissioners v O'Flynn Construction Company Limited John O'Flynn and Michael O'Flynn* [2011] IESC 47 the Supreme Court did adopt a purposive approach and rejected a purely literal one. However, this was in the very particular

context of section 86 (now TCA, section 811), which requires by its very own words that such a purposive approach be taken.

147. Mr. Justice O'Donnell delivered the majority Judgment with Mr. Justice McKechnie delivering the minority Judgment. The case concerned the use of export sales relief and through a series of transactions the export sales relief benefit was transferred from the company that had carried out the export transactions to the O'Flynns. The Court found that the transaction was a tax avoidance transaction and that it amounted to an abuse or misuse of the export sales relief provisions. The Court focused on the interpretation of the forerunner to TCA, section 811 namely section 86 Finance Act, 1989.

148. It is important to put the Judgment of Mr. Justice O'Donnell in context of interpreting section 811 and it is quite clear that Mr. Justice O'Donnell took a very different view of the importance of *McGrath v McDermott* and the rules relating to statutory interpretation from Mr. Justice McKechnie. Mr. Justice O'Donnell, delivering the majority judgment of the Supreme Court, stated as follows: -

> 66. *In my view the background to Section 86, together with its internal structure, is important in considering the true meaning and application of Section 86 (3) (b). That sub-section cannot be treated as a standalone provision on reliefs and benefits. It is a component part of the overall provision. Section 86 as a whole requires a consideration of whether or not the Revenue Commissioners should form an opinion that a transaction is a tax avoidance transaction, and sets out those matters to which the Commissioners should have regard in forming that opinion. Section 86 (2) seeks to identify those matters which are to be treated as tax avoidance transactions. The matter could perhaps have been left at that, but Section 86 (3) seeks to identify positively matters which are not tax avoidance transactions. In considering paragraph (b) of sub- section (3) the pattern set by Section 86 (2) is instructive. The starting point for the application of Section 86 (2) is that the transaction would not come within the taxing provision, were it not for the provisions of Section 86 (2) and the disallowance and re-characterisation permitted pursuant to that section, Section 86 (3) (b) is only capable of applying to transactions which are otherwise within the relief provision at least as literally construed. There must be use, before there can be said to be misuse or abuse. Here again, therefore, it is clear that the Westminster approach has been modified significantly. Prior to the enactment of Section 86 (3) (b) if a transaction came within the specific words granting relief then that was an end to the enquiry. However, it is now necessary to consider whether the transaction constitutes a misuse or abuse of that relief having regard to the purposes for which it was provided."*

67. *Taking this approach, it is I consider, apparent that the careful analysis of the Appeal Commissioners was too narrow, and consequently in error as matter of law. In the first case, it is not apparent that the determination proceeded upon an appreciation of the significance of Section 86 and the significant change it effected in the pre-existing law. …*

68. *….*

69. *The suggestion that the principles in McGrath preclude a 'purposive approach' is also perplexing. In the first place the express words of s 86 require the Commissioners to have regard to the "purposes for which it [the relief] was provided". Furthermore, the decision in McGrath itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay, C.J. re-stated the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the Courts in cases of doubt or ambiguity to resort to a "consideration of the purpose and intention of the legislature" at page 276. Indeed if McGrath stands for any principle in statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters. As Lord Steyn observed in the Northern Ireland case of IRC v McGuckian [1997] 1 WLR 991, there has been a tendency to treat tax law, almost uniquely in the civil law as continuing to be the subject of a strict literalist interpretation.*

> *'During the last 30 years there has been a shift away from the literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminster Doctrine [1936] AC 1, 19 tax law remained remarkably resistant to the new non- formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute .... tax law was by and large left behind as some island of literal interpretation.'" (emphasis added)*

70. *"Accordingly, the Appeal Commissioners' conclusion that the principles set out in McGrath prohibited the adoption of a purposive approach is incorrect on a number of levels."*

149. Mr. Justice O'Donnell and the majority of the Supreme Court were clearly interpreting section 86 (now TCA, section 811) as requiring a purposive approach. It is, of course, the case that the legal intent of the Oireachtas is to be derived from the words used in their context deploying all the aids of construction which are available in an attempt to understand what the Oireachtas intended. Mr. Justice O'Donnell focuses on the words in the section to indicate that the purpose is to be ascertained. The section expressly says so.

150. With regard to interpretation of taxing statutes other than anti avoidance it is clear that one starts with a literal interpretation of the words found and that one can look to the context of the words as found in the Act as a whole to give effect to the purpose thereby gleaned. That this is so was confirmed by the Supreme Court (Mr Justice Charlton delivering the judgement) in the case of *O'Rourke v The Appeal Commissioners* [2016] IESC 28 wherein he approved of this approach and cited the *Doorley* and *Harris v Quigley cases.*

151. In that case, Charleton J stated;

> *"A statute is to be construed according to its plain meaning and that such emerges from the text of the provision, considered within its proper context."*

152. Later he said, referring to the *McGrath, Doorley and Harris v Quigley* cases;

> *"The basic and ordinary rules of statutory construction apply in determining the meaning of any taxation statute, which are to give each section its ordinary meaning within its relevant context, and to consider exemptions from taxation, against the backdrop of the ordinarily applicable liability, with a view to analysing if that exemption applies"*

153. Recently in the Court of Appeal in the case the *Bookfinders Ltd. -v- The Revenue Commissioners* [2019] IECA 100, the Courts were again required to consider statutory interpretation in context of tax statutes. In her judgement, Kennedy J. made the following observations and findings:

> 35. *The primary issue with which this Court must deal is one of statutory interpretation in relation to the correct construction of the Act. In Gaffney v. Revenue Commissioners, Dunne J. sets out a number of authorities that highlight the principles applicable to the interpretation of taxation statues, beginning with the judgment of Kennedy C.J. in The Revenue Commissioners v. Doorley at p. 765:*

> *"A taxing Act (including of course any other Act or part of an Act incorporated in it by reference), of its own proper character and purpose, stands alone, and is to be read and construed as it stands upon its own actual language. In my opinion, therefore, the argument from the earlier Stamp Acts propounded by Pigot C.B. and adopted here, is not one which may be admitted by the Court in interpreting the Act before us. The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred."*

……

38. *The starting point is the dicta of Denham J. in D. B. v. Minister for Health and Blayney J. in Howard v. Commissioners of Public Works, where he cited with approval the following passage from S. G. G. Edgar, Craies on Statute Law (7th ed, Sweet & Maxwell, 1971):*

> *"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous then no more can be necessary that [sic] to expound those words in their ordinary and natural sense".*

39. *There is no basis at law for an approach to the interpretation of revenue statutes that differs from that of statutory interpretation generally. This is clear from the Supreme Court in Revenue Commissioners v. O'Flynn Construction, which expressly considered the issue of statutory interpretation of general tax avoidance provisions.*

……

43. *I accept the argument of the respondent that, much like McGrath v. McDermott, many of the cases which are cited as authority for the "strict" approach actually take an approach to statutory interpretation analogous to that contained in s. 5 of*

the Interpretation Act 2005 and this can be seen in many of the cases relied upon by the appellant. The passage from Inspector of Taxes v. Kiernan which is generally used to support a "strict" reading of taxation statutes reads as follows:

> *"Secondly if a word or expression is used in a statute creating a penal or taxation liability and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".*

44. *"Strict" in this instance can be interpreted as precision in the consideration of the ordinary meaning of words used in order to avoid a liability to tax arising in unclear circumstances, and not as a method by which a narrow construction is to be preferred.*

45. *On the topic of the interpretation of taxation statutes, Dodd, in Statutory Interpretation in Ireland (1st ed, Tottel, 2008) also states, at para. 6.51:*

> *"In respect of such statutes, what is typically valued is certainty and allowing those affected to rely on the ordinary and plain meaning."*

46. *As stated with admirable clarity by Blayney J. in Howard v. Commissioners of Public Works in citing with approval from Craies on Statute Law, p. 71:*

> *"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such cases best declare the intention of the lawgiver."*

47. *I adopt this approach and accordingly, the starting point in the analysis must be the plain language of the Act.*

Respondent's Conclusion

154. The deeming in TCA, section 96(3) is clearly for the purpose of ensuring that the mortgagee in possession/receiver is the person chargeable to tax in respect of the rental income which comes into its hands. That rental income is treated by the mortgagee in possession/receiver as income of the mortgagor/debtor and is accounted for in its accounts and in its dealings with the mortgagor/debtor as such. TCA, section 96(3), in deeming the estate or interest to be vested in the mortgagee, does no more than ensure that the normal rule that the person chargeable is the person entitled to the profits or

gains is over- ridden. The person entitled to the profits or gains of the rental income is, of course, the debtor. As a matter of security and contract between the debtor (mortgagor) and the Appellant (mortgagee) it has been agreed contractually between the parties that the Appellant can either act as mortgagee in possession or appoint a receiver and thus receive the rents with a view to putting those rents against the amount owed to the Appellant. The rents are obviously, therefore, treated as being profits or gains arising to the debtor but in respect of which the Bank can discharge the debt owed to it.

155. It should be noted that TCA, section 75 is the charging section for rental income and TCA section 96(3) is the interpretative section. TCA, section 96(3) ensures that the Bank as the person receiving the rental income will be the person to collect and discharge a liability to tax in respect of the rental income. It is submitted that the Appellant is not entitled to shelter the tax arising on the rents collected as if that tax were '*relevant corporation tax'* chargeable on the Appellant and is not entitled to succeed in its claim for relief under TCA, section 396B.

Determination

Issue

156. As the tax treatment of income derived as mortgagees in possession and receivers appointed by the Appellant for the purposes of TCA, section 96(3) are the same, any subsequent reference to the Appellant is in its capacity as mortgagee in possession.

157. The Appellant is asserting an entitlement to offset trading losses pursuant to TCA, section 396B against tax due on the deemed rental income derived from properties over which it acts as mortgagee in possession on the basis that TCA, sections 21 and 26, interpreted in accordance with TCA, sections 96(3) and 75(5), impose on the Appellant a charge to corporation tax.

158. The Respondent has taken a diametrically opposed interpretation and submits that TCA, section 96(3) is a mechanism for the collection of taxes on the deemed rental income derived by the Appellant in its capacity as mortgagee in possession and therefore does not constitute the profits of the Appellant for the purposes of securing an offset of trading losses against such income.

159. As such, it is these diverse interpretations that are at issue in this appeal.

Analysis

160. TCA, section 96(3) provides that tax on the rental income from property in receivership, or property where the mortgagee has taken possession, is chargeable on the mortgagee and provides as follows:

> *"Where the estate or interest of any lessor of any premises is the subject of a mortgage and either the mortgagee is in possession or the rents and profits are being received by a receiver appointed by or on the application of the mortgagee, that estate or interest shall be deemed for the purposes of this Chapter to be vested in the mortgagee, and references to a lessor shall be constructed accordingly; but the amount of the liability to tax of any such mortgagee shall be computed as if the mortgagor was still in possession or, as the case may be, no receiver had been appointed and as if it were the amount of the liability of the mortgagor that was being computed."*

161. The first part of TCA, section 96(3) provides that the interest a mortgagee in possession holds is "*deemed for the purposes of this Chapter to be vested in the mortgagee*" whereas the second part of that subsection imposes the obligation to calculate the tax liability on the rental income derived by the Appellant in its capacity as mortgagee in possession "*as if it were the amount of the liability of the mortgagor that was being computed".* As such, the Appellant is therefore required to take into account a number of aspects of the borrower's tax affairs, including details of other income, losses or allowances, tax credits if the borrower is an individual or in the case of a company, group losses if a member of a corporate group.

162. Therefore, the unusual wording of TCA, section 96(3) contains a certain peculiarity whereby the Appellant, as mortgagee in possession, is entitled to the income however the tax on such income is calculated based on the mortgagor's circumstances. As such, in reading TCA, section 96(3) in isolation, it would appear that the intention of the Oireachtas as discerned from the wording, is that the mortgagee in possession is merely acting as a facilitator in the collection and payment of the tax.

163. This interpretation is further bolstered by the fact that a corporate mortgagee in possession could have an effective rate of tax of 41% in respect of mortgagors who are individuals as opposed to the conventional corporation tax rates of 12.5% and 25% applicable to trading and passive income respectively.

164. However, as identified in the Appellant's submission, TCA, section 96(3) read in association with TCA, section 75(5) attributes the rental income to the Appellant acting in its capacity as mortgagee in possession. Therefore, the Appellant falls within the charge to tax pursuant to TCA, section 75(1) on such income and "*such profits or gains shall be chargeable in respect of such profits or gains under Case V of that Schedule*."

165. In its capacity as a corporate mortgagee, the Appellant is charged to corporation tax on the deemed rental income pursuant to TCA, section 26(1) which confirms that a "*company shall be chargeable to corporation tax on all its profits wherever arising*."

166. Therefore, as the deemed rental income comprises part of the Appellant's profits, it follows that relief for offsetting trading losses against rental income should be available pursuant to TCA, section 396B with reference to a company's *"relevant corporation tax"* defined as "*the corporation tax which would be chargeable on the company".*

167. As such, there appears to be a statutory entitlement to offset the Appellant's trading losses pursuant to TCA, section 396B against the deemed rental income on the basis that

TCA, sections 26, interpreted in accordance with TCA, sections 96(3) and 75(5), imposes on the Appellant a charge to corporation tax in respect of the deemed rental profits.

168. However, the inherent difficulty in the interpretation of TCA, section 96(3) arising from the conflict between deeming the rental income to belong to the Appellant and the requirement to calculate the tax due with reference to the mortgagor's circumstances is not easy to reconcile. This conflict was demonstrably apparent from the diametrically opposed submissions of the parties.

169. Furthermore, as a result of the uncertainty in the interpretation of legislation, it is not surprising that guidelines were drafted by the Respondent in consultation with the Tax Administration Liaison Committee and the Banking & Payments Federation Ireland, for the reporting and dealing with the taxes arising on the rental income derived by mortgagees in possession and receivers. The stated purpose of the guidelines, as set out on page 2, is to provide clarity on the "*interpretation of the current legislative position, to assist all concerned in understanding and meeting their statutory obligations*".

170. In reconciling the interpretation TCA, section 96(3), I am required to resolve whether the ambiguity should be resolved in favour of the Appellant or indeed the Respondent. The difficulty in reconciling incidences of the statutory ambiguity was identified by O'Donnell J. in *The Revenue Commissioners -v- O'Flynn Construction Company Limited, John O'Flynn and Michael O'Flynn* [2013] 3 IR 533 when making the following observation at paragraph 74:

> *"…in some cases it may be that there is a gap that the Oireachtas neglected, or an intended scheme which was not foreseen. In those cases, the courts are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the Constitutional scheme. In other cases the provision may be so technical in detail so that no more broad or general purpose can be detected"*

171. It is clear from the judgement in *Bookfinders Ltd. v The Revenue Commissioners* [2019] IECA 100, that the interpretation of a taxing statute requires "*precision in the consideration of the ordinary meaning of words used in order to avoid a liability to tax arising in unclear circumstances"* as confirmed by Kennedy J. in the following paragraphs:

> *43. I accept the argument of the respondent that, much like McGrath v. McDermott, many of the cases which are cited as authority for the "strict" approach actually take an approach to statutory interpretation analogous to that contained in s. 5 of*

the Interpretation Act 2005 and this can be seen in many of the cases relied upon by the appellant. The passage from Inspector of Taxes v. Kiernan which is generally used to support a "strict" reading of taxation statutes reads as follows:

> *"Secondly if a word or expression is used in a statute creating a penal or taxation liability and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".*

44. *"Strict" in this instance can be interpreted as precision in the consideration of the ordinary meaning of words used in order to avoid a liability to tax arising in unclear circumstances, and not as a method by which a narrow construction is to be preferred."*

172. Therefore, as observed by Kennedy J. in *Bookfinders* at paragraph 43 that in "*many of the cases which are cited as authority for the "strict" approach actually take an approach to statutory interpretation analogous to that contained in s. 5 of the Interpretation Act 2005"* which provides that in the interpretation of a provision that is obscure or ambiguous, or where on a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas that:

> *"the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

173. Correspondingly in the interpretation of any relieving or exempting provision, there must also be precision in the wording as confirmed in *Saatchi & Saatchi Advertising Limited, v Kevin McGarry (Inspector of Taxes),* where at page 567, Barrington J. placed reliance on the following passage from Kennedy CJ in *Revenue Commissioners v Doorley* [1933] IR 750:

> *"I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly*

and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

174. The Appellant relies on the observation of Geoghegan J. in *Harris v Quigley* [2006] 1 IR 165 at p.183 that "*where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer'.* However, that judgment was concerned with whether a taxpayer was entitled to a tax refund consequent on Appeal Commissioners' determination and no reference was made to the interpretation of a relieving or exempting provision as considered in *Doorley* and *Saatchi and Saatchi*.

175. Furthermore, as noted in the dissenting judgement of McKechnie J in *Revenue Commissioners v O'Flynn Construction Company Limited John O'Flynn and Michael O'Flynn* [2013] 3 IR 533 at paragraph 125:

"From this quick survey of the above authorities and those to which they refer, the resulting position relative to taxation statutes may thus be summarised:-

(i) the duty of the court is to establish the intention of the Oireachtas by reference to the language used;

(ii) in so doing, as such provisions are directed to the public at large (at least generally), the normal rules of interpretation apply which mean that, the words used should be given their ordinary and natural meaning, having regard where appropriate, to the context in which they are employed;

(iii) to create a tax charge the same must be founded within the clear, unambiguous and express terms of the provision relied upon: if the liability comes within the "wording" of the provision, that's an end to the matter: the tax payer must be taxed;

(iv) the principle last mentioned equally applies, where an exemption to tax is asserted: such exemption and its scope must likewise be so founded, as otherwise the basis of liability may be impermissibly enlarged;

(v) …."

176. In light of such jurisprudence, to allow the Appellant's claim for loss relief, it would be necessary that I ignore that the tax "*liability*" imposed on the mortgagee in possession is based on the mortgagor's circumstances. Therefore, it appears to me that the intention of the Oireachtas, notwithstanding the valid submissions made by the Appellant, as discerned from the words deployed, that TCA, section 96(3) is a collection mechanism for the tax due by the mortgagor and as a consequence does not form part of the Appellant's profits for the purposes of seeking a deduction pursuant to TCA, section 396B .

177. Furthermore, in asserting that the deemed rental income derived by the Appellant as mortgagee in possession comprises its profit on which corporation tax is paid and as a consequence entitled to loss relief pursuant to TCA, section 396B, the Appellant relies on the first operative part of TCA, section 96(3). However, in its submissions, the Appellant did not adequately address or reconcile the second part of TCA, section 96(3) mandating that the tax on such income be calculated with reference to the mortgagor's individual circumstances. Furthermore, the resulting uncertainty in the interpretation of TCA, section 96(3) that gives rise to my reluctance to accept the Appellant's submission.

178. It also seems quite bizarre that a corporate mortgagee in possession could have an effective rate of tax of 41% in respect of financially distressed mortgagors who are individuals when the corporation tax rates are 12.5% and 25% on trading and passive income respectively.

179. Therefore, and notwithstanding the statutory ambiguity, I am more inclined to agree with the Respondent's submissions that the word "*liability*" in TCA, section 96(3), as interpreted with "*precision*" indicates that the liability to tax is calculated as a final figure after all reliefs or allowances are taken into account relating to the mortgagor. The *"liability*" is then made the responsibility of the mortgagee having been deemed to be vested in the mortgagee and remitted to the Respondent. No further allowance or relief can be deducted to such a liability to tax. The attempt to do so by the Appellant is to potentially seek a second set of reliefs which is a wholly constrained and artificial interpretation of the section and clearly not within the intention of the legislature as evidenced by the words used in TCA, section 96(3).

180. However even if I were incorrect in that view, I am not satisfied that the interpretation of TCA, section 96(3) as impressed upon me by the Appellant is sufficiently clear that permits the classification of deemed rental income to be part of the Appellant's profits with the resulting entitlement to offset trading losses pursuant to TCA, section 396B.

181. On this basis, I cannot accede to the Appellant's submissions as to do so would be to act contrary to the interpretation of law as expressed by Barrington J. in *Saatchi & Saatchi Advertising Limited* and thereby, as observed by O'Donnell J. in *O'Flynn,* would be to transgress into the role of law making by usurping the role of the Oireachtas contrary to the "*Constitutional scheme*."

Observation

182. There has been criticism that the computational provision in the second part of section 96(3) is unworkable both legally and practically as it is not clear how the mortgagee could know with certainty what the tax computation was when calculated by reference to assuming the borrower was still in possession and, furthermore, practically obtaining that information concerning the borrower.

183. Furthermore, in the recent Supreme Court judgment in *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, MacMenamin J., in proposing improvements in drafting legislation, said as follows:

> 4. *"The words of the Constitution import a guarantee* [of] *the fundamental features of the rule of law. Among these features must be that the meaning of a legal provision must, insofar as is practicable, be clear and discernible, so as to provide, not only to each person subject to that law, but also their advisers, the ability to regulate conduct in order to know whether that conduct is lawful.*
>
> 5. *Opaque laws can lend themselves to abuse. Those in government departments who must draft laws may, perhaps, sometimes focus overmuch on a benign underlying intent of legislation which they seek to have enacted. Protection of the environment from litter and plastic is a case in point. But as judges, scholars and citizens have commented on previous occasions, there are areas of our law where the words of the statute too often are simply not as clear as they should be. I go no further than to say that the provisions invoked in this appeal were surely capable of a much clearer definition"*

Conclusion

184. In interpreting the word "*liability*" in TCA, section 96(3) strictly and as a consequence of the confusion generated by the wording in TCA, section 96(3), I am not satisfied that the Appellant, acting in its capacity as mortgagee in possession, is entitled to offset trading losses pursuant to TCA, section 396B against tax due on the deemed rental income

arising from properties over which it acts as mortgagee in possession on the basis that TCA, sections 21 and 26, interpreted in accordance with TCA, sections 96(3) and 75(5), impose on the Appellant a charge to corporation tax in respect of the rental income.

185. As a consequence, the assessments for the years 2011, 2012 and 2013 amounting to €90,510, €250,322 and €1,148,105 respectively stand.

186. As such, this appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

Conor Kennedy
Appeal Commissioner
17th January 2020

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.