54TACD2022

BETWEEN:

****

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This matter relates to an appeal pursuant to Taxes Consolidation Act 1997 (TCA), section 811(7) against a Notice of Opinion (Notice) dated 24th December 2012 issued to the Appellant by a Mr Philip Brennan, the Nominated Officer of the Respondent in accordance with TCA section 811(6).

2. The Notice stated that the Nominated Officer formed the opinion that the transaction detailed therein (the Transaction) carried out by the Appellant's spouse, ********* (hereinafter referred to as the Appellant on the basis that **********and ********were jointly assessed for tax purposes) was "*a tax avoidance transaction within the meaning of TCA, section 811 Taxes Consolidation Act 1997*". It specified that the tax advantages arising from the Transaction had been calculated at €6,861,717 and €74,288 for the years 2007 and 2008 respectively. The Notice also specified that the tax consequences of the opinion on becoming final and conclusive would be the disallowance of capital gains tax losses claimed.

3. By letter dated 22 January 2013, the Appellant's agent lodged an appeal under TCA, section 811(7) against the Notice on the grounds, *inter alia*, that:

(a) The Transaction was not a tax avoidance transaction.

(b) The amount of the tax advantage calculated by the Respondent was incorrect.

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

Material Findings of Fact

4. My material findings of fact are as follows:

(a) On 13 September 2007, the Appellant acquired 100,000 non-voting, non-cumulative preference shares of €1 each in *******Limited ('*******'). This increased his shareholding to 105,000 non-voting, non-cumulative preference shares, having previously acquired 5,000 non-voting, non-cumulative preference shares in *******on 14 November 2005.

(b) On 13 November 2007 the Appellant transferred his 105,000 non-voting, non-cumulative preference shares in *******to his spouse **********. As **********then held the greater part of the share capital of*******, she was connected with ******for the purposes of the TCA.

(c) On 22 November 2007 Barclays Wealth acquired on behalf of *******an 18-month EUR Banking Outperformance Note ('the Notes') with a nominal value of €38,000,000, for €38,000,000, with a Bargain Date of 22 November 2007 and a Settlement Date of 27 November 2007.

(d) On the 23rd November 2007, *******and ********* entered into a Call Option Agreement, whereby *******granted a Call Option to ******* in consideration of ******* paying an Option Premium of €34,200,000 to *******permitting the purchase of the Notes at an option price as defined under the call option agreement.

(e) ******* thereupon had the right to acquire the Notes at a consideration representing the difference between the market value of the Notes (€38,000,000) and the premium paid for the option (€34,200,000) less certain minor adjustments.

(f) On 23 November 2007 ******** entered into a Note Purchase Agreement with *******and ******* to purchase the Notes from*******, subject to the Call Option for a consideration of €7,220,000.

(g) As part of the Note Purchase Agreement, ******* granted a Put Option allowing her to require ******* to purchase the Notes on the same terms as provided for in the Call Option Agreement for consideration of €1 and the undertaking by her regarding the obligations under the Call Option.

(h) On 26 November 2007 the Board of Directors of *******resolved to enter into a series of transactions comprising:

- An Option Agreement
- A Portfolio Mortgage
- A Note Purchase Agreement

(i) On 21 December 2007 *********disposed of the Notes to ******* for €3,368,700.

(j) ********** thus sustained an actual / monetary loss on the Transaction of €3,851,300.

(k) Throughout the period of the Transaction, held the sole ordinary share in*******, a company incorporated in the State. The share held by entitled it to all voting rights.

(l) and ******* were commonly owned and as such they were connected for the purposes of the TCA. *******and ******* were therefore connected pursuant to the TCA, sections 10(6) and 432(2)(a).

Tax Consequence of the Transaction

5. The following comprises the tax consequences of the aggregate arrangements:

(a) the sale of the Notes by******* to *******is a transaction between connected persons (TCA, section 549(1)).

(b) *******and ********** are treated as parties to a transaction otherwise than by means of a bargain made at arm's length (TCA, section 549(2)).

(c) the acquisition by ********of the Notes is deemed to be for a consideration equal to the market value of the Notes on the date of the sale (TCA, section 547(1)(a)).

(d) *******and ******* are connected persons and because the Notes are at the date of the sale to ********** subject to a right in favour of *******, the

market value of the Notes is calculated as if the right (i.e. the option) did not exist (TCA, section 549(6) and (7)).

(e) The tax loss generated by the transactions is the difference between the market value of the Notes without the option (€38,000,000), and the price obtained on sale to ******* (€3,368,700) resulting capital gains tax loss of €€34,631,300 on which the Respondent calculated a tax advantage of €6,936,005.

Full and True Return

6. Notwithstanding that the only issue before me was whether the Transaction was a tax avoidance transaction, the Respondent produced a record of the Appellant's tax returns for the year 2007 in which it was indicated that the Appellant's spouse failed to notify the Respondent of a fundamental fact that she had engaged in transactions with a connected party. The Respondent also produced transcripts of a separate hearing before my colleague Commissioner Gallagher involving the same Appellant and the same tax year at which the agent for the Appellant's agent accepted that there were errors in the Appellant's 2007 tax return. In these proceedings, the Appellant argued that such documents were not only hearsay and therefore inadmissible but his client had been denied the opportunity of challenging the accuracy and legitimacy of such documents.

Joint Assessment

7. The Appellant and his spouse were jointly assessed for tax purposes.

Legislation

8. On hearing of an appeal against a notice of opinion in accordance with TCA, section 811(9)(a):

"the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under this section, and-

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

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

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

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

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

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

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

9. TCA, section 811(1) contains the following relevant definitions:

""tax advantage" means –

(i) reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or
(ii) a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person, including any potential or prospective amount so refundable or payable,

arising out of or by reason of a transaction, including a transaction where another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction;"

....
"transaction means"

(i) any transaction, action, course of action, course of conduct, scheme, plan or proposal,

(ii) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and

(iii) any series of or combination of the circumstances referred to in paragraphs (i) and (ii),

whether entered into or arranged by one person or by 2 or more persons-

(I) *whether acting in concert or not,*

(II) *whether or not entered into or arranged wholly or partly outside the State, or*

(III) *whether or not entered into or arranged as part of a larger transaction or in conjunction with any other transaction or transactions."*

10. In considering corporate transactions involving connected parties, recourse must be made to the following provisions:

TCA, section 10(7):

"A company shall be connected with another person if that person has control of the company or if that person and persons connected with that person together have control of the company."

TCA, section 432(2)

"For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire –

(a) the greater part of the share capital or issued share capital of the company or of the voting power in the company,

(b) such part of the issued share capital of the company as would, if the whole of the income of the company were distributed among the participators

(without regard to any rights which such person or any other person has as a loan creditor), entitle such person to receive the greater part of the amount so distributed, or

(c) such rights as would, in the event of the winding up of the company or in any other circumstances, entitle such person to receive the greater part of the assets of the company which would then be available for distribution among the participators."

11. TCA, section 31 is entitled 'Amount chargeable' and provides:

"*Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting –*

(a) any allowable losses accruing to that person in that year of assessment, and

(b) in so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1974-75)."

12. The broad basis upon which a chargeable gain is to be calculated is contained in TCA, 545 as follows:

(1) Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no chargeable gain shall accrue on its disposal.

(2) The amount of the gain accruing on the disposal of an asset shall be computed in accordance with this Chapter, and subject to the other provisions of the Capital Gains Tax Acts.

(3) Except where otherwise expressly provided by the Capital Gains Tax Acts, every gain shall be a chargeable gain

13. The principles by which losses are determined are governed by TCA, section 546 and provide:

(1) "Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.

(2) *Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.*

(3) *Except where otherwise expressly provided, the provisions of the Capital Gains Tax Acts which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss and part not, and references in the Capital Gains Tax Acts to an allowable loss shall be construed accordingly."*

14. Transactions between connected persons are set out in TCA, section 549 and imposes market value rules on disposals between such persons in accordance with the following provisions:

(1) *"This section shall apply for the purposes of the Capital Gains Tax Acts where a person acquires an asset and the person making the disposal is connected with the person acquiring the asset.*

(2) *Without prejudice to the generality of section 547, the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by means of a bargain made at arm's length.*

(3) *Where on the disposal a loss accrues to the person making the disposal, the loss shall not be deductible except from a chargeable gain accruing to that person on some other disposal of an asset to the person acquiring the asset mentioned in subsection (1), being a disposal made at a time when they are connected persons.*

(4) *Subsection (3) shall not apply to a disposal by means of a gift in settlement if the gift and the income from it are wholly or primarily applicable for educational, cultural or recreational purposes, and the persons benefiting from the application for those purposes are confined to members of an association of persons for whose benefit the gift was made, not being persons all or most of whom are connected persons.*

(5) *Where the asset mentioned in subsection (1) is an option to enter into a sale or other transaction given by the person making the disposal, a loss accruing to a person acquiring the asset shall not be an allowable loss unless it accrues on a disposal of the option at arm's length to a person not connected with the person acquiring the asset.*

(6) *Where the asset mentioned in subsection (1) is subject to any right or restriction enforceable by the person making the disposal or by a person connected with that*

person, then that market value shall, where the amount of the consideration for the acquisition is in accordance with subsection (2) deemed to be equal to the market value of the asset, be what its market value would be if not subject to the right or restriction, reduced—

(a) by the lesser of—

(i) the market value of the right or restriction, and
(ii) the amount by which its extinction would enhance the value of the asset to its owner, or

(b) by the market value of the right or restriction, where the market value referred to in paragraph (a)(i) and the amount referred to in paragraph (a)(ii) are equal.

(7) Where the right or restriction referred to in subsection (6), –

(a) is of such a nature that its enforcement would or might effectively destroy or substantially impair the value of the asset without bringing any countervailing advantage either to the person making the disposal or a person connected with that person,

(b) is an option or other right to acquire the asset, or

(c) in the case of incorporeal property, is a right to extinguish the asset in the hands of the person giving the consideration by forfeiture or merger or otherwise,

then, the market value of the asset shall be determined, and the amount of the gain accruing on the disposal shall be computed, as if the right or restriction did not exist.

(7A) (a) This subsection applies where the asset mentioned in subsection (1) is subject to any right or restriction enforceable by the person making the disposal or by the person connected with that person, and the market value of the asset at the date of its acquisition (without reference to any right or restriction) is greater than the consideration, in money or money's worth, given in payment for that asset.

(b) Where, on a subsequent disposal of an asset to which paragraph (a) applies by the person who acquired that asset, subsection (7) has the effect (without taking account of this subsection) of—

(i) increasing a loss, or

(ii) substituting a loss for a gain,

then that subsection shall not apply.

(8) (a) Where a person disposes of an asset to another person in such circumstances that –

(i) subsection (7) would but for this subsection apply in determining the market value of the asset, and

(ii) the person is not chargeable to capital gains tax under section 29 or 30 in respect of any gain accruing on the person's disposal of the asset,

then, as respects any subsequent disposal of the asset by the other person, that other person's acquisition of the asset shall for the purposes of the Capital Gains Tax Acts be deemed to be for an amount equal to the market value of the asset determined as if subsection (7) had not been enacted.

(b) This subsection shall apply –

(i) to disposals made on or after the 25th day of January, 1989, and

(ii) for the purposes of the determination of any deduction to be made from a chargeable gain accruing on or after the 25th day of January, 1989, in respect of an allowable loss, notwithstanding that the loss accrued or but for this section would have accrued on a disposal made before that day.

(9) Subsections (6) and (7) shall not apply to a right of forfeiture or other right exercisable on breach of a covenant contained in a lease of land or other property, or to any right or restriction under a mortgage or other charge.

15. Therefore, while TCA, section 549 deals with transactions between connected persons in determining the value of transactions between such persons it is necessary to consider the market value rules contained at TCA, section 547:

(1) "Subject to the Capital Gains Tax Acts, a person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where –

(a) the person acquires the asset otherwise than by means of a bargain made at arm's length (including in particular where the person acquires it by means of a gift),

(b) the person acquires the asset by means of a distribution from a company in respect of shares in the company, or

(c) the person acquires the asset wholly or partly –

(i) for a consideration that cannot be valued,
(ii) in connection with the person's own or another person's loss of office or employment or diminution of emoluments, or
(iii) otherwise in consideration for or in recognition of the person's or another person's services or past services in any office or employment or of any other service rendered or to be rendered by the person or another person.

(2) .....
(3) ....

(4) (a) Subject to the Capital Gains Tax Acts, a person's disposal of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset where –

(i) the person disposes of the asset otherwise than by means of a bargain made at arm's length (including in particular where the person disposes of it by means of a gift), or
(ii) the person disposes of the asset wholly or partly for a consideration that cannot be valued.

(b) Paragraph (a) shall not apply to a disposal by means of a gift made before the 20th day of December, 1974, and any loss incurred on a disposal by means of a gift made before that date shall not be an allowable loss."

Appellant's Submissions

16. The Appellant's appeal against the Opinion of the Respondent is based*, inter alia*, on the following:

Time Limits

(a) The Respondent is precluded from making enquiries outside of the prescribed four year time period pursuant to sections 956 and 955 of the Act and these provisions are referred to for their full meaning and effect. It is further submitted that the Respondent's case is statute barred pursuant to these statutory provisions and to the reasoning of the decision in the Supreme Court in the case of *Hans Droog v Revenue Commissioners*, (Supreme Court – Record No. 218/2011) delivered on the 6th October 2016.

(b) The Appellant received professional advice, and it was based on such advices that the Appellant filed his tax return. In this regard the Appellant cannot be considered to have filed the return in a "*fraudulent or negligent manner*". The Appellant relies on the provisions of TCA, section 949I(6), in advancing this ground of appeal.

The Notice of Opinion

(c) The Notice of Opinion failed to identify the basis for the Opinion that the transaction described in the Notice of Opinion is a tax avoidance transaction. The Notice simply recites the series of transactions and determines it to be a tax avoidance transaction or series of transactions with potentially devastating consequences for the Appellant.

Burden of Proof

(d) The judgment of Mr. Justice Charleton in *McNamee* clearly indicates there that the burden for each and all of the matters to be proven in respect of TCA, section 811 appeal lies with the Respondent and as such the matter should be dismissed.

Substantive Issue

(e) The transaction or transactions were commercial transactions where the investor took a real commercial decision on a leveraged basis in respect of the Notes transaction. The Appellant takes issue with the Opinion on the basis that the transaction specified or described in the Notice of Opinion is not a tax avoidance transaction. The Notice of Opinion failed to identify the basis for the Opinion that the transaction described in the Notice of Opinion is a tax avoidance transaction. Details were sought of the basis of the Opinion under appeal but these were not

forthcoming. As the Respondent has failed to identify the basis for the Opinion that the transaction described in the Notice of Opinion is a tax avoidance transaction, in the circumstances it is submitted that the TAC, to give effect to TCA, section 949AG, must determine that there is no basis for the Opinion of the Nominated Officer.

Preliminary Issue - Time Limit

17. This case arises out of a Notice of Opinion from the Respondent pursuant to TCA, section 811 and dated 24th December 2012.

18. This Notice of Opinion was given five years after the date for the filing of the relevant taxes for the year 2007 and four years and two months after the date for the 2008 filing. An amended assessment to Capital Gains Tax for the year 2007 was raised on the 7th August 2014.

19. The contention of the Appellant is that the Respondent's case is time barred pursuant to the reasoning of the Supreme Court in the recent decision in *Hans Droog –v- Revenue Commissioners,* (Supreme Court – Record No. 218/2011) delivered on 6th October 2016.

20. The Appellant contends that a preliminary issue to be determined in this appeal is whether the Notice of Assessment and/or Notice of Opinion is valid in circumstances where they issued outside of the four-year time limit.

21. The Legal Submissions furnished by the Respondent have also raised the issue of the jurisdiction of the Tax Appeals Commission (TAC) to consider the issue of the time limit in TCA, section 811 proceedings when stating:

> *"Section 811(8) confines the grounds of appeal under section 811(7) to those listed in subsection (7). The Respondent contends that the Appellants are therefore precluded from raising any question of a time bar in this appeal".*

22. The Respondent also raised issues in respect of the application of the time limit given the provisions of the Finance Act 2012 and the provisions of TCA, section 811(5)(A) which was introduced thereby.

23. The preliminary issue therefore will also deal with this point and the proper construction of the legislation on the issue of the time-bar. The preliminary issue relates to the issues around the four-year time limit and will dispense with the need for a further hearing on the Substantive Issues if the Appellant is successful.

24. As is clear from the decision in *Stanley v the Revenue Commissioners* [2017] IECA 279 the time limit issue is a fundamental (and by its very nature a preliminary) issue which can and should be determined prior to the substantive issues which arise in the tax appeal.

25. It is only if the Respondent has acted within time that the TAC will be required to engage in a consideration of the Substantive Issues. As a matter of principle, therefore, the preliminary issue approach is not only appropriate but it is the only correct one to adopt.

26. A decision to have the TAC determine the Substantive Issues at the same time as the time-limit issue makes no sense and as it would involve an enormous waste of the TAC's time and resources and have considerable consequent disadvantage for other appeals and appellants awaiting determination.

27. While the time limit is referred to as a preliminary issue, it is preliminary in the sense that its resolution in favour of the Appellant would resolve all issues. In essence, the Appellant submits that its appeal be case-managed and that the issues arising be dealt with on a modular or phased basis by way of case management because of the benefit in time saved and efficiencies.

28. It was only if the Respondent acted within time that it would be appropriate for the TAC to consider the Substantive Issues. The time limit issue could be determined discretely. This is in contrast with the lengthy evidence and submissions that would be required in relation to the hearing of the Substantive Issues.

29. It would also be incorrect to adjourn the preliminary issue to the hearing of the substantive action as, even if the preliminary issue and the Substantive Issues were listed together for hearing, it would be inconceivable that the TAC would not first determine the time limit issue before going on to hearing the Substantive Issues.

30. The Court in the case of *O'Rourke v The Revenue Commissioners* [2016] 2 I.R. 615 made it clear that while an appeal from the TAC to the Circuit Court was open to a taxpayer in respect of whom an adverse finding in respect of the time for the making of an assessment by an inspector of taxes had been made, and where final liability to taxation had been decided, this appeal would not be open at the point at which any intermediate finding is made, but only when the entire appeal is determined. An appeal is only determined by the TAC where there is a final decision by them as to liability to pay and as to the amount of tax for which the taxpayer is liable.

31. The decision in *O'Rourke* means that if the Appellant is unsuccessful on the preliminary issue, any appeal it wishes to bring cannot be brought until after the determination of the substantive appeal. Accordingly, such an appeal will not give rise to any increase in costs or postponement of the hearing because it simply cannot be pursued until the TAC has made a determination in relation to the Substantive Issues on the appeal.

32. The TAC has jurisdiction to manage its cases in an efficient manner and to determine that a particular issue should be tried first because, depending on the determination of that issue, it may be unnecessary to determine the substantive issues on appeal.

33. In *LM v An Garda Siochana* [2015] 2 IR 45, the Supreme Court held that a court was entitled on the hearing of a preliminary issue to consider if the issue was one appropriate for determination in that manner. In *LM*, O'Donnell J said at paragraph 36:-

> *"However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. Indeed, counsel for the defendants in these cases conceded that this could be done in an appropriate case, but I do not wish to rest this decision, particularly in the context of this case, on any such concession. In my view, a court retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact-dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion."*

34. It is therefore submitted that the TAC, as a decision-making body, with power to control its own procedures in significant ways, must also enjoy this important jurisdiction.

35. It is also submitted that the requirements laid down by the Supreme Courts in *Campion v South Tipperary County Council*, have also been satisfied. The Supreme Court stated that:

a) There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.
b) There must exist a question of law which is discrete, and which can be distilled from the factual matrix as presented.
c) There must result from such a process a saving of time and cost when the same is contrasted with any other suggested method by which the issues may be disposed of; in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.

d) The greater the impact which a decision on the preliminary issue(s) is likely to have on the entire case the stronger will be the argument for making the requested order.
e) Conversely if, irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issues of a substantial nature, the less convincing will be the argument for making such an order;
f) Exceptionally however, even if the follow-on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.
g) As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate
h) It must be "convenient" to make such an order: at one level this consideration of itself can be said to incorporate all other factors herein mentioned but for the purposes of clarity it is, I think, more helpful to retain the traditional separation of such matters;
i) The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties;
j) The court at all times retains a discretion whether or not to make such an order, when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally;
k) Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to do so.

The Jurisdiction of The TAC In Relation To The Time Limit

36. The main statutory provision appealing an Opinion given by the Respondent under section 811 is to be found in subsection 7 which reads as follows:

> *"Any person aggrieved by an opinion formed or, in so far as it refers to the person, a calculation or determination made by the Revenue Commissioners pursuant to subsection (4) may, by notice in writing given to the Revenue Commissioners within 30 days of the date of the notice of opinion, appeal to the Appeal Commissioners on the grounds and, notwithstanding any other provision of the Acts, only on the grounds that, having regard to all of the circumstances, including any fact or matter which was not known to the Revenue Commissioners when they formed their opinion or made their calculation or determination, and to this section-*
>
> *(a) the transaction specified or described in the notice of opinion is not a tax avoidance transaction,*

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

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

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

37. Subsection 7 restricts the taxpayer's ability to appeal in that it allows an appeal "*notwithstanding any other provision of the Acts*" only on certain grounds and those grounds are, "*having regard to all of the circumstances*," and as set out in (a) through (d) above. The reference to "*having regard to all the circumstances*" necessarily qualifies the list in (a) to (d)

38. The Taxpayer's grounds for appeal are to have regard to *"all of the circumstances, including any fact or matter which was not known to the Revenue Commissioners when they formed their opinion or made their calculation or determination…*". It can be seen that such regard is quite wide indeed given its use of the words "*all of the circumstances*" and for the avoidance of doubt the subsection went further to explain that it matters not whether any fact or matter was not known to the Respondent when they invoked TCA, section 811 in the first instance.

39. From the above context, it would appear that the expression "*fact or matter*" would be a subset of the word "*circumstances*". If a taxpayer was to give evidence therefore, it is likely that his or her motivations behind the transaction could be aired. It is submitted that taxpayer motivation would be a "*matter*" within the meaning of subsection 7 above.

40. TCA, section 811(8) is a companion subsection to subsection 7 and reads as follows:

> *"The Appeal Commissioners shall hear and determine an appeal made to them under subsection (7) as if it were an appeal against an assessment to income tax and, subject to subsection (9), the provisions of the Income Tax Acts relating to the rehearing of an appeal and to the statement of a case for the opinion of the High Court on a point of law shall apply accordingly with any necessary modifications; but on the hearing or rehearing of the appeal-*
>
> (a) *it shall not be lawful to enquire into any grounds of appeal other than those specified in subsection (7), and*

(b) *at the request of the appellants, 2 or more appeals made by 2 or more persons pursuant to the same opinion, calculation or determination formed or made by the Revenue Commissioners pursuant to subsection (4) may be heard or reheard together".*

41. The reference to hearing an appeal "*as if*" it was an income tax appeal brings in that part of the Taxes Acts which deals with an income tax appeal. This is mentioned because subsection 7 is written as being "*notwithstanding any other provision of the Acts*". That said, where that is mentioned in subsection 7, it merely continues to outline the grounds of appeal whereas subsection 8 speaks of the hearing and determining of an appeal. Accordingly, subsection 8 is procedurally focused whereas subsection 7 appears evidentially focused.

42. Subsection 8 therefore allows the consideration of the time-bar to be determined as a procedural point, as if an appeal was being made under the Income Tax Acts when the time-bar would also apply.

43. The subsection by reference to the use of the words "*as if*" in the section is concerned with the appeal of a Revenue opinion in connection with TCA, section 811 which may of course involve any tax which is governed by any of the acts mentioned in the definition of "the Acts" in TCA, section 811(1)(a).

44. TCA, section 811(9) goes on to outline how the Appeal Commissioners shall determine the appeal under each of the grounds specified in TCA, section 811(7) as follows:

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

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

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

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

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

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

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

45. Where it is not appropriate to proceed because of a time bar on the Opinion, then we do not enter into a determination of the issue of tax avoidance under TCA, section 811 so there is no contradiction between these provisions and the prohibition giving rise to a time bar in the statute.

46. This interpretation of the statutory provisions is implicitly accepted by Ms. Justice Laffoy in *Droog* who noted that:

> *"The respondent appealed pursuant to s 811(7) to the Appeal Commissioner against the notice of opinion by notice dated 5 March 2007. One of the grounds relied on by the respondent was that the notice of opinion was out of time by virtue of ss 924, 955 and 956 TCA97. The appeal was heard by the Appeal Commissioner on 20 October 2009, when it had been listed to deal solely with the ground of appeal by reference to ss 955 and 956 TCA97 (s 955/s 956). The Appeal Commissioner delivered his determination on 18 December 2009. His determination, as recorded in the Case Stated, was that the four-year time limits as set out in ss 955 and 956 applied to the forming of an opinion under s 811, so that the opinion was not valid. As recorded in the Case Stated, the Appeal Commissioner found as a fact that there was no suggestion of fraud or neglect of the respondent taxpayer in relation to the matters at issue."*

The Application of the Statutory Time Limit

47. TCA, section 955(1)) permits an inspector of taxes to amend an assessment notwithstanding that tax may have been paid or repaid in respect of the assessment. Subsection 2(a) provides that where a return contains a full and true disclosure of all

material facts necessary for the making of an assessment, the time limit for making or amending an assessment is 4 years after the end of the tax year or accounting period in which the return is made and no further tax can become payable after the end of that 4 year period.

48. However there is no time limit on the making of an assessment in circumstances where a return does not contain a full and true disclosure. Subsection 2(b) states:

> *"Nothing in this subsection shall prevent the amendment of an assessment;- where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),"*

49. Section 956 (1)(b)(i) permits an inspector to make or amend an assessment in relation to any return submitted by a chargeable person for the purposes of:

> *"making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and (ii) subject to section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate."*

50. However TCA, section 956(1)(c) provides that:

> *"Any enquiries and actions shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner."*

Droog v the Revenue Commissioners

51. The case of *Droog v The Revenue Commissioners,* High Court (2011) IEHC 142, Supreme Court (2016) IESC 55, is important in that it dealt with various arguments made by the Respondent in respect of the application of the above sections, in respect of their interaction with TCA, section 811 but also in their own terms.

52. The facts of the case were summarised by Laffoy J at the High Court. Mr. Droog (the respondent) filed his income tax return for the fiscal year 1996/1997 on 30 January 1998, and claimed relief for a loss of £50k in respect of his share of the losses of a partnership which was involved in the acquisition, distribution and licensing of films. On 25 February 1998, Mr. Droog received an assessment for 1996/1997 in accordance with the return, which allowed relief in respect of the loss as claimed. Ms. Justice Laffoy stated that:

"The exception contained in para. (b) on which counsel for the Revenue Commissioners focused, albeit as a "fall back" position and supra protest from counsel for the respondent on the basis that the point had not been raised before the Appeal Commissioner, was that contained in sub-para. (iii). The submission as to the application of that exception to the opinion of the Nominated Officer was that the giving of the notice of opinion under s. 811 was "an event occurring after" the return was delivered, which operated to disapply the four year time limit provided for in para. (a). Counsel for the respondent dismissed that submission as an attempt to "shoehorn" the notice of opinion into what he described as the wrong side of subs. (2). In my view, the rationale underlying para. (b) is obvious. Clearly, it is sensible that a taxpayer who made a return which did not contain a full and true disclosure of the facts should not be protected by the time limit in para. (a). As I understand it, as a matter of fact, it is common case that the respondent made a full and true disclosure in the return in issue here. It is also sensible that there should not be a time limit on correcting errors in calculation or the type of mistake of fact referred to in sub-para. (v). Whatever type of "event occurring after" the delivery of the return the Oireachtas had in mind in enacting sub-para. (iii), in my view, it cannot have been intended that the particular exception provided for in sub-para. (iii) would encompass an action by a nominated officer of the Revenue Commissioners pursuant to a power conferred by a separate and distinct element of the taxation code, such as the giving of a notice of opinion permitted under the anti-avoidance measures contained in s. 811. Therefore, in my view, the notice of opinion which issued on 22nd February, 2007 does not come within the exception set out in sub-para. (iii) or any other sub-para. of para (b)".

53. In respect of the history of the matter the Judge noted that:

"Just short of nine years later, on 22 February 2007 a nominated officer of the Revenue Commissioners gave notice in writing of an opinion pursuant to s.811(6) TCA97 to the respondent. There were three elements in the notice. First, the Nominated Officer stated that he had formed the opinion that the transaction he outlined was a tax avoidance transaction within the meaning of s.811 TCA97 (s 811). The details of the transaction referred to an investment under the terms of a partnership agreement and an agreement of adherence, which were identified, and of certain activities carried out by Taupe Partners, the details of which are not of relevance for present purposes. Secondly, the Nominated Officer stated that he had determined the tax advantage which was to be withdrawn from the respondent for, inter alia, the year 1996/1997. In relation to that fiscal year, the tax advantage was set out at £24,022, representing the loss relief at the rate of 48% which the respondent had been allowed on his share of partnership losses amounting to £50,046 for 1996/1997. Thirdly, the Nominated Officer stated that he had determined that, should his opinion become final and conclusive, the loss relief claimed by the respondent would be withdrawn. The respondent appealed pursuant to s 811(7) to the Appeal Commissioner against the notice of opinion by notice dated 5 March 2007. One of the grounds relied on by the

respondent was that the notice of opinion was out of time by virtue of ss 924, 955 and 956 TCA97. The appeal was heard by the Appeal Commissioner on 20 October 2009, when it had been listed to deal solely with the ground of appeal by reference to ss 955 and 956 TCA97 (s 955/s 956). The Appeal Commissioner delivered his determination on 18 December 2009. His determination, as recorded in the Case Stated, was that the four-year time limits as set out in ss 955 and 956 applied to the forming of an opinion under s 811, so that the opinion was not valid. As recorded in the Case Stated, the Appeal Commissioner found as a fact that there was no suggestion of fraud or neglect of the respondent taxpayer in relation to the matters at issue".

54. TCA, section 950 says that "*Except in so far as otherwise expressly provided, this Part [i.e. Part 41] shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts*." The Part goes on in TCA section 955 to outline the 4 year time limits for issuing/amending an assessment and TCA section 956 outlines the 4 year time limit for Revenue making enquiries into a tax return. The key point in TCA section 950 is that unless it is "*expressly*" provided for in the Tax Acts or CGT Acts that another time limit is to apply, then Part 41 is to have dominion over those Acts for time limit purposes. TCA, section 811(4) merely says that Revenue can form their opinion that a transaction is one of tax avoidance to which that section applies "*at any time*". The taxpayer's argument being that TCA section 811(4) was not an express provision such that the time limits in Part 41 had dominion over TCA section 811(4).

55. On the TCA section 811(4) matter, the Judge concluded at para 9.3 as follows:

"…in my view, the words "at any time" in s 811(4) do not have the effect of displacing the primacy given by s 950(2) to the provisions of Part 41 in relation to self-assessed taxpayers and, in particular, the time bar on making assessments and imposing additional tax provided for in s 955 or the time bar in relation to making an enquiry or taking an action provided for in s 965 [It is presumed that this is a reference to s956]. In the absence of express disapplication of the primacy of the provisions of Part 41, in my view, as a matter of construction, the words "at any time" in s811(4) must be read as meaning at any time within the time limitation period stipulated in ss955 and 956. Such construction is entirely consistent with the plain meaning of the words used in s811, which are clear and unambiguous. It gives rise to no absurdity. On the contrary it is entirely consistent with the use of the expression "at any time" in s955, where it is used in s955(1), albeit with the express saver for subs (2) at the commencement of s955(1)."

56. *Droog* confirmed the primacy of the 4 year rule but the law at issue in that case was subsequently superseded by the insertion of s811(5A) by s130 FA 2012 and it will also be seen that TCA section 811A was amended by section 140 FA 2008 with the insertion of a new subsection 1A therein.

57. The 2008 amendment is not referred to by the Respondent as it is written in a prospective manner and also refers to the date that the transaction was entered into. This makes sense in that retrospective legislation could give rise to possible Constitutional difficulties.

The 2012 Amendment

58. Section 130(1) Finance Act 2012 which enacted TCA section 811(5A) and reads as follows:

> "(*a) In this subsection—*
>
> > *"assessment" includes a first assessment, an additional assessment, an additional first assessment and an estimate or estimation;*
> > *"amendment", in relation to an assessment, includes the adjustment, alteration or correction of the assessment.*
>
> *(b) Where the opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving effect to this section, any time limit provided for by Part 41 or 41A, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax—*
> > *(i) shall not apply, and*
> > *(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable".*

59. The commencement provisions to this subsection are contained in section 130(2) FA 2012 and read as follows:

> *"(a) Subsection (1) applies to any assessment to tax or any amendment of any assessment to tax which is made, on or after 28 February 2012, so that the tax advantage resulting from a tax avoidance transaction, in respect of which a notice of opinion has become final and conclusive, is withdrawn from or denied to any person concerned.*
>
> *(b) For the purposes of paragraph (a), "assessment", "amendment", "tax advantage", "tax avoidance transaction", "notice of opinion" and "final and conclusive" shall be read in accordance with section 811 of the Principal Act".*

60. It can be seen that the provision speaks of when the assessment is made rather than when the transaction was entered into which is a different approach when compared to FA 2008's amendment. If an opinion becomes final and conclusive in 2012 but the transaction was entered into before 2008 then TCA section 811A(1A) would say that the

opinion should be void if the enquiry into the transaction which was the subject of the opinion started after 2008.

61. The FA 2012 amendment applies for time limits on "*the making or amendment of an assessment or on the requirement of a person to pay tax or additional tax*" – it appears silent on enquiries and an assessment or amended assessment would be the result of that enquiry.

62. On that basis it would appear that the TCA section 811(5A) as brought about by FA 2012 is still subject to the s811(1A) provision. It will be recalled that TCA section 811A(1A) is written as being "*without prejudice to the generality of any provision of this section or s811...*". It can't do harm to the general nature of TCA section 811 and arguably TCA section 811(5A) is specific rather than general in nature.

63. The FA 2008 amendment in TCA section 811(1A) referred to TCA section 955 and TCA section 956 as construed in accordance with TCA section 950 and ensured that the time limits therein would not prevent any Revenue action in accordance with TCA sections 811A or TCA section 811. TCA section 955 speaks of the amending of and time limits for assessments and TCA section 956 talks about time limits for Revenue enquiries.

64. The Judge in *Droog* at para 5.6 of the High Court's decision noted as follows:

> *"…the Appeal Commissioner stated (at para. 7(g) of the Case Stated): "The Revenue Commissioners suggested that we were still merely dealing with assessments but its (sic) very hard to see how an inspector can form an opinion under section 811 without having regard to the circumstances of the taxpayer in relation to which he would primarily be informed by the returns of the taxpayer. I don't think its (sic) realistic to consider that he could be working away merely with section 811 in his mind without falling foul of the prohibition on making enquiries. The consideration of the returns is a central part of the formation of an opinion by the inspector."*
> *... it seems to me that it is reasonable to infer that the formation of the opinion of which notice was given in the letter of 22nd February 2007, must have involved the making of enquiries or the taking of action … as counsel for the respondent submitted, the opinion could hardly have materialised on its own, without being preceded by enquiries into the claim for loss of relief in the return."*

65. On the basis of the above it would seem that an enquiry is necessary before a TCA section 811 opinion can be formed by Revenue resulting in a consequent assessment. This is contrary to construing a pure retrospective nature being brought to TCA section 811 by the FA 2012 amendments; this is because (1) TCA section 811(1A) was never withdrawn and (2) TCA section 811(1) was further amended in FA 2012 to take account of the new Part 41A which includes the new self-assessment provisions for 2013 et seq. Therefore, to say that TCA section 811 (5A) serves to override TCA section 811A (1A) and

allow assessment to be made prior to TCA section 811A (1A)'s commencement date in 2008 would be to ignore TCA section 811A (1A) and it is clear that that subsection still has a purpose. Indeed, such a view could give rise to retrospective legislation.

Retrospective legislation and the Irish Constitution

66. It is submitted that the amendments made to Section 811 by the FA 2012 would be contrary to the Constitution if the potential retrospective effect were held to be correct.

67. The Constitution provides as follows:

> *Article 15.5.1*
>
> *"The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission".*
>
> *Article 40.3*
>
> > *1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
> > *2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen....*
>
> *Article 43*
>
> > *1.1. The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*
> > *2. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*
> >
> > *2.1. The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*
> > *2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.*

68. Looking at Article 15.5, this was discussed in the 1985 Supreme Court case of *Doyle v An Taoiseach*. This dealt with a levy brought about by SI 152/1979. Henchy J at the Supreme Court explained the levy as follows:

"…this levy was introduced as a tax on the prime producer of live cattle, the farmer. The levy of 2% on the value of an animal was expressed to be payable … as an excise duty whenever an animal was slaughtered in the State or exported from the State. In the case of slaughtered animals, the levy was payable on the day of slaughter by the proprietor of the slaughter-house. In the case of exported animals, the levy was payable by the exporter, usually as of the day of export. In no case was the farmer, on whom the levy was intended to fall as a tax, made primarily liable. This anomaly led to an unfair and oppressive operation of the levy, particularly in the case of exporters…"

69. It is the fact that the prime producer frequently escaped a liability to tax that led the Supreme Court to arrive at its decision that the SI was ultra vires and void. The Judge explained that result was "so untargeted, indiscriminate and unfair, so removed from the primary policy of the levy, that the delegated legislation must be deemed to have been made in excess of the impliedly intended scope of the legislation…" and for that reason declared the delegated legislation void. However, as part of this decision, reference was made to s79 of Finance Act 1980 which "cured such difficulties" and here the Judge referred to the repugnance of retrospective legislation as follows:

"Counsel for the defendants has submitted that any invalidity affecting SI No. 152 of 1979 was cured when it was expressly confirmed by s79 of the Finance Act 1980. There might be force in that submission if the period of the operation of the levy came after the passing of that Act. However, the levy was expressed to operate only from May to December 1979. S79 of the 1980 Act must be read subject to the presumption that it was intended to operate prospectively and not retrospectively, see judgements of this Court in Hamilton v Hamilton... If it were held to operate retrospectively, it would have the effect of making, ex post facto, non payment of the levy in 1979 an infringement of the law. Such a result would make s79 invalid having regard to Article 15.5 of the Constitution. However, there is nothing in the 1980 Act that would justify the attribution to Parliament of an intention that the section was to operate unconstitutionally. In my opinion s79 should be treated as having only prospective effect and therefore would have no application to this case."

70. The unlawful effect of retrospectivity can be seen clearly above. The Judge mentioned the Hamilton case which was another Irish Supreme Court case. *Dunne -v- Hamilton* was not a tax case but one which dealt with the Family Home Protection Act 1976. The facts of the case were that, prior to the date of enactment of that Act, Major Hamilton (husband to Anne Hamilton) agreed to sell to Frank Dunne a particular property in Dunboyne. When Major Hamilton failed to complete the sale Frank Dunne commenced an action prior to the enactment of the Family Home Protection Act (12th. July 1976 was the date of the enactment of that Act) against the Major claiming specific performance of the contract of sale. Judgement was given in favour of Frank Dunne on 21st. April 1977. On the

enactment of the Family Home Protection Act, Anne Hamilton became aware of the power of a spouse to refuse consent to a conveyance of a family home and the property involved was a "family home" in accordance with that Act. She refused to consent to the Major conveying the property to Frank Dunne and commenced an action claiming that a sale without her consent would be void under the Act. The Supreme Court held that the sale had not been affected by the enactment of the Family Home Protection Act in July 1976 and that it was not to be regarded as applying retrospectively.

71. O'Higgins CJ dealt with the potential retrospectivity issue in some detail. He noted that the Act "sets out to alter the law" and that it declares to be unenforceable and void certain transactions which were "previously regarded in law as binding and valid". He continues as follows:

> *"This brings me to the subject of retrospectivity; it is necessary to state with some precision what I regard as such in a statute. Many statutes are passed to deal with events which are over and necessarily have a retrospective effect. Examples of such statutes, often described as ex post facto statutes, are to be found in Acts of immunity or pardon. Other statutes having a retrospective effect are statutes dealing with the practice of the Courts and applying to causes of action arising before the operation of the Statute. Such statutes do not and are not intended to impair or affect vested rights and are not within the type of statute with which, it seems to me, this case is concerned. For the purpose of stating what I mean by retrospectivity in a statute, I adopt a definition from Craies on Statute Law … which is, I am satisfied, based on sound authority. It is to the effect that a statute is deemed to be retrospective in effect when "it takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past' … Retrospective legislation, since it necessarily affects vested rights, has always been regarded as being prima facie unjust .... It is therefore, in the light of the existence of a sovereign parliament, entitled to legislate both retrospectively and prospectively, that the English Courts have laid down the principles upon which a statute which should be examined for retrospectivity. The result is a rule of construction which leans against such retrospectivity and which, according to Maxwell, is based upon the presumption that the Legislature does not intend to do what is unjust (see Maxwell The Interpretation of Statutes 9th Ed. 221)...."*
>
> *Our Oireachtas or legislature is subject to the Constitution like all other organs of the State. Its powers are circumscribed by constitutional limitations. In considering and interpreting Acts of the Oireachtas we must assume, in the first instance, that what the legislature has done was not intended to contravene the Constitution. This presumption of validity prevails until the contrary is clearly established. It follows that in interpreting or construing an Act of the Oireachtas where two possible meanings or intentions are open, one of which conforms with an Act's validity having regard to the provisions of the Constitution while the other does not, the meaning or*

intention which so conforms must be preferred. This is so because it must be assumed that the Oireachtas intended to act within its powers and with due respect to the Constitution. This approach to the interpretation and construction of the Acts is required by the Constitution…."

72. The Judge then went on to look at the aforementioned Family Home Protection Act and applied the conclusions he reached to that Act. He concluded in two ways as follows;-

"…I find nothing in the legislation which would displace the common law presumption that it was not intended to impair or affect existing vested rights. However, when one considers that this is an Act of the Oireachtas, the proposition that it was intended to affect and frustrate pre-existing contractual rights becomes unsustainable. Were this legislation to have the effect contended for, it would constitute an unjust attack upon and a failure by the State to vindicate the property rights of Frank Dunne, and of others similarly situated, and would constitute a clear infringement of the provisions of Article 40 s3 subs2 of the Constitution…"

73. The judgement of the Chief Justice has been cited at some length due to its importance for the purposes of this text. The final paragraph above is of some note. The Judge seems not to have ruled out the existence of retrospective legislation in its entirety in the first limb of that paragraph but then goes on to say that if such legislation exists and if its effect is to unjustly attack the property rights of a person then that would be repugnant to the Constitution. If the FA 2012 provisions above were held to be retrospective in their nature, then arguments would exist that such law would constitute an unjust attack on a person's property rights.

74. The structure of TCA, 811(2) defines a tax avoidance transaction as being one where, having regard to the various matters set out, Revenue form the relevant opinion. There follows subsection (3) which specifies certain circumstances in which Revenue are not to regard a transaction as being a tax avoidance transaction which provisions are designed to exclude from the consequences of TCA, section 811 commercial transactions which have been legitimately structured in such a way as to mitigate the tax due. In addition subsection (3)(b) provides for various matters which Revenue should take into account in the formation of the relevant opinion. Thus the combined effect of subsections (2) and (3) is to define a tax avoidance transaction by reference to an opinion formed by Revenue on the basis of the criteria specified in those subsections.

75. TCA, section 811(4) speaks of Revenue forming a relevant opinion '*at any time'* and it was this wording that the Revenue sought to rely on *in Droog*. However the provisions of Part 41 of the Taxes Consolidation Act are also of importance. This section is headed 'Self -Assessment' and is designed to deal with that aspect of the taxes regime which is subject to self-assessment whereby a tax payer is required to make a return of all matters relevant to the calculation of the amount of tax which ought be paid on foot of

that return. In the interpretation section contained within TCA, Part 41 being section 950(2) of the TCA it is provided as follows:-

> *'Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts.'*

76. TCA, section 951 creates an obligation on all relevant persons to make a return. TCA, section 954(2) then provides that, subject to subsection 3, an assessment is to be made by reference to the particulars contained in that return. TCA, section 955(1) allows an inspector '*at any time'* to amend an assessment notwithstanding that tax '*may have been paid or repaid*' in respect of the assessment previously issued. However, section 955(1) is expressly stated to be subject to subsection 2 which is in the following terms:-

> *(a)* '*Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 4 years commencing at the end of the chargeable period in which the return is delivered and –*
>
> *(i) no additional tax shall be payable by the chargeable person, after the end of that period of 4 years, and*
>
> *(ii) no tax shall be repaid to the chargeable person after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*
>
> *By reason of any matter contained in the return.*
>
> *(b) Nothing in this subsection shall prevent the amendment of an assessment—*
>
> *(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),*
>
> *(ii) to give effect to a determination on any appeal against an assessment,*
>
> *(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,*
>
> *(iv) to correct an error in calculation, or*
>
> *(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,*
>
> *and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3).'*

77. TCA, section 956 is also of relevance. Subsection (i)(b) allows an inspector to make inquiries or take action necessary to verify the accuracy of a return. TCA, section 956(1)(b)(ii) allows the inspector, presumably as a result of discoveries which might arise from such inquiries or actions, to amend an assessment but, importantly, that power is expressly stated to be subject to TCA, section 955(2) to which reference has already been made and which provides for the time limit. Consistent with that provision is subsection (3) which imposes a time limit on inquiries and actions outside the four year period unless the inspector has reasonable ground '*for believing that the return is insufficient due to it having been completed in a fraudulent or negligent manner*'.

78. The substance of that provision is to protect a tax payer who makes *a 'full and true disclosure'* of all relevant 'facts'. In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return. Subject therefore to certain exceptions, where it can be said that a tax payer acted fraudulently or negligently, Revenue are not entitled to seek additional income tax from a self-assessed tax payer more than four years after the tax year concerned. In the instant case it is submitted that the Appellants made a full and true disclosure of all relevant information.

79. In the Supreme Court in *Droog*, Mr Justice Clarke stated that he was persuaded that the trial judge was correct to conclude that the time limits contained in TCA, section 955 should apply in the case of TCA, section 811 and are not dis-applied by any sufficiently clear and unambiguous language in that section. Clarke J held that as the only purpose of the raising of an opinion under TCA, section 811 in this case would be to require Mr Droog to pay additional tax and as the obligation to pay any additional tax which might become payable as a result of the Nominated Officer's opinion becoming final and conclusive would necessarily arise outside the four year time limit, the commencement of that process by the raising of the opinion in question could have no lawful objective. Clarke J held that it must, therefore, itself be regarded as being legally impermissible.

80. A Notice of Opinion was issued from the Respondent pursuant to TCA, section 811 and dated the 24th December 2012, five years after the date for the filing of the relevant taxes for the year 2007 and four years and two months after the date for the 2008 filing. On the application of the reasoning in the *Droog* decision to this case the Respondent's claim as against the Appellants is time barred

Reliance on Professional Advice

81. TCA, section 955(1) permits an inspector of taxes to amend an assessment notwithstanding that tax may have been paid or repaid in respect of the assessment. Subsection 2(a) provides that where a return contains a full and true disclosure of all material facts necessary for the making of an assessment, the time limit for making or amending an assessment is 4 years after the end of the tax year or accounting period in

which the return is made and no further tax can become payable after the end of that 4 year period. However there is no time limit on the making of an assessment in circumstances where a return does not contain a full and true disclosure.

82. TCA, section 956(1)(b) permits an inspector to make or amend an assessment in relation to any return submitted by a chargeable person for the purposes of:

> *"(i)… making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and (ii) subject to section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate."*

83. However TCA, section 956(1)(c) provides that:

> *"Any enquiries and actions shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner."*

84. TCA, section 956(1)(c) provides that the issue of a full and true disclosure brings forward the question of whether the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner. The claim that there is an incomplete disclosure or an incorrect disclosure as advanced by the Respondent is incorrect, as is the implication contained within this language that the return was submitted in a fraudulent or negligent manner.

85. The inclusion of the word negligent in the phrase '*fraudulent or negligent manner*' contained in TCA, section 956, denotes behaviour which is reckless or careless or, in the case of an intentional act, conduct which amounted to a complete failure to take reasonable care. It could include acts of commission or omission such as failing to disclose a source of income or leaving part of a return blank. TCA, section 1007E considers the word carelessly to mean "failure to take reasonable care".

86. Within the Code of Practice for Revenue Audits at para 4.6.1 b) the reasonable care test is the consideration of:

> "*whether a taxpayer of ordinary skill and knowledge, properly advised, would have foreseen as a reasonable probability or likelihood that prospects that an act (or omission) would cause a tax underpayment, having regard to all the circumstances".*

87. It is further detailed within the same section that:

"If all relevant matters have not been brought to the attention of the agent, the taxpayer has not taken due care."

88. Accordingly, where a taxpayer has brought all relevant matters to the attention of an agent, as in the instant case, they should be considered to have taken due care in the preparation of their return.

89. In *AB (a firm) v Revenue and Customs Commissioners* [2007] STC (SCD) 99 the Court recognised that:

"A taxpayer who took proper and appropriate professional advice with a view to ensuring that his tax return was correct, and acted in accordance with that advice (if it was not obviously wrong), would not have engaged in negligent conduct."

90. That case is also the authority for the burden and standard of proof in which it was said at paragraph 102:

"The Revenue accepted that the burden of proving negligent conduct was on them and that the standard of proof was the balance of probabilities; Hurley v Taylor (Inspector of Taxes) [1999] STC 1; Mashood v Whitehead (Inspector of Taxes) [2002] STC (SCD) 166, paras 88 to 90; and Rowland v Boyle (Inspector of Taxes) [2003] EWHC 781 (Ch) at [3], [2003] STC 855 at [3]. We also adopt the principle that the benefit of any doubt as to negligence should be given to the taxpayer; King v Walden (Inspector of Taxes) [2001] STC 822 at [54]."

91. In determining whether a taxpayer, who having engaged an accountant and/or tax consultant, was negligent, recourse can also be made to the case of *Mariner v Revenue and Customs Commissioners* [2014] SFTD 504. This case provides a useful consideration of the law and the extent to which a taxpayer can be negligent in his or her dealings with a revenue authority. In that case, Ms. Marnier's tax adviser submitted her tax return for the year ended 5 April 2011 in which a claim was made to offset a rental income loss against other income. The offset was made notwithstanding correspondence between the taxpayer's advisers and the Revenue and Customs Commissioners ("HMRC") as well as the fact that HMRC had denied the claim the year before. Ms. Mariner, however, was not aware of the dispute. HMRC issued a penalty alleging that the taxpayer had made a careless or negligent error which had resulted in an under-payment of tax. The taxpayer appealed contending that she had relied on her adviser who was not engaged as a mere functionary to fill in forms and submit them, but to provide professional advice and guidance on the appropriate tax treatment of differing heads of income, profit and loss. HMRC contended that the taxpayer, by entrusting the completion of her tax returns to a professional adviser, had not taken reasonable care, nor could she demonstrate any

reasonable excuse, as the tax adviser had been in correspondence with them in respect of the previous tax year on the very issue that had given rise to the penalty in question.

92. In allowing Ms. Mariner's appeal, the First-tier Tax Tribunal (FTT) held that the taxpayer was only liable to a penalty if she had been negligent. The First tier Tax Tribunal determined at paragraph 22:

> *"In our judgment, if the advice of a professional, in the sphere of tax matters usually an accountant, is negligently provided, the negligence is not to be imputed to the taxpayer. The question is whether the taxpayer was negligent. She cannot be principally or vicariously liable for the negligence of her professional adviser unless the factual circumstances in which the advice is given indicate that the matter is fraught with difficulty and doubt, with the professional adviser giving no more than his honest opinion about which side of a sometimes difficult line the facts of a particular case happen to fall. It is contrary to the very notion of negligence (that is, a failure to take reasonable care) that the person who perceives there to be a need to take the advice of a professional person upon whom she believes she can properly rely, can be said to be negligent if she then relies upon that properly provided advice (even if it turns out to be wrong). That principle applies regardless of whether the advice is given expressly or impliedly."*

93. In clarifying the role of an accountant and differentiating between acting as an agent or a functionary and as a professional advisor, the FTT made the following observation at paragraphs 24 and 25:

> *"In our judgment, the two different decisions to which we have referred are properly reconcilable on this basis. If a taxpayer claims that his accountant has been negligent, for example, by failing to meet a deadline for filing a return or undertaking some or other administrative task, then the negligence of the accountant will not usually provide a defence to a penalty because the accountant is simply acting as the taxpayer's agent or functionary in filing the document that needs to be filed by a particular deadline. In other words, he is acting as a mere agent or functionary for his principal; but not as an independent professional adviser. However, in a situation where a professional adviser is not retained simply to act as a functionary, but is retained to give professional advice based upon the best of his skill and professional ability, he is not then a functionary or agent for his principal. He is a professional person acting under retainer to give professional advice upon identified issues. He is bound to provide that advice to the best of his professional skill and ability, whilst taking reasonable care in and about preparing and giving that advice. In other words, he is acting as a true professional, rather than as an agent or functionary.*
>
> *In our judgment, where an accountant acts as a mere agent, administrator or functionary, he is acting as the taxpayer's agent and his default (whether negligent*

or not) will usually provide a taxpayer with little opportunity to claim that he is not in default of a particular obligation. However, when a professional person acts in a truly professional advisory capacity, the situation is otherwise and reliance upon properly provided professional advice, absent reason to believe that it is wrong, unreliable or hedged about with substantial caveats, will usually lead to the conclusion that a taxpayer has not been negligent if she has taken and acted upon that advice."

94. In upholding the appeal the FTT concluded at paragraph 26:

"In our judgment it is not careless to rely upon a professional adviser who holds himself out as having appropriate expertise in and about a person's tax affairs and dealings with the respondent. The situation might be different if the appellant has reason to believe that her professional adviser may not be correct or that it is being contended that her adviser is not correct in his approach to the relevant tax affairs. But that, as we find as a fact, is not the present situation. The respondent has argued that a person is careless even if the negligence or carelessness is that, and only that, of the professional adviser even when that advisor is not acting as a mere functionary, but in a truly professional capacity. It is clear from what we say above that we reject that submission as wrong in law."

95. The principle that the benefit of any doubt as to negligence should be given to the tax payer has been adopted in Ireland through the case of *King v Walden (Inspector of taxes)*.

96. In the decision of the First-tier Tax Tribunal (FTT) in the matter of *Mrs Amanda Carrasco & Mr Javier Carrasco v Revenue and Customs Commissioner* [2016] UKFTT 731 (TC) the appellants contended that penalty determinations made against them by the respondents in respect of a capital gains tax liability could not be imposed, as although a careless error had been made in the return, professional advice had been relied upon in filing the return. The FTT relied on the decision in Mariner v Revenue Commissioners, detailing that:

"The very purpose of obtaining professional advice against a full disclosure of pertinent facts, is to fain advice as to how on should proceed, whether it be by reference to medical treatment, legal matters, accountancy or tax matters or a multitude of other matters where the input of true expertise is appropriate before a person can make an informed decision on how he/she should proceed. "

97. The FTT also made reference to the decision of the tribunal in *AB v HMRC* where it was held that:

"It is contrary to the very notion of negligence (that is, a failure to take reasonable care that the person who perceives there to be a need to take the advice of a

professional person upon whom she believes she can properly rely, can be said to be negligent if she then relies upon that properly provided advice (even if it turns out to be wrong). That principle applies regardless of whether the advice is given expressly or impliedly."

98. In concluding the hearing the FTT held at paragraph 25:

"In our judgement when a person seeks appropriate professional advice from somebody who is a professed expert in the applicable discipline, it will almost always be reasonable for the person who has sought the advices to rely upon that advice provided only that that person has selected a seemingly competent professional adviser, unless there are factors to the knowledge of the recipient of the advice which indicate to him/her that it ought not to be relied upon. "

99. In the instant case the Appellant relied on his professional advisers in filing his return and gave all the required information to them to do so with respect to the tax year 2007. The Appellant was of the understanding, as a result that the return filed was a full and true disclosure of his affairs for the year. Any errors identified in the return were errors made by the Advisors and corrected when identified, and cannot be laid at the door of the Appellant.

100. Revenue must have reasonable grounds for believing that the return was insufficient and completed in a fraudulent or negligent manner. It is our understanding that Revenue have not asserted fraud to exist in this case. In considering the precedence within UK case law and the principles of negligence itself, it is submitted that an individual could not be considered to be negligent where a return has been filed on the basis of advice prepared by his tax advisor. The Appellant relied on his professional advisers in filing his return and gave all the required information to them to do so and it is submitted that the Appellants cannot therefore be considered negligent in the filing of the return.

The Requirement for Fairness

101. There is recent authority from the Tax Appeals Commission (23TAC2019) where the necessity for evidence from the Respondent was clearly held to be necessary for the purposes of advancing a proposition. In that case the Commissioner stated in his determination that:

"*Determination*

51. The Appellant gave evidence that he was typically present in the State for a 4-week period over Christmas, a week surrounding St. Patrick's Day, a week to attend the Ballinasloe Horse Fair and occasional days throughout the year to attend family

functions and funerals. I have therefore found that the Appellant was not present in the State for the requisite amount of days in any given year to designate him as resident in the State pursuant to TCA, section 819. In this regard, as the Appellant was not resident in the State, his earnings from his international tarmacking business are not within the charge to Irish tax.

52. Furthermore, no evidence was given by the Respondent that could suggest that the Appellant was resident in the State in respect of the years under appeal.

53. I have also found that the Appellant was not resident in Malta for tax purposes. The Appellant's ambulatory lifestyle and his commercial activities does not support the assertion that he was resident in Malta. Furthermore, as confirmed by his Counsel, the Appellant is not in a position to provide a certificate of residency in Malta on the basis that he was not "entitled to it".

54. Notwithstanding the above, the Appellant gave evidence that in December of every year he conducts 20 "deals" which later on in his evidence he reduced to between 6 to 8 "deals" during that period. Therefore, based on such evidence, there is a charge to tax under Schedule D pursuant to TCA, section 18(1)(iii) in respect of: "Any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession, or employment exercised in the State"

55. As considered above, the Appellant is not resident in Malta or indeed in any jurisdiction which has concluded a double taxation agreement with the State. Therefore, he cannot avail of any double taxation agreement that could ameliorate a charge to Irish tax. As such a charge to Irish tax arises on the trade exercised in the State comprising the assortment of "deals" concluded on an annual basis over the Christmas period and the horse dealing activities at the Ballinasloe Horse Fair.

56. In the absence of any evidence adduced by the Respondent, it would be contrary to my statutory obligation, pursuant to Finance (Tax Appeals) Act 2015, to perform my function in a fair manner if I was to determine that the assessments raised by the Respondent should stand. As such I have determined that the Appellant should be assessed to tax in the State with reference to his trading activities carried on in the State".

102. Likewise, in the instant case, in the absence of any evidence adduced by the Respondent, it would be contrary to the statutory obligation of the Commission, pursuant to Finance (Tax Appeals) Act 2015, to perform its function in a fair manner if it was to determine that the Notice of Opinion and Assessments raised by the Respondent should stand.

103. In light of the above and for the reasons outlined herein, and also for those reasons as set out in the preliminary application and in the further Submissions made on behalf of the Appellants, it is submitted that the Notice of Opinion and Assessment made thereupon must be set aside.

Grounds of Appeal

104. While the letter submitted by the Appellant's agent on 22nd January 2013 specified the grounds of appeal as required by TCA, section 811(7), the Appellant relied on the Supreme Court decision in *Droog* at para 8.2 to argue that:

> *"The raising of an opinion whose only end can be to require the payment of additional tax in circumstances where such additional payment is prevented by the time limits contained in Pt 41 is clearly impermissible. To start a process which can have no lawful conclusion must itself be legally impermissible."*

105. As such and notwithstanding that the letter submitted by the Appellant's agent on 22nd January 2013 failed to specify the time limits as a ground of appeal, the Respondent is not only prevented from raising an assessment but is also precluded from conducting any enquiries into the Appellant's tax affairs after the time period prescribed at TCA, Part 41.

The Burden of Proof

106. In *McNamee –v The Revenue Commissioners*, the Supreme Court per Mr Justice Charleton commented on the law applicable to these provisions as follows:

> *12. In Revenue Commissioners v O'Flynn Construction [2012] 3 IR 533, this Court, dealing with the predecessor to this provision, made some comments which remain relevant to the analysis of s. 811 of the Act of 1997. In that case the substance of the transaction was the main issue in the appeal. After a consideration of the relevant decided cases, O' Donnell J for the majority stated at para. 65:*
>
> > *"Prior to s.86 the only question was whether or not the transaction came within the strict words of the statute sometimes literally and narrowly construed. In the case of a tax statute, if the component parts of the transaction did not come within the provision, then it was not possible to look at the substance of the transaction to contend that tax should be applied. Similarly, in the case of a relief, if the transaction came within the words of the provision granting relief then the relief must be granted, no matter how contrived the scheme, nor how far removed it was from the activity sought to be encouraged by the relief. But under s.86 the potential tax benefit to a taxpayer may be disallowed if the Revenue comes to the conclusion that the*

transaction is one designed to confer a tax advantage and constitutes a tax avoidance transaction. As the Appeal Commissioners in this case observed, the essential starting point to the application of s.86 is a determination that absent its provisions the taxation charge would not apply, or in the case of an exemption, that its benefit would be available to the taxpayer, on a literal construction of the language of the relevant statute".

13. Hence, it is only reliefs and benefits that are covered which might, ascribing motivation in this regard to a proper construction of the legislation, be regarded as targeted towards the legitimate use of the proper and intended purpose of taxation exemption or relief measures. Artificial or contrived schemes do not properly attract a tax exemption or relief. The indicators in that regard, the only ones capable of being brought to bear on the analysis, are those as set out in legislation. As O'Donnell J commented at para. 66:

"Looked at in this light, sections 86(2) and 86(3) appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other. This is apparent from the provisions of s.86(2)(ii) and its mirror image in s.86(3)(a)(ii). The fact that any given transaction gives rise to a tax advantage is not in itself enough to disallow that benefit. Such a transaction only becomes a tax avoidance transaction if it satisfies the requirements of s.86(2). That subsection directs the Revenue Commissioners to have regard to the results of the transaction, and its uses and means of achieving those results and any other means by which part of the results could have been achieved. In considering this issue the proviso to s.86(3) requires that the Revenue Commissioners have regard both to the form and substance of the transaction. The transaction will be a tax avoidance transaction if the Revenue Commissioners (having considered the matters set out above i.e. results, use, form and substance) form the opinion that the transaction gives rise to a tax advantage and that "the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage".

14. As to the burden of proof on the hearing before the Appeal Commissioners, the Revenue Commissioners have conceded that, at such a hearing, they bear the burden of demonstrating that the use by the taxpayer of the system of allowances or exemptions in question amounted to avoidance. This concession may be helpful. It is to be noted that, in his judgment in the O'Flynn Construction case, McKechnie J at para. 147, dissenting as to the result, commented expressly on that issue:

> *"In my view, the situation arising under s.86 is at least to a certain but definite extent, different from the situation where an appeal against an assessment is raised. In the first instance the avoidance provision can only be activated by the Revenue Commissioners, who, for the provision to have effect, must arrive at a view that the scheme or arrangement is captured by it. They must assess a violation and do so by issuing a Notice of Opinion to that effect. Such a notice can only issue if by reference to certain specified matters, they have reached a definite conclusion. This exercise is conducted by way of objective assessment. In addition, they assert, not simply a breach of the section, but also what, in their opinion and judgment, are the tax consequences which arise if, such an arrangement had not taken place. All of these steps involve positive assertions on the part of the Revenue. In such circumstances, noting the wording and structure of the section, and in the absence of any provision to the contrary, it seems to me that if the notice is challenged the normal evidential rule of "he who asserts must prove", applies."(Emphasis added).*

107. The Appellant argued that Mr. Justice Charleton did not create a carve out in respect of subsection (3) and this supports the Appellant's submission that, in respect of the entire test, that the burden of proof is on the Respondent, including subsection (3) and therefore all of the matters to be proven in respect of section 811 lies on the Respondent.

108. Furthermore the Appellant asserted that Mr. Justice McKechnie fell into error in *O'Flynn* when stating:

> 148. *With regard to the exemptions in subs (3), the situation is not that straightforward. On the one hand, if either exemption is claimed, the Revenue Commissioners cannot assert the existence of an avoidance transaction if they are satisfied as to the validity of such a claim. (emphasis added) In such circumstances the transaction is never an avoidance one. This situation is quite unlike the position where there is prima facie or presumptive liability to tax, but the tax payer is excused the consequences by falling within the provision of an exemption. The scheme under subs (3), in conjunction with subs (2), is not structured in this way. So it is not altogether correct to simply assert that subs (3)(a) and subs (3)(b) are but exemption provisions.*
>
> 149. *However, on the other hand, such provisions are in my view clearly more analogous to an exemption provision than any other. If they are in play then the consequences of the section as a whole, may be bypassed. Most likely, but not necessarily in all circumstances, the tax payer will assert reliance on such provision. Therefore, in my view it is proper to treat these subsections, as akin to exemption provisions and*

accordingly, following well established law, the onus of proof in this regard should be on the tax payer."

109. The error has been corrected by Charleton J. there that the appropriate position is that the burden for each and all of the matters to be proven in respect of TCA, section 811 lies on the Respondent.

110. It is therefore open to an Appeal Commissioner to determine that the case on the basis that the Respondent has failed to demonstrate or put forward in evidence or in respect of the purpose of the legislation such as is required to meet their case.

111. Furthermore in the instant case, there are a series of assertions advanced by the Respondents to support the claimed purpose. Any finding must however be based on evidence.

112. If the evidence of the Appellant as to the principal purpose is to be countered by the Respondents without evidence this may only be done in circumstances where an issue of credibility arises on this evidence. A finding of incredibility may not be done lightly or on the basis of a hunch.

113. In this regard there are also recent authorities where the issue of an improperly grounded finding of lack of credibility in a witness has resulted in a decision of a tribunal being quashed.

114. In the area of refugee law, many decisions in respect of claims to refugee status rest, to a greater or lesser extent, on findings made in respect of the applicant's credibility and the courts frequently have been asked to review this aspect of the decision-making process. In conducting the review, the Courts have given credence to the applicant's story where a decision-maker has failed to identify those parts of it he accepts and those he does not.

115. In *NK v Refugee Appeals Tribunal* [2004] IEHC 240, [2005] 4 IR 321, Finlay Geoghegan J, on an application for leave to apply for judicial review, held that '*there are substantial grounds for contending that the tribunal or an adjudicator at first instance is obliged, where an issue is raised as to the credibility of the applicant, to assess the applicant's credibility either in general or in relation to particular factual issues and to make a clear finding on that issue*'. A finding on credibility must be based on cogent reasons, or as Finlay Geoghegan J said in *NK*, it 'must be based on reasons which bear a legitimate nexus to the adverse finding'.

116. The decision-maker is not entitled to rely only on his 'gut instinct'. In *da Silveira v Refugee Appeals Tribunal* (9 July 2004, unreported), High Court at p 27, per Peart J:

'The assessment of credibility is one of the most difficult tasks facing the Commissioner and the Tribunal member. It is an unenviable task, and one that is fraught with possible danger. It is very easy I suspect to come to a conclusion in the light of the questionnaire answers and the Interview, and possibly the oral hearing on the appeal, that the story as told is simply not believable. In everyday life, one is so used to simply having a feeling that all we are told is not exactly as someone would have us believe. One's experience of life hones the instincts, and there comes a point where we can feel that the truth can, if it exists, be smelt. But reliance on what one firmly believes is a correct instinct or gut feeling that the truth is not being told is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal.'

117. In *Memishi v Refugee Appeals Tribunal*, (25 June 2003, unreported), High Court, Peart J stressed the need for 'substantial' reasons to justify an adverse finding on credibility.

"[T]he fact that some important detail is not included in the application form completed by the applicant when he/she first arrives is not of itself sufficient to form the basis of an adverse credibility finding, and … the fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient. Mere conjecture on the part of the authority is insufficient, and … corroboration is not essential to establish an applicant's credibility.'

118. Specific cogent reasons showing a lack of credibility must be shown for a finding of incredibility and these must go to the heart of the matter before the Court or tribunal. It is submitted that this has not been done in each of the findings of incredibility in the instant case.

Substantive Issue

119. The transactions were commercial transactions where the investor took a real commercial decision on a leveraged basis in respect of the Notes transaction.

120. The 18 month EUR Banking Outperformance Note was suitable for investors who expected the European Banking sector to outperform the DJ Eurostoxx 50 and were prepared to forego dividend income in return for a minimum return. It was a leveraged bond investment and a commercial transaction.

121. The new appeals procedure before the Tax Appeals Commission became effective from 21 March 2016 pursuant to the provisions of the Finance (Tax Appeals) Act 2015. Under the old system it was possible for the Circuit Court to reverse the decisions of the Appeal Commissioners. The Circuit Court was in this regard a critical check and balance. The only avenue of appeal now open under the new system is on a point of law to the High Court. This is much less accessible to taxpayers, especially where they are exposed to

having the appeal heard in public and can be held liable to pay the full legal costs (of both sides) if they lose the appeal. It is submitted that the loss of the Circuit Court appeal makes it more important than ever for the TAC to enforce the mandated fair procedures.

122. One of the new provisions TCA, section 949AG provides that:

> *"Unless the Acts provide otherwise, in adjudicating on and determining an appeal, the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or were required by the Acts to have regard – (a) in making their decision or determination, (b) in making or amending an assessment, (c) in forming an opinion, or (d) in taking any other action, in relation to the matter under appeal."*

123. This is a mandatory provision that obliges the TAC to "*have regard to*" all matters that Revenue may, or was required by the legislation to, have regard to when performing various functions, including, in particular, forming an Opinion. Although the meaning of "have regard to" is not defined in the legislation, it is submitted that it should be given its ordinary meaning to the effect that something must be taken into account and considered.

124. In *Barber v Minister of the Environment and Another* [1997] 51 WIR 64:it was stated by the Court that:

> *"To have regard to' does not, in my view, mean 'slavishly to adhere to'. It requires the planning authority to consider the development plan but does not oblige them to follow it...Thus in the United Kingdom the obligation to 'have regard to' certain matters means that they must be taken into account or kept in view; it does not mean that these matters are binding and must automatically be followed by the decision-making bodies."*

125. The new statutory provisions now impose a positive duty on the Respondent to support its Opinions before the TAC.

126. Furthermore if documentation and evidence of beliefs and judgements are to be furnished to the TAC, it must follow that the taxpayer has a right to access that information and documentation, as well as the right to challenge same by cross examination.

127. In the instant case the Respondent has failed to identify the basis for the Opinion that the transaction described in the Notice of Opinion is a tax avoidance transaction and in the circumstances it must be determined by the TAC, to give effect to TCA, section

949AG, that there is no basis for the Opinion of the Revenue which the TAC may have regard to.

128. In addition it was submitted that the Opinion could not have been validly formed due to error in the amount of the tax advantage specified or described in the notice of Opinion and in the description of the transaction contained in the Opinion.

129. In the Respondents Replying Submission, the following assertions are made with regard to this series of transactions, *inter alia*:

(i) It is the Respondents submission that the transaction was carefully arranged to take advantage of the capital gains tax rules in relation to options, and the interaction between these rules and the rules for disposals between connected persons".

(ii) The transaction … took place primarily for the purpose of generating the tax advantage thereby engaging section 811 TCA 1997.

(iii) There is no commercial motive for this investment apart from the tax advantage.

(iv) The transaction was plainly not undertaken or arranged by the Appellants with a view, directly or indirectly to the realisation of profits in the course of the business activities or by them." Business" in this context means a trade, profession or vocation.

(v) There is no evidence that the Transaction was carried on in the course of a business activity carried on by her.

(vi) As the loss claimed of €34,681,300 is an artificially generated capital loss the transaction is a blatant misuse or abuse of section 31 TCA 1997.

130. It is on the basis of these assertions of fact by the Respondent that the Respondent rests its Notice of Opinion and Assessment. These assertions and others in similar vein are made by the Respondents entirely without evidence.

131. The assertions made by the Respondent, on which the Opinion is based, fail to properly acknowledge that the Appellants are experienced investors who have invested widely in both property, funds, stocks and shares and various financial products. At the time this investment was made, the Appellants had come into a great deal of money and were involved in numerous financial transactions and investments.

132. The assertions of the Respondent, on which their Notice of Opinion and Assessments are based, do not refer to this background or acknowledge same. They do not place these

transactions in their proper context with regard to the activities of the Appellants. The Respondents simply assert a purpose which is not supported by any evidence.

The Statutory Framework

133. The actions of the Appellants do not properly come within the statutory provisions of section 811.

134. In section 86 of the Finance Act, 1988, which introduced the general anti-avoidance provision into the tax code, a clear distinction was made between what was called tax evasion, which involved the improper concealment of facts from the tax authorities so as to unlawfully reduce tax, on the one hand, and tax avoidance, which involved structuring ones affairs in a manner which minimised tax, on the other.

135. This distinction has remained at the heart of the statutory framework. TCA, section 811(2) defines a "*tax avoidance transaction*." The structure of TCA, section 811(2) defines a tax avoidance transaction as being one where, having regard to the various matters set out, Revenue form the relevant opinion. In forming its opinion that the transaction gives rise to a tax advantage, and was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage, Revenue do not have to have regard to all (a) through (c) in arriving at their opinion.

136. There follows subsection (3) which specifies certain circumstances in which Revenue are not to regard a transaction as being a tax avoidance transaction which provisions are designed to exclude from the consequences of section 811 commercial transactions which have been legitimately structured in such a way as to mitigate the tax due.

137. Compare this with subsection 3(b) which notes that:

> *"…in forming an opinion referred to in paragraph (a) in relation to any transaction, the Revenue Commissioners shall have regard to-*
>
> *(i) the form of that transaction,*
> *(ii) the substance of that transaction,*
> *(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and*
> *(iv) the final outcome and result of that transaction and any combination of those other transactions which are so related or connected."*

138. It is curious that it would appear from the above that Revenue are mandated to have regard to all of what follows in the listing contained in (i) through (iv). So one can see

why the permissive and prescriptive approach is given to the Appeal Commissioners in this regard.

139. Subsection (3) states that:

> *"(a) Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that—*
>
> > *(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction—*
> >
> > > *(I) was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and*
> > >
> > > *(II) was not undertaken or arranged primarily to give rise to a tax advantage, or*
> >
> > *(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided.*
>
> *(b) In forming an opinion referred to in paragraph (a) in relation to any transaction, the Revenue Commissioners shall have regard to—*
>
> > *(i) the form of that transaction,*
> >
> > *(ii) the substance of that transaction,*
> >
> > *(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and*
> >
> > *(iv) the final outcome and result of that transaction and any combination of those other transactions which are so related or connected".*

140. Therefore subsection (3)(b) provides for various matters which Revenue should take into account in the formation of the relevant opinion. Thus the combined effect of subsections (2) and (3) is to define a tax avoidance transaction by reference to an opinion formed by Revenue on the basis of the criteria specified in those subsections.

141. It can be seen from (i) and (ii) of that subsection that two tests must be satisfied if Revenue are to opine that the transaction was a tax avoidance transaction for TCA, section 811(2) purposes in that (1) there must be a tax advantage and (2) "*The transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage".*

142. In the English case of *Commissioners of Inland Revenue v. Sema Group Pension Scheme Trustees* [2002] [74 TC 593], the High Court Judge described a tax advantage as not being "*a main object*" of the transaction if it is the "*mere icing on the cake."* In this regard he referred to an obiter dictum of Cross J in *Commissioners of Inland Revenue v. Kleinwort Benson Ltd.* [1968][45 TC 369] as authority in favour of a holding that the obtaining of the tax credit was not a main object. Cross J noted as follows:

> *"Here there was only a single indivisible transaction and it was an ordinary commercial transaction, a simple purchase of debenture stock …. When a trader buys goods for £20 and sells them for £30, he intends to bring in the £20 as a deduction in computing his gross receipts for tax purposes. If one chooses to describe his right to deduct the £20 (very tendentiously be it said) as a 'tax advantage' one may say that he intended from the first to secure this tax advantage. But it would be ridiculous to say that his object in entering into the transaction was to obtain this tax advantage. In the same way I do not think that one can fairly say that the object of a charity or a dealer in shares who buys a security with arrears of interest accruing on it, is to obtain a tax advantage, simply because the charity or the dealer in calculating the price which they are prepared to pay proceed on the footing that they will have the right which the law gives them either to recover the tax or to exclude the interest as the case may be."*

143. In the case *of O'Flynn Construction* [2011] IESC 47, O'Donnell J agreed with the Appeal Commissioners that the transaction was done primarily to achieve a tax advantage. Para (9)(viii) of the Commissioners' case stated to the High Court in that case noted as follows:

> *"It was admitted by the company that the transaction was a prearranged sequence of events and on foot of this and following a consideration of all the evidence we determined that the transaction was entered into solely for the purpose of obtaining a tax advantage with the consequence that we were satisfied that the transaction 'was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage' as specified in subsection (2)(ii)".*

144. In the instant case, it is submitted that while it is clear that a tax advantage was obtained, it was as a result of the transactions but not necessarily the principal purpose of the transactions. The question ultimately must be decided on the evidence.

145. In respect of the question of evidence as to purpose and in the consideration of whether or not a transaction is a tax avoidance transaction under TCA, section 811(2). Smyth J noted at the High Court in the O'Flynn case that:

> *"…On the appeal, the taxpayer has the option and right to give evidence in support of the case that he is making. In the absence of such evidence, it is necessary to infer, solely from objective considerations, for what purpose the transaction has been undertaken or arranged..]"*

146. It should be noted that, as per the above reference to Mr Justice Smyth's decision in the High Court, it is in only in the absence of evidence from the Appellant that an imputation of the impermissible purpose of the transaction may be made.

147. Therefore the test in subsection (3)(a) and (b) is an intricate part of the test to determine whether there has been a tax avoidance transaction. It is not an exception to a found tax avoidance transaction but part of the test as to whether to determine whether a tax avoidance transaction has occurred in the first place. Subsection 3(b) brings into account the issue of the purpose of this legislation and also the misuse or abuse of that purpose. So it is not a finding of the tax avoidance transaction and then an exception.

148. As a consequence no provision has been misused or abused and that each provision stands on its own.

149. The burden of proof remains on the Respondent and if one applies that reasoning to TCA, section 811 one comes away with a very different result, where, if, as is asserted here, it's not possible to discern the provision of TCA section 549 and 31, it will not be clear how the Respondent can submit that those provisions misused or abused or were misused or abused in claiming the capital gains tax loss.

150. The result was not created by the Appellant but by the application of the law to the transactions. And it is the purpose of those tax provisions that have to be identified by a Respondent and it is the purpose of those provisions that have to be shown to have been misused or abused.

Conclusion

151. The transactions were commercial transactions where the investor took a real commercial decision on a leveraged basis in respect of the bond transaction.

152. The transaction specified or described in the Notice of Opinion is not a tax avoidance transaction. The Notice of Opinion failed to identify the basis for the Opinion that the transaction described in the Notice of Opinion is a tax avoidance transaction.

153. The Respondent is precluded from making enquiries outside of the prescribed four year time pursuant to TCA, sections 956 and 955 and these provisions are referred to for their full meaning and effect. The Revenues case is statute barred pursuant to these statutory provisions and to the reasoning of the decision of the Supreme Court in the case *of Hans Droog –v- Revenue Commissioner*s, (Supreme Court – Record No. 218/2011) delivered on the 6th October 2016.

154. The Respondent has failed to discharge the burden of proof as mandated by Charleton J. in *McNamee*.

155. The Appellant received professional advice, and it was based on such advices that the Appellant filed his tax return. The Appellant cannot be considered to have filed his return in a "fraudulent or negligent manner". The Appellant relies on the provisions of Taxes Consolidation Act 1997, Section 949I(6), if necessary, in advancing this ground of appeal. The Appellant relied on his professional advisers in filing his return and gave all the required information to them to do so and it is submitted that he cannot therefore be considered negligent in the filing of his return.

Respondent's Submissions

Preliminary Issue - Time Limits

156. TCA, section 811(6) TCA prescribes what is to be contained within a Notice of Opinion. The Notice of Opinion issued by the nominated officer herein described the matters which it was required to specify pursuant to section 811(6)(a)(i), (ii), (iii) and (iv). Consequently, the Notice of Opinion herein fully complies with section 811(6). The Appellant appears to suggest that the Notice of Opinion should have gone further in terms of its detail, however, there is no statutory basis for such a contention. Even if, which is not the case herein, there was any detail lacking in the Notice of Opinion, the Appeal Commissioner looks at matters afresh and has jurisdiction pursuant to TCA, section 811(9)(i)(II) to amend the transaction as specified in the Notice of Opinion as he sees fit. The Appellant appears to have misunderstood the purpose of the Notice of Opinion and the provisions of section 811(6) & (9).

157. As the Appellant acknowledged, he is not entitled to rely on a ground of appeal not specified in their notice of appeal unless the Appeal Commissioners are satisfied that the

ground could not reasonably have been stated in the notice (TCA, section 949I(6)). The Respondent object to the Appellant's reliance on any ground of appeal other than those set out in the notice of appeal dated 22 January 2013.

158. Without prejudice to the above, before addressing the Appellants' arguments based upon the Supreme Court decision *Hans Droog*, one must firstly ascertain whether the Appellant has any entitlement to rely upon the findings of *Droog*. The Respondent contends that the Appellant has no such entitlement for the following reasons.

(a) In *Droog* the Court considered whether a Notice of Opinion under TCA, section 811 was subject to the time limits contained in Part 41 TCA 1997, despite the fact that TCA, section 811(4) provides that a Notice of Opinion can be formed "at any time".

(b) The Appellant incorrectly state that TCA sections 955 and 956 provide that no tax can be sought more than four years after the return-filing year unless there is negligence or fraud on the taxpayer's part. Firstly, TCA, section 956 involves an inspector's right to make enquiries and has no application herein, particularly as the enquiries made giving rise to the Opinion and the formation of the said Opinion all took place within the four-year time limit. The section dealing with the time limit for amending an assessment is TCA, section 955(2). TCA, section 955(2) makes no reference to "negligence or fraud", as suggested by the Appellant, rather the issue is whether there was a "*full and true disclosure of all material facts necessary for the making of an assessment*", i.e. whether the Appellants filed a fully compliant tax return.

159. TCA, section 955(2)(a) provides that:

"Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) No additional tax shall be payable by the chargeable person after he end of that period of 4 years, and
(ii) No tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return." *[Emphasis added]*

160. What is clear from TCA, section 955(2)(a) is that the four-year time limit is only open to a chargeable person who "*has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period*".

161. Clarke CJ in *Droog* recognised that:

> *"the section clearly prohibits the imposition of any additional tax burden outside the four year period in the case of a person who has made a fully compliant return." [Emphasis added]*

162. Indeed, the reasoning of Clarke CJ was referred to by McDonald J in *Perrigo v Revenue Commissioners*, as follows:

> *"In my view, the observations of Clarke C.J. in para. 6.6 of his judgment must be seen in the context of his judgment as a whole. It is important to recall that, in Droog, the Supreme Court had to consider whether a nominated officer of the Revenue was entitled to form an opinion under section 811 of the 1997 Act outside the four-year limitation period prescribed by s. 955 (2). Section 811, if read on its own, suggested that such an opinion could be formed "at any time" and the issue before the Supreme Court was whether those words must still be read subject to the four-year limitation period prescribed by s. 955 (2). Clarke C.J. carefully analysed the provisions of ss. 955 and 956. In para. 4.5 of his judgment, Clarke C.J. outlined the rationale behind s. 955 (2) in the following terms:*
>
> *"4.5. It is easy to understand the reasoning behind that provision.* ***Where a tax payer has made a 'full and true' disclosure of all relevant facts****, the Oireachtas must have considered that it would have been significantly unfair to allow Revenue to reopen the amount of tax due after the relevant four-year period...".*
>
> [Emphasis added]

163. In the context of TCA, section 955(2)(a) it is necessary to have regard to the Appellant's Income Tax Return for the year 2007. There was a requirement in the return to indicate with a tick "*if any of the original acquisitions were between connected parties or otherwise not at arm's length*." The Appellant failed to place any tick in the box, thus failed to disclose that it was a transaction between connected parties, a very material non-disclosure. The whole purpose of this duty of disclosure was to alert Revenue that the transaction was not at arm's length, which would in the normal course give rise to greater Revenue scrutiny. Consequently, there was a failure on the Appellant to make a "*full and true disclosure of all material facts necessary for the making of an assessment*" and that the Appellants have no entitlement to rely on the four-year limitation period.

164. In this regard it is noteworthy that the same issues arose in Hanrahan. Under the heading "*Material Findings of Fact*" at paragraph 7 of the determination Commissioner Kennedy established the following facts:

> *"The Appellant's tax returns for the years 2004 and 2005 failed to record that part of the arrangement associated with the Transactions were between "connected parties" and therefore the Respondent had no means of appreciating the particular significance of the transaction specifically in light of the Appellant's reliance on market value rules between connected parties to generate the capital loss claimed."*

165. It is clear from the foregoing that Commissioner Kennedy determined in Hanrahan that as a material finding of fact there was a failure on the part of the Appellant to make a full and true disclosure in his Income Tax Return for the relevant years.

166. The failure to disclose that transactions took place with connected persons was by no means the only defect in the Appellants' 2007 return. The Appellants' failure to file a return in accordance with the requirements of section 955 TCA was addressed in detail by Commissioner Gallagher in TAC determination 88TAC2020 (a case which dealt with the very same return) as follows:

> *"Limitation Period*
>
> *The Respondent in this appeal raised the amended assessment approximately seven years after the relevant tax year, being 2007. The Appellant contended that the amended assessment was out of time in accordance with section 955 TCA 1997.*
>
> *The Respondent claimed that it was entitled to raise an amended assessment in accordance with s.955(2)(b) on the grounds that the 2007 return filed did not contain a full and true disclosure of all material facts.*
>
> *In this regard the Respondent, referring to the evidence of [Witness Y], stated that there were a number of serious errors which [Witness Y] acknowledged and that those errors were such as to disapply the time limit. The Appellant in respect of these errors, sought to rely on a claim that these were errors of his agent and that they could not be attributed to the Appellant. This submission is contradicted by the express provisions of section 951(5) TCA 1997, which treat a return filed by an agent as if it had been prepared and delivered by the chargeable person himself. In addition to the errors detailed by [Witness Y] in his evidence, the most serious error was the failure to disclose the disposal of the property as one of development land.*
>
> *The submissions of the Appellant raised questions in relation to whether the Appellant could be considered to have been negligent in circumstances where he sought out and relied upon professional advice. However, Senior Counsel for the*

Respondent submitted in closing, that neither fraud nor negligence was part of the applicable statutory test and that there was no allegation of fraud, negligence or neglect being made by the Respondent in this appeal.

The wording of section 955(2)(b) does not refer to negligence nor does it require that a finding of negligence be made as a condition of its application. It relates to the matter of whether the chargeable person has made in the return, a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period. In this appeal, the return contained a number of errors, the most serious of which was that it did not identify the 2007 disposal as a disposal of development land. In these circumstances it is clear that the return did not contain 'a full and true disclosure of the facts' in accordance with section 955(2)(b).

In conclusion, I determine that the Respondent was entitled to amend the assessment in accordance with the provisions of section 955 TCA 1997 and that the amended assessment was not out of time."

167. Arising from the foregoing, in the context of TCA, section 955(2) the Appellants have no entitlement to rely on the four-year time limit provided for therein, which was conditional on the Appellants having made a full and true disclosure of all material facts necessary for the making of an assessment, which they have failed to do. The reasoning of Mr Justice Clarke in *Droog* was premised on there being "*a fully compliant return*", something which the Appellant fail to satisfy herein. In the absence of a compliant return the Appellants have no entitlement to rely on the four-year limitation in accordance with TCA, section 955(2)(b)(i) which provides that:

> *"(b) Nothing in this subsection shall prevent the amendment of an assessment –*
>
> (i) *Where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),"*

168. The Appellant's submissions focus on TCA, section 956 and the words "*fraudulent or negligent manner*" arising therein. However, as explained above, TCA, section 956 has no application herein and consequently the various civil penalty cases cited by the Appellant regarding whether there was fraud or neglect in circumstances where a taxpayer relied upon a tax agent are of absolutely no consequence herein. Rather, the issue is whether there was a full and true disclosure of the facts in accordance with TCA, section 955(2)(b), something the Appellants fail to satisfy.

169. Without prejudice to the Respondent's view that the Appellants have no entitlement to rely on the four-year time limit provided for in section 955 as a result of their failure to file a compliant tax return for 2007, the Respondent addresses the time limit arguments raised by the Appellants as follows:

(a) Unlike the facts giving rise to the *Droog* decision, the Notice of Opinion herein was formed within the four-year limitation period. In contrast, in *Droog* the Notice of Opinion was formed more than 9 years after the transaction to which it related.

(b) The focus in *Droog* was therefore on whether a Notice of Opinion could be validly formed by Revenue outside of the four-year limitation period, in the context of a compliant return (unlike the position herein). There was therefore no need for the Supreme Court to consider TCA, section 811(5A), as it was not a section which Revenue could have relied on in that instance, given that the Notices of Opinion issued long outside the four-year limitation period. Subsection 5A was introduced by section 130 of the Finance Act, 2012 and provides as follows:

"(1) Where the Opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving effect to this section, any time limit provided for by part 41 or 41A, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax –

(i) shall not apply, and
(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable.

(2) (a) Subsection (1) applies to any assessment to tax or any amendment of any assessment to tax which is made, on or after 28 February 2012, so that the tax advantage resulting from a tax avoidance transaction, in respect of which a Notice of Opinion has become final and conclusive, is withdrawn from or denied to any person concerned."

170. Section 130(2) FA 2012 provides that the amendment applies to any assessment or any amendment of an assessment made on or after 28 February 2012. In the event that the Notice of Opinion herein becomes final and conclusive, subsection (5A) will apply to any assessment or amended assessment that may be made. It is clear from the wording of section 130 FA 2012 that the legislative intention was to enable assessments to be made or amended at any time after the enactment of that section, in order to give effect to a section 811 opinion which had become final and conclusive, regardless of the chargeable period to which the assessment related and regardless of whether that chargeable period pre-dated the enactment of TCA, section 811(5A). This description of the application of the provision is clear and unqualified. It can have no meaning other than that in this case the time bar which presented as the issue in *Droog*, does not apply. TCA, section 811(5A) applies to any assessment or amendment of an assessment which is

made on or after 28 February 2012. There is no qualification as to the chargeable period for which such an assessment or amendment of an assessment may be made. The Respondent submits that the meaning of the commencement provision in relation to TCA section 811(5A) in section130 (2), FA 2012, is entirely clear.

171. Because TCA, section 811(5A) is clear and admits of no other interpretation, the issue of whether it should be construed so as not to apply to opinions before it was enacted simply does not and cannot arise. TCA, section 811(5A) did not involve any repeal of an earlier statute and so section 27 of the Interpretation Act 2005 is of no application given the clear language of TCA, section 811(5A). Provisions such as section 27 do not operate where the contrary intention appears in the Act in question. In any event, section 27 is operative only where there is a repeal of a Statute, there is none here.

172. It should also be emphasised that the application of TCA, section 811(5A) in this case would be wholly prospective. Prospective effect (either generally or in this context) does not imply that subsection (5A) cannot govern the issue of assessments etc, post 28 February 2012, for chargeable periods earlier than 2012. TCA, section 811(5A) contains no restriction as to the chargeable periods to which the assessments may relate. It is to be noted that the introduction of legislation which changes the limitation period for a type of claim and applies to claims accrued or indeed pending in litigation, is not without precedent. This was done in both the Statute of Limitations (Amendment) Act 1991 (section 7) and the Statute of Limitations (Amendment) Act 2000 (section 2).

173. The Appellant suggested that the issue of the Notice of Opinion being formed within the four year timeframe from the filing of the return was irrelevant in *Droog*, and that the operative date in all circumstances is the date the appellate system is exhausted. The Appellant referred to Clarke CJ's obiter comments but failed to highlight the fact that Clarke CJ was analysing TCA, section 811 as it stood prior to the introduction of subsection (5A), which had effect post 28 February 2012. In *Droog* the relevant year of assessment was 1996/97, the notice of opinion was issued on 22 February 2007 and the hearing before the Appeal Commissioners took place on 20 October 2009, which gave rise to the Case Stated to the High Court and thereafter to the Supreme Court. All of the Appellant's submissions in respect of time limits are misconceived as they do not take account of the application of section 811(5A)/section 130 FA 2012. Furthermore, the obiter comments of Clarke CJ which are relied upon by the Appellant herein were made in the absence of any reference or consideration whatsoever by him in his judgment of TCA, section 811(5A) and this is not surprising as he was not concerned with same and it did not form part of the question he was being asked to address, being the case stated from the Appeal Commissioners, which long predated the introduction of TCA, section 811(5A).

Substantive Issue – Tax Avoidance Transaction

174. It is helpful to refer to Mr Justice O'Donnell's analysis in *Revenue Commissioners -v- O'Flynn Construction Company & Ors* [2011] IESC 47 to understand the background to section 811 and its legislative antecedent, section 86. In that case, O'Donnell J. clearly took the view that the legislation, which is now 811, had its genesis in the decisions of the High Court and the Supreme Court in *McGrath* and the refusal of the Irish courts to apply a doctrine of fiscal nullity to attack what was recognised as a clear tax avoidance transaction which had no commercial purpose other than tax avoidance. So it follows that the *McGrath* case was very much the kind of case or one of the types of cases which the legislature had in its mind when drafting and enacting section 811. As such the legislative intent was to reverse the effect of the decision in *McGrath* and as a consequence to specifically legislate against the transactions pursued by the Appellant which were exactly the same as those of the *McGrath* scheme.

175. It is relevant that at paragraph 62 of *O'Flynn* O'Donnell J. observed:

> *"Prior to section 86 the only question was whether or not the transaction came within the strict words of the statute sometimes literally and narrowly construed. In the case of a tax statute, if the component parts of the transaction did not come within the provision, then it was not possible to look at the substance of the transaction to contend that tax should be applied. Similarly in the case of a relief, if the transaction came within the words of the provision granting relief then the relief must be granted, no matter how contrived the scheme, nor how removed it was from the activity sought to be encouraged by the relief. But under s.86 the potential tax benefit to a tax payer may be disallowed if the Revenue Commissioners come to the conclusion that the transaction is one designed to confer a tax advantage and constitutes a tax avoidance transaction. As the Appeal Commissioners in this case have observed, the essential starting point to the application of s.86 is a determination that absent its provisions the taxation charge would not apply, or in the case of an exemption, that its benefit would be available to the tax payer, on a literal construction of the language of the relevant statute.*

176. O'Donnell J. continued (at paragraphs 63-65) that the provisions of Finance Act 1989 section 86, which correspond to TCA, section 811(2) and (3) :

> *…appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other … The fact that any given transaction gives rise to a tax advantage is not in itself enough to disallow that benefit. Such a transaction only becomes a tax avoidance transaction if it satisfies the requirements of [section 811(2)]. That subsection directs the Revenue Commissioners to have regard to the results of the transaction, and its uses and means of achieving those results and any other means by which part of the results could have been achieved. In*

considering this issue the proviso to [section 811(3)] requires that the Revenue Commissioners have regard both to the form and substance of the transaction. The transaction will be a tax avoidance transaction if the Revenue Commissioners (having considered the matters set out above i.e. results, use, form and substance) form the opinion that the transaction gives rise to a tax advantage and that "the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage".

It may be of some significance that [section 811(3)] goes on to state positively what shall not be regarded as a tax avoidance transaction. That will arise if the Revenue Commissioners are satisfied that even though the transaction could have been structured in a way which had given rise to a greater amount of tax, the transaction was nevertheless "undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of business activities of a business carried on by the person", and "was not undertaken and arranged primarily to give rise to a tax advantage".

While this does not purport to be a definitive or detailed analysis of the provisions of [section 811(2)] and [section 811(3)], it is clear that the distinction sought to be made in the section between permissible tax advantage and impermissible tax avoidance, is a distinction between legitimate tax mitigation of a genuine commercial transaction on the one hand, and a transaction undertaken or arranged primarily for the purposes of giving rise to a tax advantage. This is a distinction which is more easily described than applied, but for present purposes, it is neither necessary nor desirable to explore the well travelled and heavily contested borderline between these concepts…

177. The Supreme Court's analysis and application of section 86 (and by extension, section 811) is instructive. O'Flynn Construction Company Limited ("OFCL") purchased resources for consideration but ultimately availed of a tax advantage as the company categorised the resources as being subject to export sales relief, despite the fact that OFCL was not engaged in the manufacture of goods for export.

178. In finding against the defendant company, the majority of the Supreme Court (per O'Donnell J.) referred on more than one occasion to the lack of "*commercial logic*" to the transaction under consideration in that case and stated (at paragraph 80) :-

…the form of the transaction was highly artificial and contrived. It was not the realisation of profits in the ordinary course of business activities. It was a transaction arranged primarily to give rise to a tax advantage, and the substance of the transaction was to permit OFCL to pass its distributable profits to its shareholders, without incurring tax…

179. In *McNamee -v- Revenue Commissioners* [2016] IESC 33, the Supreme Court considered a series of transactions which resulted in the creation of a capital loss. The effect of section 811 TCA 1997 and the view of the majority in *O'Flynn* was summarised by Laffoy J. as follows at para 18:

> *" As a matter of construction of the foregoing provisions of s. 811, when one considers subss. (2), (3) and (4) together, while it is true that in subs. (4) the task of forming an opinion that a transaction is a tax avoidance transaction is separate and distinct from the tasks of, inter alia, calculating the tax advantage and determining the tax consequences, before forming an opinion in accordance with those provisions, the Revenue Commissioners must consider the matters outlined in subss. (2) and (3), which O'Donnell J. succinctly summarised as "results, use, form and substance". Those matters must be considered by reference to a specific transaction which comes within the definition in subs. (1), not by reference to, say, some form of tax avoidance scheme of which the Revenue Commissioners have become aware…*

Section 811(2)

180. Section 811(2) provides that a transaction is a 'tax avoidance transaction' if, having regard to one or more of:

(a) its results
(b) its use as a means of achieving those results
(c) any other means by which those results or any part thereof could have been achieved,

the Revenue Commissioners form the opinion that

(i) the Transaction gives rise to, or but for section 811 would give rise to, a tax advantage, and
(ii) the transaction was not undertaken or arranged primarily for purposes other *than to give rise to a tax advantage.*

The results of the Transaction

181. The result of the Transaction was that the Appellants reduced their capital gains tax liability for the year 2007 by €6,861,717 and for the year 2008 by €74,288. This was achieved by the Appellants entering into the Transaction which gave rise to an inflated capital gains tax loss of €34,681,300. However, the real monetary loss on the Transaction was only €3,851,300.

Its use as a means of achieving those results

182. The Transaction was instrumental in achieving the results outlined in the preceding paragraph.

Other means by which the results (or part thereof) could have been achieved

183. The same result (i.e. a reduction in the capital gains tax liability) could have been achieved had either of the Appellants incurred a genuine loss of €34,681,300 on the disposal of an asset in 2007. However, this would have involved a much more substantial real cost.

184. Having regard to:

(i) the results identified above;
(ii) the use of the Transaction as a means of achieving these results; and/or
(iii) other means by which these results, or part of these results, could have been achieved,

the Respondent formed the opinion that the Transaction gave rise to, or but for section 811 would have given rise to, a tax advantage as defined in section 811(1), and that it was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage. It is respectfully submitted that the Respondent was correct in forming such opinion.

The tax advantage

185. 'Tax advantage' is defined in section 811(1) as:

(i) a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or
(ii) a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person, including any potential or prospective amount so refundable or payable,

arising out of or by reason of a transaction, including a transaction where another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction;

186. The Respondent submits that the Transaction gave rise to a reduction or avoidance of capital gains tax charges and/or capital gains tax assessments on the Appellants in the amount of €6,861,717 in 2007, and that this reduction or avoidance is a tax advantage for the purposes of section 811 TCA 1997. The Transaction also gave rise to losses forward which were utilised by the Appellants in 2008 resulting in a further reduction or

avoidance of capital gains tax charges and/or capital gains tax assessments on the Appellants in the amount of €74,288.

The purpose(s) for which the Transaction was primarily arranged

187. It is the Respondent's opinion that the Transaction was not undertaken or arranged primarily for any purpose other than to give rise to the tax advantage identified above. The Respondent submits that no other purpose for the Transaction can reasonably be discerned.

188. The purpose of *********holding, transferred to her by *******of shares in *******appears to have been to 'connect' her with that company for the purposes of the 'connected persons' provisions in TCA 1997. The connection between **********and *******was an essential ingredient of the Transaction. Absent this connection, the Transaction would not have resulted in the tax advantage. There is no commercial motive for this investment apart from the tax advantage.

189. The entire Transaction was completed in little over three months, with the Notes purchased and sold in less than a month. It was a largely circular transaction which achieved nothing commercially. When the Transaction was complete, *********had resold the Notes and was in essentially the same position commercially as before, save that she had expended €3,851,300 and had generated a capital gains tax loss of €34,681,300.

190. It is relevant that *********paid *******€7,220,000 for the Notes at a time when they were worth only approximately €3,800,000. *********only possible motive for doing this was to put herself in a position to crystallise the artificial tax loss. There would appear to be no commercial reason whatever for purchasing the overvalued Notes.

Section 811(3)(a)

32. Section 811(3)(a) provides that:

> *Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that –*
> *(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction –*

was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and
was not undertaken or arranged primarily to give rise to a tax advantage, or
(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the provision having regard to the purposes for which it was provided.

191. The Respondent is not satisfied that the Transaction comes within the exception provided for in section 811(3)(a)(i)-(ii) and are not prevented from regarding the Transaction in this case as a tax avoidance transaction.

Section 811(3)(a)(i)(I): business purpose test

192. The Transaction was plainly not undertaken or arranged by the Appellants with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by them. 'Business' in this context means a trade, profession or vocation (section 811(1)).

193. There is no evidence to suggest that *********carried on a business of trading in financial instruments in 2007. If she had, it is scarcely conceivable that she would have agreed to buy the Notes for almost twice their market value. There is no evidence to suggest that the Transaction was undertaken in the course of any business activity carried on by her. The fact that the Transaction is categorised in the Appellants' tax return for 2007 as a transaction giving rise to a loss for capital gains tax purposes, rather than as a loss for income tax purposes, strongly suggests that the Transaction was not undertaken with a view to the realisation of profits in the course of the business activities of a business carried on by them.

194. Furthermore, the relevant documentation suggests that the Transaction was undertaken and arranged with a view to the realisation of a loss, not a profit. The Transaction was undertaken or arranged with a view to the generation of a significant artificial capital gains tax loss which the Appellants could use to shelter capital gains on their disposal of other assets, and no other interpretation of its purpose is possible. The reason that the Appellants voluntarily entered into a transaction which resulted in an actual loss of €3,851,300 was that the scheme, if successful, would result in a tax saving which would more than compensate them for that loss.

Section 811(3)(a)(i)(II): 'not…primarily to give rise to a tax advantage'

195. In *Revenue Commissioners -v- O'Flynn Construction Company & ors* [2011] IESC 47 (SC) Mr Justice O'Donnell said (in paragraph 63) that the provisions now contained in section 811(2) and (3), TCA 1997

> *…appear to be directed towards making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax view on the one hand, and a purely tax driven transaction designed to give rise to a tax advantage on the other. This is apparent from [section 811(2)(ii)] and its mirror image in [section 811(3)(a)(i)(II)]…*

196. The Transaction in this case clearly falls into the second category i.e. it is 'a purely tax-driven transaction designed to give rise to a tax advantage'.

197. The Transaction had no commercial purpose. The Appellants' only possible motive for entering into the Transaction was the avoidance of tax. In the circumstances, the provisions of section 811(3)(a)(i)(II) cannot prevent it from being regarded as a tax avoidance transaction.

Section 811(3)(a)(ii): Relief, allowance or other abatement

198. The Respondent submits that the Transaction, which was undertaken or arranged for the purpose of obtaining the benefit of an 'allowance or abatement' provided by the Taxes Acts, namely the deduction of capital gains tax losses under section 31 TCA 1997, clearly results in a misuse or abuse of section 31 having regard to the purposes for which it was intended.

199. In *O'Flynn* Mr Justice O'Donnell said in relation to the 'misuse or abuse' provision:

> *72 …while it is helpful to attempt to offer some definition of the individual component "abuse" and "misuse", and in that respect to distinguish between them, in my view, the section is best understood when those concepts illuminate each other. The statutory phrase, "misuse … or an abuse of the provision having regard to the purposes for which it was provided" is to be read as one comprehensive indication that the object of the subsection is to ensure that reliefs and benefits are only available to transactions which can be regarded as a proper and intended use of the provision. In any given case it will not matter whether that transaction is characterised as an abuse or misuse; what is important is that full effect is given to the intention of the section that only appropriate uses of the provisions get the benefit of the tax relief…*
>
> *74 The idea that any particular scheme can produce a result that the Oireachtas did not intend, is much more easily expressed than applied in practice. The legal intent of*

the Oireachtas is to be derived from the words used in their context, deploying all the aids to construction which are available, in an attempt to understand what the Oireachtas intended. But in very many cases, the Oireachtas will not have contemplated at all, the elaborate schemes subsequently constructed, which will take as their starting point a faithful compliance with the words of the statute. 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 and detailed so that no more broad or general purpose can be detected, or may have its own explicit anti-avoidance provision. In such a case there may be no room for the application of s.86 since it may not be possible to detect a purpose for the provision other than the basic one that the Oireachtas intended that any transaction which met requirements of the section should receive the relief. However, there are some cases of which this is one, where it may be possible to say with some confidence that though there has been compliance with the literal words of the statute, the result is not the sort of relief that the Act intended should result. In such cases, s.86 permits an evaluation of the particular transaction and a consideration as to whether it comes not just within the words, but also within the intended scheme, or is rather, a misuse or abuse of it. The fact that such an evaluation may be difficult and can create some uncertainty, is not a reason to avoid the task. Certainly in tax matters it is difficult to achieve and the desire to provide certainty to those who wish to avoid a taxation regime which applies to others similarly situated to them, is something which ranks low in the objectives which statutory interpretation seeks to achieve. The tax payer could, after all, achieve a high level of certainty, but at the price of paying tax on dividends received.

200. The assessment of the purpose of any relief involves something somewhat more sophisticated than a repetition of a general dictum from a judgment, even one delivered by McCarthy, J. The question is not what the general purpose of any scheme is - the unsurprising subject of promoting manufacture and export and therefore maintenance of employment - it is what is the purpose of this particular scheme? As Denham, J. observed, the purpose of an Act is best discerned from the words used. When recourse is had to a generalised purpose such as the encouragement of exports, there is a frustrating ascending the levels of generalisation rather than descending towards specificity.

201. The Appellants' claim for loss relief in this case under TCA, section 31 cannot be regarded as a 'proper and intended use' of that section, nor can it be described as an 'appropriate use' of the relief.

202. The purpose of capital gains tax loss relief is to ensure that taxpayers are taxed on their net chargeable gains. In the present case, the market value rules in TCA, sections 547-

549 have been exploited so as to enable a claim for relief for a loss which has been artificially inflated to roughly nine times its real value.

203. 43. As the loss claimed of €34,681,300 is an artificially generated capital loss, the Transaction is a blatant misuse or abuse of TCA, section 31.

204. For the reasons set out above, TCA, section 811(3)(a) does not preclude it from regarding the Transaction in this case as a tax avoidance transaction.

Section 811(3)(b)

205. Section 811(3)(b) requires the Respondent, in forming an opinion that a transaction is a tax avoidance transaction, to have regard to:

(i) the form of that transaction,
(ii) the substance of that transaction,
(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and
(iv) the final outcome and result of that transaction and any combination of those other transactions which are so related or connected.

206. In forming their opinion that the Transaction is a tax avoidance transaction, the Respondent has had regard to the said matters.

The form of the Transaction is set out in the Notice of Opinion.

207. In *O'Flynn Construction*, Mr Justice O'Donnell said of the transaction in that case (paragraph 39):

…The form of the transaction (or series of transactions) is highly artificial and has no commercial logic. Indeed a number of the steps that the participants were required to take to bring the scheme to fruition appear to defy commercial logic…

This is equally true of the Transaction in the present case.

208. The substance of the Transaction is that the steps engaged in by the Appellants resulted in a monetary loss of €3,851,300 but created capital gains tax loss relief of €34,681,300 for tax purposes which was subsequently claimed against chargeable gains made in 2007 with an amount available to be carried forward and used against chargeable gains in subsequent years. While in form the Transaction involved the purchase and sale of the Notes, in substance it constituted a scheme for the creation of an artificial capital gains tax loss.

209. The Respondent does not consider that there are any transactions, other than the Transaction identified in the Notice, whose substance requires to be considered under TCA, section 811(3)(b)(iii).

210. The Respondent has also had regard to the final outcome of the Transaction, being the generation of a capital gains tax loss of €34,681,300 and the consequent reduction in the capital gains tax payable by the Appellant on the disposal of other assets.

211. When it comes it applying subsection (3) and the misuse or abuse rule, you have to consider that the legislature must have seen the *McGrath* scheme and the exploitation of the computational rules in relation to connected persons and options as one of the mischiefs which the legislation was directed at. It therefore must have seen what happened in *McGrat*h as an abuse or misuse of the legislation in that case. And if it was a misuse or abuse in that case, then when you are looking at it through the prism of TCA, section 811 it is likely that it is also an abuse in this case.

212. There was no commercial reason for the Appellant to have paid €7.22 million for Notes which were only worth €3.4 million. There was no reason why she took active steps to acquire preference shares in *******and to have connected herself with the company except for the purposes of getting the tax loss.

213. The appropriate use of that TCA, section 31 is to give relief for a real loss. The *McGrath* case distinguished between a real loss and a contrived or artificial loss. And there is no doubt that in this appeal there is an artificial and manufactured loss which is greatly in excess of the real loss. Finally it would be very strange if the purpose of TCA, section 31 were to provide for relief for artificial losses.

214. In *O'Flynn*, the Appellants argued that the Revenue bore an evidential burden which they had failed to discharge because they did not call the nominated officer. However McKechnie J. disagreed. Both Judge Smyth and Judge McKechnie have therefore clearly said that if either of the exceptions in subsection (3) are to be invoked, the Appellants bear the onus of proof as endorsed by the settled law in this area most notably Doorley.

215. Furthermore if O'Donnell J. and the other judges in *O'Flynn,* who are in the majority, could not have made the finding that the transaction was a tax avoidance transaction if they had considered that the Revenue bore an evidential which they had failed to discharge.

216. In this appeal, the Appellant's spouse generated an artificial tax loss. It is quite clear that the various arrangements whereby she became a connected person with******* whereby******* created an option over the Notes by granting the option to ******* whereby , the Appellant's spouse bought the Notes subject to that call option, were essential to achieve the result and to crystallise her artificial tax loss.

217. The final outcome of the transaction is that, absent the application of TCA, section 811, the Appellants had no capital gains tax liability for 2007, despite having realised a number of chargeable gains. As such the Appellant's gains were entirely covered by the loss that arose on this transaction and they also had a loss forward, which they were able to utilise in 2008.

218. In O'Flynn, O'Donnell J. at paragraph 71 made reference to *McGrath* where he says:

> *"First, there is here no positive statement of the significant effect of section 86 upon the decision in McGrath v. McDermott which might be said to be the raison d'etre of the section."*

219. Finally as noted by O'Donnell J. the *raison d'être* of TCA, section 811 was the Supreme Court decision in the *McGrath* scheme.

Tax consequences of Opinion

220. The tax consequences specified in the Notice of Opinion would be just and reasonable in order to withdraw or deny the tax advantage outlined above.

Double taxation relief

221. No question of double taxation relief arises in this case.

Determination

222. As this appeal was heard before the judgment of *Hanrahan v The Revenue Commissioners* [2022] IEHC 43 which was delivered on 14th January 2022, I convened a case management conference to discuss the impact of that judgment on this appeal. At that conference, the Respondent agreed that the facts and law in *Hanrahan* "*are on all fours*" with the issues in this appeal.

Time Limit Issue

223. A substantial proportion of the Appellant's submissions relied on the Supreme Court's decision in *Droog* and it was therefore argued that it was unlawful for the Respondent to make enquiries into the Appellant's 2007 tax return as the 4 year limitation period had expired. However such an argument is misplaced as there was evidence before me that the Respondent commenced enquiries into the Appellant's 2007 tax return by April 2010 when the Appellant was notified of a 'Revenue Audit' and therefore the Respondent's enquiries are within 4 year limitation period. Furthermore as submitted by the Respondent, the Notice issued to the Appellant on 24th December 2012 and therefore

within the prescribed 4 year time limit for the purposes of making enquiries pursuant to TCA, section 956.

224. The Respondent also opened extracts of the Appellant's 2007 tax return to highlight that a full disclosure of all relevant information had not been made on that return. However the Appellant objected to the production of that return on the basis that it was hearsay evidence. As such and notwithstanding that while it is irrelevant in these proceedings whether such documents were admissible, I informed the Appellant at the hearing that any challenge to any assessment to be raised by the Respondent is a matter for another day as my statutory function pursuant to TCA, section 811 (8) is confined to grounds of appeal drafted in accordance with TCA, section 811(7) and as detailed in the Appellant's letter of 22nd January 2013 where it was asserted that:

(a) The transaction specified or prescribed in the notice of opinion is not a tax avoidance transaction.

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

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

225. Furthermore as identified by the Respondent, as and from 28th February 2012, there is no limitation contained within TCA, section 811(5A) preventing the making of an amended assessment and expressly states:

"Where the opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving effect to this section, any time limit provided for by Part 41 or 41A, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax—

(i) shall not apply, and

(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable."

226. Notwithstanding the 2012 Finance Act amendment, the Appellant submitted that in accordance with the judgment in *Droog,* I am required to disregard the express wording of TCA, section 811(5A). However, I cannot accept such a submission as I am jurisdictionally constrained from departing from the statutory wording contained in TCA, section 811(5A) in respect of the making or amending an assessment on or after 28th February 2012. Therefore, unlike the Superior Courts, I do not possess the statutory or

indeed constitutional authority to dispense with "*a process which can have no lawful conclusion"*.

227. Furthermore there was a tacit acceptance by the Appellant that the protection afforded by TCA, section 955 preventing the Respondent from raising an assessment on the Appellant outside of the 4 year limitation period is only relevant after the TCA, section 811 appellate process has been completed. It is also significant that as the appellate process is extant, the purported unlawful act of making or amending the 2007 assessments has not yet occurred. Therefore, as the law currently stands, there is no statutory impediment restricting the Respondent from making or amending an assessment after appellate process has been completed.

228. The Appellant is also attributing any errors in his 2007 tax return to his agent. As such it was argued that the Agent's purported negligence should not be attributable to the Appellant for the purposes of permitting the Respondent to conduct enquires into his 2007 tax return. However and notwithstanding that the Appellant failed to adduce evidence that he had furnished all relevant information to his agent for the purposes of completing his 2007 tax return, as noted above, the issue of time limits is irrelevant in an appeal process governed by TCA, section 811(8).

229. The Appellant also failed to make a specific application to prevent the Respondent from making enquiries into his affairs pursuant to TCA, section 956(2) which states:

> *"A chargeable person who is aggrieved by any enquiry made or action taken by an inspector for a chargeable period, after the expiry of the period referred to in subsection (1)(c) in respect of that chargeable period, on the grounds that the chargeable person considers that the inspector is precluded from making that enquiry or taking that action by reason of subsection (1)(c) may, by notice in writing given to the inspector within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners, and the Appeal Commissioners shall hear the appeal in all respects as if it were an appeal against an assessment."*

230. Finally, a similar issue arose in *Hanrahan* where the Court found:

> 129. *Nevertheless, the appellant cannot rely on s. 955 (2) even in relation to the 2005 tax year as, insofar as the "tax consequences" identified in the notice of opinion are concerned (that is, an assessment to capital gains tax for 2004 and an amended assessment for 2005), subs. (5A) provides that the time limit in s. 955 (2) does not apply. While the provision is retrospective in nature, the common law presumption against retrospective legislation is rebutted by the very clear language in s. 130 (2) of the 2012 Act which disapplies s. 955 (2) from any assessment or amended assessment that may be raised on or after 28 February, 2012. Similarly, had the appellant identified a constitutional*

right or principle infringed by s. 130 of the 2012 Act, the presumption of constitutionality could not prevent the clear language of s. 130(2) from operating. That subsection is clear and unambiguous and, in the absence of any challenge to its constitutional validity, it must be applied. I therefore agree with the Commissioner on this point.

130. *...*

131. *...*

132. *..... As the appellant has not identified any ambiguity in s. 811 (5A) insofar as the "tax consequences" identified in the Notice of Opinion are concerned, it does not seem to me that they could have altered the Commissioner's determination. Subs. (5A) applied and any challenge to its constitutional validity could only be made by proceedings initiated in this Court."*

231. On this basis, I am unable to consider any of the Appellant's submissions on the time limit issue.

Burden of Proof

232. The Appellant submitted that in an appeal against a Notice of Opinion in accordance with TCA, section 811, the burden of proving the "*Transaction*", the results and consequences flowing therefrom, falls on the Respondent and has been the universally accepted procedure since the enactment of Finance Act 1989, section 86. In *Revenue Commissioners -v- O'Flynn Construction Company Limited and Others* [2011] IESC 47, McKechnie J. espoused the following clarification of the law relating to the burden of proof in TCA, section 811 type appeals at paragraph 147:

"In my view, the situation arising under s86 is at least to a certain but definite extent, different from the situation where an appeal against an assessment is raised. In the first instance the avoidance provision can only be activated by the Revenue Commissioners, who, for the provision to have effect, must arrive at a view that the scheme or arrangement is captured by it. They must assess a violation and do so by issuing a Notice of Opinion to that effect. Such a notice can only issue if by reference to certain specified matters, they have reached a definite conclusion. This exercise is conducted by way of objective assessment. In addition, they assert, not simply a breach of the section, but also what, in their opinion and judgment, are the tax consequences which arise if such an arrangement had not taken place. All of these steps involve positive assertions on the part of the Revenue. In such circumstances, noting the wording and structure of the section, and in the absence of any provision to the contrary, it seems to me that if the notice is challenged the normal evidence rule of "he who asserts must prove.""

233. In light of the above, the Respondent *"conceded"* that it bore the burden of proving that the Transaction was a tax avoidance transaction but argued that the burden of proving that there was no misuse of abuse of a tax relief or benefit remained on the Appellant.

234. The Appellant argued that in the dissenting judgment in *O'Flynn,* McKechnie J. fell into error when espousing the view that it was the responsibility of the taxpayer to prove that the Transaction "*would not result … in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided"* pursuant to TCA, section 811(3)(a)(ii). The Appellant asserted that the justification for such a view was derived from *McNamee* where Charleton J. at paragraph 14 opined that at a TCA, section 811 hearing that:

> *"the burden of proof on the hearing before the Appeal Commissioners, the Revenue Commissioners have conceded that, at such a hearing, they bear the burden of demonstrating that the use by the taxpayer of the system of allowances or exemptions in question amounted to avoidance. This concession may be helpful. It is to be noted that, in his judgment in the O'Flynn Construction case, McKechnie J at para. 147, dissenting as to the result, commented expressly on that issue:"*

235. The Respondent submitted that in *McNamee*, Charleton J. only made reference to paragraph 147 of the judgment of McKechnie J. in *O'Flynn* and that the inference that the Appellant was impressing upon TAC was that by not commenting on paragraphs 148 and 149 of that judgment, Charleton J. was disapproving of them. However the Respondent argued that if Charleton J. intended to disagree with the specific findings of McKechnie J., he would have explicitly stated so in his judgment. Furthermore, in *McNamee*, Charleton J. made no reference to the following paragraphs in *O'Flynn* where of McKechnie J stated:

> 148. *With regard to the exemptions in subs (3), the situation is not that straightforward. On the one hand, if either exemption is claimed, the Revenue Commissioners cannot assert the existence of an avoidance transaction if they are satisfied as to the validity of such a claim. (emphasis added) In such circumstances the transaction is never an avoidance one. This situation is quite unlike the position where there is prima facie or presumptive liability to tax, but the tax payer is excused the consequences by falling within the provision of an exemption. The scheme under subs (3), in conjunction with subs (2), is not structured in this way. So it is not altogether correct to simply assert that subs (3)(a) and subs (3)(b) are but exemption provisions.*
>
> 149. *However, on the other hand, such provisions are in my view clearly more analogous to an exemption provision than any other. If they are in play then the consequences of the section as a whole, may be bypassed. Most likely, but not necessarily in all circumstances, the tax payer will assert reliance on such*

provision. Therefore, in my view it is proper to treat these subsections, as akin to exemption provisions and accordingly, following well established law, the onus of proof in this regard should be on the tax payer."

236. Therefore I agree with the Respondent that far from it being assumed that Charleton J. disagreed with such findings, it must be assumed that he agreed with them.

237. The Respondent also submitted that O'Donnell J. and the other judges in *O'Flynn,* who were in the majority, could not have made the finding that the transaction was a tax avoidance transaction if they had considered that the Respondent bore an evidential burden which they had failed to discharge.

238. In this regard and having considered the submissions, I agree with the Respondent that while the observations of Charleton J. were *obiter*, there was no substantial observations or criticisms of the findings of McKechnie J. at para 149 when stating that in his "*view it is proper to treat these subsections, as akin to exemption provisions and accordingly, following well established law, the onus of proof in this regard should be on the tax payer."*

239. Furthermore the issue *McNamee* considered a judicial review of the manner in which the Respondent formed its opinion. As such, there was no substantive consideration of TCA, section 811. Therefore the issue of who bears the burden of proof in a TCA, section 811 appeal was not before the Supreme Court in that case.

240. However and notwithstanding the above, in *Hanrahan*, Stack J. in determining whether the taxpayer bore the burden of proving that there was no misuse or abuse of a relieving provision in a TCA, section 811 type appeal concluded that this:

223. …. is a question of law rather than fact. There could perhaps be evidence in an appropriate case to the effect that, while the transaction was not in the course of trade or business, it still had a logic, perhaps as an investment, outside of the taxpayer's commercial activity and this evidence would be material to the operation of s.811 (3)(a).

224. But even without that evidence, it seems to me that the purpose of the relevant relieving provision must be divined in accordance with the usual principles of statutory interpretation and is, in effect, a matter of law. This, I think, is a case where the absence of evidence is not conclusive one way or another as the taxpayer is saying, in effect, that he contends for a particular interpretation of s. 31 and for a particular interpretation of s.549. In particular, he asserts that he is within the wording of those provisions. I do not think, in the context of the particular legal arguments made in this appeal, that the failure to tender evidence as to the purpose of the transaction determines the matter one way or another."

241. As such in accordance with the interpretation of TCA, section 811(3)(a)(ii) as espoused in *Hanrahan*, there was no obligation on the Appellant to demonstrate that there was no "*misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*."

Substantive Issue

242. On the hearing of an appeal against an opinion, determination or calculation of the Revenue Commissioners, TCA, section 811(9)(a) mandates that "*the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under"* the provisions of TCA, section 811.

243. The Appeal Commissioners are therefore required, pursuant to TCA, section 811(2), to determine whether a transaction is:

> *"a "tax avoidance transaction" if having regard to any one or more of the following-*
>
> *(a) the results of the transaction,*
> *(b) its use as a means of achieving those results, and*
> *(c) any other means by which the results or any part of the results could have been achieved,*
>
> *….. that-*
>
> *(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and*
>
> *(ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,"*

244. A transaction is not be considered to be a tax avoidance transaction if it comes within either the 'Business Profit Exclusion' or the 'Relief Exemption' provisions contained in TCA, section 811(3)(a) and expressed as follows:

> *"Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the* [Appeal Commissioners] *shall not regard the transaction as being a tax avoidance transaction if they are satisfied that-*
>
> *(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction-*

(I) *was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and*

(II) *was not undertaken or arranged primarily to give rise to a tax advantage,*

or

(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided."

245. In making such a determination it is also necessary to consider the following criteria contained in TCA, section 811(3)(b):

(i) the form of that transaction,
(ii) the substance of that transaction
(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and
(iv) the final outcome and result of that transaction and any combination of those other transactions which are so regulated or connected."

246. Furthermore, in determining the appeal under any of the permitted grounds of appeal, TCA, section 811(9)(a) prescribes the alternative determinations which may be made by the Appeal Commissioners.

Provisions of TCA, section 549 – Connected Party Transactions

247. The Transaction was categorised in the Appellant's tax return for 2007, as a capital gains tax transaction giving rise to a loss and therefore part of the Appellant's submissions relied on the assertion that the Transaction did not "*result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided."*

248. It was not disputed that the assortment of elaborate arrangements structured by the tax advisors and pursued by the Appellant gave rise to a "*tax advantage*".

249. The procurement of the *"tax advantage*" involved the acquisition of the Notes by the Appellant from *******having a market value of €38,000,000 but subject to an

impairment in the form of the call option granted by *******to ******* in consideration of an option premium of €34,200,000. As a consequence, the impaired value of the Notes was €3,800,000 notwithstanding that the Appellant paid €7,220,000 for that asset which were subsequently sold to ******* for €3,368,700.

250. The Appellant was deemed, under TCA, sections 547(1) and 549(1) & (2), to have acquired the Notes at market value whereby the option granted to ******* was ignored in accordance with TCA, section 549(6) & (7). Therefore for capital gains tax purposes, the Appellant was deemed to have acquired the Notes for a consideration of €38,000,000.

251. Thereafter the Appellant was deemed to have disposed of the Notes at its unfettered market value of €38,000,000 as opposed to the amount received of €3,368,700. Therefore, and in accordance with the prescriptive application of the statute, the Appellant was deemed to have made a capital gains tax loss of €34,631,300. Furthermore, in accordance with TCA, section 31, the loss was available for offset against chargeable gains accruing in 2007 and 2008, resulting in a total "*tax advantage"* of €6,936,005.

252. Having reviewed the documentation opened by the Respondent, I am satisfied that the purpose of the Appellant's investment in******* was to have a connection with that company for the purposes of the '*connected persons'* provisions. The connection between the Appellant and *******was an essential component of the Transaction as was the disposal of the Notes to *******, a company unconnected with the Appellant but connected with*******. In the absence of these arrangements, the Transaction would not have resulted in the '*tax advantage'* of €6,936,005. Furthermore, the disparity in the market value of the impaired Notes, the consideration paid to acquire the Notes and the consideration received by the Appellant on the sale of the Notes clearly demonstrated that there was no commercial motive for this investment apart from the "*tax advantage"*.

253. Furthermore, and as noted by the Respondent, the purchase of the impaired Notes had no commercial purpose other than to crystallise an artificial tax loss. As such in structuring the Transaction to avail of the connected party provisions in TCA, section 549, I am satisfied that the Appellant procured a "*tax advantage*" of €6,936,005 and that the purchase and sale of the Notes "*was …. arranged primarily …. to give rise to a tax advantage"* thereby constituting a *"tax avoidance transaction*".

254. I am also in agreement with the Respondent that the purpose of TCA, section 549 as discerned from the statutory wording is to prevent the avoidance of tax by a disponer who is connected to the acquirer by disposing of the asset at an undervalue by the simple device of artificially depressing the consideration or disposing of it at an

undervalue. Furthermore, it is also clear that any contrived impediments that has the effect of reducing the market value between connected parties are to be ignored.

Provisions of TCA, section 546 – Loss Relief Provisions

255. The entitlement to deduct "*allowable losses*" is governed by TCA, section 546 and provides:

> *(1) "Where under the Capital Gains Tax Acts an asset is not a chargeable asset, no allowable loss shall accrue on its disposal.*
>
> *(2) Except where otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed."*

256. The calculation of the loss accruing to the Appellant on the disposal of the Notes in 2007 to ******* was governed by TCA, section 546. It was not until Finance Act 2010, section 59, that the TCA was amended to restrict allowable losses in respect of disposals made on or after 4 February 2010 by the insertion of section 546A to losses associated with "*arrangements to secure a tax advantage*".

257. Therefore, as the Appellant is claiming a loss on the disposal of the Notes to *******, an unconnected party, the corollary is that if a gain arose, that gain would have been liable to capital gains tax. In the absence of any other express statutory provision governing the calculation of the Appellant's loss on the disposal of the Notes in 2007, it is necessary to calculate the loss on the same basis as computing "*the amount of a gain accruing on a disposal."* Therefore, the Appellant's allowable loss on the disposal of the Notes calculated in accordance with TCA, section 546(2) is as follows:

Consideration Received by the Appellant	€ 3,368,700
Deemed Market Value of Notes on date of Disposal	€ 38,000,000
Capital Gains Tax Loss Claimed	(€34,631,300)

258. In this regard, TCA, section 546(2) is prescriptive to the extent that "*Except where otherwise expressly provided the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed."* Therefore, as noted above, the basis on which the Appellant calculated the loss conformed with TCA, section 546(2).

259. I therefore agree with the Appellant's submission that the calculation of the loss arising on the disposal of the Notes was prescriptively imposed upon him by TCA section 549(7).

Provisions of TCA, section 31 – Reduction in Chargeable Gains

260. As the transaction was arranged primarily to give rise to a tax advantage, I am required, pursuant to TCA, section 811(3)(a)(ii), to consider whether the Appellant's entitlement to reduce his chargeable gains in 2007 and 2008 in accordance with TCA, section 31, would result "*directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided*".

261. TCA, section 31 provides:

> "*Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting –*
>
> *(a) any allowable losses accruing to that person in that year of assessment, and..*"

262. The Respondent submitted that the Appellant's claim for TCA, section 31 relief cannot be regarded as a proper and intended use of that section, nor can it be described as an appropriate use of the relief. The Respondent asserted that the purpose of capital gains tax loss relief operates in the real world and is to ensure that taxpayers are taxed on their net chargeable gains by conferring a relief to compensate a person for enduring a financial deprivation. The Respondent also argued that the Appellant exploited the market value rules in TCA, sections 547 & 549 to claim relief for a loss which has been artificially inflated to over ten times its real value. As the loss of €34,631,300 was an artificially generated capital loss, the Transaction must therefore be considered to be a blatant misuse or abuse of the relief afforded by TCA, section 31 as there are no rules in capital gains tax code that confers an entitlement on a taxpayer to claim artificial losses or to claim losses in excess of those actually incurred. Therefore, no loss was suffered by the Appellant other than the €7,220,000 paid to *******for the facility of entering into the Transaction.

263. The Respondent also relied on the following passage in *Aberdeen Construction* where at paragraph 131 Lord Wilberforce opined:

> *"The capital gains tax is of comparatively recent origin. The legislation imposing it, mainly the Finance Act 1965, is necessarily complicated and the detailed provisions as they affect this or any other case must of course be looked at with care. But a guiding principle must underline any interpretation of the Act; namely, that its purpose is to tax capital gains and to make allowance for capital losses, each of which ought to be arrived at on normal business principles. No doubt anomalies may*

occur, but in straightforward situations such as this, the courts should hesitate before accepting results which are paradoxical and contrary to business sense. To paraphrase a famous cliche, the capital gains tax is a tax on gains, it is not a tax on arithmetical differences."

264. The Appellant argued that the loss claimed arose directly from the application of TCA, section 549, because in calculating the acquisition cost of the asset, the option over the asset was disregarded and therefore there was no discretion over this fiscal outcome as it was prescriptively imposed by TCA section 549(7).

265. Having considered the evidence and with the benefit of the parties' submissions, I am satisfied that the loss claimed by the Appellant arose from the prescriptive interpretation and application of statutory provisions. As such an attempt must be made to discern a purpose of a contested statutory provision which as observed by O'Donnell J., in *O'Flynn* at paragraph 74, requires:

"an evaluation of the particular transaction and a consideration as to whether it comes not just within the words, but also within the intended scheme, or is rather, a misuse or abuse of it. The fact that such an evaluation may be difficult and can create some uncertainty, is not a reason to avoid the task."

266. However since the hearing of this appeal in December 2021, the High Court in *Hanrahan*, a case the Respondent confirmed is on "*all fours*" with the facts and law in this appeal, undertook the "*task*" of interpreting TCA, section 31. In that judgment, Stack J. opined:

187. I understand the appellant's argument that s. 31 has no purpose to speak to the fact that it does not seem to pursue any particular economic policy, as was the case with the relief under consideration in O'Flynn Construction, nor does it pursue any social policy, as is the case where taxpayers can deduct pension contributions from their income for the purposes of assessment to income tax. But that does not mean it has no purpose: it establishes an important principle for the assessment of capital gains tax at the general level. The manner in which those losses and gains are computed are dealt with elsewhere in the TCA.

…

206. The fact that s. 31 has its own anti-avoidance provision, s. 549 seems to raise different considerations from those arising in respect of the relief which was relevant to the judgments in O'Flynn Construction. In that case, not only the provisions of the legislation providing for ESR, and its failure to impose certain restrictions were considered, but also the impact of company law on the transaction in issue (see para. 81 of the judgment of O'Donnell J.) were referred to. It is furthermore clear from the minority judgment of McKechnie J. in O'Flynn

Construction that all members of the Court agreed that the Act as a whole could be read so as to ascertain the policy of the Oireachtas for the creation of ESR relief against the payment of income tax on dividends received by any shareholder.

207. ....

215. The implication of both judgments, however, is that where there is a specific anti-avoidance provision in place which governs the transaction under consideration, a general anti-avoidance provision such as s. 811 does not apply as this would exceed the proper constitutional role of the courts.

216. The limitations on s. 811 which were identified in O'Flynn Construction seem to me to be applicable in this instance. There are specific anti-avoidance provisions, including s. 549, contained in the TCA. There is a "gap" or anomaly flowing from it which the legislature has neglected to address. In those circumstances, it seems to me that the limits of s.811, as identified by the majority in O'Flynn Construction, have been reached, and it cannot be used to go so far as to disapply the express provisions of section 549.

217. Allied to that, the plain meaning of s. 811 (3)(a)(ii) requires me to look at the purposes for which the relieving provision, which in this case is s. 31, was introduced. It is arguable that on a correct interpretation of s. 811 (3)(a)(ii) itself, there is no ambiguity about this and that any abuse or misuse of s. 549 is immaterial. For that reason, I must reject the contention of Revenue that s. 31 should be interpreted in the light of s. 549.

218. In those circumstances, in my view, the appellant can legitimately rely on s. 811 (3)(a)(ii) for the purposes of demonstrating that the Transaction is not a "tax avoidance transaction".

219. The appellant cleverly and deliberately took advantage of the anti-avoidance provision in s.549 to create an artificial loss solely for the purpose of reducing his capital gains tax liability. The Oireachtas did not foresee - or perhaps more correctly given its similarities to that at issue in McGrath v. McDermott many years ago – failed to address the scheme drawn up on behalf of the appellant. It had specifically legislated for tax avoidance schemes drawn up by connected persons for the purposes of avoiding capital gains liability and, even more specifically, addressed its mind to the creation of artificial losses by transactions between connected persons. By the use of a slightly more complicated structure, the appellant has not only avoided the anti-avoidance provisions but has in fact taken advantage of them for his own purposes to create the very artificial loss which they are designed to avoid.

220. For those reasons, it is my view that s. 811 does not, on the facts of this case and given the nature of the statutory provisions by virtue of which the artificial loss was

created, permit me to find that the appellant has misused or abused the relief provided for in s.31.

267. As such, the Court held that as TCA, section 31, which determines the amount chargeable to tax, has its own anti-avoidance provision namely TCA, section 549 (transactions between connected parties), the general anti-avoidance provision, TCA, section 811 has no application. Furthermore and notwithstanding that the facts in this appeal are similar to those considered by the Supreme Court in *McGrath*, and "*on all fours*" with *Hanrahan*, I must conclude that the legislation enacted by the Oireachtas failed to address the offset of artificial losses in respect of transactions between connected persons. Therefore, as confirmed in *Hanrahan*, I must conclude that the Appellant "*has not only avoided the anti-avoidance provisions but has in fact taken advantage of them for his own purposes to create the very artificial loss which they are designed to avoid.*"

268. As such, while the series of transactions undertaken by the Appellant produced an artificial loss of €34,631,300 and was arranged for the purpose of obtaining the benefit of the relief provided by TCA, section 31, the Transaction did not result in a misuse of that provision having regard to the purposes for which it was provided. In this regard, the Appellant's claim for capital gains tax loss relief succeeds. Therefore pursuant to TCA, section 811(9)(a)(i)(III) the Notice of Opinion dated 24th December 2012 that issued to the Appellant by the Nominated Officer of the Respondent is void.

Conor Kennedy
Appeal Commissioner
11th March 2022

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