THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

[2020] IEHC 552

[2019 No. 104 J.R.]

[2019 No. 46 COM.]

BETWEEN

PERRIGO PHARMA INTERNATIONAL DESIGNATED ACTIVITY COMPANY

APPLICANT

AND

JOHN McNAMARA, THE REVENUE COMMISSIONERS, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 4th November, 2020

Contents

Introduction

1. In these judicial review proceedings, the applicant (*"Perrigo")* challenges the legality of a notice of amended assessment dated 29th November, 2018 issued by the first named respondent, an inspector of taxes, in respect of the accounting period 1st January, 2013 to 31st December, 2013 in the sum of €1,636,047,645.00. The basis for the amended assessment is described in some detail in a letter issued by the second named respondents, the Revenue Commissioners (*"the Revenue")* on 30th October, 2018 setting out the Revenue's findings arising from the audit of the corporation tax returns of Perrigo for the periods ended 31st December, 2012 and 31st December, 2013 (*"the audit findings letter").* In short, the contention of the Revenue in the audit findings letter was that a transaction (involving the disposal of intellectual property rights) which had been treated as part of the trade of Perrigo in its corporation tax returns should properly have been treated as a capital transaction. When treated in this way, the transaction, in accordance with s. 78 of the Taxes Consolidation Act, 1997 (*"the 1997 Act"*), attracted tax at an effective rate of 33% rather than the 12.5% rate applicable to trading transactions under s. 21 (1) of the 1997 Act.

2. The transaction which has given rise to controversy between the parties involved the sale to Biogen, in 2013, of Perrigo's remaining 50% interest in the intellectual property relating to a pharmaceutical product sold under the brand name Tysabri which is used to treat multiple sclerosis and Crohn's disease.

3. Perrigo contends that the Revenue is incorrect in characterising the sale of the intellectual property (*"the Tysabri IP")* as a capital transaction and has appealed the notice of amended assessment to the Tax Appeal Commission (*"the TAC"*). In the event that the present application for judicial review fails, it will be for the TAC to determine whether the disposal of the Tysabri IP was or was not a trading transaction. In the proceedings before the

court, Perrigo claims that the appeal should never have to proceed before the TAC. As described in more detail below, Perrigo claims that, irrespective of the nature of the transaction, there was no legal entitlement on the part of the inspector to issue the assessment.

4. Perrigo has instituted these judicial review proceedings challenging the legality of the notice of amended assessment on the grounds that the assessment is (a) in breach of Perrigo's legitimate expectations; (b) so unfair as to amount to an abuse of power; and (c) that it amounts to an unjust attack on its constitutionally protected property rights. The case based on legitimate expectation has a number of aspects to it. It is based on four separate categories of representation alleged to have been made by the respondents over a period of more than 10 years. This requires consideration of a significant volume of material and this is examined, in detail, in paras. 24 to 254 below. In order to put that consideration in focus, some of the relevant legal principles applicable to legitimate expectation claims are first outlined in paras. 11 to 23 below. In turn, the claim based on an alleged abuse of power is considered in paras. 255 to 266 below. Finally, the claim based on constitutionally protected property rights is addressed briefly in paras. 267 to 268 below.

The nature of the proceedings before the court

5. It is important to keep in mind that these are judicial review proceedings. Proceedings of this kind cannot be instituted without leave of the court. In this case, the relevant order was made by the court on 25th February, 2019. By that order, Perrigo was given leave to apply for the relief claimed in Part D of its statement of grounds on the grounds specified in Part E of that statement. The statement of grounds is a crucial document in judicial review proceedings. It defines the scope of the claim made and fixes the parameters of the review to be carried out by the court of the legality of the decision under challenge. It is also important to bear in mind that, in the absence of an order directing the cross examination of the deponents of the affidavit sworn on behalf of the parties, proceedings of this kind are heard

and determined on the basis of the affidavit evidence before the court. In this case, no application was made to cross examine any of the deponents of the affidavits. As discussed in paras. 193 to 198 below, the fact that the deponents of the affidavits were not cross-examined has significant consequences.

6. It will be necessary, in due course, to consider all three aspects of the case made by Perrigo. That said, I believe it is fair to say that legitimate expectation is the main focus of the case made by Perrigo. In paras. D28 to D32 of its statement of grounds, Perrigo puts forward five different formulations of its legitimate expectation claims. Each of these claims is stated to be advanced on the basis of s. 445 of the Taxes Consolidation Act, 1997 (*"the 1997 Act")* and on the basis of what are described in the statement of grounds as *"the facts outlined below".* The latter is a reference to the facts alleged in paras. E36 to E123 of the statement of grounds. Unfortunately, the statement of grounds does not identify which of the allegations contained in paras. E36 to E123 relate to the respective five individual formulations of the legitimate expectation claims as set out in paras. E28 to E32. Order 84, rule 20(3) of the Rules of the Superior Courts envisages that the facts and matters relevant to each ground on which relief is sought will be separately identified in the statement of grounds. The approach taken in the statement of grounds created some difficulty for me in understanding the ambit of the case made by Perrigo in these judicial review proceedings. This was particularly so in circumstances where, as explained in more detail below, there were a number of additional matters raised in affidavits sworn on behalf of Perrigo, in the course of the proceedings, which were not relied upon or mentioned in the statement of grounds. In this context, it is important to understand the function of a statement of grounds in judicial review proceedings. This was described very recently by Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122. In that case, having cited the decision of the Supreme Court in *A.P. v. DPP* [2011] 1 I.R. 79, Barniville J. stated, at para. 108:

"These passages from the various judgments delivered by members of the Supreme Court in AP set out the obligations on an applicant who seeks judicial review to set out clearly and precisely each ground upon which each relief is sought in the proceedings and make clear that the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review. Unless there is an application for leave to amend the statement of grounds to include an additional relief or additional grounds to support an application for existing relief, it is not open to the applicant to seek that additional relief or to advance that additional or those additional grounds. It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O. 84, r. 20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court."

7. In light of the role played by the statement of grounds in proceedings of this kind, it is unfortunate that, in respect of each of the separate formulations of the legitimate expectation claim, the reader of the statement of grounds should be referred to the entire of paras. E36 to E132 with no separate identification of the specific facts and matters relied upon in respect of each such formulation. This is especially important in the context of a claim based on legitimate expectation where, in order to support that claim, it is necessary for Perrigo to establish that a representation was made to it by one or more of the respondents which led it to reasonably entertain the expectation in question.

8. The observations of Murray C.J. in *A.P. v. DPP* [2011] 1 I.R. 729 at p. 732 are apposite in this context:

> *"5. In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."*

The four categories of representation in issue

9. On the first day on which these proceedings were listed for hearing, I raised with counsel for Perrigo the difficulty that I had in working out from the statement of grounds what were the precise representations that are relied upon for the purposes of the legitimate expectation claim. Two days later, counsel, very helpfully explained that there were four categories of representation relied upon namely:

(a) The representation alleged to have been made in the certificate (described in more detail below) issued by the third named respondent ("*the Minister")* by which it is alleged the Minister represented that IP disposals would be treated as trading transactions for taxation purposes. According to counsel, the relevant paras. of the statement of grounds in respect of this aspect of the case made by Perrigo are paras. 12, 44, 45, 48, 60 and 113.

(b) The second category of representation relates to a tax briefing document issued by the Revenue in October, 2004 namely Tax Briefing Issue 57 (*"TB 57")* which (*inter alia*) addressed the taxation position of certificate holders after the expiry of the certificate mentioned in sub para. (a) above and which stated (*inter alia*) that activities meeting the requirements of such a certificate would qualify for the general rate of corporation tax at 12.5%. According to counsel, the relevant paras. of the statement of grounds for this purpose are paras. E13, E58 and E59.

(c) The third category of representation relates to the conduct of the parties and in particular the course of dealings between them, the meetings which took place between them, the correspondence, the returns made by Perrigo to the Revenue, the provision of accounts and tax computations by Perrigo to the Revenue and the assessments issued by the Revenue over the years (which have since become final and conclusive) during which no question was raised by Revenue as to the nature of the activities carried on by Perrigo. Counsel explained that, for this purpose, paras. E9, E14, E55, E58, E64-65, E74-75, E89, E91-92, E113 and E122 of the statement of grounds are relevant.

(d) The final category of representation relates to the combined effect of each of the three factors outlined in sub paras. (a) to (c) above. Counsel stated that the relevant paras. of the statement of grounds for this purpose are paras. E17, E21, E62 and E95-96.

10. For the purposes of my analysis of the case made by Perrigo, I will, accordingly, consider the case by reference to each of these four categories. Before doing so, it may be helpful, at this point, to briefly consider the applicable criteria that govern legitimate expectation claims.

Legitimate expectation – the applicable principles

11. I was referred to a large number of authorities on the doctrine of legitimate expectation. In particular, I was referred by counsel for Perrigo to a significant number of UK authorities. It may be necessary, at a later point in this judgment, to consider the case law on legitimate expectation in more detail. At this point, it is sufficient to note that, according to relevant Irish case law, there are three matters that must be established in order to mount a claim based on legitimate expectation. These were identified in the judgment of

Fennelly J. in the Supreme Court in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at p. 162-163 where he characterised the requirements as *"preconditions"*.

12. In that case, Fennelly J. described these preconditions in the following terms:

> *"Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally, they are qualified by considerations of public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."*

13. Although Fennelly J. cautioned that his remarks were provisional in nature, the criteria identified by him have been consistently applied in subsequent case law including the relatively recent decision of the Supreme Court in *Cromane Seafoods Ltd v. Minister for Agriculture, Fisheries and Food* [2017] 1 I.R. 119. In that case, both Clarke and Charleton J.J. emphasised that some degree of precision is required in relation to the first of these criteria – namely the requirement that the relevant public authority must be shown to have made a representation. In particular, at p. 143 in *Cromane*, Clarke J. (as he then was)

observed that the matters relied upon as against the Minister in that case "*could not be said to amount to a clear commitment on the part of the Minister …"* and that the indication given by the Minister in that case (which had been relied upon by the applicant) did not *"amount to the type of representation which meets the criteria identified by Fennelly J. in Glencar Exploration plc v. Mayo Council (No. 2)…. It is neither precise nor is it of a nature which could, in any event, be delivered by the Minister …"*. Those observations represent the view of the majority of the Supreme Court in that case. At p. 196, Laffoy J. agreed with the judgment of Clarke J. and at p.p. 222-223, Charleton J. expressly agreed with the observations of Clarke J. quoted above.

14. As noted in para. 11 above, Fennelly J., in *Glencar*, acknowledged that refinements or extensions of the criteria proposed by him were possible and he also said:

> *"Equally, they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected."*

15. The suggestion that there may be qualifying factors that weigh against the existence of a legitimate expectation has been explored further in more recent decisions. In *Lett & Co. Ltd v. Wexford Borough Council* [2012] 2 I.R. 198, Clarke J. (in the High Court) suggested that, on a review of the authorities, there are both positive and negative factors which must be found to be present or absent (as the case may be) in order that a party can rely upon the doctrine of legitimate expectation. He observed, at p. 212, that the positive elements are to be found in the three tests set out by Fennelly J. in *Glencar*. He then continued:

> *"The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in Wiley v. The Revenue Commissioners [1994] 2 I.R. 160, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to*

exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in Hempenstall v. Minister for Environment [1994] 2 I.R. 20, legitimate changes in executive policy to take place."

16. It will be noted that Clarke J. referred to a decision involving the Revenue namely *Wiley v. The Revenue Commissioners* [1994] 2 I.R. 160. In that case, the applicant had claimed to be entitled to a legitimate expectation to a repayment of excise duty paid on a motor vehicle on the ground that he had been granted such a refund on two previous occasions and had not been given any advance notice of a change of practice on the part of the Revenue before he purchased a third vehicle. It was clear on the facts of the case (and accepted by the applicant) that, while he suffered from physical disabilities affecting his legs and back, he did not come within the scope of the relevant exempting provision namely s. 43 (1) of the Finance Act, 1968 which authorised a repayment of excise duty in cases where the purchaser of the motor vehicle had suffered some injury or disease which meant that he or she was *"wholly or almost wholly, without the use of each of his legs".* The Supreme Court upheld the decision of the High Court in that case that, in circumstances where the applicant was aware that he did not come within the ambit of the relevant statutory provision, there could be no legitimate expectation. However, Finlay C.J. also said (in a passage on which the respondents rely in this case) at p.p. 166-167:

"An additional feature …, in my view, also arises in this case which would independently defeat the applicant's claim. The Revenue Commissioners are a statutory body who can only act pursuant to statutory powers vested in them. As of 1987, they did not have any statutory power to grant repayments by way of concession of excise duties, otherwise than in accordance with the scheme which they had put in operation and which had received, one presumes, the consent of the

Minister for Finance. For them to repay excise duty on a motor car to a person who is disabled but who did not come within the approved scheme, would be ultra vires and a breach of their statutory obligation to collect excise duties, except where they were validly exempted or avoided. There is in this case no question of a promise by the Revenue Commissioners to do any particular thing… and I am satisfied that quite independently of the more generally applicable principles of legitimate expectation and the limit it may impose on that doctrine, that this applicant could not pursue on the basis of expectation a remedy which would involve the carrying out by the statutory authority, the Revenue Commissioners, of activities which they were not empowered to carry out, and the payment or repayment of monies which they were not empowered to pay or repay."

17. For completeness, it should be noted that the decision in *Wiley* was applied subsequently by Hedigan J. in *Cork Opera House plc v. The Revenue Commissioners* [2012] 2 I.R. 65 at p. 74 where Hedigan J. expressly stated that the doctrine of legitimate expectation cannot operate to confer upon a statutory authority a power which that authority does not have under the terms of the relevant statute. It is clear from p. 75 of the report in that case that the appeal by the applicant to the Supreme Court subsequently failed.

18. The respondents rely, in part, on the decision in *Wiley*. The respondents also rely on a similar approach taken by McGovern J. in *Sarlingford v. Appeal Commissioner Kelly* [2017] IEHC 416 where he said, at para. 27:

"It is well established that a legitimate expectation cannot arise in respect of a right where none exists. So if, for example, the Revenue Commissioners are not entitled to give a tax exemption, a party cannot claim such exemption on the basis of legitimate expectation perhaps based on a claim that another taxpayer got that relief".

19. However, counsel for Perrigo argued that there was no legal obligation on the Revenue to issue an amended assessment in this case. Accordingly, he argued that there was nothing contrary to the law in the Revenue not raising an assessment. He therefore distinguished *Wiley* on that basis. He also sought to rely on an *obiter* statement by O'Flaherty J. in the same case where he said at p. 174:

> *"The duty of the Revenue Commissioners is to treat all taxpayers (I include those liable for excise duties and the like) fairly; they must exercise their discretionary powers in an even-handed way and they are entitled to lay down what evidence they will accept as to entitlements to benefits or exemptions in a manner that does not have to be too hidebound (because if it was the work of tax-gathering might be stultified) consistent with its overall obligation to have remitted, as far as is practicable, what is due to the Exchequer. In this they should, as Lord Scarman said in Reg. v. I.R.C., Ex p. Fed. of Self-Employed (1982) AC 617: 'ensure that there are no favourites and no sacrificial victims'".*

20. There was also argument at the hearing as to whether the courts had yet gone so far as to recognise substantive – as opposed to procedural – legitimate expectation. In *Lett & Co. Ltd v. Wexford Borough Council*, Clarke J., at p. 210, referred to the debate which had taken place in the case law as to the extent to which it can be said that a legitimate expectation can relate to a substantive benefit rather than to an entitlement to have a process conducted in a particular way. In *Atlantic Marine Supplies Ltd v. Minister for Transport* [2016] 1 I.R. 605 at p. 631, Clarke J., in 2010, expressed the view that there was no reason in principle why the doctrine of legitimate expectation cannot be invoked to obtain a substantive rather than a purely procedural benefit. Nonetheless, he qualified this observation in the following terms:

> *"However, it does seem to me that the negative factors which I identified in Lett & Co. Ltd v. Wexford Borough Council … as being likely to prevent a legitimate*

expectation arising are much more likely to apply, in practice, to cases where a substantive rather than a procedural benefit is asserted. There are likely to be very few cases where a legitimate expectation concerning compliance with a particular procedure could infringe the principles frequently invoked against recognising a legitimate expectation on the facts of a particular case. It is highly improbable that imposing an agreed procedure could, for example, lead to a party obtaining a right which they did not have, such as led the Supreme Court to reject the claim in Wiley v. Revenue Commissioners …. Likewise, the preservation of an entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned, is most unlikely to be interfered with by requiring the relevant decision maker to comply with expectations legitimately arising in respect of the procedures to be followed."

21. The judgment of Clarke J. was given in March 2010. Ultimately, in July 2016, the Supreme Court concluded that there was no legitimate expectation established in that case. It was therefore unnecessary for the Supreme Court to decide whether legitimate expectation could give rise to substantive as opposed to procedural rights. Counsel for Perrigo argued that, on the facts of this case, it ultimately does not make any difference if the remedy of legitimate expectation is confined to procedural matters. Counsel argued that, at the very least, Perrigo had a legitimate expectation that the Revenue would not retrospectively treat a disposal of IP as anything other than part of the trade of the company and that if the Revenue were considering making a decision that prospectively they would no longer treat Perrigo as trading in IP, they would provide Perrigo with adequate and reasonable notice so that it could organise its corporate affairs accordingly. This formulation of legitimate expectation is expressly set out in para. E30 of the statement of grounds.

22. Accordingly, counsel argued that, at minimum, Perrigo must have a legitimate expectation that it would be given reasonable notice in advance of any intention by the Revenue to treat an IP disposal as a capital transaction. No such notice was in fact given by the Revenue prior to the transaction in issue in these proceedings and, accordingly, the Revenue could not retrospectively treat the transaction as a capital transaction when prior reasonable notice had not been given to Perrigo.

23. I do not believe that, at this point in this judgment, it is necessary to resolve the issue as to whether legitimate expectation can or cannot give rise to a substantive (as opposed to a purely procedural) remedy. Whether it is necessary to resolve that issue will depend on whether Perrigo has established that it meets each of the three criteria identified by Fennelly J. in his judgment in *Glencar*. As noted previously, Fennelly J. made it clear that these criteria represent *"preconditions for the right to invoke the doctrine"*. I, therefore, propose to consider, by reference to each of the four categories of representation alleged, whether these three preconditions have been satisfied in this case. If so, it may then become necessary to consider the law in relation to legitimate expectation in more detail and in particular to consider whether the doctrine can give rise to both substantive and procedural rights. It may also be necessary to consider whether any of the negative factors identified by Clarke J. in *Lett & Co.* arise in this case such as to affect the legitimate expectation claims made. On the other hand, it will be unnecessary to consider those issues if Perrigo does not satisfy the three *Glencar* preconditions.

The claim based on the Shannon Certificate

24. The first category of representation relied upon relates to the Shannon Certificate which was issued by the Minister on 20th February, 2002 to the applicant then called Elan Pharma International Ltd (*"EPIL"*). For convenience, in this judgment, I will refer to the applicant as EPIL in relation to those activities carried out by it prior to its more recent

change of name following the acquisition of the Elan Group by Perrigo Company plc. In all other circumstances I will refer to the applicant as Perrigo. The certificate expired on 31st December, 2005. Although the certificate expired several years before the disposal of the Tysabri IP, Perrigo claims that the certificate is still relevant to that disposal. In particular, Perrigo contends that, under the certificate, IP disposals were treated as part of its trade and that the certificate constituted a representation by the Minister and by the Revenue (arising from the involvement of Revenue in reviewing the application for the certificate) that such activities would be regarded as being in the nature of trade.

25. By way of background, a 10% rate of corporation tax was introduced in 1980 for income derived from manufacturing. This 10% rate was subsequently extended to a number of service activities including those carried on by companies in the International Financial Services Centre (*"the IFSC"*) and in Shannon Airport, County Clare. This 10% rate represented a significantly lower rate of tax than the equivalent rate of corporation tax applicable to other corporate trading activities which ranged from 45% in the 1980s to 36% in the early 1990s.

26. The special taxation arrangements for activities carried on in Shannon Airport were introduced by s. 17 of the Finance Act, 1981 which inserted a new s. 39A into the Finance Act, 1980. In turn, s. 39A was amended on a number of occasions until it was re-enacted in s. 445 of the 1997 Act. It is clear from s. 445 (7) of the 1997 Act that the underlying intention of the regime was to promote activities at Shannon Airport which contributed to the use or development of the airport. Under s. 445 (7) the Minister was not permitted to grant a certificate unless the activity covered by the certificate was carried on in Shannon Airport and unless it fell within one or more of the following classes of trading operations namely:

(a) The repair or maintenance of aircraft;

(b) Trading operations in relation to which the Minister was of opinion, after consultation with the Minister for Public Enterprise, that they *"contribute to the use or development of the airport";* or

(c) Trading operations ancillary to those described at sub para. (a) or (b) above or to any operations consisting of the manufacture of goods.

27. If those conditions were met, the Minister was empowered under s. 445 (2) to give a certificate certifying that trading operations of the company concerned as specified in the certificate constituted *"relevant trading operations"* for the purposes of s. 445. If so, they were deemed by s. 445 (9) to constitute the manufacture of goods in the State. This meant that they could avail of the 10% rate of corporation tax applicable to manufacturing operations.

28. According to para. 41 of the statement of grounds, EPIL, which was then a subsidiary of Elan Corporation Plc (*"Elan"*), was actively looking at ways in 1997 in which to structure its business and in particular to maximise the value of the intellectual property which it was acquiring. EPIL concluded that Ireland was *"the most appropriate jurisdiction in which to operate the … business and a factor in the analysis was the potential for the Applicant to become certified to trade within the Shannon area…".*

29. It will be necessary, presently, to consider the application for the certificate made by EPIL in more detail. It is sufficient to note, at this point, that, as part of its application, the applicant prepared and submitted to the Department of Finance a business plan setting out information in relation to its proposed activities including its activities in relation to IP. In order to apply for the certificate under s. 445, EPIL had first to secure a licence from the Minister for Industry and Commerce under s. 2 of the Customs-Free Airport (Amendment) Act, 1958 (*"the 1958 Act"*) to carry on trading operations in Shannon. EPIL secured such a licence. The application to the Minister for the Shannon Certificate was then made in

February 1997. In July 1997, EPIL commenced operations in Shannon. The certificate from the Minister was not issued until 2002 but the certificate was granted with effect from 1st July, 1997 which was the date on which operations in Shannon first commenced. By its terms, the Minister certified that the trading operations described in the certificate constituted *"relevant trading operations for the purpose of Section 445 (2) of the Act".*

30. The applicant contends that everything which was specified in the certificate was a trading operation and that these trading operations included disposals of IP. This is disputed by the respondents who argue that the certificate applies only to disposals by means of licencing, sub-licencing, distribution, research and development or similar arrangements or agreements.

31. Counsel for Perrigo stressed, in their written submissions, that the applicant has never argued that the mere existence of the certificate converts non-trading operations into trading operations. On the contrary, they submit that the certificate confirms that the Minister was satisfied (and so certified) that the trade carried on by EPIL at that time was as set out in the certificate.

32. Counsel for Perrigo also emphasised what they characterised as *"the duration and rigour of the application process"* and they drew attention in this context to the fact that the application for the certificate was made in February, 1997 and that the certificate was not issued until February 2002, following *"five years of engagement between the Applicant and the Minister/Revenue".*

33. In light of the case made by Perrigo, it will, accordingly, be necessary to consider the terms of the certificate, the relevant provisions of s. 445 of the 1997 Act and the nature of the application made for the grant of the certificate.

The terms of the certificate

34. The certificate contains four paragraphs. In para. 1, various definitions are set out which are not relevant for present purposes. Paragraph 2 deals with the trading operations of EPIL to which the certificate refers and is addressed in detail below. Paragraph 3 sets out certain conditions. These include a condition that separate records and accounts will be kept by EPIL of the trading operations to which the certificate relates and a condition that EPIL will continue to carry out those trading operations within Shannon Airport. Paragraph 4 contains the operative words by which the Minister certified that the trading operations to which the certificate refers constitute, with effect from 1st July, 1997, relevant trading operations for the purpose of s. 445 (2) of the Act.

35. Paragraph 2 is of critical importance for the purposes of this case. It describes the trading operations of EPIL. These are broken down into two parts namely intellectual property rights management (which is the relevant activity here) and treasury services. Paragraph 2 is subject to a proviso (set out below) on which the respondents place significant reliance in the present case. In addition, the respondents contend that the description of intellectual property rights management does not extend to IP disposal.

36. The description of intellectual property rights management is set out as follows in para. 2:

> *"2. The trading operations of the Company to which the certificate refers are:*
>
> ***(A) Intellectual Property Rights Management:***
>
> *Acquiring, holding, exploiting, dealing in and disposing of any franchise, licence and intellectual property right including without limitation any patent, trademark, copyright (including design copyrights, performing right, marketing right, production right, lending right, industrial design right and plant breeders right)*

whether by means of licensing, sub-licensing, distribution research and development or similar arrangement or agreement".

37. Perrigo contends that it was always understood that the above description of intellectual property rights management included IP disposals. I do not believe that Perrigo's subjective understanding of the terms of para. 2 (A) of the certificate is relevant. Like any other written document, the certificate must be construed objectively. When read in that way, I do not believe that Perrigo's understanding is borne out by a straightforward reading of the words used in para. 2 (A). It is true that the opening words of the paragraph are expressed in very broad terms and specifically include *"exploiting"*, *"dealing in"* and *"disposing"*. However, those words do not appear on their own. The words must be read in the context of the description as a whole. It seems to me that, having regard to the syntax used, the broad language at the outset of the description is qualified by the words *"whether by means of licensing, sub-licensing, distribution research and development or similar arrangement or agreement"* which appear at the end of the same sentence. Those words, on their own, do not appear to me, as a matter of the ordinary meaning of words, to extend to outright disposals of intellectual property. However, counsel for Perrigo submit that the words *"whether by means of"* should not be construed as limiting words. They submit that, if the intention had been to limit the broad language which is used at the outset of the description, then the draftsman would have used the words *"by means of".*

38. I do not believe that this submission is sound. It seems to me that the use of the words "*whether by means of..."* are linked to the words at the end of the description namely: *"... or similar arrangement or agreement".* They are intended to convey that the forms of exploitation of intellectual property which are listed at the outset of the description can take place either by means of licencing, sub-licencing, distribution research and development or by means of a similar arrangement or agreement. The words *"similar arrangement or*

agreement" appear to me to limit the means of exploitation to arrangements which are in some way similar to licencing, sub-licencing, distribution research and development.

The evidence of Mr. Hurley in relation to the certificate

39. Counsel for Perrigo also submitted that the interpretation of para. 2 (A) of the certificate urged by the respondents make no commercial sense. In particular, counsel argued that it made no commercial sense to limit the exploitation or disposal of intellectual property rights to licencing, sub-licencing and analogous arrangements. They referred, in this context, to the affidavits of David Hurley (who was previously Vice President of Taxation in the Elan Group with overall responsibility for tax affairs from 1997 to 2002) and Randall B. Sunberg (a partner in Baker McKenzie in New York and co-head of the firm's North America Life Sciences Transactions Practice). According to Mr. Hurley, disposals of IP were something that had to be considered at all stages of EPIL's business. In paras. 13-14 of his affidavit sworn on 2nd July, 2019, Mr. Hurley said:

> *"13. As anybody who is familiar with the biotechnology and pharmaceutical sectors will be aware, there are a number of stages in the development and commercialisation of pharmaceutical products. For products that are successful and are not abandoned or discontinued prior to commercialisation, those stages include drug-discovery, research and development, clinical trials (which usually involve multiple phases) manufacturing and then distribution. The IP to the pharmaceutical products can be acquired or disposed of at any of those stages.*
>
> *14. There is a similar life-cycle to the IP for pharmaceutical products. That lifecycle template involves acquisition, holding, exploiting, enhancing, dealing in and disposing of IP. From the time that the Applicant began trading in 1997, its trading operations involved all of the foregoing for the purpose of maximising value and realising same as appropriate including by way of disposal. It is this business model*

which is reflected in both the application for the … Certificate and, most notably, in the form of … Certificate that was ultimately issued … to the Applicant following extensive consultation with the Second Named Respondent. …"

40. In para. 14 of his affidavit, Mr. Hurley also referred to the language used in para. 2 (A) of the certificate and he particularly emphasised the use of the word *"disposing"* in the opening words of that paragraph. For the reasons discussed above, I do not believe that, when read as a whole, the paragraph extends to outright disposals of intellectual property. However, I accept that, like any other document intended to have legal effect, the certificate must be read in context. As Clarke J. (as he then was) observed in *Rambaxy Laboratories Ltd. v. Warner-Lambert Company* [2009] 4 I.R. 584 at p.p. 599-600:

"36. It seems to me that recent developments in a number of jurisdictions and in a number of areas of construction, all betray a common tendency. Very many different forms of document are designed to determine legal rights and obligations. At one end of the spectrum are the laws of the land to be found in the Constitution, Acts of the Oireachtas, and Instruments made with the authority of those Acts. A whole host of other forms of documents govern the legal relations between parties. Contracts are frequently in written form. Unincorporated bodies govern the relations of their members by means of rules, corporate bodies by their Articles of Association. A document such as a patent, as had been seen, defines the extent of the monopoly of the patentee.

37. Where questions arise as to the proper construction of a document having legal effect, then it falls to a court to construe it and thus determine its effect on the legal rights and obligations involved. That construction may involve determining the law of the land, the nature of bilateral contractual relations, the obligations or entitlements of a member of unincorporated or corporate bodies or the boundaries of a patentee's

monopoly. However, it seems to me that the overall principle behind the construction of any document which is intended or is likely to affect legal entitlements and obligations is that it must be construed in the context of its purpose and in a manner which those whose rights and obligations are likely to be affected by it, would understand it.

38. The most fundamental aspect of context is the nature of the document itself. One expects an Act of the Oireachtas to be drafted in a particular way and with a considerable amount of care. One would not likely assume there to have been a mistake. Similarly, significant commercial contracts, carefully negotiated with the assistance of experienced lawyers, must be assumed to have been properly worked out by those lawyers. A court will not likely assume a mistake in this regard …. However, where specialist or technical language is used, a court may require evidence to understand that language in context. In addition, a court may need to know the overall context of the circumstances leading to the negotiation of the contract in the first place. This is because the contract should be construed in the way in which a reasonable and informed person entering into a contract of that type would be likely to interpret it. That person will not come to the interpretation of the contract with a blank mind. The contractual negotiations will commence against a particular factual backdrop and the parties will be seeking to advance their commercial interests against that factual back drop."

41. In order to understand the meaning and effect of the certificate, it therefore seems to me to be essential to consider the context in which the certificate was issued. That will involve a consideration of the provisions of s. 445 of the 1997 Act. It will also involve a consideration of the relevant factual matrix and, in particular, the nature of the application made by EPIL for the certificate. In looking at the context in this way, it is important,

however, to bear in mind that the subjective intention of the parties to the certificate is not an aid to the construction of the certificate. It is true that, in the passage quoted above, Clarke J. referred to the way in which a legal document would be understood by those to whom it is addressed. I have no doubt that, in making that suggestion, Clarke J. had in mind that the assessment as to how the document would be understood would be an entirely objective exercise which would not take into account evidence as to the subjective intention of any party to the relevant legal document under consideration.

Mr. Sunberg's affidavit

42. Insofar as Mr. Sunberg's affidavit is concerned, he has given evidence about a number of matters. In para. 5 of his affidavit he explains that the common meaning of *"exploit"* in the life sciences industry, with respect to IP, is any activity that utilises the IP and results in a financial return. This includes research, development and commercialisation activities. Mr. Sunberg explains that *"IP can be exploited by developing and commercializing products that use such IP, or by licensing out such IP to third parties, or by assigning or selling such IP for value".* Mr. Sunberg also explains in para. 7 of his affidavit that the timeline for drug development is very long and that it usually takes at least ten years for a new drug to complete the journey from initial discovery to the marketplace with clinical trials taking six to seven years on average and the average cost to develop each successful drug is estimated to be US$2.6 billion with a success rate of under 12%. He also explains in para. 8 of his affidavit that divesting non-strategic assets is a "*mainstay"* of the life sciences industry. In para. 10 he explains that, due to the intangible nature of IP, his experience is that *"divestitures of IP are not confined to binary transactions such as purchase and sale, but also include the myriad intermediate transactions, such as licencing and hybrid structures".* With regard to the Certificate, Mr. Sunberg says the following in para. 12 of his affidavit:

"12. With respect to paragraph 64 of Mr. McNamara's Supplemental Affidavit and although it will ultimately be a matter for the Irish Court to decide the effect of the ... Certificate, this conclusion that the ... Certificate does not provide for 'outright disposals' is one which seems incorrect to me based on my reading of the .. Certificate and my experience of the industry. I note that the ... Certificate refers to 'disposing of any franchise, licence and intellectual property right' and does not distinguish between different types of disposals. Having IP rights does not mean that you are necessarily an owner, but rather you might be a licensee or partial owner of the IP. Moreover, an outright disposition relates more to the scope of the rights held by the grantor or seller, not to all possible types of rights to the IP. Accordingly, even if you have only a limited licence to IP for a specific use or field, you can dispose of some or all of those rights. Also, the term 'outright disposition is sometimes used to refer to the payment of all consideration upfront rather than payment of part of the consideration upfront and the rest through a downstream mechanism such as milestones and royalties or other contingent payments. This demonstrates that IP rights are unique because of their intangible nature and are differentiated from fixed or business assets which are typically not susceptible to such partial holding and disposition of rights".

43. Mr. Sunberg also says in para. 13 of his affidavit:

"13. ... Again, although it will ultimately be a matter for the Irish Court to decide the effect of the ... Certificate, the IP Rights Management clause of the ... Certificate does not only provide for licences and sublicenses and, based on my experience of the industry, it would have made no commercial sense for the Applicant to have confined itself to those activities. On my reading of the ... Certificate, it deals with the full life-cycle of obtaining IP, enhancing the value of IP and recognizing the value of such IP,

which is consistent with the Applicant's business model as was generally known in the life sciences industry and as set forth in the Affidavit of David Hurley and the statement of Mary Sheahan".

44. In paras. 14 and 15 of his affidavit, Mr. Sunberg gives further evidence in relation to the language used in para. 2 (A) of the Certificate. I am not convinced that it is either necessary or appropriate that such evidence be given. Counsel for the respondents objected to Mr. Sunberg's evidence on the interpretation of the certificate. Counsel stressed that Mr. Sunberg has no expertise in matters of Irish law and, in any event, evidence as to how a document should be interpreted is inadmissible. In my view, that objection is well founded. Moreover, the words used in para. 2 (A) of the Certificate are words which are well understood. They are not technical words peculiar to the pharmaceutical industry. They are words which are regularly used in legal agreements or legal documents addressing IP rights and their construction is a matter for the court. Moreover, the words used in the certificate must also be construed in light of the nature of the application made by EPIL for the certificate in question (addressed in paras. 82 to 119 below). Nonetheless, for completeness, it might be noted that Mr. Sunberg, in these paragraphs, said the following:

"14. The meaning of obtaining such IP is 'acquiring' the means of enhancing the value of such IP is 'holding' and 'exploiting'. The means of recognizing the value of such IP is 'dealing in' and 'disposing'. The examples of 'licensing, sub-licensing, distribution [,] research and development or similar arrangement or agreement' are not limited to being examples of 'disposing', but rather they are examples of all of the stages of activities in the life-cycle referred to above.

15. From my experience negotiating numerous collaboration agreements in the life sciences industry during the relevant time period …, pharmaceutical and biotech companies could effectuate the activities enumerated in the … Certificate (i.e.,

acquire, hold, exploit, deal in and dispose of IP via licensing agreements, sub-licensing agreements, distribution agreements, research and development agreements, and importantly 'similar arrangements or agreements') by means of a wide variety of deal structures, including collaborations, strategic alliances, joint ventures, and product divestitures, which are conducted by means of asset purchase agreements and hybrid asset and license deals".

45. In para. 16 of his affidavit, Mr. Sunberg suggested that the disposal of the Tysabri IP could readily have been structured as a licence agreement where the applicant would exclusively licence the relevant IP to the acquirer (Biogen) in return for essentially identical financial consideration. Mr. Sunberg explained that many deals are structured as hybrid asset and licence deals and that factors influencing the structure of such deals include whether IP or other items are solely related to the relevant product or are used more broadly in operations and whether one structure will require third party consents while the other structure will not. It should be noted, at this point, that no case is made in the statement of grounds that the disposal of the Tysabri IP to Biogen could have been structured as a licence. There is also no evidence before the court from Biogen to the effect that it would have been prepared to structure the disposal in that way. In these circumstances, I do not believe that this evidence is relevant. Mr. Sunberg also stated that the financial consideration under the Tysabri disposal was *"essentially identical to how financial consideration is structured under license agreements, with an up-front payment and royalty-structure payments".* I can well appreciate that, from a commercial or financial perspective, there may be little difference between the two arrangements. However, from a legal perspective, a licence is quite different to an outright disposal. Moreover, for the reasons outlined in paras. 37 – 38 above, the form of words used in the certificate are clearly intended to limit the forms of exploitation covered by the certificate. This element of Mr. Sunberg's evidence therefore appears to me

to be of limited relevance save to the extent that it might be said to be germane to the argument made on behalf of Perrigo that, in interpreting para. 2 (A) of the Certificate, there is no good commercial reason to differentiate between licencing, on the one hand, and outright disposal, on the other. That is an issue which, it seems to me, is best considered as part of the overall context of the Certificate including the nature of the application made by EPIL (which is addressed in more detail below). Mr. Sunberg's evidence may also be relevant to the proper characterisation of the transaction for the purposes of the pending appeal before the TAC. The proper characterisation of the disposal of the Tysabri IP is not a matter that falls for determination in these proceedings.

The proviso to the certificate

46. The other element of the Certificate which requires consideration is the terms of the proviso which is also contained in para. 2 of the Certificate. In this context, immediately after para. 2 (B) of the Certificate, there is a very lengthy proviso which commences with the words *"**PROVIDED ALWAYS THAT".*** There are nine different elements of the proviso. Of those, it is the final element which is relevant for present purposes. This is in the following terms:

> *"Any income arising from the operations referred to above is chargeable to tax under Case 1 of Schedule D as part of the Company's trading income. [The question of whether the Company is trading and if so whether any of its particular operations are trading operations and therefore chargeable to tax under Case 1 of Schedule D is primarily one of fact to be determined after the events in question have taken place]".*

47. Case 1 of Schedule D covers trading income. The words in parenthesis suggest that, notwithstanding the terms of the Certificate, the question whether any particular transaction constitutes trading will remain an issue of fact to be determined after the activity in question has been carried out. Counsel for the respondents submitted that these words constituted a

very explicit qualification on the Certificate which clearly mean that the Revenue is entitled, notwithstanding the Certificate, to look at the facts of any particular activity of EPIL with a view to determining whether or not it was or was not part of the trade of EPIL. In contrast, counsel for Perrigo described the words in parenthesis as a *"footnote"* and he suggested that the interpretation advanced on behalf of the respondents would rob the Certificate of legal effect. It was argued on behalf of Perrigo that it could not be the case that the Minister issued a certificate specifying trading operations whilst permitting Revenue subsequently to second-guess that certification. It was further argued that the only manner in which the proviso can be construed consistently with the Minister's statutory powers is if it were to operate as an acknowledgment that the Revenue have the right to satisfy themselves that the relevant company certified (in this case EPIL) is carrying out the activities that have been certified. It was submitted that the Revenue cannot, however, retain the ability, during the currency of the Certificate, to call into question whether the certified activities are trading or not. According to Perrigo, the Revenue has not done this in any other case in respect of any company which had the benefit of either a Shannon Certificate or an IFSC Certificate.

48. In order to address these competing submissions, it is necessary, in the first instance, to consider the relevant provisions of s. 445 of the 1997 Act. The provisions of s. 445 are an important element of the context against which the certificate falls to be construed. I will therefore defer my consideration of the competing arguments of the parties until after I have considered the meaning and effect of s. 445.

Section 445 of the 1997 Act

49. As noted above, s. 445 was originally introduced into Irish law by s. 17 (b) of the Finance Act, 1981 which inserted a new provision in the Finance Act, 1980 namely s. 39A. At the time of the enactment of the 1981 Act, the rate of tax applicable to manufacturing activities was significantly lower than the rate of tax applicable to other corporate trading

activities. A special rate of 10% applied to manufacturing activities. The new provision enacted in 1981 extended the application of the 10% rate to the holder of a certificate issued by the Minister where certain conditions were fulfilled. As noted above, the purpose of the new provision was to encourage investment in Shannon Airport and its immediate vicinity. The relevant trading activities of the holder of a certificate were deemed by s. 39A (7) (a) of the 1980 Act (as amended) to constitute the manufacture of goods in the State and thereby to be subject to the lower 10% rate of tax.

50. There are a number of features of s. 445 which must be considered. In the first place, although both "*relevant trading operations*" and "*trading operation"* are defined in s. 445 (1) there is no definition of *"trading"* or *"trade".* This is consistent with the approach taken elsewhere in the 1997 Act and in other taxation statutes. No attempt has been made to provide a comprehensive statutory definition of *"trade".* While s. 3 (1) of the 1997 Act ostensibly gives a definition of *"trade",* the definition provided is of no real assistance. The *"definition"* is quite circular in its terms. Insofar as relevant, s. 3 (1) provides as follows:

> *"'trade' includes every trade, manufacture, adventure or concern in the nature of trade".*

51. In the absence of a comprehensive statutory definition of *"trade"*, the question whether a particular transaction forms part of a trade for tax purposes requires individual consideration of the underlying facts and circumstances. Essentially, a case by case analysis must be carried out. This has been the position for a long number of years. It is not peculiar to the 1997 Act. As Jessel M.R. observed in *Erichsen v. Last* (1881) 8 Q.B.D. 414 at p. 416:

> *"There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things".*

52. Similar observations have been made in subsequent cases including by Lord Wilberforce in *Ransom v. Higgs* [1974] 1 WLR 1594 at pp. 1610-1611. The courts have found trades to exist in a wide variety of circumstances. Thus, for example, in *Noddy Subsidiary Rights Co v. Inland Revenue Commissioners* [1967] 1 WLR 1, the licencing of intellectual property was held to be capable of constituting a trade. That case concerned the activities of a company established to licence the production of merchandise based on the Noddy character created by Enid Blyton.

53. In 1955, a report of the Royal Commission on the Taxation of Profits and Income (UK) sought to identify a number of indicia of trading which became known as *"badges of trade"*. These are now regularly used, on both sides of the Irish Sea, in the determination, in an individual case, as to whether a particular transaction falls within the definition of trade. These factors (which were formulated in the context of the exploitation of property rights) include matters such as the frequency of similar transactions, the length of the period of ownership of the asset and whether supplementary work was undertaken in connection with the property disposed of. However, these factors are no more than a guide. The weight to be given to the factors will vary according to the individual facts and circumstances of each case. In each individual case, it is always necessary to consider the full circumstances. These are issues which will require to be debated in any hearing before the TAC. As noted previously, it is not the function of the court in these judicial review proceedings to reach any determination as to whether the disposal of the Tysabri IP was – or was not – a trading transaction. However, the fact specific nature of the inquiry as to whether any particular activity constitutes a trade does seem to me to be of some relevance to the construction of s. 445 of the 1997 Act especially in circumstances where s. 445 does not purport to address the meaning of *"trading"* or of *"a trade"* for the purposes of the section. By leaving the meaning of that word undefined (save to the extent set out in s. 3 (1) of the 1997 Act), it

seems to me that the Oireachtas was proceeding on the basis that *"trading"* would be addressed in the same way as it is in any other taxation context requiring individual analysis on a case by case basis.

54. There are a number of definitions in s. 445 (1) which are of relevance. In the first place, *"the airport"* is defined as having the same meaning as in the Customs-Free Airport Act, 1947. By virtue of ss. 1 and 2 of the latter Act, the limits of the Customs-Free Airport at Shannon were defined by orders made by the Minister for Industry & Commerce.

55. *"Company"* is defined as meaning *"any company carrying on a trade"*. In turn *"qualified company"* is defined as meaning a company *"the whole or part of the trade of which is carried on in the airport"*.

56. A "*trading operation"* is defined as meaning *"any trading operation which apart from this section and section 443 (13) is not the manufacture of goods for the purpose of this Part but is carried on by a qualified company"*. Although this purports to be a definition of *"trading operation"*, it does not in fact assist significantly in understanding the meaning of what types of operation are considered to be trading. All that it does is to identify that the manufacture of goods will not be regarded as trading for the purposes of s. 445 and, secondly, that the operations in question must be carried on by a "*qualified company"* as defined. As discussed above, given that *"trading"* is not itself defined, it must, in my view, be read consistent with the definition of *"trade"* in s. 3 (1) of the 1997 Act which, as outlined above, requires a case by case analysis.

57. *"Relevant trading operations"* are defined as meaning *"trading operations specified in a certificate given by the Minister under subsection (2)"*. This tells us that only those trading operations (defined to the limited extent set out above) which are specified in a certificate given by the Minister will constitute relevant trading operations for the purposes of s. 445. This is reinforced by the provisions of s. 445 (2) which states:

"(2) Subject to subsections (7) and (9), the Minister may give a certificate certifying that such trading operations of a company as are specified in the certificate are, with effect from a date specified in the certificate, relevant trading operations for the purposes of this section, …".

58. Section 445 (3) explicitly provides that a certificate given under s. 445 (2) may be given "*either without conditions or subject to such conditions as the Minister considers proper and specifies in the certificate".* As described above, the certificate given to EPIL contains a number of conditions which are expressly set out in para. 3 of the certificate and which require, for example, that separate records and accounts will be kept by the company of the trading operations to which the certificate relates and that those records and accounts will be available for inspection by the Inspector of Taxes or other authorised officer of the Revenue. The certificate also contains the condition that EPIL will continue to carry out the trading operations to which the certificate refers within Shannon Airport. There is also a condition requiring that a minimum number of employees will be maintained. The proviso mentioned above is not contained in the list of conditions set out in para. 3. Instead, it appears at the end of para. 2. For that reason, counsel for Perrigo have argued that s. 445 (3) is not relevant for the purposes of this case.

59. Under s. 445 (4) the Minister has a power to revoke a certificate in two circumstances namely (a) where the trade of the company ceases or is carried on wholly outside the airport; or (b) the Minister is satisfied that the company has failed to comply with any condition subject to which the certificate was given.

60. Under s. 445 (5), the Minister is also given an express power to give notice requiring the holder of the certificate to desist from any activity in respect of which the Minister is of the opinion that it has had or may have an adverse effect on the use or development of the airport (or as otherwise inimical to the development of the airport). The same subsection

gives the Minister a power to revoke the certificate if the Minister is not satisfied that the company has complied with the requirements of the notice.

61. Under s. 445 (7) the Minister is not empowered to certify that a trading operation is a *"relevant trading operation"* unless it is carried on in the airport and is within one or more of three classes of trading operations namely those described in para. 26 above. For present purposes the relevant class of trading operations are those in relation to which the Minister is of opinion (after consultation with the Minister for Public Enterprise) that they contribute to the use or development of the airport.

62. Counsel for Perrigo have submitted that, in order for the Minister to comply with this subsection, the Minister must form the view that trading is being carried on in the airport. It was submitted that, as a consequence, so long as the activity certified continued to be carried on, and in the absence of a change of the law or a revocation of the certificate, the 10% rate continued to apply for the duration of the certificate. It was also argued that the certificate was understood by EPIL (and would have been objectively understood by any recipient) as certifying that, at that point in time, the Minister (who had received and relied upon the advice of the Revenue) was satisfied (a) that EPIL was already carrying on the activity specified in the certificate and (b) that those activities constituted *"trading operations".*

63. In contrast, counsel for the respondents argued that the purpose of s. 445 (7) is obvious. It is intended to ensure that any certificate given by the Minister under s. 445 (2) will be of benefit to Shannon Airport. Counsel submitted that a purposive construction should be given to s. 445. The respondents relied in this context on the decision of the Supreme Court in *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50 (addressed further below).

64. For completeness, it should be noted that, under s. 445 (8) the Minister is prohibited from certifying certain trading operations as *"relevant trading operations".* These relate, in

the main, to services directly related to the air transport activities at Shannon including services provided to passengers (such as hotel, catering and money-changing) or services in connection with the landing, departure, loading or unloading of aircraft.

65. Counsel for the respondents placed some reliance on s. 445 (9) which counsel suggested reflected the core function of the certificate. Under s. 445 (9), *"relevant trading operations"* are to be regarded as the manufacture in the State of goods. This is the deeming provision which enabled *"relevant trading operations"* to be subject to the reduced 10% rate of tax applicable to manufacturing operations.

66. Section 445 (10) was not discussed significantly during the course of the hearing. However, in my view, this subsection should not be overlooked. Section 445 (10) provides as follows:

> *"The inspector may by notice in writing require a company claiming relief from tax by virtue of this section to furnish him or her with such information or particulars as may be necessary for the purpose of giving effect to this section, and subsection (2) of section 448 shall apply as if the matters of which proof is required by that subsection included the information or particulars specified in a notice under this section".*

67. By its terms, s. 445 (10) must be read as though s. 448 (2) also applied. Section 448 (2) deals with relief from corporation tax in relation to manufacturing. Insofar as relevant, s. 448 (2) (a) provides as follows:

> *"Where a company which carries on a trade which consists of or includes the manufacture of goods claims and proves as respects a relevant accounting period that during that period any amount was receivable in respect of the sale in the course of the trade of goods, corporation tax payable by the company for that period, in so far as it is referable to the income from the sale of those goods, shall be reduced …".*

68. Section 448 (2) clearly envisages that a manufacturing company must prove to Revenue, for the purposes of the reduction available under that subsection, that the amounts claimed by the company concerned were receivable in respect of the sale of goods in the course of a manufacturing trade. When s. 445 (10) is read in conjunction with s. 448 (2) (as it is clearly intended to be) it appears to me to envisage that an inspector of taxes may by notice in writing require a company which holds a certificate under s. 445 (2) to prove to the inspector the matters specified in the notice served by the inspector under the subsection. This seems to me to suggest that the Oireachtas envisaged that the Revenue would be entitled to require proof, in respect of any receipt received during a relevant taxable period, of a company's entitlement to claim the benefit of the taxation regime applicable under s. 445. Having regard to the provisions of s. 448 (2) this would appear to include the ability to call for proof that the relevant income (or to use the language of s. 448 (2) the *"amount ... receivable"*) arose in the course of the relevant trade.

69. That still begs the question as to whether the effect of the certificate is to deem the activities specified therein to constitute *"trading".* As noted above, counsel for Perrigo argue that the Minister must have been satisfied that the activities described in the certificate constituted trading. Otherwise, he could not have reached the conclusion that the requirements of s. 445 (7) had been satisfied and he could not have certified that the operations described in the certificate (or to use the language of s. 445 (2) *"such trading operations*") constituted relevant trading operations for the purposes of s. 445.

70. Counsel for Perrigo also argued that s. 445 was intended to attract employment to the area of Shannon Airport and that, for this purpose, it was clearly intended to provide certainty to those who are prepared to set up a business there. It was submitted that it would be absurd to think that international companies would be prepared to set up business in Shannon without some level of certainty that they would be in a position to avail of the 10% rate of tax

then applicable. While such evidence is not admissible as an aid to the interpretation of the statutory provision, Mr. Hurley, in his affidavit sworn on 2nd July, 2019 stated, in para. 10, that:

> *"10. Given the fact that the standard rate of corporation tax was over three and a half times that applicable to certified trading activities and that the capital gains tax rate was 40% initially and 20% from 3 December 1997 (and that much lower tax rates were available in other jurisdictions) it was vital that the Applicant not just obtain the benefit of the 10% rate but that it obtain certainty as to its entitlement to that rate. The Shannon regime provided the certainty which the Applicant required through the statutory framework and the rigorous approval process involved in obtaining a … Certificate …".*

71. Similarly, Mr. Conor O'Brien (a partner and former head of tax in KPMG Ireland) suggested, in para. 19 of his affidavit sworn on 27th May, 2019 that:

> "*…the Shannon and the IFSC regimes were national projects designed to attract investment into Ireland through incentive corporation tax rates. Investors coming into Ireland would, of course, have been concerned to ensure that the advertised incentive rates actually applied and Ireland would have an interest in ensuring that there were no 'nasty surprises' for persons investing in Ireland on the basis of incentive tax regimes introduced by the State and heavily promoted to inward investors through the IDA".*

72. While statements of this kind cannot be taken into account in construing the provisions of a statute, counsel for Perrigo have effectively made the same point by way of submission in the course of their argument and they have stressed that, in considering the object of s. 445, the need to provide certainty to investors is an obvious consideration.

73. As against that, counsel for the respondents submitted that the clear purpose of the provision was simply to apply the 10% manufacturing rate to non-manufacturing operations once they were carried on at Shannon Airport. That is the effect of the deeming provision in s. 445 (9). They point out that there is no equivalent deeming provision deeming non-trading activities to constitute trading. Counsel for the respondents submitted that s. 445 does not in any way interfere with or affect the significant body of material available in relation to what constitutes *"trading"* for the purposes of the Taxes Acts (including the 1997 Act) and that if it had been the intention of the Oireachtas to disapply the pre-existing and longstanding law in relation to the analysis of trading for taxation purposes, this would have required explicit provision to be made to that effect in s. 445 or some other provision of the 1997 Act. Given that no such provision was made, counsel argued that s. 445 was not intended in any way to affect the case by case approach which is taken in relation to individual transactions for the purposes of determining whether or not such a transaction does or does not constitute *"trading"* as understood in the case law. Thus, s. 445 (on this interpretation) could not prevent the Revenue, in any particular case, to contest whether a particular transaction, in truth, constitutes *"trading"* for any of the purposes of the Taxes Acts.

74. Before addressing the competing arguments of the parties on the interpretation of s. 445, it is necessary to identify the approach which a court is required to take in relation to the interpretation of statutes. The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in *Bookfinders Ltd v. The Revenue Commissioner* [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

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

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

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

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

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

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

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

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".*

75. Bearing these principles in mind, I now turn to consider the meaning and effect of s. 445 of the 1997 Act. Much of the debate in this case centred on s. 445 (7) which, as described above, provides that the Minister is not to give a certificate under s. 445 (2) unless a *"trading operation"* (as defined in s. 445 (1)) is carried on in the airport and is within one or more of the classes of *"trading operations"* set out in paras. (a) to (c) of the subsection. Section 445 (7) does not explicitly provide that the Minister must be satisfied that the operation in question is in the nature of a trade. In accordance with the principles set out in the *Dunnes Stores* case, s. 445 (7) must be read in context. It is clear that, for s. 445 (7) to apply, there must be a *"trading operation"*. Section 445 (7) expressly envisages that a trading operation exists which complies with one of the three classes of operations described therein. While the definition of the phrase *"trading operation"* in s. 445 (1) is circular in that

it defines such an operation as *"any trading operation which … is not the manufacture of goods … but is carried by a qualified company",* it is clear that the definition proceeds on the assumption that there is an underlying trade being carried on. This is also clear from the definition of a *"qualified company"* in s. 445 (1) which, as set out above, is defined as a company *"the whole or part of the trade of which is carried on in the airport".* This is also borne out by a consideration of s. 445 (2) which is the operative subsection under which the relevant certificate is given. The text of s. 445 (2) is set out above. It is clear from the text that the certificate is to be given in respect of *"such trading operations of a qualified company as are specified in the certificate…".* That language seems to me to envisage that the Minister's power to provide a certificate is dependent on there being trading operations which the Minister is required to specify in the certificate. If, for example, the Minister were to have issued a certificate in respect of an operation at the airport which clearly did not constitute trading one could well see circumstances where a person adversely affected by the grant of the certificate (such as, for example, a disgruntled competitor of the certificate holder) might wish to challenge the *vires* of the Minister to grant the certificate in question. That said, I believe that there is force in the submission made on behalf of the respondents that the level of benefit to Shannon as a consequence of activities carried on in Shannon was a particular focus for the Minister in deciding whether or not to grant a certificate. For that purpose, the frequency or regularity of the activity to be carried on by an applicant for a certificate would be important. To that extent, there would be an overlap between that concern and one of the indicia of trading (as that word is understood in a taxation context). Although the badge of frequency is not decisive in itself, frequency of transactions can nonetheless be a significant element in determining whether a trade is being carried on. As Rowlatt J. said in *Pickford v. Quirke* (1927) 13 T.C. 251 at p. 263:-

"Now, of course, it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction… become taxable as items in a trade as a whole, setting losses against profits… and combining all into one trade."

76. In my view, it is apparent from a consideration of the provisions of s. 445 (1), s. 445 (2) and s. 445 (7) that a certificate cannot be granted unless the Minister is satisfied that the operations of the certificate holder as described in the certificate are in the nature of trading transactions in the way in which that word is understood in tax law. To that extent, I accept this element of the interpretation of s. 445 advocated by Perrigo. However, this finding is of limited assistance to Perrigo in the present case. In the first place, for the reasons discussed in paras. 77 to 80 below, I do not believe that there is anything in the terms of s. 445 to suggest that, when read as a whole, the Minister, in granting the certificate, is reaching any conclusion that all transactions thereafter carried out by the holder of the certificate will necessarily constitute trading even where they are of a similar nature to the activities specifically mentioned in the certificate. Secondly, even if I am wrong in the views expressed in paras. 77 to 80 below, it remains to be seen whether an outright disposal of intellectual property could be said to fall within the activity covered by the certificate. That issue is addressed further in paras. 82 to 125 below.

77. Moreover, it seems to me that there is nothing in s. 445 which interferes with or modifies the law in relation to what constitutes trading. In particular, there is nothing in s. 445 which says that, merely because a certificate has been given, this means that all transactions of the certificate holder thereafter are immune from review or investigation by the Revenue. The issue as to whether a particular transaction constitutes trading will, for the reasons discussed in paras. 50 to 53 above, always be subject to individual analysis depending on the particular circumstances pertaining to that transaction. This conclusion is

reinforced by the combined provisions of s. 445 (10) and s. 448 (2) of the 1997 Act which, when read together (as they are required to be) envisage that, in any particular case, the tax payer can be put on proof by Revenue as to whether any particular transaction arose in the course of the taxpayer's trade. The interrelationship between those provisions has been addressed in paras. 66 to 68 above.

78. I have not lost sight, of the argument advanced by counsel for Perrigo that such a construction of s. 445 would lead to great uncertainty for those proposing to trade in Shannon. In my view, that submission is misplaced for at least two reasons. In the first place, as outlined above, s. 445 does not contain any provision which purports to make transactions of the certificate holder immune from investigation by the Revenue. On the contrary, the combined effect of ss. 445 (10) and 448 (2) confirms that the Revenue may always put the taxpayer on proof that the relevant receipt arose from trading. As the judgment of McKechnie J. in *Dunnes Stores* makes clear, it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning. Section 445 (10) accordingly cannot be ignored. If s. 445 were to have the effect contended for by Perrigo, it would have been a simple matter for the Oireachtas to omit s. 445 (10) and instead to declare that the certificate of the Minister would be conclusive. The Oireachtas plainly did not take that course and did not choose to give a certificate such a status.

79. Secondly, the risk that a particular transaction might be subject to analysis or investigation by Revenue is a risk which is borne by every trading taxpayer. It is not an unusual or exceptional risk. The principles which are applicable are well established. A tax payer's tax advisor will be able to assist in providing appropriate advice with regard to the application of those principles in relation to any individual transaction under consideration by a taxpayer. There is also the ability to seek an advance opinion from the Revenue before proceeding with a proposed transaction. I do not underestimate the complexity that is

sometimes involved in reaching a conclusion as to the side of the line on which a particular transaction is likely to fall. I appreciate fully that the analysis is not always straightforward. Nonetheless, there are a battery of tax advisors available to assist. Furthermore, in the case of large corporate groups such as the former Elan Group, it is clear that they frequently have their own tax departments who, I have no doubt, would be well familiar with the niceties of what might or might not constitute a trade. It is noteworthy, in this context, that Mr. Hurley (who has sworn affidavits on behalf of Perrigo in these proceedings) was Vice President of Taxation in the Elan Group and had overall responsibility for tax affairs from 1997 to 2002. He is not only a fellow of the Institute of Chartered Accountants but he is also a member of the Irish Institute of Tax.

80. In these circumstances, I do not believe that there is any scope for the application of the principle described by McKechnie J. in the *Dunnes Stores* case that this interpretation of s. 445 would lead to absurdity in the sense of failing to reflect what otherwise is the true intention of the Oireachtas. In my view, if it had been the intention of the Oireachtas to disapply the well-established approach taken in relation to trading (as described in paras. 50 to 53 above), explicit provision would have been made to that effect. It follows that the proviso contained in the certificate is consistent with the provisions of s. 445. It cannot be characterised as nothing more than a *"footnote"* as urged by counsel for Perrigo.

81. Having considered the provisions of s. 445, it is next necessary to turn to the application made by EPIL for the s. 445 certificate. Even if I am wrong in my construction of s. 445, it seems to me to be necessary to undertake this task in order to understand what types of activity were intended to be covered by the Certificate.

The application for the grant of the Certificate

82. There was a significant number of written interactions between the parties in advance of the grant of the Certificate. Unfortunately, the correspondence and other material was not

in chronological order in the exhibits before the court but, at my request, I was furnished, at the conclusion of the hearing, with a chronological list of the relevant exhibits. The exhibits demonstrate that, in February 1997, EPIL submitted its application to the Minister for the Certificate. The application (which essentially comprised a business plan) was put forward in a significant level of detail. The application (including the appendices) extends to 21 pages. In the course of his oral submissions, counsel for Perrigo drew attention to the use of the words *"exploitation of intellectual property"* in para. 1.2 of the application and he suggested that those words were plainly capable of extending to a disposal of such property. However, as counsel for the respondents highlighted, para. 1.2 must be read as a whole. Paragraph 1.2 states:

> *"With its additional focus on foreign markets,* ***Elan*** *has identified a number of opportunities to develop business overseas, particularly by the exploitation of intellectual property in the following specific areas:*
>
> *(a) The purchase of rights to pharmaceutical products from third parties for exploitation by way of licencing.*
>
> *(b) The purchase, development or co-development, of products which are not yet on the market but are at an advanced stage of development. Again, the objective being to licence the developed product in return for royalty."*

83. When para. 1.2 is read as a whole, I believe it is clear that the nature of exploitation which was clearly envisaged was exploitation by way of licencing. This is reinforced by a consideration of para. 1.4 of the application which states:

> *"1.4* ***Elan*** *wishes to establish a subsidiary in Shannon [ELAN PHARMA INTERNATIONAL LTD]* ***("EPIL")*** *which will be licenced to engage in:*
>
> *(a) Technology licencing; and*
>
> *(b) Inter-company lending."*

84. Again, the reference to *"licencing"* is notable. Further background is provided in s. 4 of the application. Here, also, the focus is on the licencing operation. Paragraph 4.1 provides as follows:

> *"4.1 as mentioned in the Executive Summary [which contains para. 1.2],* ***Elan*** *has identified two areas it would like to develop in the future.*
>
> *(a) The first area is the acquisition of rights to existing and new pharmaceutical products.* ***Elan*** *believes there are opportunities to purchase these rights and exploit them by way of licences to appropriate licencees. It is envisaged that such licencees will be located in a wide range of jurisdictions …. Such licensees will mainly be independent third parties. …*
>
> *(b) the second area which* ***Elan*** *would like to develop through* ***EPIL*** *is the purchase and subsequent financing of the development, or co-development of products which have not yet reached the market. This would be done with both Group companies and third parties. If successfully concluded, the end product will also be licenced as in (a) above)."* (underlining added).

85. There are also repeated references to licencing operations in s. 5 of the application. There is no reference here to disposals. Section 5 deals with the proposed activities of EPIL. In para. 5.1, it explains that EPIL will acquire the rights to specific products either by a licencing arrangement or by purchase. Paragraph 5.2 then provides:

> "*The product will then be licenced to a distributor…in various jurisdictions in return for a loyalty (sic)."*

86. Furthermore, in para. 5.4 it is stated that each distributor will *"operate under a formal licence agreement"* and that the rights to the product are *"potentially licensable to a large number of licensees in many countries of the world".* As the *Noddy* case shows, such an activity is capable of constituting a trade for tax purposes.

87. Appendix IV contains a brief marketing plan. Again, the marketing plan refers solely to licencing. It says nothing about disposals of intellectual property. Thus, paras. 2 and 3 of the marketing plan state:

> *"Once the rights to products that fit into the above categories have been acquired then the focus will be on licencing these products to as many jurisdictions as possible. The licence will be granted to existing licencees or new licencees depending on how the best return for* ***EPIL*** *can be achieved.*
>
> *3. On an ongoing basis* ***EPIL*** *will advise the local licencees on the marketing and promotion of the products"* (underlining added by way of emphasis).

88. Appendix V contains a description of the proposed licenced activities. Paragraph (d) is in the same form as para. 2 (A) of the Certificate (quoted above). Again, counsel for Perrigo sought to argue that the use of the words *"exploiting",* "*dealing in"* and "*disposing"* are very wide. However, as explained in para. 37 above, all of those words are, in my view, qualified by the words: *"whether by means of licencing, sub-licencing, distribution, research and development or similar arrangement or agreement".* For the same reasons as previously discussed, I am of the view that, when the paragraph is read as a whole, it clearly suggested that the exploitation or disposal of the intellectual property rights would take place by means of licencing, sub-licencing or similar arrangements. This conclusion is strongly reinforced when that paragraph is read in conjunction with the application as a whole. As outlined above, there is nothing in the body of the application to suggest that EPIL intended to sell or dispose outright any intellectual property rights acquired by it. On the contrary, the application very clearly described the proposed activities by reference to licencing. I must therefore reject the submission made on behalf of Perrigo that para. (d) of Appendix V should be given the broad construction contended for.

89. I should also deal with the argument made by counsel for Perrigo by reference to the use of the words "*without limitation*" which, in common with para. 2 (A) of the Certificate, also appear in para. (d) of Appendix V. Counsel suggested that those words referred to the activities of "*exploiting" "dealing in" "disposing*" and the other activities listed at the beginning of the paragraph. I do not accept this submission. It seems to me to be very clear that the words "*without limitation*" refer to the words "*intellectual property right".* The relevant phrase is: *"...any franchise, licence and intellectual property right including without limitation any patent, trademark, copyright ...".* It is clear from the syntax that the words "*without limitation*" refer to the intellectual property rights mentioned. They are intended to convey that the rights in question are not limited to patents, trademarks and copyright but extend to any form of intellectual property.

90. Some emphasis was placed by counsel for Perrigo on the material in Appendix VI which contain projected income statements and balance sheets for EPIL in the period 1997-1999. Counsel drew attention, in particular, to the way in which amortisation of rights (over twenty years) is listed as a cost and is not added back in the way in which it would be if the intellectual property was to be treated as a capital asset for tax purposes. Counsel submitted that it was accordingly *"clear from the beginning"* that intellectual property was to be treated as stock in trade and not as a capital item. He also referred to the way in which the projected income statements then applied the 10% rate to the profits shown in the projected income statement. However, as counsel for the respondents argued, Appendix VI was not a tax computation. It was not prepared or proffered for that purpose. As counsel for the respondents highlighted, if it were a tax computation, one would expect to find, for example, some reference to depreciation of fixed assets. Counsel contrasted this with the tax computations prepared on behalf of EPIL in 2002 where a figure for depreciation is shown. Moreover, the focus of the application under s. 445 was to satisfy the requirements for the

grant of a certificate. Crucially, as outlined above, the application was expressly put forward on the basis that the forms of trading to be carried on by EPIL at Shannon were in the nature of the acquisition of intellectual property rights and the onward licencing of those property rights to others. The application also suggested that there were also to be some other activities but these are not relevant for present purposes. Counsel for the respondents also drew attention to the fact that in Appendix VI, the only revenue shown is *"sales revenues (royalties @ 15%)"*. This is an important point. It is consistent with the exploitation of intellectual property by means of licences (which are frequently granted on the basis of a royalty payment). As counsel noted, there is no reference in Appendix VI to the generation of income from disposals.

91. A copy of the application was subsequently forwarded by the Department of Finance by fax to Mr. Declan Rigney on 19th March, 1997. According to the fax cover sheet, the Revenue were asked for their views on the attached application.

92. On 7th May, 1997, Mr. Paul Ryan of the Department of Finance, wrote to Woodchester International Leasing Ltd (*"WILL")* which had been retained by EPIL to provide agency management services. In that letter, Mr. Ryan outlined a number of concerns on the part of the department. These included a suggestion that (as had previously been mentioned at a meeting of the parties on 19th March) the wording at para. (d) of Appendix V of the application was *"incorrect".* It should be noted, however, that the wording used in para. (d) was subsequently accepted and it now appears, as noted above, in para. 2 (A) of the Certificate issued by the Minister.

93. On 8th May, 1997 WILL responded to Mr. Ryan. With regard to the query raised in relation to the suggested wording at para. (d) in Appendix V, WILL explained that the wording was *"as per the most recent draft of the WILL Management Services Licence"*. Thus, the language used in para. (d) of Appendix V came from EPIL. This was confirmed by

Mr. David Hurley in his affidavit sworn on behalf of Perrigo on 2nd July, 2019 at para. 46 where he purported to give wholly inadmissible evidence as to his intention in drafting the list of IP management activities set out in the trading operation section of the application. In their letter of 8th May, 1997, WILL also addressed, in some detail, a query raised in para. 3 of Mr. Ryan's letter of 7th May in relation to intra-group activity. It was explained that the pricing of royalties would be at an arm's length basis irrespective of whether the distributor was a group or non-group entity and it was also stated that the agreement entered into with the distributor *"will clearly isolate the licence fee due to EPIL in respect of the relevant product…"*. The reference to licencing should be noted. There is nothing in the letter to suggest that EPIL would be involved in outright disposal of intellectual property.

94. A focus of the correspondence at this time related to the proposed use of the WILL agency arrangement in Shannon rather than an EPIL stand-alone operation. The rationale was explained in a letter from Mr. Hurley to Mr. Ryan of 13th May, 1997 in which Mr. Hurley said that the agency was the preferred approach to "*test the strategy over a three to five-year period"* and that there would be "*no particular objection"* to revisiting the matter in three years' time to determine whether a stand-alone operation might be more appropriate. In the course of that letter, Mr. Hurley also dealt with the issue of intra-group royalties as follows:

> *"It is a fundamental basis of our application that we will be allowed to licence the rights to any of the products purchased by EPIL both to group distributors and third party distributors, both of whom will distribute produce to the end customer…. [T]he objective of the exercise is to capture the maximum world-wide profit for the Elan Group. This would include not only the profit from licensing but also the profit from manufacturing and distribution…".*

95. The letter then explained that appropriate transfer pricing arrangements would be put in place between EPIL and group companies. Having provided that explanation, Mr. Hurley continued as follows:

> *"In summary, it is fundamental to our proposal that we can licence any of the rights to products we buy to both group and third party distributor. Any restriction in terms of ability to licence to our subsidiaries would, in practical terms, rule out Shannon as a base for this proposed business…."*

96. Once again, it will be seen that the description of the business which EPIL proposed to establish (through WILL) in Shannon was the licencing of intellectual property acquired by EPIL to both group and third party undertakings. No suggestion was made in the letter that EPIL would also be engaged in the sale of intellectual property rights.

97. Following receipt of Mr. Hurley's letter, it appears that Mr. Ryan of the Department of Finance consulted with the Revenue in relation to the issue of transfer pricing (which was of particular relevance in the context of intra-group transactions). In a letter dated 20th May, 1997 sent by Mr. Declan Rigney of the Revenue to Mr. Ryan, Mr. Rigney confirmed that it was correct to say that the United States had stringent controls in relation to transfer pricing. The letter continued:

> *"However, the reality is that intra-group activities are the ones which are most at risk to the misuse of transfer pricing arrangements. On the basis that the 10% rate is being applied to any profits generated by the Shannon operation, it appears to me to be perfectly reasonable to continue to apply some limit on the amount of intra-group activities which can be carried on. …".*

98. Counsel for Perrigo suggested that the reference to the 10% rate being applied shows that this was the understanding of the Revenue at the time. I do not read the letter in that way. In my view, the most sensible reading of the letter is that the writer was assuming that,

if the 10% rate applied to the profits generated by the proposed EPIL operation at Shannon, it would be reasonable to continue to apply some limit on the amount of intra-group activities which could be carried on. In Mr. Ryan's earlier letter of 7th May, 1997 to WILL, he had suggested that intra-group activities would be subject to a limitation (which was strictly adhered to in previous cases) based on the lower of 10% of gross income from the Shannon activities or the sum of US$3 million per annum. Moreover, the reference to the 10% rate must be seen in the light of the dealings between the parties up to this time. For the reasons discussed above, it is clear that, at this time, the description of the business to be operated by EPIL (insofar as the exploitation of intellectual property is concerned) related to the licencing of intellectual property which EPIL clearly hoped would qualify for the 10% rate.

99. A meeting of the Shannon Licensing and Certification and Advisory Committee took place on 21st May, 1997. The minutes of the meeting of that day were compiled by Mr. Ryan. It is clear from this document that the understanding of the Department of Finance at this time was that the activity to be carried on by EPIL (insofar as the exploitation of intellectual property rights is concerned) was that EPIL would be involved in the licencing of such rights. In para. 2 (a) of the minutes, it is expressly stated that:

> *"2. It is envisaged that EPIL will be engaged in the following activities:*
>
> *(a) Acquisition of rights to existing and new pharmaceutical products (primarily neurological)* ***to be exploited by way of licence*** *to Group companies and third-parties".* (emphasis added).

100. In para. 4 of the minutes there is a reference to the 10% guideline established for intra-group intellectual property rights management operations. Paragraph 4 notes a concern on the part of the Department of Finance that there could be very little substance and activity in Shannon relative to significant royalty income from locations outside of Ireland such that the Shannon operation could be little more than a *"cash box".* In para. 5, the minutes record

the argument made by Mr. Hurley in his letter of 13th May, 1997 that *"it is fundamental to the project that EPIL can licence"* any of the rights to products purchased to both group and third-party distributors. Paragraph 5 continued:

> *"The Company considers that any restriction in terms of its ability to licence to its own subsidiaries would role (sic) out Shannon as a base for its proposed business. In effect, the Company wants the existing guideline to be extended to 100%".*

101. At a later point, para. 9 of the minutes records a concern on the part of the Revenue that *"the volume of traffic passing through Shannon Airport as a result of the proposed project is minimal".* On that basis, it is recommended that the request to extend the existing 10% guideline on intra-group intellectual property rights management activities should not be conceded. For present purposes, what is important about these minutes is that they clearly show that the understanding of the Department of Finance at this time was that the intellectual property rights management to be undertaken by EPIL would consist of the licencing of both group companies and third-parties. There is nothing to suggest that there was any understanding that EPIL would be involved in the outright disposal of intellectual property rights. Counsel for Perrigo has, nonetheless, argued that there is nothing said in the minutes or in the correspondence from Mr. Hurley which predates these minutes to suggest that EPIL would not be involved in outright disposal. Counsel highlighted in this context the evidence that disposal of intellectual property rights would not normally take place in the first number of years of exploitation of such rights. He also referred to the evidence of Conor O'Brien of KPMG to the effect that sales of intellectual property rights will typically be cyclical and unpredictable. In addition, counsel pointed to the evidence of Mr. Hurley to the effect that it was always the intention of EPIL to dispose of intellectual property rights. It should also be noted that, in para. 17 of his first affidavit, Mr. Hurley stated that he was

"acutely aware" that income from activities other than those certified by the Minister would be taxable at the higher rate and he asserted that:

> *"Given the inherently risky nature of the Applicant's trade and the fact that income was to be earned from many sources, the certification of disposals as forming part of the trading operations was* ***absolutely critical****".* (emphasis added).

That assertion on the part of Mr. Hurley does not sit easily with the material placed before the Department of Finance as of 1997. As of that date, the material placed before the Department of Finance clearly suggested that the relevant activity to be carried on by EPIL at Shannon was the licencing of intellectual property. While Mr. Hurley, in correspondence, had highlighted the fundamental importance of EPIL being in a position to licence IP to other group companies, he said nothing to the Department about the *"critical importance"* of disposals. Nor did he say anything, in correspondence, to the effect that income was to be earned from *"many sources"*. As outlined above, both the application and the correspondence described the proposed activities to be carried on by EPIL as being in the nature of licencing. I must, in any event, consider the matter not by reference to evidence given retrospectively as to the subjective intention of the parties but by reference to the objective meaning of the material that was generated during the course of the application for the licence.

102. I have to say that I am not impressed by the suggestion made by counsel for Perrigo that there is nothing in the material, as of this time, to suggest that EPIL would not be involved in disposals. It is manifestly clear from the materials before the court that EPIL, in making its application to the Minster for a certificate under s. 445, was purporting to describe the nature of the business which it proposed to carry on at Shannon. Having regard to the provisions of s. 445 of the 1997 Act, it would be surprising if EPIL had not approached the matter in that way by carefully describing the nature of its proposed activities in Shannon so

that an assessment could be made by the Minister as to the potential applicability of s. 445. Furthermore, it must be recalled that, in these proceedings, Perrigo (who bears the burden of proof) is seeking to make out a case of legitimate expectation. Having regard to the judgment of Fennelly J. in *Glencar*, for Perrigo to succeed, it must, as a precondition, establish that a representation was made to it which gives rise to the alleged expectation on its part. Thus, Perrigo bears the burden of proving that a representation was made to it (by virtue of the certificate issued in this case) that outright disposals of intellectual property would be regarded as trading by the respondents. If EPIL never mentioned to the respondents its intention to undertake such disposals, it is very difficult to understand how the absence of any reference to such disposals could give rise to a representation on the part of the respondents that such disposals would be regarded as trading.

103. This position is reinforced by material sent by Mr. Hurley to Mr. Ryan following the committee meeting in question. On 3rd June, 1997, Mr. Hurley sent a fax to Mr. Ryan referring to a telephone conversation earlier that day in which Mr. Ryan asked Mr. Hurley for *"further details on the proposed modus operandi of EPIL".*

104. Mr. Hurley commenced his fax by stating that he presumed the issue of main interest was in relation to inter-company *"licencing".* However, he also stated that *"obviously, where third parties are involved the procedure will be somewhat similar".*

105. Thereafter, as before, Mr. Hurley, in his letter, proceeded to describe the proposed *"modus operandi"* of EPIL by reference to the licencing of rights. A meeting between Mr. Ryan and Mr. Hurley subsequently took place on 5th June, 1997 and, on the following day, Mr. Hurley sent a further fax to Mr. Ryan. There is nothing in this fax which gives any inkling that it would be part of EPIL's *"modus operandi"* to engage in outright disposals of intellectual property. Furthermore, although two affidavits have been sworn by Mr. Hurley, he says nothing about what transpired between him and Mr. Ryan on 5th June, 1997.

Subsequent to the meeting and subsequent to Mr. Hurley's fax of 6th June, 1997, there was further communication between Mr. Ryan in the Department of Finance and Mr. Rigney in the Revenue. On 2nd July, 1997, Mr. Rigney wrote to Mr. Ryan confirming that there were *"no issues of major significance from Revenue's perspective as respects this proposal".* He explained that there was no issue in relation to transfer pricing to which Mr. Rigney could point as being *"particularly offensive".* However, he did note that there were broader policy issues that had to be addressed in relation to intra-group licencing and in relation to the fact that the projected volume of traffic passing through Shannon Airport as a result of the proposed project was minimal.

106. On 19th January, 1998 an internal Department of Finance memorandum recorded some of the issues which had been debated in the correspondence and noted that the Revenue was satisfied that sufficient commitments had been given to allay any concerns in relation to transfer pricing. In addition, the memorandum noted that the Revenue was of the view that the project was not detrimental in the tax treaty context. Counsel for Perrigo has argued that this demonstrates that the Revenue gave careful consideration to the proposed EPIL activity at the time. I agree that it certainly demonstrates that the Revenue was involved in considering issues such as transfer pricing (in the intra-group context) and other policy issues. Tax authorities would have an obvious interest in ensuring that intra-group pricing was not artificially set with a view to minimising liability to tax. However, at this point, there was nothing in any of the material examined by the Revenue which suggested that EPIL would be involved in outright disposals of intellectual property and, accordingly, there was no reason for the Revenue to give consideration to such an activity.

107. The department memorandum continued to record concern in relation to intra-group activities. Further questions were raised by the Department in a letter dated 23rd January, 1998 and these were addressed by Mr. Hurley in a letter dated 27th January, 1998. Mr.

Hurley's letter dealt with a number of issues (most of which are not immediately relevant). However, in the course of the letter, Mr. Hurley also explained that EPIL would be controlled by a board of directors who would have overall responsibility in relation to *"products to be acquired, development of products, licencing of products and advancement of loans etc".* There is nothing in this letter which in any way suggested that EPIL wished to engage in a broader range of exploitation activities than had been signalled in previous correspondence.

108. On 26th May, 1998, Mr. Des O'Leary of the Department of Finance wrote to Mr. Hurley in relation to the conditions which would be attached with regard to intra-group trading. Subsequently, on 26th April, 1999 Mr. O'Leary wrote to Ms. Edel Quinlan in the Revenue and Mr. Pat Clune of Shannon Development enclosing a copy of the draft certificate (which was in identical form to that ultimately issued) in which he asked whether the Revenue had any objections to the provisions of the draft certificate. In the letter to Mr. Clune, he asked for any views which Shannon Development might have on the terms of the certificate as proposed. The letter to Mr. Clune noted that the wording of the certificate was subject to amendment until consultations with the Revenue and the Department of Public Enterprise had been completed. Counsel for Perrigo sought to place some emphasis on these letters as indicating the extent of the Revenue's involvement in the process. Later, on 28th June, 1999, WILL forwarded to Mr. Hurley the first two pages of the draft certificate (which must have been made available to WILL by the Department of Finance) which contained a definition of the Elan Group and a description of the intellectual property management services in similar terms to that ultimately contained in para. 2 (A) of the certificate ultimately issued. That said, the form of the draft forwarded by WILL was different to the form of the certificate ultimately issued. Furthermore, it was described as a "*draft licence"* rather than a certificate. It appears to have been an earlier draft of the document sent by the Department of Finance to the Revenue and Shannon Development in April 1999.

109. By July 1999, it appears that a copy of the draft certificate was available to EPIL. On 23rd July, 1999, Mr. Hurley wrote to Mr. O'Leary of the Department of Finance setting out comments on the draft certificate. This letter is important for a number of reasons. In the first place, it addresses the issue of intellectual property rights management. In the letter, Mr. Hurley seeks confirmation that the buying and selling of product by EPIL would be covered. However, this clearly relates to the buying and selling of pharmaceutical products and not the buying and selling of intellectual property rights. In para. 3 of his letter, Mr. Hurley said:

> *"As Elan has developed in Europe and the US, it is becoming clear that the best way to exploit the intellectual property owned by Shannon is for that company to act as principal; purchasing the product from third party contract manufacturers, and supplying the product to distributors in Europe and the US (both Group and non-Group companies). Given that the sales are taking place in conjunction with intellectual property ownership, invoicing the products makes commercial sense. It is common in pharmaceutical groups to have a centralised company purchasing and selling. Common locations include Switzerland because of the attractive tax position it offers. We are keen to develop such a company in Ireland. However, in order to do this, we would need to benefit from the lower tax rate. In the context of Shannon's ownership of intellectual property, we believe that exploitation by buying and selling the product should be acceptable and we should be grateful if you could confirm that it is acceptable within the terms of the existing licences".*

110. The second aspect of the letter which is relevant is para. 9 which deals specifically with the reference in the proviso of the draft certificate to Case I income. In that paragraph, Mr. Hurley stated:

> *"We have already discussed the complexities under Irish tax law as to whether companies are trading or not, particularly in the instance of financial services or*

intellectual property management. Our understanding is that EPIL is trading and that this position will be respected following the end of Shannon relief in 2005".

111. This clearly suggests that Mr. Hurley was aware (as one would expect having regard to his position as head of tax for the Elan Group) of the potential complexity involved in analysing whether a particular activity constitutes trading for tax purposes and also that he was conscious of the effect of the proviso. It also suggests that Mr. Hurley did not regard the certificate as providing confirmation that EPIL was trading. There would be no need to raise the issue if he already thought that the certificate, once issued, would confirm that position. Mr. Hurley concluded his letter by asking Mr. O'Leary for his views on the issues raised in the letter.

112. For reasons which are unclear, Mr. O'Leary did not respond to Mr. Hurley until 21st September, 2000. Mr. O'Leary did not provide the confirmation sought at para. 3 of Mr. Hurley's letter. Mr. O'Leary explained that it was long-standing policy of the Department not to approve projects which involved any more than a minimal amount of international trading (i.e. activity carried on within the airport consisting of trading in goods where the goods do not physically pass through the airport). Mr. O'Leary stated that:

"Buying and selling of product on such a basis would not come within the terms of the EPIL's tax certificate."

113. With regard to the request made in para. 9 of Mr. Hurley's letter to confirm that EPIL was trading, Mr. O'Leary refused to provide that confirmation. In para. 9 of his response he said:

"As specified in EPIL's draft certificate, and in all certificates granted to IFSC and Shannon Free Zone companies, the issue of whether any company is trading (regardless of whether or not it has been granted a certificate) is a matter of fact to be determined after the activities in question have taken place".

114. That language reflects the terms of the proviso which was contained both in the draft certificate and in the final version of the certificate as issued by the Minister. Given the very clear statement contained in this letter and given the terms of the proviso itself, it is very difficult to understand how it can now be contended that a representation was made by any of the respondents, as a consequence of the grant of the certificate, to the effect that any particular transaction within the terms of the certificate would necessarily constitute trading for tax purposes. A specific question was asked by Mr. Hurley and was answered in clear terms. In my view, this answer makes it very difficult to see how any representation can be said to arise, by virtue of the certificate, of the kind contended for by Perrigo in these proceedings.

115. In turn, it took some time for Elan to respond to Mr. O'Sullivan's letter. A response was ultimately provided by fax dated 6th June, 2001 sent to Mr. O'Sullivan of the Department of Finance by Ms. Marie O'Rourke, associate director of taxation at Elan. Significantly, no issue was raised in this letter in relation to the refusal of the confirmation sought by Mr. Hurley in para. 9 of his letter of 23rd July, 1999. The letter confirmed that Elan agreed with the terms of the latest draft certificate with the exception of the issue regarding the proposed distribution of pharmaceutical products by EPIL. With regard to intellectual property rights management, Ms. O'Rourke stated as follows:

> *"As you are award the EPIL licence (sic) as it stands in its current draft status certifies the Company to acquire, hold, exploit, deal in and dispose of any franchise, licence and intellectual property rights. In this regard, EPIL has invested to date a significant amount of resources in acquiring and developing intellectual property rights in pharmaceutical products and technology and we feel the best way forward to exploit the intellectual property owned by EPIL is for the company to act as principal; i.e. by purchasing the product from third-party contract manufacturers and supplying*

the product to distributors in Europe and the US, primarily to Group companies but with the option to supply to non-Group companies".

116. Ms. O'Rourke went on to explain in more detail why the buying and selling of product *"should be acceptable"* in Elan's view within the terms of the certificate (which she incorrectly referred to as a licence). In the course of the oral submission made by counsel on behalf of Perrigo, it was argued that the letter clearly signalled that EPIL intended to do much more under the certificate than merely licence Group companies and third-parties to use intellectual property rights acquired by EPIL itself. Counsel highlighted in this context the first sentence in the passage quoted above and the references made to *"exploit, deal in and dispose of any … intellectual property right".* If that letter stood on its own, I can see that there might be some substance to the submission made by counsel to that effect. However, I do not believe that the letter can be read in the manner suggested by counsel for Perrigo. In the first place, the letter must be read against the backdrop of the previous dealings between the parties and the terms of the draft certificate itself. In particular, no request had been made by EPIL to expand the activities proposed to be carried on by it or to amend the draft certificate to cover such expanded activity. When read against the backdrop of the dealings between the parties, I believe that an objective reading of the letter would suggest that the words used by Ms. O'Rourke were intended as a shorthand for what is contained in the terms of para. 2 (A) of the draft licence. Secondly, it is clear from the terms of Ms. O'Rourke's letter (read as a whole) that this aspect of her letter was concerned not with expanding on the activities carried on by EPIL in terms of the exploitation of intellectual property rights but was instead focused on the desire of EPIL to bring the buying and selling of product within the terms of the proposed certificate.

117. The request by Ms. O'Rourke that the sale and purchase of products would be treated as falling within the ambit of the certificate was rejected. This was confirmed in a letter from

Mr. O'Sullivan to Ms. O'Rourke of 30th August, 2001. In that letter, Mr. O'Sullivan sought confirmation that the draft certificate was otherwise acceptable to EPIL so that Mr. O'Sullivan could arrange to have it signed by the Minister and issued.

118. Mr. Hurley responded on behalf of Elan to Mr. O'Sullivan on 4th October, 2001. In that letter, Mr. Hurley urged that the definition of the exploitation of intellectual property rights contained in para. 2 (A) of the draft certificate should be expanded to include the purchasing and selling of pharmaceutical products. In the letter, he stated that:

> *"In this regard one of the more significant impacts of the continued growth in EPIL's operations is that we are becoming very restricted in the trading limits as originally included in the draft Trading Certificate for EPIL. In particular, we are currently finalising the acquisition of a significant line of pharmaceutical products and when concluded the exploitation of these together with EPIL's current products may result in EPIL being in breach of some of the limits imposed on the 'Intellectual Property Rights Management' trading operations".*

119. Mr. Hurley received a response from Mr. Sean O'Sullivan of the Department of Finance which reiterated what had been said by Mr. O'Leary in his letter of 21st September, 2000. Nonetheless, Mr. O'Sullivan stated that, in order to resolve the outstanding issue, he was prepared to propose an addition to the certificate conditions to make clear that international trading in goods (where the goods do not physically pass through the airport) would not be permissible *"unless it constitutes a minor but integral element in the Company's total operations at the airport. Such trading shall not, on a year to year basis, exceed 20% of the total turnover of the Company which is derived from the trading operation specified in the certificate…."*.

Conclusion in relation to Perrigo's case based on the Shannon Certificate

120. The certificate subsequently issued in the form previously circulated in draft on 26th February, 2002. For the reasons previously discussed in paras. 37 to 38, the certificate, when read by reference to its own terms, appears to me to limit the intellectual property rights management set out in para. 2 (A) to the licencing, sub-licencing, distribution, research and development or similar arrangements or agreements. It does not seem to me to extend to outright disposals of intellectual property. That is not to say that such disposals of IP might not, depending on the evidence, give rise to a trade in disposals. However, for all of the reasons outlined above, such disposals do not come within the ambit of the Shannon certificate. In my view, that conclusion is strongly reinforced by a consideration of the nature of the application which was made by EPIL (as described above). It is quite clear that the form of exploitation of intellectual property rights described in the application and subsequent correspondence was described in terms of licencing. There was nothing to suggest that outright disposals of intellectual property would be covered. Similarly, there was nothing in the terms of the certificate itself which suggested that the activities of EPIL described therein extended to outright disposals of IP. Accordingly, I cannot see any basis to suggest that the certificate gives rise to a representation of the kind claimed. While Mr. Sunberg, in his affidavit, has suggested that there is no good commercial reason to differentiate between licencing and outright disposals, both the certificate and the application expressly limited themselves to activities in the nature of licencing. That was a choice made by EPIL itself. As noted in para. 93 above, the language used in para. (d) of Appendix V in the application for the certificate came from EPIL itself and it was that language that was subsequently incorporated in the description of the IP rights management trade given in para. 2 of the Shannon certificate.

121. Likewise, it is clear from the correspondence that no representation was given that all transactions of EPIL would be treated as trading. On the contrary, it is clear from the exchange of correspondence described in paras. 109 to 113 that EPIL sought an assurance that its activities at Shannon constituted trading and this was rejected by the respondents. Instead, it was made clear in Mr. O'Leary's letter of 21st September, 2000 that the issue as to whether any particular transaction would constitute trading would be *"a matter of fact to be determined after the activities in question have taken place"*. This is consistent with the terms of the proviso (quoted in para. 46 above) subject to which the certificate was issued which makes it very clear that the question whether any particular operations or transactions are in the nature of trading operations and therefore chargeable to tax under Case 1 of Schedule D is one to be determined after the events in question have taken place. While both Mr. Enda Faughnan (who was formerly a partner in the firm of PwC and was formerly the head of its tax practice in Ireland) and Mr. Conor O'Brien of KPMG both suggest that the proviso was interpreted and applied in practice by the Revenue *"so that a taxpayer's activities would be taxed as a Case 1 trade subject to the 10% rate so long as it actually carried on the activities outlined in the relevant certificate"*, that evidence does not appear to me to be relevant to the question of whether a representation was made to the applicant. If Perrigo is to establish the first of the pre-conditions to its legitimate expectation claim (as explained in *Glencar)*, it must demonstrate that a representation was made by the Revenue or one or more of the other respondents to it. Contrary to its case, it is clear from the correspondence between the parties that it sought confirmation that its activities constituted trading and this confirmation was refused by the respondents who made it very clear that the issue as to whether a particular transaction constituted trading would be subject to individual analysis.

122. The approach taken in the correspondence is also consistent with the terms of the certificate itself. As noted in para. 46 above, the certificate contains a proviso which specifically makes clear that the question of whether EPIL is trading (and if so whether any of its particular operations constitute trading) was an issue to be determined after the operations in question have taken place. In my view, not only is the certificate limited to transactions in the nature of licencing and other similar arrangements but it is also very clearly subject to the proviso. I cannot see any basis upon which it can plausibly be suggested that the proviso is in some way a "*footnote"*. It is an inherent part of the certificate and it cannot be ignored.

123. Nor can I see anything in the terms of s. 445 of the 1997 Act that would cause me to take a different view. As discussed in paras. 66 to 68 above, s. 445 (10) (when read in conjunction with s. 448 (2)) seems to me to expressly envisage that an inspector of taxes is entitled to put a tax payer on proof that any particular transaction constitutes trading even where the tax payer holds a certificate granted by the Minister under the section.

124. In reaching this conclusion, I have not lost sight of the argument made on behalf of Perrigo that such an interpretation of the certificate (or indeed such an interpretation of s. 445) would make no commercial sense. I reject that submission. The grant of a certificate would, in my view, provide significant comfort to a tax payer that, for as long as it carried on a trade in Shannon of the kind mentioned in the certificate, it would be entitled to the special manufacturing rate of tax at 10%. That rate of tax would not, however, apply to transactions which were of a capital rather than a trading nature. That does not, in my view, undermine commercial certainty. It is simply a consequence of the fact that different rates of tax apply to capital transactions, on the one hand, and trading transactions on the other. As discussed in para. 79 above, the risk that a particular transaction might constitute a capital transaction is not an unusual or exceptional risk. The principles which are applicable are well established

and the tax payer's tax advisor will be able to assist in providing appropriate advice with regard to the application of those principles in relation to any individual transaction under consideration by the tax payer.

125. In the circumstances described above, I have come to the conclusion that Perrigo has failed to establish the necessary representation on the part of the respondents in order to give rise to a legitimate expectation claim on the basis of the certificate. As the existence of a representation is a precondition to establishing legitimate expectation, it follows that the case made by Perrigo by reference to the certificate must fail. In the circumstances, no useful purpose would be served in considering whether any of the other preconditions to the establishment of a legitimate expectation have been satisfied in relation to this element of Perrigo's case. That is not, however, the end of the matter. As noted above, Perrigo also maintains a legitimate expectation claim in respect of the alleged representations summarised in para. 8 (b) to (d) above. It is next necessary to consider each of these, in turn.

The second category of representation based on TB 57

126. Perrigo alleges that TB 57 gives rise to a separate but related representation to that considered in paras. 24 to 125 above. According to counsel for Perrigo, paras. 13, 58 and 59 of the statement of grounds are relevant to this alleged representation. According to paras. 13 and 58 of the statement of grounds, when the Shannon and IFSC regimes were approaching their expiry, tax practitioners (including KPMG) and Shannon and IFSC certified companies sought clarity and assurances from the Revenue in respect of the rate at which profits (arising from the continuance of the pre-existing trading activities identified in the relevant certificates) would be taxed after the expiry of the 10% rate of tax which had been applicable under both the Shannon and IFSC regimes. Following meetings held between senior representatives of the Revenue (including the then Chairman of the Revenue) and the Heads of Tax or senior tax partners at the four largest accountancy firms in Ireland (including

EPIL's tax advisors KPMG) it is alleged that the Revenue, through TB 57 confirmed that the tax treatment of Shannon certified companies would not change at the expiry of the Shannon regime.

127. In para. 59 of the statement of grounds it is alleged that TB 57 was issued for the purposes of being relied upon by tax payers and in order to reduce the number of queries which the Revenue had to manage in respect of the issue. It is also contended that the alleged representation was intended by the Revenue to be relied upon and that it was in fact relied upon by EPIL and its advisors KPMG in the preparation of its corporation tax returns and in the tax computations prepared annually thereafter. As evidence of that reliance, para. 61 of the statement of grounds refers to the annual report for 2005 of EPIL's then parent, Elan Corporation plc (which included consolidated financial statements for the Elan Group of companies including EPIL) which contains the following statement:

> *"Income arising from qualifying activities in our Shannon-Certified subsidiary is taxable at the rate of 10% until 31 December 2005. From 1 January 2006, such income is taxable at the rate of 12.5%".*

128. By way of background, I should explain that the general rate of corporation tax was reduced by s. 21 of the 1997 Act to 12.5% for trading income of companies and was first applied generally from 1st January 2003. According to Mr. Conor O'Brien of KPMG, tax practitioners, in view of the pending expiry of the Shannon and IFSC regimes, were keen to obtain *"some clarity and assurances"* from the Revenue on behalf of their clients regarding the tax treatment of companies exiting the IFSC and Shannon regimes. Mr. O'Brien said that meetings took place between senior personnel in the Revenue (including the then chairman) and the Heads of Tax at the four large accountancy firms at which tax practitioners asked the Revenue to confirm that the trading position of IFSC/Shannon Certificate holders would not change following the cessation of those regimes. Mr. O'Brien referred to TB 57 issued in

October 2004 as the response to that request. In his affidavit, he quoted two sentences from TB 57 in which the Revenue state that trading activities already meeting the requirements for the IFSC and Shannon regimes *"will qualify for the 12.5% tax rate".* Mr. O'Brien then said in para. 13 of his affidavit that:

> *"13. The representation made by the Second Named Respondent as set out in the Tax Briefing was accepted by tax practitioners and their clients and relied upon and, from my experience of advising in respect of these matters at that time, I say and believe that it was issued precisely for that purpose."*

129. Mr. O'Brien also referred to correspondence which took place between KPMG on behalf of individual clients and responses provided by the Revenue. However, I do not believe that this material can be relied upon for the purposes of establishing a representation made to EPIL for the purposes of these proceedings. Such material might well be relevant to the position of the taxpayers to which it relates. However, it is clearly not relevant to the position of EPIL. Moreover, such material does not form any part of the statement of grounds which relies, in the context of this alleged representation, solely on TB 57.

130. It is therefore necessary to consider the terms of TB 57. This is a detailed document running to sixteen pages of which three (pp 10-12) are concerned with the new 12.5% general rate of corporation tax introduced by s. 21 of the 1997 Act. In the introduction to this section of TB 57, the Revenue referred to the provisions of s. 3 (1) of the 1997 Act insofar as it addresses the meaning of "*trade"*. The document notes that, in circumstances where *"trade"* is not specifically defined, the term takes on the "*generally accepted meaning".* The briefing continues by stating:

> *"Guidance as to what constitutes 'trading' is available from case law and from a set of rules known as the Badges of Trade. Revenue views on what constitutes trading*

are set out in the Revenue leaflet 'Guidance on Revenue Opinions on Classification of Activities as Trading'. …".

131. The briefing includes at p. 12 a note on the badges of trade. The introduction also informs the reader that the Revenue *"give advance opinions in large inward investment cases. As a result, there is a body of decided cases and these can be accessed on the Revenue website…".*

132. The briefing also explains that the introduction of the general 12.5% corporation tax rate for profits from trading activities of companies was *"focusing attention on what activities can be classified as giving rise to trading income. Revenue is increasingly being asked to give opinions as to the appropriate classification for tax purposes. The purpose of this note is to give general guidance as to how Revenue approaches the subject and to outline the type of information that should accompany a request for an opinion".*

133. The briefing then describes that, under the self-assessment system, the question of whether a company is trading is decided initially by the company itself. The briefing states that, for most companies, it will be obvious whether or not they are trading. The briefing further explains that, where a tax payer has a doubt about the tax treatment, the taxpayer can take a view on the issue and express doubt under s. 955 of the 1997 Act in the relevant return. It is further explained that *"A formal expression of doubt protects the taxpayer from interest and penalties in the event that Revenue, for example, in the context of an audit, take a different view of the tax treatment at a later date".*

134. This description of the self-assessment system is of some relevance in the context of the case made by Perrigo in relation to the third aspect of the alleged representations (addressed in the next section of this judgment). This brief description in TB 57 is consistent with the case made by the Revenue here that it is for the taxpayer in the first instance to reach a determination as to whether its activities constitute trading. However, that determination is

always subject to a subsequent review and audit within the relevant statutory period by the Revenue who may take a different view.

135. As noted above, Mr. O'Brien, in his affidavit has highlighted two sentences in TB 57. These appear in the following section of TB 57. In my view, it is important to put those two sentences in the context of what is said in this section of TB 57 as a whole:

> *"**Trading***
>
> *...In the vast majority of cases there will be no doubt about whether a company's activities constitute trading. Companies manufacturing, dealing in articles or commodities and those providing services will all come within the 'trading' description. The 10% tax regime for companies in the IFSC and Shannon applies only to income arising from trading activities. Therefore, such activities already meeting the requirements of these regimes will qualify for the 12.5% tax rate.*
>
> ***Relevant Issues***
>
> *Whether or not, in any situation, a trade is being carried on is determined by an examination of the facts of the particular case and by interpreting those facts in the context of the badges of trade and of case law insofar as it applies. There are an infinite variety of possible factual circumstances so that no fixed formula can be applied to determine whether or not an activity can be classed as 'trading'. As already pointed out in the previous paragraphs, in the vast majority of cases there will be no doubt about whether the activities constitute trading…."*.

136. Both Mr. O'Brien of KPMG and Mr. Faughnan of PwC purport to give evidence as to how the Tax Briefing was understood and relied upon by tax practitioners. In paragraph 15 of his affidavit, Mr. Faughnan (having referred to the same two sentences of TB 57 as those highlighted by Mr. O'Brien and having referred to correspondence with the Revenue relating to IFSC companies) says as follows:

"15. The Tax Briefing was understood and relied upon by me and, I believe, by my tax practitioner colleagues as a representation from the Second Named Respondent to the effect that provided companies continued to carry on the activities listed in their Shannon or IFSC certificates as they had done to date, those activities would continue to attract corporation tax at the new rate of 12.5%. It is my understanding that the Second Named Respondent understood this to be the case and I was very comfortable with this position as I knew that the Second Named Respondent would in every case have been fully involved in the detailed certification process for the Shannon and IFSC tax certificate. The fact that the certified activities had been negotiated and approved to qualify as 'trading' and that these trading activities had to have commenced before the tax certificates issued in relation to them, was consistent with the Second Named Respondent's representation that those companies who continued the same trading activities post the expiry of the Shannon and IFSC regimes 'will qualify for the 12.5% tax rate'".

137. In para. 16 of his affidavit Mr. Faughnan goes on to say that he occasionally had reason to correspond with the Revenue on behalf of individual clients who were certified under either the Shannon or IFSC regimes and who wished to have specific rulings on their behalf in relation to their post December 2005 trading status. Mr. Faughnan said that he recalls a number of such specific rulings being given by the Revenue but that "*most clients did not seek such a ruling primarily because of the reassurances given by the Second Named Respondent through the other means referred to above".*

138. Counsel for the respondents strongly argued that this evidence was inadmissible. He argued that, insofar as any of the deponents sought to give evidence as to the understanding of the tax community at large, such evidence constituted inadmissible hearsay. For my part, I do not believe that it is necessary to make a finding that the material in question is

inadmissible. It is unnecessary to do so in circumstances where I do not believe, on any fair reading of TB 57, it can plausibly be suggested that the Revenue was representing that any activity carried on by the holder of a Shannon Certificate would be treated as trading. As noted above, the case made by Perrigo is on the basis of TB 57 and on the basis of the pre-existing Shannon Certificate. It does not make any case based on any specific representation made to it and therefore the material to which Mr. Faughnan refers in very general terms (without any particulars or details) is not relevant to the case which Perrigo seeks to make.

139. Taking the passage quoted in para. 135 above, it seems to me that this passage conveys the following messages:

(a) In the first place, it explains that, in the vast majority of cases, there will be no doubt about whether a company's activities constitute trading. This must be read with what is said earlier in the same section of TB 57 relating to the meaning of *"trading"* and the application of the rules known as the Badges of Trade;

(b) Secondly, the passage makes crystal clear that the 10% tax regime for companies holding IFSC and Shannon certificates *"applies only to income arising from trading activities".* Crucially, this does not suggest that all activities of a company in the IFSC or Shannon regime will constitute trading activities. On the contrary, it makes clear that the 10% regime applied only to income which arose from trading activities.

(c) The next following sentence (which is the one on which Mr. O'Brien and Mr. Faughnan principally rely) continues:

> *"Therefore such activities already meeting the requirements of these regimes will qualify for the 12.5% tax rate".*

The reference to "*such activities"* clearly refers back to the *"trading activities"* mentioned in the preceding sentence. Contrary to the suggestion made by Mr.

O'Brien and Mr. Faughnan, the sentence does not suggest that all activities of companies previously in the IFSC or Shannon regimes would qualify for the 12.5% rate. Only *"such activities"* (i.e. trading activities) already meeting the requirements of the IFSC and Shannon regimes will do so.

(d) In addition, the next following sentence makes very clear that whether or not *"in* ***any*** *situation"* (emphasis added) a trade is being carried on is to be determined by *"an examination of the facts of the particular case and by interpreting those facts in the context of the badges of trade and of case law".* While an attempt was made by counsel for Perrigo to suggest that this sentence applies to the generality of cases and not to the specific cases addressed in the preceding paragraph of TB 57. I cannot accept that this is so on any fair reading of the sentence. The sentence clearly applies in any situation.

Conclusion in relation to Perrigo's case based on TB 57

140. Accordingly, for all of the reasons discussed in para. 139 above, I have come to the conclusion that TB 57 cannot be construed as a representation of the kind contended for by Perrigo. On the contrary, TB 57 is consistent with the warning previously contained in the proviso to the Shannon Certificate that the questions as to whether a company is trading and, if so, whether any of its particular operations are trading operations are to be determined after the events in question have taken place. The section of TB 57 (summarised in para. 133 above) also highlights that it is for the taxpayer company to form its own view, under the self-assessment system, as to whether a transaction is or is not trading and that a different view might potentially be taken by the Revenue in the context of an audit at a later date.

141. In circumstances where TB 57 does not give rise to the representation alleged, there can be no basis for a legitimate expectation claim on foot of the tax briefing. Accordingly, this element of the legitimate expectation claim, advanced by Perrigo, fails and it is

unnecessary to consider whether the other preconditions identified in *Glencar* have been satisfied in respect of this component of Perrigo's claim.

142. Even if I am wrong in my view as to the meaning and effect of TB 57, this would be of no assistance to Perrigo in this case in circumstances where, for all of the reasons discussed in paras. 34 to 125 above, I have come to the conclusion that the Shannon Certificate did not, in any event, extend to outright disposals. Thus, even if TB 57 could be construed as a representation that all activities covered by a certificate previously given under the Shannon regime would be taxable at 12.5% following the expiry of that regime, such a representation could not be relied upon by Perrigo in respect of a transaction (namely an outright disposal) which was not of a kind covered by the certificate in the first place.

The representation alleged to arise as a consequence of the course of dealing between the parties

143. This element of Perrigo's case is focused on the interactions between the Revenue and EPIL and its tax advisors over a long period of years during which (so it is alleged) EPIL made tax returns accompanied by financial statements which clearly showed that disposals of intellectual property were being treated by EPIL as part of its trade. Notwithstanding extensive dealings between the parties and in particular between EPIL and its tax advisors, on the one part, and the Large Cases Division (*"LCD")* of the Revenue, on the other, no question was ever raised by Revenue in relation to the tax treatment of intellectual property disposals until the audit findings letter of 30th October, 2018.

144. The relevant paragraphs of the statement of grounds which are said to be relevant to this aspect of Perrigo's case are paras. 9, 14, 55, 58, 64-65, 74-75, 89, 91-92, 113 and 122. Insofar as this aspect of Perrigo's case is based on the statutory context, this is addressed in paras. 145 to 149 below. In para. 150 and following paras. I attempt to summarise the balance of the case made by Perrigo.

The statutory context on which Perrigo relies

145. In order to understand this aspect of the case made by Perrigo, it is necessary to keep in mind the statutory regime dealing with the making of returns and assessments. Perrigo has highlighted that the statutory regime falls into two parts, the first (found in Part 41 of the 1997 Act) covers taxable periods prior to 1st January, 2013 while the second (found in Part 41A) covers taxable periods subsequent to 1st January, 2013. In respect of taxable periods prior to 1st January, 2013, Perrigo draws attention, in paras. 8 and 9 of the statement of grounds, to the provisions of s. 954 (2) and s. 954 (3) of the 1997 Act which governed the making of assessments during those periods. Section 954 (2) states:

> *"(2) Subject to subsection (3) an assessment made on a chargeable person for a chargeable period shall be made by the inspector by reference to the particulars contained in the chargeable person's return".*

146. Although that subsection envisages the making of an assessment by the inspector, the provision is nonetheless consistent with the self-assessment system of taxation in that the assessment is made by reference to the particulars contained in the return made by the tax payer. However, Perrigo argues that it is clear from the text of the subsection that it must be read in conjunction with (and subject to) s. 954 (3) which (so Perrigo argues) shows that the inspector has a role in reviewing the return and may make an assessment if he or she is not satisfied with the return.

147. Section 954 (3) provides as follows:

> *"(3) Where—*
>
> *(a) a chargeable person makes default in the delivery of a return for a chargeable period, or*
>
> *(b) the inspector is not satisfied with the return which has been delivered, or has received any information as to its insufficiency,*

nothing in this section shall prevent the inspector from making an assessment in accordance with section 919 (4) or 922, as appropriate."

148. In respect of periods subsequent to 1st January, 2013, s. 959R and s. 959W now govern the making of returns. Those provisions are in somewhat different terms to s. 954(2) and s. 954(3) of the 1997 Act. The provisions of s. 959R and 959W were inserted by s. 129 of the Finance Act, 2012 and are considered further below. The combined effect of those provisions is that the tax payer now makes the assessment without any intervention by an inspector at all.

149. With reference to s. 954 (2) and s. 954 (3), the case is made in para. 9 of the statement of grounds that, by raising an assessment in accordance with EPIL's return and not subsequently amending the assessment, the Revenue were thereby declaring themselves satisfied with the contents of the return. Although not advanced as part of the opening of Perrigo's case, counsel for Perrigo, in the course of his reply, also drew attention to s. 956 (1)(a) of the 1997 Act which provides that:

"For the purposes of making an assessment… or amending an assessment, the inspector–

(i) may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and

(ii) may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains or allow any deduction, allowance or relief by reference to such statement or particular".

Counsel argued that, in contrast to the position under ss. 959R and 959W (dealing with taxable periods after 1st January, 2013), these statutory provisions clearly envisage a role for the inspector in the imposition of the tax liability. Counsel characterised the inspector's role

in making the assessment under s. 956 (1)(a) as being *"interposed between the return and the liability to tax"*. Counsel contrasted this position with the current position under ss. 959R and 959W (contained in Part 41A) under which the self-assessment is made by the taxpayer by reference to the particulars contained in the taxpayer's return without any active intervention by an inspector of taxes. Section 959R (1) provides that every return must include a self-assessment by the taxpayer while s. 959W (1) provides that a self-assessment made by a taxpayer under s. 959R must be made by reference to the particulars contained in the taxpayer's return. It will be necessary at a later point in this judgment to consider Perrigo's arguments in relation to the statutory context in more detail. It is sufficient, at this point, to record that the provisions identified above (on which Perrigo expressly relies) cannot be read on their own. There are a number of other provisions which are highly relevant and which form part of the statutory context governing the system of assessment of taxes.

150. In para. 55 of the statement of grounds, the case is made that, throughout the period 1997 to 2005, EPIL at all times accounted for corporation tax at the 10% rate in accordance with its Shannon Certificate on its trading activity which included disposals of intellectual property. The case is made that, at no point was any issue or concern raised by the Revenue as to the treatment of intellectual property rights as stock in trade and that it was never suggested that the disposals were not part of its trade. The case is also made that, as a subsidiary at the time of Elan, one of the largest Irish companies, EPIL had an ongoing and constant relationship with the Revenue and that, if the Revenue had any contrary view as to the nature of its trading income, EPIL and KPMG as its tax advisors would have legitimately expected such a concern to be raised. The statement of grounds highlights that such a concern was not raised and, for many years, EPIL ordered its tax affairs accordingly.

151. At para. 64 of the statement of grounds, it is stated that information was provided to the Revenue on an annual or periodic basis for each of the relevant accounting periods. This comprised:

(a) The form CT 1 namely the tax return. This set out the profits and losses and constituent figures and the various tax charge headings for the period (as set out in the prescribed form);

(b) Secondly, EPIL was required to provide its financial statements to the Revenue which included a profit and loss account, an income statement and a balance sheet together with a director's report, auditor's report and detailed notes explaining and analysing the figures;

(c) Thirdly, EPIL supplied a tax computation which set out the basis for the calculation of the various tax figures disclosed in the CT 1 form. This continued up to and including the year ended 31st December, 2007. After the mandatory online filing of corporation tax returns was introduced (in respect of returns filed after 1st January, 2009) supporting tax computations were sent to the Revenue only where they were specifically requested. In para. 73 of the statement of grounds, it is confirmed that the Revenue specifically requested the tax computations for the years ended 31st December, 2009, 2010, 2011 and 2012.

The establishment of the Large Cases Division within the Revenue

152. In para. 65 of the statement of grounds, Perrigo refers to the establishment of LCD in the course of a programme of organisational change within the Revenue undertaken throughout 2002 and 2003. When LCD was established, businesses with an annual turnover in excess of €125 million or annual tax payments in excess of €12 million were generally

within the remit of LCD. According to para. 65, EPIL's annual turnover has been in excess of €125 million since 1st January, 1999 such that EPIL was within the remit of LCD when it was first established in 2002/2003. I believe it is fair to say that no particular emphasis is placed on the establishment of LCD in the statement of grounds. However, in para. 61 of his affidavit sworn on 5th July, 2019, Mr. Jim Clery (the partner in KPMG who acted on behalf of EPIL in relation to tax matters and tax returns) drew attention to the following:

> *"61. In an article published in the Irish Tax Review in 2004, Sean Moriarty who was an official in [the Revenue] … explained the rational (sic) for the formation of … [LCD] … which, following its formation, handled the tax returns and computations filed by the Applicant. The article described how major corporate groups were being profiled by … [the Revenue] … and warned that all taxpayers under the control of LCD should expect an audit within the next five years. Within LCD, taxpayers were grouped by industry sector … meaning that the LCD officials dealing with the Applicant dealt with all of the heads of tax to which the Applicant was subject. Following the establishment of LCD, the Applicant was subject to two audits (one relating to VAT returns and [another] relating to PAYE returns). The Applicant's and my reasonable expectation was that its trading activities and corporation tax returns, given the relative quantum in comparison to VAT and PAYE, would have been reviewed before [the Revenue] … chose to audit the VAT and PAYE returns…."*

<u>The article in the Irish Tax Review 2004</u>

153. The article published in the Irish Tax Review 2004 is too lengthy to replicate here. However, the article explains that *"Revenue is saying a number of things to large business management"*. The article then lists these and they include:

(a) A reference to a desire on the part of the Revenue to have a dialogue about the obligations of large businesses in relation to tax and duty compliance;

(b) The writer of the article calls on large business to engage with the Revenue in working towards agreement on what constitutes high compliance "*which will leave no room for surprises on either side";*

(c) In addition, the article states that a process of review should be started *"of your own or your company's compliance across all taxes and duties and let this become a foundation for a system, which institutionalises a rolling review";*

(d) The article called on taxpayers to talk to the Revenue before they put in place *"tax schemes or structures about which you have doubts";*

(e) The article also warned that Revenue audits are a fact of business life and all cases dealt with in LCD *"can expect an audit of some kind within the next five years"* but it was also stated that:

"the nature and scale of that audit will depend on perceptions of risk. Auditors are equipped to understand your business, and through risk assessment systems, to hone in on areas where compliance practice is suspect in relation to any tax or duty".

(f) The article also stated that, while the Revenue had limited resources, it would do its best to give taxpayers and their advisors guidance on *"genuine non-hypothetical business situations where you are unsure about the interpretation of tax or duty law or practice";*

(g) With regard to tax advisors the article stated that there would essentially be no change in the relationship between the Revenue and such advisors and that the Revenue regarded *"the tax advisor as the cornerstone of the system and will be very careful to do nothing which would undermine this role".*

154. In para. 62 of his affidavit, Mr. Clery said:

> *"62. I am aware of two meetings having taken place between the Applicant and [the Revenue] … in the period between 2004 and 2009 and I am also aware that there was correspondence and discussions directly between the Applicant's tax team and the LCD representatives throughout the period that LCD was dealing with the Applicant. In my opinion, the relationship between the Applicant and … LCD … was very open and constructive. At no stage, including during the two meetings in 2004 and 2009, did … [the Revenue] … express any concern or disagreement with the manner in which the amortisation, impairments or disposals of IP were dealt with in the corporation tax returns and supporting tax computations filed by the Applicant each year, which … clearly evidenced the. … tax treatment of disposals of IP….."*

The email of 26th July, 2005 from Mr. MacSuibhne

155. Mr. Clery exhibited two emails in this context including an email dated 26th July, 2005 sent by Mr. Niall MacSuibhne of the Revenue to Mr. Alan Campion of Elan. The email was sent in the context of an application made by EPIL for a refund of tax withheld on royalty receipts. The email confirmed that the Revenue was prepared to grant the application sought. The email continued in these terms:

> *"I have confirmed that Large Cases Division regard Elan as compliant taxpayers, and as such have no objections to the payments being made gross. If there are any problems in the future, please do not hesitate to contact me".*

The email of 18th June, 2009 from Mr. Neenan

156. The second email exhibited by Mr. Clery is an email of 18th June, 2009 from Mr. Paul Neenan of the Revenue to Noel Kehoe at Elan in relation to a meeting which had taken place

on the preceding day. The email addressed a number of matters. In the course of the email, Mr. Neenan said:

> *"… The meeting gave me the opportunity to make a presentation to you on the Cooperative Approach to Tax Compliance-Revenue Working with Large Business. I have discussed this with you several times over the past couple of years but the presentation this morning allowed me to highlight the many ways that we have worked together very effectively since the establishment of Large Cases Division and the emergence of the case manager system and to demonstrate that this is what is envisaged under the Cooperative Compliance Approach….*
>
> *I believe that much of the work we have done to date does away with the need for a formal risk review at this time … ".*

157. In para. 66 of his affidavit sworn on 5th July, 2019, Mr. Clery says, having exhibited the emails described above, continues in the following terms:

> *"66. Correspondence such as this reinforced my belief and the Applicant's belief that the Applicant had been correctly accounting for tax; indeed, their correspondence cannot reasonably be construed as having any other meaning. An integral part of the tax treatment was the treatment of IP as part of the Applicant's stock in trade".*

158. Notwithstanding this averment on the part of Mr. Clery it should be noted that neither the email of 18th June, 2009 nor the email of 26th July, 2005 are identified in the statement of grounds as specific representations giving rise to any legitimate expectation on EPIL's part. Nor is any reference made in the statement of grounds to the article in the Irish Tax Review which drew attention to the establishment of LCD. It is true that the establishment of LCD is mentioned in the statement of grounds in relation to the third category of representation relied upon but the statement of grounds does not go so far as to make the case subsequently argued in para. 61 of Mr. Clery's affidavit. Quite apart from the issue that arises in light of the

judgment of Barniville J. in *Rushe v. An Bord Pleanala* and the decision of the Supreme Court in *A.P. v. DPP*, it is surprising, to say the least, that if these emails had been relied upon by EPIL in taking the approach adopted by it in respect of IP disposals in its tax returns and computations, no mention is made of them in the statement of grounds. If EPIL had relied on any representation made by the Revenue, it would, undoubtedly, be highlighted in the statement of grounds. Moreover, the language used by Mr. Clery in para. 66 of his affidavit is quite guarded and he does not go so far as to suggest that the emails gave rise to any particular form of representation. Instead, in para. 67 of his affidavit, he placed more significant reliance upon the fact that the Revenue never challenged EPIL on its tax treatment of IP. Given that fact and the Shannon Certificate, TB57 and *"the presence and continual oversight by LCD of large corporates"* and the filing of returns *"unchallenged for almost twenty years"* Mr. Clery contended that EPIL had a reasonable expectation that the respondents would not perform a *"retrospective volte face"* and would not seek to revisit the tax position and would not thereby revisit the tax position and would not *"thereby seek to charge it to tax on the 2013 disposal of Tysabri IP".* In order to consider that case, it will be necessary to review, in more detail, the material provided by EPIL to the Revenue over the years. The case made by Perrigo in this context is summarised in paras. 160 to 166 below and the underlying material is addressed, in more detail, in paras. 177 to 204 below

159. Although not developed in the statement of grounds, Perrigo, in the course of the evidence subsequently filed on its behalf, has made the case that both it and its tax advisor understood that those officers of the Revenue employed in LCD were highly skilled persons well capable of reviewing and understanding the material furnished to LCD on an annual basis by EPIL (as it then was). Thus, for example, in the affidavit of Todd Kingma sworn on behalf of Perrigo on 3rd December, 2019, it is stated in para. 23:-

> *"23. ...I say and believe that the Applicant expected and was entitled to expect that the Respondents were employing individuals with the appropriate level of skill and experience to perform the task assigned to them."*

160. This point was developed further in the course of the oral submissions made by counsel for Perrigo. Counsel referred to the qualifications of some of the deponents of the affidavits sworn on behalf of the respondents which, counsel submitted, strongly suggested that the deponents had the necessary expertise to review and analyse the material submitted to the Revenue by EPIL and its tax advisers. Counsel submitted that this was particularly so in circumstances where, as was acknowledged on behalf of the respondents in the course of their affidavits, the Elan Group was regarded as a *"high profile"* taxpayer.

The case made in relation to the manner in which IP was treated in the materials supplied by EPIL to the Revenue

161. In its statement of grounds, Perrigo has expressly relied upon the manner in which (without contest by the Revenue) the financial statements and tax computations were submitted every year and it contends that they illustrated that EPIL had very clearly treated its intellectual property as trading stock or circulating capital. The case made by Perrigo in reliance on the financial statements and tax computations is described in more detail in paras. 176 to 202 below. At this point, I will confine myself to a summary of the case made in the statement of grounds. At para. 74 of the statement, Perrigo makes the case that, as a result of the possession by the Revenue of the returns made (and, in particular, the financial statements and tax computations), both the inspector and the Revenue had *"complete visibility of the… treatment of transactions in IP including… treatment of IP disposed in each accounting period"*. Perrigo contends that it was self-evident from the material provided annually to the Revenue that EPIL was treating, for tax purposes, the acquisition and holding of IP rights as trading stock or circulating capital and that all disposals of such IP rights were included in the

Schedule D Case I trading profit/loss disclosed in the form CT 1. Perrigo contends that this was obvious from the fact that no adjustment was made to the operating profit in the tax computations for: -

(a) Acquisitions of IP;

(b) Amortisation of IP;

(c) Impairments of IP; and

(d) Disposals of IP.

162. It is Perrigo's case that it was thus readily apparent that all profits and losses from IP disposals were returned as Schedule D Case I trading profits and that IP was treated as trading stock. Perrigo relies upon the fact that the Revenue issued assessments for all of the years in question in agreement with the returns and thus in agreement with the tax computations. Perrigo argues that the returns demonstrate not only full compliance with its filing obligations but also that, in doing so, the Revenue were fully apprised of the fact that IP was consistently treated as trading stock and EPIL repeatedly accounted for tax on the disposal of IP as trading transactions. In paras. 176 to 204 below, I address, in more detail, the information provided to the Revenue on an annual basis by EPIL.

163. In paras. 77 to 84 of its statement of grounds, Perrigo addresses the returns made in 2001 to 2004 during which a number of disposals of IP rights took place. For example, in respect of the 2001 tax year, EPIL disposed of IP rights to a number of compounds including Diastat, Mysoline, Nasarel and Nasalide. In para. 77 of the statement of grounds, it stated that these disposals led to a taxable Schedule D Case I income of US$165,310,902. There was no adjustment for these disposals and Perrigo maintains that this indicates that the sale was treated as part of the trade. Perrigo highlights that not only was the disposal of the IP treated as part of an IP trade, but there was also intangible asset amortisation of US$42 million which was disclosed in Note 10 of the Financial Statements and was not adjusted in

calculating the tax adjusted profit of the trade in the tax computation as it was treated as amortisation of trading stock. Perrigo maintains that the *"correctness"* of this treatment was entirely dependent upon the IP in question being trading stock for tax purposes and was entirely consistent with the treatment of the IP as trading stock and not as a capital item.

164. As noted above, the statement of grounds also addresses disposals made by EPIL in the tax years 2002, 2003 and 2004. In paras. 86 to 92 of the statement of grounds, further examples are given of IP disposals in the 2009, 2010 and 2011 tax years. In para. 88, Perrigo highlights a transaction in the 2011 return. In that period, there was a sale of IP with a net book value of US$26.2 million for consideration of US$299 million. The gain of US$272.8 million was included in the gains allocated to the IP trade and no adjustment was made for this portion of the net gain such that it was taxed as a Schedule D Case I receipt from the IP trade. The relevant transactions reflected in the IP trading profit were included in Note 12 of the Financial Statements and in Note 3 on p. 23 of the Tax Computations. In para. 89 of the statement of grounds, Perrigo contends that it is *"inconceivable"* that the Revenue (who had expressly requested tax computations from EPIL) did not consider the treatment of IP gains in the 2011 tax year.

165. In that year (as in every previous year), assessments were issued in conformity with the EPIL return and no query was raised by the Revenue then or since in respect of any aspect of EPIL's Schedule D Case I trading income for that accounting period. Furthermore, in para. 91 of the statement of grounds, Perrigo expressly contends that the acceptance by the Revenue of the tax returns *"by the issuance of an assessment in accordance with those returns"* for a period of fifteen years prior to 2013 and the absence of any amended assessment or the expression of any doubt or reservation as to the status of the IP as stock in trade constituted *"collectively and individually, an express and/or implied representation that the* [Revenue]*... were satisfied with the content of those returns and, in particular, that all of*

the IP held by the Applicant was held as stock in trade. The quality and effect of this representation was amplified by its repeated nature, since precisely the same course was followed in respect of each period of assessment since 1997". This allegation must be seen in light of the case made by Perrigo in respect of a statutory context discussed in paras. 145 to 148 above.

166. In addition, in para. 92 of the statement of grounds, Perrigo contends, that during this time, EPIL and its advisors, KPMG, met or corresponded with various officials of the Revenue and discussed its tax affairs with the LCD. No issues were ever raised during that period with regard to the status of IP as stock in trade of EPIL's business. At no stage was any expression of concern made. Nor was any objection raised in relation to the manner in which disposals of IP were addressed in the tax returns filed by EPIL each year.

The disposal of the Tysabri IP

167. The disposal of the Tysabri IP took place in the 2013 tax year. In September, 2014, KPMG submitted the relevant CT 1 form to the Revenue and in October, 2014, the financial statements for the 2013 period of assessment were also submitted together with a corporation tax computation. On 23rd September, 2014, the Revenue issued a letter acknowledging receipt of the corporation tax return for 2013. This letter was issued in the name of the inspector (who was the relevant district manager of LCD). The letter stated that the self-assessment disclosed an amount of profit chargeable to tax for 2013 in the amount of €137,454,830 and that the amount of tax chargeable for the period was €6,993,251 and that the balance of tax payable for the period was nil. In para. 94 of its statement of grounds, Perrigo claims that the amount of profit chargeable to tax for the period (namely €137,454,830) was inclusive of its Case I trading income after claiming Case I losses forward and that the amount is clearly derived from the *"net income for the year"* amount shown in the financial statement which

reflects (*inter alia*) the income from the sale of the Tysabri IP as described on p. 2 and Note 10 of the relevant Financial Statement.

168. In para. 98 of the statement of grounds, the background to the acquisition of the rights to Tysabri is set out. Perrigo explains that from 1st January, 2000, EPIL began to fund the continued development of Tysabri. It sought to find a collaboration partner with the necessary technical capability knowledge and experience in the area of multiple sclerosis research and development. Biogen was chosen as the counterparty as it satisfied both of those requirements. EPIL first disposed of 50% of its interest in the IP relating to Tysabri to Biogen in 2000 and received an upfront payment of US$15 million as reimbursement of research and development expenditure incurred to that date together with milestone payments if certain triggering events in the development process occurred. At the time of this partial disposal, Tysabri had not undergone the full clinical trials process and required *"hundreds of millions of dollars of additional research and development investment with absolutely no guarantee of success"*. Perrigo maintains that all income associated with the 2000 disposal was at the time treated and returned for corporation tax purposes as part of trading income and no issue was raised by the inspector or by the Revenue. Between 2004 and 2006, Tysabri was launched on the United States market, withdrawn from the market and subsequently relaunched. EPIL continued to actively manage the IP asset (representing the remaining 50% interest in the patents and the other IP relating to Tysabri) remaining in its portfolio. This was principally done through the detailed governance arrangements in the Collaboration Agreement with Biogen. It involved (*inter alia*) trying to establish the efficacy of the drug for the treatment of other diseases (such as Crohn's disease) and attempting to secure licences for its release in jurisdictions outside the United States.

169. Throughout this period of collaboration, EPIL did not manufacture Tysabri. Instead it was manufactured by Biogen. In April, 2013, the remaining 50% interest in the Tysabri IP

was sold to Biogen with the consideration paid in the form of an upfront payment together with future contingent payments. The upfront payment received from Biogen in 2013 was included in the trading income in the EPIL tax return filed with Revenue in September, 2014 for the 2013 period. Perrigo complains that it was not until 30th October, 2018, not long before the expiry of the applicable four-year statutory limitation period, that the Revenue issued the audit findings letter in which the contention was made, for the first time, that the disposal of IP did not constitute part of EPIL's trade.

The additional complaints made in relation to the audit findings letter

170. An additional complaint made by Perrigo is that the audit findings letter purported to retrospectively re-characterise previous IP disposals as not being trading transactions notwithstanding that the tax assessments in respect of those transactions had become final and conclusive and could not now be challenged by the Revenue under the 1997 Act. Notwithstanding a meeting which subsequently took place between the parties, Perrigo complains that, thereafter, on 29th November, 2018, the notice of amended assessment was issued (the legality of which is now challenged in these proceedings). Perrigo also complains that by issuing the amended assessment, the inspector and the Revenue are seeking to *"revisit"* the previous "*representations"* alleged to have been made by them. Perrigo also maintains that, by calling into question the characterisation of the historic transactions, this would (if the matter were to proceed before the TAC) place an extraordinarily onerous burden on Perrigo to demonstrate that the assessment is wrong and will force Perrigo to incur very considerable cost and expense (both in terms of management time and legal representation) and that months of intensive work by Perrigo and its tax and legal advisors will be required. It also draws attention to the fact that, in 2005, the death occurred of its former chairman, Mr. Donal Geaney (who it is alleged was involved in the formation of the EPIL IP trade and its establishment in Shannon and the disposal of the original 50% interest

in Tysabri to Biogen in 2000). It also highlights that none of the management team of EPIL in the period prior to 2015 are currently employed by the Perrigo group and that Perrigo has encountered significant difficulty recovering its records, many of which are unlikely to be available to it (albeit that efforts remain ongoing to recover and review whatever documents might be available). It is also alleged that this process will add very considerably to the expense of an appeal to the TAC.

The response of the respondents to this aspect of Perrigo's case

171. Before considering the material submitted by EPIL and its tax advisers to the Revenue on an annual basis, it may be helpful, at this point, to outline, in general terms, the position taken by the respondents in relation to this aspect of Perrigo's case. According to the statement of opposition and affidavit evidence before the court, the position taken by the respondents is that the making of assessments on foot of the tax returns submitted by EPIL did not involve any determination that the Revenue were satisfied with the contents of the return. On the contrary, it is alleged that, as part of the self-assessment regime that applied, the corporation tax returns of EPIL were processed by the Revenue in a *"non-judgmental manner"* and that, at all material times, the Revenue retained the right to make an amended assessment if information came to light which caused the inspector to become dissatisfied with the return (subject to the four-year time limit imposed by ss. 959 and 959AA of the 1997 Act). In addition, it is contended that, during most of the period prior to 1st January, 2013, EPIL was in a loss-making situation and that, as a consequence, no detailed interrogation of its returns occurred. The respondents maintain that EPIL would not have been considered a material tax risk for the Revenue.

172. The respondents make the case that the approach taken by the Revenue did not constitute a representation that appropriate tax treatment had been applied in the returns submitted on behalf of EPIL. It is argued that the case made by Perrigo in these proceedings

would undermine the operation of the self-assessment tax regime as provided for by the Oireachtas which proceeds on the basis that there are strict time limits curtailing Revenue's entitlement to challenge tax returns to a period of four years. However, the system envisages that such a challenge by the Revenue may be made at any time during that four-year period notwithstanding that the tax payer, under the self-assessment system, has previously made a full return of tax and an assessment has issued. It is further submitted that, if the doctrine of legitimate expectation applied in the manner suggested by Perrigo, there would have been no need for the four-year time limit to be imposed by the 1997 Act restricting the right of the Revenue to make assessments. Instead, the issuing of an assessment following the making of a return by the tax payer would be sufficient of itself to prevent the Revenue from issuing an amended assessment.

173. It is accepted by the respondents that corporation tax returns were submitted along with financial statements and tax computations over the years but it is contended that the Revenue did not carry out a review of the treatment of IP until September, 2016 following a review of the 2012 corporation tax return in that month. This is explained in more detail in the affidavit of Emer Smith, an officer of the Revenue, sworn on 25th September, 2019. In that affidavit, Ms. Smith says that, in August, 2016, she was assigned to review a repayment claim made by EPIL in respect of research and development credits in respect of the year ended 31st September, 2012. In carrying out that review, she undertook a detailed examination of the entire tax computation for the year ended 31st December, 2012 and that, in doing so, she crosschecked and totted the tax computation against the financial statements of the company for the same year. As part of that analysis, she reviewed the profit and loss account, balance sheet and the notes to the accounts for 2012 as well as the accounting policies disclosed in the financial statements and noted that the amortisation/depreciation charge for the year shown had not been added back in full in the tax computation. Based on

her review of the tax computation and financial statements, Ms. Smith says that she was unable to determine why the intangible asset amortisation had not been added back in full. She, therefore, made contact with EPIL who responded to say that the amortisation of IP was deductible *"in accordance with general trade deduction principles"*. This prompted Ms. Smith to make contact again with EPIL. She requested that she be provided with details as to why the amortisation charge in respect of intangible assets had not been added back in the tax computation. She specifically asked to be informed of the basis on which it was considered to be an expense of a revenue nature rather than a capital nature. It is clear from Ms. Smith's affidavit that it was her analysis of the 2012 accounts which led to the train of events which subsequently triggered a tax audit. According to the inspector, it was in the course of this audit, that the Revenue considered, for the first time, whether a trade in the buying and selling of IP was carried on. The inspector, Mr. McNamara, explains in his first affidavit that this was the first Revenue audit of the EPIL corporation tax returns and that it was the first time that the Revenue had considered the disposals by the applicant of intellectual property and the issue as to whether such disposals did or did not constitute trading activities.

174. In the statement of opposition, the case is made that the fact that the Revenue had not previously examined EPIL's treatment of IP did not, in any way, preclude it from doing so in September, 2016. The respondents again rely, in this context, on the self-assessment system which, according to them, operates on the basis that it is the Revenue's *"prerogative as to whether it reviews or makes enquiries in respect of a chargeable person's returns and when it chooses to do so, subject to the time limits provided for in the TCA"*.

175. With regard to the complaint made by Perrigo that the audit findings letter (and the consequent amended assessment) involved the retrospective re-characterisation of the transactions undertaken in relation to IP, the respondents, in their statement of opposition, maintain that it was necessary for the Revenue to have regard to the historical position in

order to understand what had taken place in respect of IP (including its acquisition and how it was held and disposed of). According to the respondents, it became apparent that the Tysabri IP had been a capitalised intangible asset on the EPIL balance sheet, amortised over an eleven-year period and, in advance of its disposal to Biogen in 2013, was treated as an asset for the sale under IFRS 5, the accounting standard which applies to non-current assets held for sale. The respondents also refer to the financial statements of EPIL from which it was clear (so they maintain) that the Tysabri IP was held as a capital asset which generated a substantial part of the income of the Elan Group as a whole. The respondents suggest that these factors indicated that the IP in question was held as a capital asset.

The material submitted by EPIL to the Revenue

176. As outlined above, the case made by Perrigo is that, in its tax returns, it did not hide its treatment of IP transactions. It argues that the failure of the Revenue to raise any query in relation to that treatment gives rise to an implied representation that the tax treatment of such transactions was acceptable to the Revenue. That said, it was acknowledged on the part of Perrigo that, in the EPIL financial statements, IP was treated as though it were a capital asset. However, when it came to the tax computations, submitted by EPIL (as it then was), there were no adjustments in the corporation tax computations for depreciation (or amortisation), for impairment or for profit and loss on disposal of IP. Counsel submitted that it was clear, in the circumstances, that the IP was being treated as trading stock for tax purposes. Counsel also submitted that EPIL was entitled to proceed in that way and that it is well recognised that the accounting treatment of a transaction is not determinative of whether any particular item is trading or capital in nature for tax purposes. Thus, it was argued that the fact that IP was treated in the financial statements as capital did not make it so.

The 1997 return

177. With a view to highlighting the extent of the information provided to the Revenue, counsel for Perrigo took me through some of the material furnished to the Revenue on an annual basis commencing with the tax return and financial statements for 1997. The approach taken by counsel was consistent with the case made in the statement of grounds. In the first place, counsel addressed the 1997 financial statements. In the director's report (at p. 2 of the financial statements), the principal activity of EPIL was explained in terms which counsel confirmed is consistent throughout the financial statements. The report states:-

> *"The company is involved in the purchase, development and exploitation of the rights to pharmaceutical products and the provision of financing facilities to associated companies. The company expects to significantly expand these operations in the future."*

178. Counsel submitted that, as highlighted in the affidavits sworn on behalf of Perrigo in the course of the proceedings, *"exploitation"* is understood, in the pharmaceutical industry, to include disposal. That said, exploitation can equally be said to include *"licencing"*. The description of the business is, therefore, not inconsistent with the description previously given of the proposed trading activities in the application for the Shannon Certificate. For completeness, it should be noted that counsel for the respondents drew attention to the difference in language between the description of the business of EPIL in the contemporaneous financial statements, on the one hand, and the description given in para. 36 of the statement of grounds where it is stated that: -

> *"The material trade of the Applicant was at all material times the acquisition of IP in pharmaceutical products with a view to enhancing the value of same and ultimately disposing of same at a profit".*

179. The financial statements for 1997 show a loss on ordinary activities (before interest and taxation) of US$11,188,786. This is made up in part of what is described in the profit and loss account as "*general and administrative expenses".* However, Note 2 (at p. 9 of the financial statements) and Note 4 (at p. 10) record a figure of US$288,333 as *"amortisation of intangible assets"*. When one compares this with the tax computation furnished in respect of the same year, this shows the loss (per the financial statements) at US$11,188,786 but no adjustment is made for amortisation. Counsel submitted that it was very clear in those circumstances that the intellectual property was being treated as a trading asset in the tax computations. As outlined below, this submission was repeated by counsel in respect of several subsequent years.

The 1998 return

180. In the case of the 1998 tax year, the financial statements showed an operating profit of US$18,407,751. Note 4 explained that the profit has been arrived at after charging for (*inter alia*) the amortisation of intangible assets in the sum of US$5,534,970 which counsel for Perrigo stressed was a significant figure. Yet, in the tax computation for that year, the figure for amortisation (or depreciation) was not adjusted. Counsel argued that if the depreciation had been added back at US$5,534,970 that would have generated a significant additional tax liability of 10% of that sum.

The 1999 return

181. In respect of the 1999 tax year, the profit and loss account of EPIL (contained within the financial statements furnished to the Revenue) showed a figure for profit on ordinary activities before interest and taxation of US$38,523,324. Before arriving at that figure, a number of deductions are made in respect of expenses including a deduction of US$44,699,639 in respect of research and development expenses. Counsel for Perrigo

highlighted that this very significant figure was *"expensed"* to the profit and loss account and he also emphasised that the deduction exceeds the net figure for profit (before interest and taxation). Counsel for Perrigo also drew my attention to Note 5 which states that the operating profit before taxation had been arrived at after charging a number of items including US$15,450,064 in respect of *"amortisation of intangible assets".* Counsel noted that this represents 40% of the figure for profit which has, so it was suggested, obvious consequences for taxation purposes. Counsel then referred to the corporation tax computation for the same year which shows the figure for profits with no adjustment for depreciation or amortisation. Counsel also drew attention to the fact that in the tax computation for this year, group relief was claimed in respect of a loss suffered by another company within the Elan group. This claim for relief reduced the profits for taxation purposes to zero. If, however, the amortisation charge of US$15,450,064 had been added back, counsel suggested that there might not have been sufficient group relief available from any other Elan entity. That said, counsel candidly accepted that he did not know the answer to this question and it has to be said that there is no evidence before the court to that effect. In most years, relief was claimed in respect of group losses which matched the amount of taxable profit of EPIL.

182. In the context of the 1999 tax year, counsel for Perrigo also noted that, attached to the tax computation was an analysis of additions to intangible fixed assets. These comprised a number of pharmaceutical compounds and what was described as ethical transdermal technology. The total value of these intangible fixed assets was given at US$77,293,749. The acquisition of these assets by EPIL was, of course, entirely consistent with the business plan set out in the application for the Shannon Certificate. It should be recalled that the application for the Shannon Certificate expressly stated that EPIL would be involved in the

acquisition of IP assets. The acquisition of such assets by EPIL was a necessary element of its proposed licensing activities at Shannon.

The 2000 return

183. The pattern continued in respect of the 2000 tax year. The expenditure on research and development is shown in the profit and loss account for that year at US$135,248,783 which (together with other expenses) were deducted from the gross margin to give an operating profit (before taxation) of US$92,995,705. Note 5 states that the operating profit was arrived at after charging (*inter alia*) the amortisation of intangible assets at US$18,134,092.

184. In the tax computation (which was furnished to the Revenue Commissioners together with the financial statements for 2000 which contained the profit and loss account and the notes) total taxable Case I income is stated to be US$92,995,705. The sum shown in Note 5 in respect of amortisation is not added back. In common with the preceding year, group losses are claimed in an equivalent amount to the income such as to arrive at a nil figure for taxable income. The tax computation was accompanied by a further analysis of additions to intangible fixed assets (in similar form to the 1999 year). However, the page dealing with these additions also shows a number of write-downs at cost. These arose in respect of Diastat, Zonegran and Zelapar. Counsel for Perrigo noted that, if the IP relating to these compounds was not trading stock, the impairment or write-down would need to have been added back for tax purposes. For completeness, it should be noted that these write-downs appear under the heading *"disposals"* but, at an individual level, they are each described as a write-down.

The 2001 return

185. It was not until the tax computations for the 2001 tax year were furnished that any reference was made to disposals of IP (as such) in the material supplied to the Revenue. The tax computation for that year was, in common with previous years, furnished to the Revenue together with the financial statements for that year. The profit and loss account (at p.7 of the financial statements) showed an operating profit (before exceptional items and taxation) of US$22,672,254. This was after taking account of a number of deductions including a very significant deduction of US$166,024,524 in respect of research and development costs. Note 3 to the accounts recorded that exceptional revenues and costs incurred in 2001 and 2000 were included in the profit and loss account. The net total for these exceptional revenues and costs is stated to be US$142,638,648. This figure is included as profit in the second column of the profit and loss account and therefore represents a very significant part of the overall profit of EPIL for the 2001 tax year.

186. It is also important to record, at this point, that Note 3 to the 2001 financial statements also refers to a number of product rationalisations. The note states: -

> *"Exceptional product revenue in 2001 relates to product rationalisation revenue. The exceptional cost of sale as related to product rationalisation revenue was US$15,324,995. In 2001, [EPIL] rationalised Diastat, Entex, Mysoline, Nasarel and Nasalide".*

187. Each of the product rationalisations are also identified in the material attached to the corporation tax computation submitted in respect of the 2001 tax year. As in the case of the previous tax years, the total taxable Case I income equates to the income set out in the profit and loss account with no adjustment for depreciation or the exceptional items notwithstanding that the financial statements for the same year show significant figures for amortisation of intangible fixed assets. The computation was accompanied by a table

showing the additions to intangible fixed assets. It also showed, for the first time, disposals which coincide, to some extent, with those described in Note 3 (dealing with exceptional items) in the 2001 financial statement. The total value of the disposals was given at US$194,410,768 which counsel for Perrigo suggested was so significant as to *"jump out"*. The fact that these disposals were identified is certainly of some significance in the context of this element of the claim made by Perrigo. This is especially so in circumstances where, at that point, the tax computations for a number of the preceding years showed significant additions to the intangible fixed assets. However, it is also important to record that the tax computation showed no tax payable in circumstances where the entire of the taxable Case I income of EPIL was matched by a group loss relief claim of an equivalent amount in respect of another company in the Elan group.

188. The 2001 tax computation is also relevant to another aspect of Perrigo's case (namely the case made in relation to the Shannon Certificate). In this context, in para. 77 of the statement of grounds and in paras. 48-50 of Mr. Hurley's first affidavit, it is asserted that the disposals shown in the 2001 financial statements formed the basis upon which the Minister considered the entitlement of EPIL to a Shannon Certificate. This assertion is made on the basis that the disposals were expressly disclosed in the tax computations and financial statements. I have to say that I do not understand how it can be suggested that the Minister would be aware of what was contained in tax computations submitted by a taxpayer to the Revenue. More importantly, however, it is impossible to see how this aspect of Perrigo's case could plausibly be advanced in circumstances where the financial statements in question post-date the grant of the Minister's certificate in February 2002. As counsel for the respondents identified, the financial statements for 2001 were created in September 2002. Furthermore, it is clear from para. 93 of the statement of grounds that, as one would expect, the tax computations and returns were made in the Autumn of the year following the tax year

in question. Thus, in the case of the 2001 tax year, the relevant return would be made to the Revenue in the Autumn of 2002. This was several months after the certificate had been granted. Thus, even if there was any basis to suggest that the Minister would be aware of what was contained in confidential tax returns of a taxpayer, there is simply no basis for the suggestion made by Perrigo in its statement of grounds and in its affidavit evidence, to the effect that, as a consequence of the financial statements for 2001, the Minister was aware of the disposals of Diastat and the other IP rights mentioned in para. 77 of the statement of grounds or paras. 48-50 of Mr. Hurley's first affidavit. In this context, I am very conscious that Mr. Hurley was not cross-examined in relation to his affidavit. However, the financial statements for 2001 are stated on their face to have been signed on 26th September, 2002. Given that the onus of proof lies on Perrigo, I take the view that Mr. Hurley had an obligation to explain how, notwithstanding the date of the signing of the 2002 financial statements, he could, nonetheless, assert in his affidavit that, as a consequence of the financial statements for 2001, the Minister was aware of the disposals prior to the grant of the Shannon Certificate.

The 2002 return

189. 2002 was a difficult year for the Elan group. According to the directors' report for EPIL for that year, Elan announced, on 31st July, 2002, a significant restructuring plan involving the *"divestiture of non-core businesses and product".* The report also identified that, in October 2002, EPIL sold its rights to Actiq. In that context, the report stated: "*Net of the write-down of the related intangible asset, the company recorded revenue of US$40.3m on the closing of this transaction".* The profit and loss account for that year showed a loss (before exceptional items are taken into account) of US$162,914,841. There was a further loss of US$416,780,545 in respect of exceptional items. The combined losses amount to US$579,695,386. These took account of research and development costs of US$302,243,456. Note 11 addresses intangible fixed assets and identifies that there were

significant impairment charges during 2002. In addition, as before, there are significant figures for amortisation. The same note also shows that the net loss on disposals in 2002 was of the order of US$206m. One can work out from Note 11 that the net figure for impairments is of the order of US$473m. Yet, in the tax computations for the same year (furnished to the Revenue together with the financial statements) no adjustment is made in respect of the impairment charge. Counsel for Perrigo pointed out that it was not added back as an impairment charge and he suggested that EPIL was *"putting up in lights that the assets in question are being treated as trading assets".* Similarly, there was no adjustment made for the net figure of US$206m in respect of disposals. Similar to previous years, the tax computation was accompanied by a table showing additions and disposals during 2002. It must, however, be borne in mind that to arrive at the conclusion suggested by counsel, one would have to drill down into the material contained in the notes to the financial statement. It must also be borne in mind that it can be dangerous to retrospectively review the material contained in the financial statements through the prism of the current dispute between the parties. The present dispute between the parties places a particular focus on aspects of the information contained in the financial statements that might not have appeared to be readily evident at a time when the issue of the tax treatment of IP transactions was not under specific scrutiny by the Revenue.

The 2003 return

190. There was a similar pattern in 2003. In the directors' report in respect of that year, further reference is made to the difficulties suffered by the Elan group in 2002. The report recorded that EPIL received a *"gain of US$184.8m"* on the closing of a transaction relating to Sonata representing the *"net of the write-down of the related intangible asset".* The report also recorded the sale of the *"pain portfolio"* and a gain of US$39.8m on the closing of that transaction. This resulted in total gains of $214,414,178 which are recorded in the profit and

loss account. The net gain was also described in Note 3 to the accounts where the makeup of the figure US$214,414,178 is provided. It represents the net figure when the losses on termination of the Nic Mec product and the disposal of the transdermal intangible asset are set against the gains received on foot of the disposal of Sonata and the pain portfolio. Note 11 deals with the intangible fixed assets and is consistent, in form, with Note 11 in the 2002 financial statement. In a similar way, one can work out from Note 11 the net figure for disposals in the year and the note also identifies the amount recorded in the accounts in respect of amortisation. In the tax computation for the same year, no adjustment is made for these items. The computation simply takes the figure for losses from the profit and loss account without making any adjustments other than in respect of two very small items of US$80,196 and US$64,156. Counsel for Perrigo have highlighted in their submissions that the Revenue, in the audit findings letter, have sought to characterise the disposals in 2003 as capital items (in circumstances where they took place as part of a divestment of assets under a rationalisation plan) and they argue that all of this must have been apparent to the Revenue in 2004 when the 2003 financial statements and tax computations were submitted. Counsel for Perrigo have highlighted, in this context, that the 2003 year was the subject of a compliance report undertaken by Mr. Kevin Prendergast, an LCD Case Manager, in January 2005 in which he expressly reviewed the 2003 financial statements. For completeness, it should be noted that neither EPIL nor its tax advisors, were aware of the existence of this compliance report at the time. Its existence only emerged in the course of these proceedings. Counsel submitted that the report is of particular significance in that it predates the email of 26th July, 2005 from Mr. MacSuibhne (addressed in para. 154). Counsel also submitted that the compliance report is very comprehensive and it was suggested that it was *"just not possible"* to have completed the report without a detailed review of the financial statements, the corporation tax returns and the tax computations submitted by EPIL. In circumstances where

the compliance report was prepared in respect of the 2003 tax year, it may be helpful, at this point, to consider the report and to address the issue which arises in relation to the attempt by Perrigo to rely upon it.

The compliance report

191. The compliance report prepared by Mr. Prendergast was the subject of detailed submissions by counsel. The report describes the nature of the trade carried on by EPIL as *"Purchase development and exploitation of pharmaceutical products rights, provisioning of finance facilities".* The report notes that, during 2003, EPIL *"sold off a number of products and businesses"* and that turnover has declined by more than 50% *"leading to very heavy losses".* It is clear that, for the purposes of preparing the report, Mr. Prendergast gave some consideration to the financial statements. The report contains a section dealing with *"Significant Notes to the Accounts"* and Mr. Prendergast records that, in 2003, a sale of a *"number of franchises, portfolios, and drug delivery businesses"* took place. It also refers to exceptional items *"covering gains on the sales of above".* However, the analysis of the accounts is fairly rudimentary. The report does not make any attempt to analyse the financial statements in any detail. In particular, there is no analysis of the extensive detail contained in the notes to the 2003 financial statements. Nor is there any reference to amortisation. There is a page headed *"Tax Details-Summary".* This page (which is clearly in a standard form) requires the compiler of the report to give details of the most recent audit for corporation tax. Mr. Prendergast entered *"N/a"* in response to this question. The next page of the report is headed *"Corporation Tax Details".* This states that there were no profits chargeable to corporation tax for the accounting period in question (namely the 2003 tax year). In the section dealing with *"Additional Comments"*, Mr. Prendergast stated that EPIL was *"not expected to be profitable for tax purposes until 2006/7".* The next four pages of the report contain what appears to be a standard form *"Corporation Tax Checklist"*. As part of the

checklist, the compiler of the report is asked to consider losses and, in particular, the compiler is asked to consider the question as to whether the losses arise from ordinary ongoing activities of the group entity or whether the losses are generated by an unusual transaction *"such as a partnership in which it is a passive investor, or large s.247 interest claim".* The answer given by Mr. Prendergast to this question is *"Ordinary".* In addition, the checklist raises a question whether accounting policies adopted by the taxpayer are in accordance with tax law. To this question, Mr. Prendergast answered *"Yes".* The checklist also raises a question in relation to *"trading and non-trading income?"* to which Mr. Prendergast answered, in one word *"No".*

The submission of counsel for Perrigo in relation to the compliance report

192. Counsel for Perrigo submitted that the report by Mr. Prendergast demonstrates that the *"expectation"* on the part of EPIL that LCD and the Revenue would give a detailed consideration to the EPIL tax returns with a view to ascertaining their compliance with tax law was an entirely legitimate one. It was also argued that it confirmed the reasonableness or legitimacy of that expectation. In addition, it was argued that the report demonstrates that the suggestion made in the affidavit sworn on behalf of the Revenue that all that was happening within LCD was *"non-judgmental processing"* is *"not a complete statement of the true facts".* Thirdly, counsel argued that the report shows that the *"express representation of compliance"* in the email from Mr. MacSuibhne was not based merely on the lack of any outstanding payments by EPIL but was based on *"the fact that a very thorough compliance review had been undertaken by [LCD] only a few months previously by Mr. Prendergast".* It was submitted that this had *"certain forensic implications"* in that it *"certainly means that it is very strange, to say the least, that the Revenue persisted the position that they have sworn to of saying that there was no detailed interrogation before 2017".*

The objection of the respondent to the approach taken by Perrigo in relation to the compliance report and the affidavit evidence sworn on behalf of the Revenue.

193. At this point, it is important to record that, (as outlined in more detail below) a significant number of officers of the Revenue (including Mr. Prendergast) have gone on affidavit to explain the approach taken by the Revenue in general and to explain the compliance report in particular. The deponents of those affidavits were not cross-examined. In those circumstances, counsel for the respondents objected to the submissions summarised above. Counsel for the respondents argued that the approach taken by Perrigo is impermissible. He argued: -

> *"It is as though this is the position for the purpose of the case, Mr. Prendergast had finished giving evidence in the box, Mr. Sreenan had been asked had he any questions, said no, he had no questions in relation to Mr. Prendergast's evidence and then proceeded, at the end of the case, to seek to attack what he had sworn about in the way in which he has. In my respectful submission, that is simply not permissible…"*

In the absence of cross-examination, Perrigo is not entitled to call into question the evidence given on behalf of the respondents

194. In my view, the objection made by counsel for the respondents is well founded. Before the intervention of counsel for the respondents, I had previously raised with counsel for Perrigo whether it was permissible to take the approach outlined above, having regard to the decision of the Supreme Court in *McNamee v. The Revenue Commissioners* [2016] IESC 33.

195. In *McNamee,* the applicants challenged a s.811 notice issued by the Revenue on the grounds (*inter alia*) that the Revenue had been guilty of pre-judgment bias. The applicants contended that, long prior to the issue of the s. 811 notice, the Revenue had formed the view

that the transactions, the subject matter of the notice, had been entered into for the sole purpose of avoiding tax. Each of the relevant officers of the Revenue (including the authorised officer who issued the s.811 notice) had set out their position on affidavit. While notices to cross-examine had been served, the applicant chose to proceed with cross-examination of one of the deponents only and confined the cross-examination very narrowly to one relatively small issue in the case. Notwithstanding that such documents were never put to any of the deponents who swore affidavits on behalf of the Revenue in that case, the applicant sought to rely on internal Revenue documents with a view to demonstrating that, contrary to what was stated by the deponents on affidavit, there was, in fact, prejudgment on the part of the Revenue Commissioners. That approach was condemned by the Supreme Court. Delivering the decision of the court, Laffoy J. said at para. 80: -

> *"In support of the contention that the finding of the trial judge as to the timing of the formation of the relevant opinion was incorrect, the taxpayer submits that, as a matter of fact, the evidential documentary record demonstrates that the relevant opinion was formed before August 2011 and such inference should be drawn by this Court. Having regard to the circumstances identified earlier (at para. 43), as would have been the position in relation to the hearing in the High Court, if this Court were to attempt to draw such inference while faced with the same unsatisfactory state of affairs as the High Court was faced with, it would create the potential to give rise to a serious risk of injustice to the Revenue Commissioners and to their deponents. The complaints advanced on behalf of the Revenue Commissioners on the hearing of the appeal as to the manner in which the Taxpayer seeks, in proceedings primarily based on affidavit evidence, to undermine the evidence given…on affidavit…particularly when neither deponent, although available for cross-examination, was cross-examined or given an opportunity to comment upon or explain the documents and, in*

particular, the contents thereof, upon which the taxpayer now relies, are wholly justified….".

196. In the course of her judgment in *McNamee*, Laffoy J. referred to the decision of the House of Lords in *Browne v. Dunn* (1893) 6 R.67 where Lord Halsbury said at p.76: -

"To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have disposed to".

197. A similar approach was subsequently taken by the Supreme Court in *RAS Medical Ltd v. Royal College of Surgeons in Ireland* [2019] IESC 4 where Clarke C.J. addressed, in some detail, the difficulty that arises where parties, in cases tried on affidavit, seek to persuade the court to determine contested questions of fact on the basis of affidavit evidence without cross-examination. At para. 7.4 to para. 7.7, Clarke C.J. gave the following guidance:

"7.4. Just as it is inappropriate to argue in a trial conducted on oral evidence that the evidence of a witness should not be accepted, either on grounds of lack of credibility or unreliability, without having given that witness a fair opportunity to answer any issues arising in that context, so also is it impermissible to ask a decider of fact … to determine contested questions of fact on the basis of affidavit evidence or documentation alone.

7.5. … Even if there may be a dispute about aspects of the underlying events, it may be that the fact that a particular document existed or was sent to a relevant party is itself important and if there is no challenge to the fact that the document existed or was, in fact, sent and received, then the court is clearly entitled to make a finding that,

for example, a certain allegation was made or a certain state of affairs communicated to another party. What consequences such a finding of fact might have on the proceedings generally is, of course, another matter.

7.6. But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.

7.7. A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability."

198. In the present case, it was open to Perrigo to seek leave to cross-examine the deponents of the affidavits sworn on behalf of the respondents. It is important, in this context, to bear in mind that, in these proceedings, Perrigo, as the applicant, has the obligation to prove its case. If it therefore wished to establish that the affidavits sworn on behalf of the respondents do not, to paraphrase Perrigo's counsel, give rise to a complete statement of the true facts, the proper way to pursue that case was by means of cross-examination. In my view, having regard to the decisions of the Supreme Court outlined above, Perrigo, in the absence of cross-examination, is not entitled to call into question the evidence given by the deponents of the affidavit sworn on behalf of the respondent.

The 2004, 2009 and 2011 tax returns

199. It will nonetheless be necessary to carefully consider the evidence adduced on behalf of the respondents. Before doing so, I should, in the first instance, complete the review of the financial statements and tax computations submitted annually by EPIL in the years between 2003 and 2013 (when the disposal of EPIL's remaining interest in the Tysabri IP took place). In this context, counsel for Perrigo highlighted certain aspects of the accounts for 2004, 2009 and 2011. The profit and loss account in 2004 showed an operating loss on ordinary activities (before interest and taxation) of US$131,632,916 which was arrived at after charging US$11,731,199 in respect of amortisation of intangible assets and US$1,558,057 in respect of depreciation of tangible assets. Yet, when it came to the tax computation, no adjustment was made in respect of these items.

200. In respect of the 2009 tax year, the directors' report records that, on 17th September, 2009, EPIL transferred all of its assets and liabilities relating to its Alzheimer Immunotherapy Programme to Crimagua, an indirect wholly owned subsidiary for a consideration of US$233.5m. The report also notes that EPIL recorded a gain of US$27.1m on the disposal of

the related assets and liabilities. For this year, research and development expenses reached US$340.5m. In the related tax computation, a similar approach was taken to that in the previous years (as outlined above).

201. Insofar as 2011 is concerned, counsel drew attention to the statement in the directors' report that EPIL had divested assets and recorded a net gain of US$714.5m. This is confirmed in Note 12 to the financial statements. Counsel submitted that one could work out from the information contained in Note 12 combined with the information in Note 14 that there was a profit of US$273m on the disposal. He suggested that this was very significant given its proximity to the subsequent disposal to Biogen in 2013. Again, when it came to the tax computation, the computation was prepared on the same basis as before. Counsel suggested that, from the perspective of a tax practitioner or of the Revenue, the treatment of the disposal in the materials furnished to the Revenue with the 2011 tax return *"stands out…because it isn't the full add back… what's missing in there is the add-back consistently with all previous years, for profit on disposal of IP"*.

202. It should be noted that, in each of the tax computations for 2004 and 2009, the computation showed a loss in respect of Case I income. In the case of the 2011 computation, there was a profit shown in respect of EPIL's Case I income but when allowance was made for losses carried forward from previous years, the taxable income was stated to be *"nil"*.

The R & D claims

203. Counsel for Perrigo also drew attention to the very significant research and development (*"R&D"*) claims allowed by the Revenue over the years under s. 766 of the 1997 Act which amounted in total to US$ 3,262,669,248. Counsel submitted that the *"sheer quantum"* of the claim made in respect of research and development costs and the Revenue's *"indifference"* to the claiming of it as a trading expense strongly supports the

"reasonableness of our expectation that trading treatment was accepted. Because the item is so large year on year and the Revenue say they would expect these kind of losses, which can only mean trading losses, but they do a volte face in 2018 and treat it as a capital expense in the audit findings letter". The response of the Revenue in respect of this aspect of Perrigo's case is summarised in paras. 216 and 218 below.

The conclusion urged by Perrigo

204. Counsel for Perrigo submitted that the cumulative effect of the returns made to the Revenue over the years (combined with the assessments made on foot of those returns) was that EPIL (now Perrigo) had a legitimate expectation that, having bought and sold IP for many years, when, ultimately, EPIL did sell the remaining 50% interest in the Tysabri IP, the Revenue Commissioners would not raise an assessment treating the profits from that disposal (uniquely in the case of all of the disposals) as a capital gain or on the basis set out in the audit findings letter that EPIL's trade never included the disposal of IP. Counsel also highlighted in this context the evidence from the tax practitioners who swore affidavits on behalf of Perrigo that this is the only case in which the Revenue have challenged a transaction of a Shannon Certificate holder or an IFSC certificate holder in this way. Insofar as the latter point is concerned, I do not believe that this is ultimately relevant. There is no evidence before the court as to the nature of the trade carried on by any other holder of a Shannon Certificate or an IFSC certificate. One would need a significant amount of detail about the individual circumstances of other certificate holders before one would be in a position to compare and contrast, in an informed way, the particular activities of EPIL, on the one hand, and those of other certificate holders, on the other hand. That detail is not available in the present case and I therefore do not believe that any reliance can be placed on this point by Perrigo.

The evidence given by officers of the Revenue in response

205. Having outlined the approach taken in relation to the submission of financial statements and tax computations to the Revenue, it is next necessary to consider what has been said by the Revenue, on affidavit, in response to this element of Perrigo's case. Given the emphasis placed by Perrigo on the compliance report prepared by Mr. Prendergast, it may be helpful to first address his affidavit. In that affidavit, Mr. Prendergast explains that he is a chartered accountant and that, in November 1999, he was recruited as a contract financial accountant by the Revenue where he worked until he resigned in March 2005.

206. Although he is a chartered accountant and although he was recruited by the Revenue, Mr. Prendergast said that his role was not that of a taxation expert. He explained that he never had any taxation role at any stage in his career prior to joining the Revenue. His previous experience as an accountant was in statutory audit, consulting, and, subsequently, financial services.

207. Although he was recruited by the Revenue (with four others with similar accounting qualifications) to fill *"a gap in financial accounting acumen then evident in Revenue and to assist tax inspectors in undertaking their duties"* and their specific role was *"to assist in the inspections of large corporates",* Mr. Prendergast said in para. 4 of his affidavit that he was: *"never in possession or indeed expected to be in possession of the necessary technical taxation skills to assess, for example, the appropriate tax treatment of IP or whether the sale of intellectual property should be properly assessed as a capital transaction rather than as trading income from a tax perspective".*

208. He explained that his initial assignment was to the Dublin Audit District 6 which dealt with group accounts. He also assisted in a number of special projects including the conversion of group financial statements to IFRS, the negotiations of a Double Taxation Treaty and the setting up of LCD. He also said that, in any *"pure tax work"* he always

worked with trained and experienced taxation officers. Following the establishment of LCD, he was assigned to the Manufacturing and Pharmaceuticals sub-unit and given responsibility for reviewing the financial structures of group entities assigned to that sub-unit. Mr. Prendergast said that he was assigned to the Elan Group in January 2004 as a Case Manager and that he worked in that position until his departure from the Revenue in March 2005. In that context, he exhibited the compliance report and he explained that this comprised an *"overall review of the Applicant from a compliance perspective".* He further explained that, as is apparent from the report, he was of the view that EPIL had no liability to corporation tax due to losses, that it had low VAT liability due to the nature of its operations but he nonetheless recommended that there should be a "*PREM audit"* in 2005 in respect of remuneration of key staff. As I understand it PREM is an acronym used in the context of employer PAYE/PRSI obligations. In para. 7 of his affidavit, he confirmed that he has reviewed the records generated by him during the period when he acted as Case Manager assigned to the Elan Group. Having done so, he swore as follows: *"I say and believe that the issue of the Applicant's tax treatment of IP was certainly never considered or reviewed by me".*

209. As noted above, Mr. Prendergast was not cross examined on his affidavit. While counsel for Perrigo has raised questions as to how a chartered accountant would not be in a position to assess the appropriate tax treatment of IP or to analyse whether the sale of IP should be assessed for taxation purposes as a capital transaction rather than a trading transaction, the evidence before the court is to the contrary effect. Mr. Prendergast has sworn in clear terms that he did not have the necessary technical taxation skills to make assessments of this kind. An application could have been made on behalf of Perrigo for leave to cross examine Mr. Prendergast and to test the veracity of what he said on affidavit. However, no such application was made. In these circumstances, I do not believe that it is open to Perrigo

to suggest that the evidence of Mr. Prendergast should be rejected. While counsel for Perrigo has sought to suggest that the compliance report provides objective evidence of Mr. Prendergast's expertise, I do not believe that this is so. In the first place, having regard to the approach taken by the Supreme Court in *McNamee* and in *RAS Medical*, I do not believe that it is open to Perrigo to pursue that argument without first giving Mr. Prendergast an opportunity to explain himself under cross-examination. Secondly, even if the difficulty created by the *McNamee* and *RAS Medical* decisions did not exist, I do not believe that the compliance report provides objective evidence of expertise on Mr. Prendergast's part. On the contrary, as I have previously observed, the compliance report appears to be a fairly rudimentary document. It does not suggest, by its terms, that any extensive review was undertaken of the financial statements of EPIL. In particular, it does not suggest that there was any attempt to co-relate what was contained in the financial statements with the relevant tax computations supplied by EPIL in respect of the 2003 tax year. In that context, I have already highlighted that there is no reference in the report to amortisation. I appreciate that Mr. Prendergast is a chartered accountant. However, experience shows that the chartered accountant qualification covers a wide range of areas of expertise. Some chartered accountants specialise in tax. Some specialise in audit work or in other accounting sub specialties.

210. I now turn to the evidence of the inspector, Mr. McNamara. In his first affidavit, Mr. McNamara explained the approach taken by the Revenue in the years before the 2013 tax year. In para. 20, he said that, for most of that period, EPIL was in a loss making situation and *"so no detailed interrogation of the Applicant's returns occurred. Due to the very substantial losses reflected in the Applicant's earlier corporation tax returns made by it under the self-assessment regime, the Applicant would not have been considered a material tax risk for Revenue and accordingly no detailed interrogation of those tax returns took place*

and assessments were made in a non-judgmental manner in accordance with the corporation tax returns…".

211. With regard to the tax years 2001- 2004, Mr. McNamara suggested that the disposals which took place during that period reflected the implementation of a recovery plan and that they did not constitute a trade. He also highlighted that (as Perrigo acknowledged in the course of the hearing) it is apparent from the financial statements of EPIL that the Tysabri IP was treated by EPIL as a capital asset and not an item of stock in trade.

212. In his second affidavit, Mr. McNamara further addressed the case made by Perrigo arising from the delivery, on an annual basis, of the corporation tax returns, tax computations and financial statements. In para. 8 of his second affidavit, Mr. McNamara said that, in order for the Revenue to become aware and appreciate the tax treatment adopted in respect of IP, a detailed interrogation of the tax returns, computations and financial statements would have been required. Such an interrogation would also have included raising queries with EPIL. He confirms that this never happened until the review of the tax returns in September 2016. Mr. McNamara also said that, if the Revenue does not make an amended assessment in respect of any particular year, this does not represent an approval by the Revenue of the contents of the return made by the tax payer. Accordingly, Mr. McNamara said:

> *"There was no basis whatsoever for Mr. Clery or Mr. Kingma to assume that any return that was not the subject of a Revenue Assessment had received approval by the [Revenue]….".*

213. In para. 51 of his second affidavit, Mr. McNamara, in the course of addressing the 2001 and 2002 tax years, explained that the tax computations and financial statements did not make it clear that revenue was being generated from the sale of IP and treated as part of the turnover disclosed. With regard to amortisation, Mr. McNamara further stated in para. 52 of his affidavit that, as was the case in relation to the tax treatment of disposals of IP, the issue

of amortisation *"was simply not considered by the [Revenue] until September 2016".* Mr. McNamara also said in para. 56 of the same affidavit that there is no input in the Form CT 1 (namely the corporation tax return) for either an *"amortisation deduction"* or an *"amortisation addback"* and that it would only be possible to identify the relevant tax deduction by contrasting the financial statements of EPIL with its corporation tax computation which for several periods contain multiple tax computations for several trades including (a) the exploitation of the rights to IP, (b) the provision of financing activities to companies (referred to in the tax computations as the *"Dublin Activities"),* (c) the Athlone Drug Delivery business (referred to in the computations as the *"Athlone Activities")* from 2005 to 2011 and (d) a management services trade from 2008 to 2013. In para. 57, Mr. McNamara reiterated the point in his first affidavit that significant losses were sustained by the Elan Group and, against that backdrop, Mr. McNamara stressed that no detailed interrogation took place prior to September 2016. In the same para. he also stated that there is *"no onus upon [the Revenue] to carry out a detailed interrogation or Revenue audit of a tax payer within a particular time period …. Ultimately, it is a matter for [the Revenue] as to whether and when they choose to carry out a detailed review or a Revenue audit and, in this instance, it was chosen to carry out a Revenue audit… in 2018…".*

214. With regard to the request made by Revenue for corporation tax computations for the 2009 to 2011 periods, Mr. McNamara said that the primary purpose of this request was to review the repayments claims that arose in respect of R&D credits claimed in those years. In para. 66 of his affidavit, Mr. McNamara explained that in March 2005 and December 2012 PREM audits were carried out. He said that there was some level of screening carried out on the corporation tax returns at that time by Mr. Prendergast (in respect of the March 2005 PREM audit) and by Ms. Margaret Duggan (in respect of the December 2012 PREM audit). However, Mr. McNamara said that there is no note or document evidencing any

consideration of IP disposals or treatment of amortisation. As noted above, this is supported by direct evidence from Mr. Prendergast. There is also direct evidence from Ms. Duggan (which I address below). Mr. McNamara explained, in the same paragraph, that, as noted above, the first detailed consideration of the matter occurred in September 2016 when Ms. Emer Smith was assigned to the review of the R&D claim in respect of the year ended 31st December, 2012. As well as reviewing the specific details of that claim, Ms. Smith further undertook an analysis of every component of the tax computation for the year ended 31st December, 2012 and, arising from that exercise, Ms. Smith made contact with EPIL and asked for details as to why amortisation had not been added back. There is also an affidavit from Ms. Smith which is summarised in para. 173 above. As outlined in para. 173, Ms. Smith explained that she was unable to determine why the intangible asset amortisation had not been added back in full. She then raised queries with EPIL which led to a train of enquiry and ultimately to the audit which resulted in a detailed review of EPIL's tax liabilities and which culminated in the audit findings letter described above. In para. 10 of her affidavit, Ms. Smith rejected the suggestion made on behalf of Perrigo that it would have been obvious to any person considering the financial statements and tax computations that IP was held by EPIL as stock in trade. Ms. Smith said:

> *"I do not believe this to be the case as despite my … detailed interrogation of the Applicant's financial statements and tax computation in respect of 2012 as well as my initial enquiries raised with the Applicant …, it was not in any way apparent to me that it was so. Indeed, the very reason why I raised the query regarding amortisation was because having reviewed the accounts it appeared to me that the … IP was held as a capital asset and consequently the amortisation charge ought to have been disallowed for tax purposes".*

215. In his second affidavit, Mr. McNamara also rejected the suggestion made on behalf of Perrigo that it was reasonable to assume that any return that was not the subject of a Revenue assessment had received a tacit approval of its contents. He also rejected the reliance placed by Perrigo on the fact that, in some of the corporation tax computations, reference was made to an "*IP Trade".* Mr. McNamara says that the Revenue understood that EPIL was involved in licencing IP to third parties which, he says, would amount to an "*IP trade"* but he also said that the Revenue had no knowledge that EPIL was involved in any trade of disposing of IP.

216. In her affidavit, Ms. Duggan explained that she qualified as an associate of Chartered Accountants Ireland in 2005 and that in January 2017 she became a Fellow. She also said that she has been a chartered tax advisor since 2013 and that she was appointed an inspector of taxes in September 2010. Between September 2010 and October 2014 she was a compliance manager in LCD and was assigned to the Elan Group from November 2009 to January 2012. During that time, she said she did not carry out a review of the corporation tax returns provided by EPIL under the self-assessment regime. She further explained that her review centred on the claims for repayment of R&D tax credits under s. 766 (4B) of the 1997 Act. During her time as compliance manager she carried out an *"aspect query"* on each of the claims made by EPIL for these three years. She further explained that an *"aspect query"* is regarded as a short targeted intervention for the purpose of checking a particular risk. The purpose, in this case, was to ensure that a claim was made in accordance with s. 766 of the 1997 Act and that EPIL met the criteria and was eligible for such a repayment. In carrying out this exercise, Ms. Duggan confirmed that she obtained the corporation tax computations for EPIL for each of the three years in question but that she did not carry out a detailed interrogation of the computation. In particular, she did not consider the tax treatment applied by EPIL in the tax computation. She noted from the loss history listed in the returns that there were substantial losses forward accumulated by EPIL and she said that she did not

consider the basis of these losses or review how they had arisen. For the purposes of the exercise carried on by her, she compared the R&D amounts listed in the R&D report provided by EPIL with the claim made by EPIL for the relevant years to ensure that the amount of the credit claimed was in line with the amount contained in report. With regard to IP, Ms. Duggan said in very clear terms that she did not consider the tax treatment being applied to IP at any stage during her time as compliance manager. Furthermore, she said that she was unaware of the tax treatment adopted by EPIL in respect of IP and was unaware of any trade being carried on by EPIL of disposing of IP or of the holding of IP as stock in trade.

217. In addition to the R&D reviews carried out by her, Ms. Duggan also said that, in October 2011, she was involved in a transfer pricing audit of a related company in France but she explained that this was not a corporation tax audit or aspect query and did not involve a review or analysis of the corporation tax returns for the relevant period. Ms. Duggan confirmed that there was no corporation tax audit of EPIL during her time as compliance manager.

218. An affidavit was also sworn by Mr. Paul Neenan, the author of the email of 18th June, 2009 (described in para. 156 above). He explained that he joined LCD in February 2005 as an assistant principal and his role initially involved the analysis of customs operations within LCD. In October 2005 he was assigned as a case manager for several healthcare groups and, in early 2006, this was extended to include the Elan Group. While he said he dealt with a number of issues relating to the Elan Group (including withholding tax exemptions, VAT authorisations, payroll issues and capital gains tax clearance applications), he did not identify corporation tax as an area of risk and he was aware at that time that EPIL was making substantial losses as a consequence of the costs associated with drug development. He also confirmed that he did not at any point review or consider the tax treatment of IP and he has no recollection of EPIL ever bringing the manner of this tax treatment of IP to his attention.

He also said that he was unaware that EPIL was involved in any trade of disposing of IP or holding IP as stock in trade. According to Mr. Neenan, the only corporation tax intervention in which he was involved was the processing of R&D credit repayments following the filing of a protective claim received in December 2008 for the 2004, 2005, 2006 and 2007 years and a subsequent claim for the 2008 year received on 30th April, 2009. In para. 7 of his affidavit, Mr. Neenan confirmed that, in the course of these interventions, he only considered matters relating to the computation of the R&D credit in the relevant years and did not carry out a review of the corporation tax computation.

219. In the context of Mr. Neenan's affidavit, it is important to note that the R&D claims were not submitted at the same time as the tax returns and related documents. They were pursued separately. Furthermore, as is apparent from Mr. Neenan's affidavit, the claims in respect of R&D were not received until December 2008.

Has Perrigo established a representation by the Revenue to it arising from the conduct of the Revenue in the course of the dealings between the parties?

220. In circumstances where none of Mr. Neenan, Mr. Prendergast, Mr. McNamara, Ms. Duggan and Ms. Smith (or any of the other deponents of affidavits sworn on behalf of the respondents) have been cross examined, I do not believe that it is open to Perrigo to ask the court to reject the evidence given by the deponents of the affidavit sworn on behalf of the Revenue. Nor, is it open to Perrigo to question the evidence of those deponents in the manner outlined in the submissions made by counsel on behalf of Perrigo. In these circumstances, I am unable to make any finding that the Revenue must have known that IP disposals formed part of the trade of EPIL or that IP was treated as stock in trade. However, that does not dispose of this element of Perrigo's case. It is still necessary to consider whether, notwithstanding that Perrigo has failed to prove that the Revenue knew or must have known that EPIL was purporting to treat IP disposals as part of its trade, a representation can

be said to have arisen, as a consequence of the conduct of the Revenue in the course of its dealings with EPIL, that it accepted that IP disposals formed part of the trade of EPIL and/or that IP was part of the stock in trade of EPIL.

221. In this context, it is well established that a representation can arise by conduct. This is clear, for example, from the observations of Charleton J. in *National Asset Loan Management Ltd v. McMahon* [2014] IEHC 71, at para. 20, where he said (albeit in the context of the civil remedy of estoppel):

> *"Estoppel can arise pursuant to an oral or written representation …. It can also arise by virtue of an assumption, perhaps tacit, shared by parties. In that instance, however, there must be conduct which establishes an objective state of affairs whereby the party otherwise bound by the legal relations is placed in circumstances whereby it is understood that a new state of affairs governs the relations between the parties. This clearly requires some action or behaviour or representation by the party who is to be bound by the new state of affairs. People cannot just jump to conclusions that matters must be so, with no foundation in the behaviour of the party whose rights in law are to be estopped, and then claim what is in essence an altered state of obligation. Estoppel is not based on bare assumption. Estoppel is based either on representations or on situations of behaviour that, reasonably construed, clearly withdraw or alter the strictures of legal obligations in such a way that it would be unfair to later enforce these…."*.

222. It might be suggested that, in circumstances where there is no proof that the Revenue knew that EPIL was treating IP disposals as part of its trade for tax purposes, there could be no representation to the effect alleged. However, the absence of any intentional conduct on the part of the Revenue does not necessarily mean that a representation cannot be implied

from the conduct of the Revenue. Thus, for example, in a private law context in *Freeman v. Cooke* (1848) 2 Ex 654 Parke B., at p. 663, said:

> *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation will be equally precluded from contesting its truth."*

223. Similar observations were made by Lord Cranworth L.C. in *Jordan v. Money* (1854) 5 HLC 185 (at p. 212) and by Brett J. (as he then was) in *Carr v. The London and Northwestern Railway Co.* (1875) LR 10 C.P. 307 where he said, at p. 317:

> *"and another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of fact, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented".*

224. It is sometimes said that silence is not enough to give rise to a representation. It is certainly the case that it is often very difficult, in practice, to establish that a representation can arise from silence. Thus, for example, in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 91, Murray J., at para. 129 stated that, it is in *"exceptional circumstances"* that the general law may treat silence as a representation *"but only where there is an affirmative duty to speak (see Doolan v. Murray Unreported, High Court, 21st December, 1993))".* That said, if the silence is accompanied by a course of conduct, that may, depending on the circumstances, be sufficient to give rise to an implied representation. Thus, for example, (albeit in quite a different context), Rix L.J. in *Stocnia Gdanska SA v. Latvian Shipping Co.* (No. 2) [2002] EWCA Civ. 889 at para. 96 (addressing the significance of silence in the context of a continuing repudiation of contract) said:

"The silence was not mere silence, it was overlaid with all that had gone before, it was a speaking silence. The difficulty with silence is that it is normally equivocal. Where, however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally. Where silence speaks, there may be a duty on the silent party in turn to speak to rectify the significance of his silence…."

225. In the present case, Perrigo relies not merely on the silence of the Revenue Commissioners over the years in response to the submission of the information described in paras. 177 to 204 above but it also relies on the fact that the Revenue issued assessments on foot of the tax returns made by EPIL. In this context, it relies on the statutory provisions discussed in paras. 145 to 149 above. In addition, Perrigo seeks to rely upon the emails from Mr. MacSuibhne and Mr. Neenan (discussed in paras. 155 to 158 above) and on the article published by the Revenue in the Irish Tax Review discussed in para. 153 above.

226. Having regard to the case made by Perrigo, it seems to me to be necessary to examine the statutory context in more detail and also to further consider the case sought to be made by Perrigo in reliance on the emails and the article published in the Irish Tax Review.

The email from Mr. MacSuibhne in context

227. In his email, Mr. MacSuibhne stated that EPIL were regarded by the Revenue as *"compliant tax payers".* The email in question is dated 26th July, 2005. I have previously noted that the email is not relied upon in the statement of grounds. The first occasion on which it is mentioned is in Mr. Clery's affidavit sworn after receipt of the respondents notice of opposition. In light of the fact that no reliance is placed on the email in the statement of grounds, I do not believe that Perrigo is entitled to rely upon the email as evidence of a representation made to it by the Revenue. Moreover, even if this difficulty did not arise, I do not believe that a statement of that kind constituted a representation that Revenue accepted

that IP formed part of EPIL's stock in trade. The formula of words used, in my view falls far short of any such representation. In addition, the email must be read in context. There was no request made to Mr. MacSuibhne or any other officer of the Revenue asking Mr. MacSuibhne to acknowledge any particular aspect of the tax treatment of the transactions of EPIL. The email was sent in a particular context relating to a withholding tax exemption request. In my view, counsel for the respondents was correct in characterising the statement in the certificate as being very similar to the formula of words used in a tax clearance certificate. Such a certificate is issued pursuant to s. 1095 of the 1997 Act in respect of a tax payer who is in compliance with the obligations imposed in relation to the timely remittance of taxes and the delivery of returns required under the Taxes Act. As is well known, the fact that a tax payer complies with such obligations does not mean that the tax payer is in any way immune from further inquiry by the Revenue or that the tax payer is not subject to audit at any stage in the future. Thus, in a tax context, a statement from the Revenue that it regards a tax payer to be compliant does not seem to me to assist Perrigo and it is unsurprising that the email was not relied upon in the statement of grounds. The fact that no reliance was placed upon it in the statement of grounds is also telling in a different respect. If Perrigo truly believed that the email had the significance now sought to be placed upon it, it is difficult to understand how it could have been overlooked in the statement of grounds. The statement of grounds runs to 142 paragraphs of which 87 purport to provide details of the facts relied on in support of the relief claimed. If the email had conveyed a message to EPIL of the kind now suggested, it would surely have been included somewhere in the 87 paragraphs setting out the relevant facts.

The email from Mr. Neenan in context

228. Similarly, no reference is made on the statement of grounds to this email of 18th June, 2009 from Mr. Neenan to EPIL. I therefore reiterate the observations made in para. 158 above in relation to this email. Furthermore, even if one were to have regard to the email, it does not go so far as to suggest (as contended by Mr. Clery) that EPIL had been correctly accounting for tax or that EPIL had correctly accounted for the treatment of IP as part of its stock in trade. The email certainly suggests that the Revenue was happy with the level of cooperation between the parties such that Revenue did not believe there was a need for a formal risk review at the time. However, this email cannot be read in isolation. It must be read against the backdrop of the provisions of the 1997 Act (considered in more detail below) from which it is clear that an inspector of taxes is entitled to raise an amended assessment against a tax payer (within a four-year period) even where the tax payer has previously made a true and full return. Every tax payer is subject to that statutory scheme. Thus, the fact that, at a particular point in time, the Revenue may not have considered it necessary to carry out a review does not prevent the Revenue from doing so at a later time within the relevant four-year period. This was highlighted by the Revenue in TB 57 which, as noted in para. 133 above, explicitly stated that the Revenue, in the context of an audit, could potentially take a different view of the taxation of a transaction at a later date than the view adopted by the tax payer. In the same document (on which express reliance is placed by Perrigo in these proceedings) there was a very clear statement that the question of whether or not, in any situation, a trade is being carried on is to be determined by an examination of the *"facts of the particular case and by interpreting those facts in the context of the badges of trade and of case law insofar as it applies".* The Revenue was clearly indicating that a consideration of the issue of trading was not always readily arrived at and that it was necessary to examine the facts and interpret them in the context of the badges of trade and the case law. The email

from Mr. Neenan gives no indication that an exercise of that kind had ever been carried out by the Revenue.

Further observations in relation to the Irish Tax Review article

229. In common with the emails from Mr. MacSuibhne and Mr. Neenan, the article published in January 2004 in the Irish Tax Review is not mentioned in the statement of grounds. Thus, similar observations arise here as previously made in paras. 228 to 229 above. In the circumstances, I do not believe that it is open to Perrigo to seek to rely upon the article as giving rise to a representation on the part of Revenue or as evidence of an element of the course of conduct from which it relies. Even if that difficulty did not arise, I do not believe that the article assists Perrigo's case. I have attempted to summarise some of the main features of the article in para. 152. The article undoubtedly calls for greater cooperation between LCD and large tax payers and their tax advisors. It also portrays LCD as a specialised unit which proposed to build good relationships with large business in an attempt to build cooperative approaches towards achieving high compliance. To that extent, had a case been made in the statement of grounds to this effect, the article would support the contention advanced by Perrigo, in the course of the evidence, as summarised in paras. 159 to 160 above that Perrigo expected and was entitled to expect that the Revenue would employ individuals with the appropriate level of skill and experience to perform the tasks assigned to them. However, crucially, the article highlighted that the approach proposed by the author needed to be *"underpinned by highly professional risk-based audit and compliance interventions with the imposition of penalties and other sanctions where non-compliance is discovered"*. The article also highlighted that Revenue audits are a fact of business life and that all cases dealt with by LCD could expect an audit of some kind within five years from the publication of the article in 2004. The evidence in this case is that, although there were a number of audits of EPIL in relation to specific taxes, there was never a corporation tax audit.

There was nothing in the article to suggest that, merely because an audit did not take place, LCD could be taken to be satisfied that no issue arose in relation to any particular area of taxation which was not the subject of investigation by audit. It would, of course, not have been open to LCD to make a suggestion of that kind. There could be no proper basis for the Revenue treating large tax payers more favourably than other tax payers. In the context of the arguments as to unfairness (addressed further below), counsel for Perrigo, in the course of the hearing, drew attention to the observations of O'Flaherty J. in *Wiley v. The Revenue Commissioners* [1994] 2 I.R. 160 at p. 174 (quoted in para. 19 above) where O'Flaherty J. stressed that the duty of the Revenue is to treat all tax payers fairly and to exercise their discretionary powers in an even-handed way. That observation seems particularly apposite in the context of the case made (such as it is) on the basis of this article. While the article trumpeted the more professional and cooperative approach to be taken by LCD, no indication was given that the Revenue would not exercise its statutory powers to make an amended assessment even where it had a good cooperative relationship with a tax payer. On the contrary, the article clearly indicated that audits were likely to take place. Having regard to the statutory powers that an inspector of taxes has to issue an amended assessment, any reader of the article would know that any audit could well lead to the making of such an amended assessment in the event that the Revenue took a particular view of a transaction investigated as part of such an audit.

The statutory context

230. As outlined in paras. 145 to 149 above, Perrigo makes the case that, by raising an assessment in accordance with EPIL's return in each of the taxable periods prior to 1st January, 2013, and not subsequently amending the assessments, the Revenue were thereby

declaring themselves satisfied with the contents of the returns. In making this case, Perrigo relies on the provisions of ss. 954 (2), 954 (3) and 956 (1) (a) in Part 41 of the 1997 Act which were the relevant provisions in force during the course of dealing between EPIL and the Revenue in the period prior to the disposal of the Tysabri IP in 2013. As outlined above, Perrigo contends that a representation arises as a consequence of the material made available on an annual basis by EPIL to the Revenue and the subsequent issuing of assessments by the inspector of taxes without expressing any dissatisfaction on his part. Perrigo argues that, arising from this course of conduct, the Revenue effectively represented to EPIL that its treatment of IP as part of its stock in trade was acceptable to the Revenue such as to estop the Revenue from purporting to issue the notice of amended assessment under s. 959Y of the 1997 Act in respect of the disposal of the Tysabri IP which is now under challenge in these proceedings. In order to make that case, Perrigo argues that, under Part 41 of the 1997 Act, the inspector of taxes had an active role in making the relevant assessment. As outlined in para. 148 above, the self-assessment system which operated under Part 41 of the 1997 Act differs from the system which now operates under Part 41A where the assessment is made by the tax payer under ss. 959R and 959W. Essentially, the case made by Perrigo is that, under s. 954 (2), the inspector must take active steps to make an assessment on a chargeable person albeit that this is done by reference to the particulars contained in the returns submitted by a tax payer. Perrigo correctly makes the case that s. 954 (2) must be read in conjunction with s. 954 (3) which envisages that where the inspector *"is not satisfied with the return which has been delivered",* nothing in s. 954 is to prevent the inspector from making an assessment. Perrigo argues that, in this case, having regard to the fact that, for many years, tax returns were made on the basis that IP was treated as stock in trade without any expression of dissatisfaction by the inspector, the Revenue must be taken to have been satisfied with the contents of the returns. In further support of this element of its case, Perrigo relies on s. 956

(1) (a) of the 1997 Act which envisages that, in respect of taxable periods before 1st January, 2013, the inspector had a statutory role in making the assessment. The provisions of s. 956 (1) (a) have already been quoted in para. 149 above and it is unnecessary to repeat them here. In substance, what s. 956 (1) (a) provides is that, for the purposes of making an assessment or amending an assessment, the inspector may accept either in whole or in part any statement or other particular contained in a return made by a tax payer. Thus, Perrigo argues that, unlike the system which came into force in respect of taxable periods after 1st January, 2013 (which, as noted in para. 148 above requires that assessments be made by the tax payer in line with the tax payer's own return), the system in force in respect of previous years (including those discussed in para. 176 to 202 above) was not self-assessment in any true sense and required the active participation of inspectors in making an assessment. When this factor is taken into account, Perrigo argues that the acceptance by the Revenue Commissioners, without objection, of the returns over a long period of years constitutes a representation that the Revenue accepted, by its conduct, that IP was held by EPIL as stock in trade.

231. In my view, this argument by Perrigo, although superficially attractive, is based upon an incomplete consideration of the relevant provisions contained within Part 41 of the 1997 Act. In particular, it fails to take account of the very clear provisions of s. 955 (1) and s. 956 (1) (b) of the 1997 Act. Section 955 (1) makes clear that an inspector of taxes (subject to the time limitation considered further below) has an unfettered power to amend an assessment made on a chargeable person for a chargeable period *"by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions …"*. Thus, the initial acceptance by an inspector of taxes of a return made by a tax payer under Part 41

of the 1997 Act does not operate to prevent a subsequent change of mind on the inspector's part.

232. Furthermore, the argument by Perrigo also fails to have regard to the provisions of s. 956 (1) (b) under which an inspector of taxes may make enquiries or take action necessary to verify the accuracy of a return previously accepted by the inspector and this power on the part of the inspector is not precluded by the making of a previous assessment under s. 954. Section 956 (1) (b) provides as follows:

> *"(b) The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a) (i) shall not preclude the inspector—*
>
> > *(i) from 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".*

233. Thus, the combined effect of s. 955 (1) and s. 956 (1) (b) makes very clear that the previous acceptance by a tax inspector of any statement contained in a return does not prevent the inspector from subsequently issuing a contrary assessment or making further enquiries which may lead to a new assessment being issued. This is an important feature of the self-assessment system under Part 41 which is designed to ensure that the Revenue will not be precluded from re-opening a tax payer's liability to tax as a consequence of, for example, the previous making of an assessment by an inspector by reference to the return made by the tax payer without investigation by the inspector of the underlying facts. Thus, the purpose behind s. 955 (1) was explained by Clarke C.J. in *Revenue Commissioners v. Droog* [2016] IESC 55 at para. 4.4 as follows:

"The purpose of that provision would appear to be to ensure that a tax payer could not argue that the fact that they had made a return and had paid tax in accordance with an assessment raised on foot of that return might mean that their tax affairs for the fiscal period concerned were irrevocably finalised".

234. As Clarke C.J. explained, in the same paragraph, this is subject to s. 955 (2). Under s. 955 (2), there is a four-year limitation period imposed on the powers exercisable by an inspector in any case where a tax payer has made a full and true disclosure, in the relevant tax return, of all material facts necessary for the making of an assessment. Section 955 (2) of the 1997 Act (in common with s. 959AA of the 1997 Act in respect of periods after 1st January, 2013) places a statutory time limit on the ability of the inspector to exercise the powers available under both s. 955 (1) and s. 956 (1) (b).

235. Accordingly, the only limitation on the power of the inspector to raise an amended assessment, in cases where a full and true return has been made by the tax payer, is that any such amended assessment must be made within the relevant four year period. In all other relevant respects, s. 956 (1) (b) contains an unfettered power on the inspector to make an amended assessment even where the inspector has previously accepted (to use the language of s. 956 (1) (a) of the Act) any statement or other particular contained in a return delivered by the tax payer. In my view, this is a key feature of the tax code insofar as the case made by Perrigo is concerned.

236. In advancing this element of its case, Perrigo has failed to take into account the combined effect of s. 956 (1) (b) and s. 955 (1) of the 1997 Act. In the context of tax payers subject to the self-assessment regime, the reality is that every compliant tax payer (who makes a full and true return to the Revenue) faces the prospect of the return being re-opened and re-examined by an inspector of taxes within the relevant four-year period. The classic way in which that will be done is where the Revenue turn the spotlight on a particular aspect

(or a number of aspects) of a tax payer's potential tax liability through the means of an audit which usually will not take place until after the year of assessment in question. Under such an audit, the inspector will closely examine the relevant transactions of the tax payer during the period under investigation and will be free (subject to the four-year limit imposed by s. 955 (2) of the 1997 Act) to re-assess the liability of the tax payer concerned to tax. That is a feature of the statutory scheme established by the 1997 Act to which self-assessed tax payers are subject.

The non-objection of the Revenue does not give rise to the representation alleged

237. Against that backdrop, I fail to see how Perrigo can plausibly suggest that the non-objection by Revenue in the past can be said to give rise to an implied representation that, thereafter, the ongoing transactions of EPIL would not be subject to scrutiny or the possibility of an adverse assessment by the Revenue using the powers available to an inspector under s. 955 (1) or s. 956 (1) (b) in the case of the tax years covered by Part 41 of the 1997 Act or under s. 959Y in the case of the tax years covered by Part 41A. In this context, s. 959Y, in the same way as s. 955 (1) expressly provides that a Revenue officer may at any time amend either a Revenue assessment or a self-assessment notwithstanding that tax may have been paid in respect of a previous assessment or that the assessment may have been amended on a previous occasion or on previous occasions. I appreciate that the Revenue never sought to exercise those statutory powers under s. 955 (1) or s. 956 (1) (b) in respect of any of the years prior to 2013. However, it is necessary to keep in mind that, as Clarke C.J. observed in *Droog*, the purpose of s. 955 (1) (and the same applies to s. 956 (1) (b)) is to ensure that a tax payer cannot argue that the fact that they had made a return and had paid tax in accordance with an assessment raised on foot of that return might mean that their tax affairs for the fiscal period concerned were irrevocably finalised. Accordingly, the making of an assessment under s. 954 could not be said to convey to a tax payer the impression that the Revenue was

necessarily satisfied with the tax treatment of the relevant transactions of a tax payer. Subject only to the four-year time limit, s. 955 (1) and s. 956 (1) (b) allow the Revenue to amend the assessment. It is true that, in the case of a fully compliant tax payer, this is subject to a four-year limitation period prescribed. However, that provision simply operates to prevent the Revenue from reopening the amount of tax due after the relevant four-year period. It does not deem the Revenue to be satisfied with the return previously made.

238. This seems to me to be particularly so in the context of the issue which arises in the present case as to whether a particular transaction (such as the disposal of IP) constituted a part of EPIL's trade. EPIL was consistently told that the question whether any particular transaction constituted part of its trade would be a matter for individual assessment after the transaction in issue was carried out. This was made clear in the letter of 21st September, 2000 sent by Mr. O'Leary to Mr. Hurley of EPIL (quoted in para. 113 above). It was also made clear in the proviso to the Shannon Certificate (quoted in para. 46 above). The same message was also conveyed to all tax payers (including EPIL) in TB 57 (quoted in para. 133 above). As explained above, Perrigo expressly relies on one aspect of TB 57 for the purposes of the case made by it in these proceedings. In my view, it cannot isolate one aspect of TB 57 in this way. If it is the case that EPIL had regard to TB 57, it cannot be said not to be aware of the aspect of that briefing described in para. 133 above. As noted there, TB 57 explained that the Revenue could, in the context of an audit undertaken after the relevant return was made, take a different view of the tax treatment of a transaction. As explained in para. 234 above, that is a feature of the Irish tax system to which every tax payer is subject. Furthermore, a reading of the article in the Irish Tax Review 2004 (had it been considered at the time) would also have shown that audits are likely. Whether or not that article ever came to its attention, it is inherently unlikely that EPIL, as a sophisticated tax payer, would not have been aware that any of its transactions could be the subject of a Revenue audit and that, in such

circumstances, the Revenue could potentially take the view that an individual transaction does not constitute trading. In the present case, there was never any relevant audit. There were targeted audits in respect of other taxes but there was never any corporation tax audit. As a consequence, there was never any investigation by the Revenue of the issue as to whether the sale of IP by EPIL constituted trading for tax purposes.

239. Furthermore, it is important to bear in mind that, even in cases where there may be an established trade which the Revenue has never questioned, a particular transaction may have distinguishing features which call into question whether it is, in truth, a part of that trade or whether it is, in fact, of a capital nature. Thus, even if it were the case that there had been a history of acceptance by the Revenue that previous sales of IP formed part of a trade carried on by EPIL, I do not believe that this could be said to preclude the Revenue from challenging Perrigo's characterisation of the sale of the Tysabri IP. In this context, I note that, in the affidavits of the inspector, Mr. McNamara and of Professor Eamonn Walsh sworn on behalf of the respondents, there are a number of reasons advanced - which are specific to the Tysabri IP - as to why its disposal to Biogen should be regarded as a capital transaction rather than a trading transaction. These include the existence of the collaboration agreement with Biogen which contained restrictions on EPIL's ability to dispose of the Tysabri IP (which was also cited in the audit findings letter), the contention that Tysabri IP was source of the dominant revenue stream of EPIL for many years, and the contention that the Tysabri IP was treated as a capital asset and not an item of stock in trade in the financial statements of EPIL (which also featured in the audit findings letter). I should make clear that these reasons are strongly contested by Perrigo. However, it is no part of my function in these judicial review proceedings to determine who is correct. That will be a matter for the TAC to decide. However, it could not be said that the Revenue does not have an arguable basis to contest the treatment of the sale of the Tysabri IP as a trading transaction. Like any other transaction, the

correct characterisation of the sale of the Tysabri IP will have to be determined by the application of the badges of trade principles discussed earlier in this judgment. The fact that there may be earlier sales of IP is likely to be an important consideration in any such assessment but it will clearly not be the only factor in play. That being so, I cannot see any basis on which the Revenue's non-objection to EPIL's previous tax treatment of IP sales could be said to give rise to a representation that the Revenue would necessarily treat all sales of IP (and, in particular, the sale of the Tysabri IP) in the same way. While Perrigo is plainly very aggrieved by the approach taken by the Revenue, it must be remembered that the Revenue does not have the last word. The existence of a right of appeal to the TAC constitutes a very important protection for Perrigo. It will be for the TAC, after an *inter partes* hearing, to make the relevant findings of fact and if Perrigo is thereafter unhappy with the TAC's application of the law or with the inferences drawn by it from its primary findings of fact, it will have the opportunity to appeal the decision of the TAC to the High Court by way of case stated.

Conclusion in relation to Perrigo's case based on its course of dealings with the Revenue

240. In the circumstances described in paras. 226 to 239 above, I have come to the conclusion that Perrigo has failed to establish that there is anything in the course of dealings between EPIL and the Revenue which could be said to give rise to a representation that the Revenue would not revisit the tax treatment of any individual IP disposal and, in particular, the disposal of the Tysabri IP. In those circumstances, I cannot see any grounds on which Perrigo can advance a legitimate expectation claim on the basis of its course of dealings with the Revenue. In circumstances where Perrigo has failed to establish the first of the three *Glencar "preconditions"*, this aspect of its legitimate expectation claim must fail. It is, accordingly, unnecessary to consider whether the remaining *Glencar* preconditions are satisfied or whether there are any negative factors (to use the language of Clarke J. in *Lett v.*

Wexford Borough Council) that require to be taken into account. It is also unnecessary to consider the large number of additional cases on legitimate expectation that were cited in the course of the submissions made on behalf of the parties (including the UK authorities). The next issue to be addressed is whether a combination of each of the Shannon Certificate, TB 57 and the course of a dealings can be said to give rise to a legitimate expectation on Perrigo's part.

The case based on a combination of the Shannon Certificate, TB 57 and the course of dealings

241. As noted in para. 9 (d) above, the paragraphs of the statement of grounds which are said to be relevant to this aspect of Perrigo's case are paras. E17, E21, E62 and E95-96. I do not believe that it is necessary to replicate in this judgment what is alleged in these paragraphs of the statement of grounds. In my view, it is simply not possible to come to the conclusion that the combination of the certificate, TB 57 and the course of dealings between the parties is sufficient to give rise to any basis for the legitimate expectation claim advanced by Perrigo. For all of the reasons discussed above, I have come to the conclusion that the individual components of this combination do not give rise to any representation of the kind alleged in the statement of grounds. Given the views which I have formed in relation to those three aspects of Perrigo's case, I cannot see how it can be suggested that a combination of those factors gives rise to a different conclusion.

242. For completeness, I note that, in para. E21 of the statement of grounds, it is suggested that the parties had reached a *"common understanding of the factual and legal premise upon which the 2013 disposal and all previous disposals occurred".* In essence, the case pleaded there is equivalent to what is known, in the private law arena, as estoppel by convention. However, as Charleton J. observed in *National Asset Loan Management Ltd v. McMahon* [2014] IEHC 71, at para. 20 (quoted in para. 221 above), there must, in such cases, be

conduct which, on an objective basis, establishes such a common understanding. In such circumstances, as Charleton J. emphasised, there must be some element of behaviour on the part of the party against whom the estoppel claim is made that, reasonably construed, clearly alters the *"strictures of legal obligations in such a way that it would be unfair to later enforce these…"*. While that observation was made in a private law context, it seems to me to be equally relevant in the context of determining whether the first limb of the *Glencar* test is met in this case. In my view, Perrigo has no case to make based on the Shannon Certificate. Likewise, it has no case to make based on TB 57. While I fully appreciate that there was a long course of dealing between the parties (which has been described at length earlier in this judgment) the statutory context – in combination with (a) the lack of any corporation tax audit; (b) the consistent position adopted by the Revenue (and communicated in clear terms to EPIL) that any claimed trading status can only be determined after a transaction has taken place; and (c) the considerations discussed in para. 240 above all seem to me to rebut any suggestion that there was a common understanding of the factual and legal premise upon which the disposal of the Tysabri IP occurred. Accordingly, I have come to the conclusion that this element of Perrigo's legitimate expectation claim must also fail. It is unnecessary in the circumstances to consider any of the remaining *Glencar* criteria.

Consideration of the complaint made by Perrigo in relation to the audit findings letter

243. As noted in para. 170 above, an additional complaint made by Perrigo is that the audit findings letter purported to retrospectively re-characterise previous IP disposals as not constituting trading transactions notwithstanding that the tax assessments in respect of those transactions could no longer be challenged by the Revenue having regard to the four-year limitation period prescribed by s. 955 (2) of the 1997 Act. That case appears to me to be made principally in relation to the second element of Perrigo's case – namely its case that the assessment is so unfair as to amount to an abuse of power. Perrigo's case in relation to

unfairness is considered further below. However, in the course of the hearing, counsel for Perrigo sought to advance an argument based on the decision of the Supreme Court in *Revenue Commissioners v. Droog* [2016] IESC 55. This argument appears to be relevant to the claim made in para. 31 of the statement of grounds that Perrigo had a legitimate expectation that the Revenue would not *"seek to enquire into, revisit or re-characterise, 16 years of business transactions involving disposal of IP retrospectively when the assessments to tax in respect of the periods in question had become final and conclusive".* Having said that, it should be noted that the decision in *Droog* is not mentioned in the written submissions delivered on behalf of Perrigo in advance of the hearing. Nonetheless, in the course of the hearing, reliance was placed on it to suggest that the Revenue, in the audit findings letter, was not entitled to revisit any of the transactions undertaken by EPIL in the period prior to the disposal of the Tysabri IP in 2013. In particular, reliance was placed on the following observation made by Clarke C.J. in *Droog* at para. 6.6 of his judgment:

> *"6.6. … I would wish to strongly emphasise that those comments are made solely in the context of a case where a tax payer has made a fully compliant return. They could have no application where the tax payer has given incomplete or incorrect information to Revenue. But there is nothing in the legislation, on the interpretation which Revenue urges, which limits the time for the formation of a section 811 opinion in any way.* ***Could it really be the case that Revenue could revisit the consequences of a fully compliant tax return, and an assessment made and paid as a result thereof, 30 years after the event?*** *On the basis of the construction which Revenue urges there would not seem to be any obvious statutory barrier to such a course of action."* (emphasis added).

244. Although reliance on *Droog* appears to have been something of an afterthought, the case is potentially relevant to the claim made in para. 31 of the statement of grounds and it is

therefore important that I should address the issue. Moreover, the issue was argued on both sides. As noted above, it arises in the context of the audit findings letter. That letter was annexed to the statement of grounds. In the course of the letter, the author, Mr. O'Donoghue, set out what he described as a *"summary of the main points underpinning Revenue's position on the matter and why it differs from that of EPIL".* In the course of his summary, Mr. O'Donoghue stated, at paras. 2-4 of the letter:

> *"2. Revenue does not dispute the fact that EPIL carried on a Case I trade.*
>
> *3. The details contained in the … 'Shannon' certificate or in EPIL's Memorandum and Articles of Association are not determinative of the trade actually carried on by EPIL, the trade of EPIL is determined on the basis of fact.*
>
> *4. EPIL carried on a trade of the purchase, development and exploitation of the rights to pharmaceutical products and the sale of pharmaceutical products. The sale of IP did not form part of its trade. After analysing the disposals of IP made by EPIL since it began its trade, we have concluded that they were not carried out as part of a trade of acquiring and selling IP, for example:*
>
> - *IP disposed of during the 'recovery plan' of 2002 to 2004,*
> - *Following an assessment of 'strategic alternatives' in 2009, and*
> - *As part of the disposal of the Elan Drug Technologies business in 2011".*

245. In the course of the hearing, counsel for Perrigo complained that para. 4 of the letter constituted a complete redefinition of Perrigo's trade and that it was not confined to the disposal of the Tysabri IP. As noted above, he also drew attention to the observation made by Clarke C.J. in *Droog* quoted in para. 243 above. He submitted that the Revenue was clearly not entitled to revisit the characterisation of the transactions described in para. 4 of the letter after the relevant four-year period prescribed by s. 955 (2) had already expired.

246. Before addressing the potential impact of the judgment in *Droog*, I should first record that the paragraphs of the audit findings letter quoted above should not be read in isolation. Although it is undoubtedly the case that, in para. 4 of the letter, the Revenue suggested that EPIL had never carried on a trade of acquiring and selling IP, this is not the only basis on which the Revenue advanced its contention that the disposal of the Tysabri IP was not a trading transaction. In paras. 5 – 6 of the summary of the main points made by the Revenue, the writer put forward reasons which were specific to the Tysabri IP for suggesting that the transaction could not constitute trading. In particular, in para. 5, the writer referred to the original collaboration agreement entered into between EPIL and Biogen which placed restrictions on EPIL's ability to dispose of its remaining share of the IP. In addition, in para. 6, reliance was placed on the accounting treatment of Tysabri as an intangible asset in the financial statements of EPIL.

247. It is also very important to note that, in recording the EPIL position, the writer of the letter, Mr. O'Donoghue, on p. 2, drew attention to a document which had been prepared by EPIL which outlined EPIL's history *"with reference to the volume of acquisitions and disposals of intellectual property made by the Company since the initiation of its trade".* It therefore appears to be clear that, in making a case to the Revenue, in response to the audit, that the disposal of the Tysabri IP constituted a trading transaction, EPIL itself relied on what it regarded as a history of trading transactions in IP. Thus, it was EPIL which itself sought to bring historical (i.e. pre-2013) transactions into focus.

248. It also has to be said that it is unsurprising that both sides should refer to historical transactions. It is not unusual, in considering whether or not a particular transaction constitutes trading, to examine its place in the overall history of transactions undertaken by a particular tax payer. In this context, it is striking that, in para. 18 of the statement of grounds, Perrigo expressly pleaded that the sale of the 50% interest in the Tysabri IP to Biogen was *"a*

*part of a long-established trade recognised by the **Shannon Tax** Certificate"* (bold in original).

249. In circumstances where Perrigo has itself relied on the pattern of transactions prior to the disposal of the Tysabri IP, it is difficult to see the basis on which Perrigo now complains about the audit findings letter. In addition, it is evident from a reading of the letter, as a whole, that the views expressed by the Revenue in respect of prior transactions, is not the sole or even the main reason why the Revenue expressed the view that the Tysabri transaction did not form part of the trade of EPIL.

250. Moreover, I do not see anything in the judgment of Clarke C.J. in *Droog* to support the contention of Perrigo that the Revenue, in the context of the consideration of a particular transaction, cannot look at the history of previous transactions entered into outside the four-year time limitation prescribed by s. 955 (2) of the 1997 Act. 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 s. 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…".*

251. Thereafter, in paras. 4.7 and 4.8 of his judgment, he referred to this rationale again and, in para. 4.8 stated that ss. 955 and 956 are designed *"to prevent the reopening of the tax affairs of a tax payer in respect of the types of tax covered by Part 41 outside of a four-year period except in circumstances where the original return was, or was reasonably suspected to be, fraudulent or negligent".* It seems to me to be clear that the Chief Justice expressed himself in those terms as a shorthand for what he had previously said in para. 4.5 of his judgment where he said that the Oireachtas must have considered that it would have been significantly unfair to allow Revenue to reopen *"the amount of* ***tax due****"* (emphasis added) after the relevant four-year period. The language of the Chief Justice in that paragraph is consistent with the language of s. 955 (2) itself which expressly provides that *"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 …****no additional tax shall be payable*** *by the chargeable person after the end of that period… ".* (emphasis added).

252. Similarly, it seems to me that, when Clarke C.J. questioned, in para. 6.6 of his judgment, whether the Revenue could *"revisit the consequences of a fully compliant tax return, and an assessment made and paid as a result thereof, thirty years after the event?",* he had in mind an attempt by the Revenue to reopen the amount of tax due. This conclusion is reinforced by a consideration of the analysis which follows in s. 7 of the judgment in *Droog.* In particular, in para. 7.4 of his judgment, the Chief Justice identifies that the only reason for a s. 811 opinion is to initiate a process leading, from the Revenue's perspective, to an outcome under which a tax payer pays more tax than was previously assessed. That is the whole purpose of a s. 811 opinion. It seeks to re-characterise a transaction in a way that will result in additional tax being paid by the tax payer. Thus, in para. 7.4, Clarke C.J. said:

> *"7.4. Section 955(2)(a)(i) says that no additional tax shall be payable by the chargeable person after the end of the relevant four-year period. That provision is*

expressed in clear and unambiguous terms. …. 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. It is quite clear that the purpose of the Revenue opinion in this case, if it were to become final and conclusive, would be, by whatever means, to impose an additional burden on Mr. Droog to pay tax. He would be required to pay the sum of IR£24,022 which he saved by virtue of the losses attributable to Taupe Partners being allowed for the purposes of the calculation of his tax when originally assessed. The only reason for a section 811 opinion is to initiate a process leading, from Revenue's perspective, to a requirement to pay that money in some form. It is designed to ensure that Mr. Droog pays more tax. …"..

253. Having concluded that the s. 811 opinion was designed to require the payment of additional tax, Clarke C.J. came to the conclusion that the s. 811 opinion was subject to the same four-year limitation period as prescribed by s. 955 (2). In the course of the analysis carried out by him to arrive at that conclusion, Clarke C.J., at para. 7.6 of his judgment, again repeated that "*what s.955 prohibits is an obligation to pay tax arising outside the four-year time limit in those cases to which the section applies".* Again, this reinforces the conclusion that, when Clarke C.J. spoke, in para. 6.6 of his judgment about a tax return being revisited, he had in mind a process which would lead to the payment of additional tax in respect of an accounting period more than four years previously. In these circumstances, I do not believe that the decision in *Droog* is authority for the proposition advanced by Perrigo. It is clear from the decision that the Revenue cannot impose a tax liability after the relevant four-year period has passed. However, there is nothing in the judgment to suggest that the Revenue is precluded from looking at previous transactions in the context of a determination as to whether a later transaction by the same tax payer does or does not form part of a trade, even where such earlier transactions took place more than four years prior to the particular

transaction under consideration. As noted in para. 53 above, one of the matters that is traditionally examined in the context of the *"badges of trade"* is the frequency of similar transactions. It is clear from the audit findings letter that the reference to prior transactions by Mr. O'Donoghue was made in the context of an analysis of historical transactions as part of such an exercise. No suggestion was made that the Revenue intended to re-assess the tax consequences of those transactions or to impose a tax liability in respect of them.

254. In my view, there is nothing in the Supreme Court judgment in *Droog* which casts doubt on the ability of either tax payers or the Revenue to examine a tax payer's historical transactions in the context of a determination as to whether a particular transaction constitutes part of a trade. Thus, for example, I would be surprised if Perrigo, in the course of its appeal to the TAC, did not itself lay significant emphasis on its prior history of dealings in IP. In the circumstances, I reject the case made by Perrigo on the basis of the judgment in *Droog.*

The case made by Perrigo that the assessment is so unfair as to amount to an abuse of power

255. In relation to this aspect of the case, it should be noted that, on Day 5 of the hearing, counsel for Perrigo very helpfully explained that, in the event that the court concludes that no *"clear representation"* has been established, Perrigo falls back on its argument that the conduct of the Revenue in this case amounts to an abuse of power. In its written and oral submissions in support of this aspect of its case, Perrigo placed significant reliance upon a decision of the Court of Appeal of England & Wales in *R v. Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681. Counsel suggested that there was a clear parallel between the facts of the *Unilever* case and the present case. The *Unilever* case concerned claims for loss relief made by companies within the Unilever group. The relevant UK statute prescribed that such claims should be made within two years from the end of the accounting period in which the loss was incurred. The UK Revenue did not have any express statutory

power to extend that time. However, the relevant UK statute (in common with s. 849 (2) of the 1997 Act in Ireland) provided that corporation tax should be under the care and management of the UK Revenue. It was common ground between the parties to the proceedings that the UK Revenue had a discretion under that provision to accept late claims for loss relief. In the early 1990s, the UK Revenue disallowed a claim made by Unilever to set off trading losses incurred during the accounting year ended 31st December, 1988 against profits of that accounting year on the ground that a claim to do so had not been made within two years after the end of the accounting period. Unilever contended that, having regard to a long-established practice which operated between it and the UK Revenue, the latter could not, in fairness, treat the claim as time-barred and brought judicial review proceedings in which Unilever challenged the refusal of the Revenue to accept the late claim. While there was no evidence, in that case, that either Unilever or the Revenue had consciously disregarded the time limit in the past, there had been at least 30 occasions where claims had been accepted outside the two-year time limit. The Court of Appeal came to the conclusion that the position adopted by the UK Revenue in that case was so unfair as to amount to an abuse of power. In reaching that conclusion, Bingham MR (as he then was) drew attention to a number of aspects of the course of dealings between the parties including the consensual procedure adopted by the parties which he said had been undertaken *"harmoniously for years";* the fact that the statutory time limit had been overlooked by virtue of *"mutual oversight";* the fact that, if the Revenue was correct, Unilever would be seriously prejudiced in circumstances where the point was *"taken now and not before"*; and also the fact that, if the UK Revenue was correct in its position, it would receive an *"adventitious windfall"* of £17 million sterling through the *"understandable error of an honest and compliant tax payer, shared over many years by the Revenue".*

256. In response to this element of Perrigo's claim, the respondents have drawn attention to the way in which the UK Supreme Court has subsequently distinguished the approach taken in *Unilever*. The respondents refer, in particular, to the decision of the UK Supreme Court in *R (Gallaher Group Ltd) v. Competition and Markets Authority* [2018] 2 WLR 1583. In that case, the UK Supreme Court treated the *Unilever* decision as an instance of *Wednesbury* irrationality. In the *Gallaher* case, Lord Carnwath observed, at para. 32 that: *"Simple unfairness as such is not a ground for judicial review".* He cited in this context, the speech of Lord Diplock in *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 637 where he said:

> *"judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise, …"*

257. It should also be noted that, in Ireland, McCracken J. in *DH Burke & Sons v. The Revenue Commissioners* (High Court, unreported, 4th February, 1997) distinguished *Unilever.* In addition, it should be noted that, more recently, Murray J. in the Court of Appeal in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 91 also drew attention to the *Gallaher* decision in para. 134 of his judgment as authority for the proposition that the UK Supreme Court "*now prefers to see Unilever as an example of irrationality, and indeed perhaps as the case of a settled practice giving rise to an implied representation".*

258. *Unilever* was not the only authority on which Perrigo sought to rely in the context of this element of its case. In the course of the oral submissions of counsel on behalf of Perrigo, attention was also drawn to the decision of the Supreme Court in *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159. In that case, the applicant challenged a tax assessment on the ground, inter alia, that there had been a failure by the Revenue to apply the provisions of the

Tax Payers' Charter of Rights. In particular, he relied upon a provision of the Charter which stated that, in a tax payer's dealings with the Revenue Commissioners, the tax payer is entitled to expect that every reasonable effort would be made to provide access to *"full, accurate and timely information about revenue law and your entitlements and obligations under it…."*. While the applicant was unaware of the Charter at the relevant time, he sought to rely upon it as indicating an acceptance by the Revenue of specific requirements as to fairness in their dealings with tax payers which, he argued, created a legitimate expectation that such requirements would be met. In that case, the applicant was not informed by the relevant inspector of taxes of his right to appeal a refusal by the Criminal Assets Bureau to accept a notice of appeal. At that time, an appeal lay to the Appeal Commissioners (now replaced by the TAC) from such a refusal. The applicant argued that this failure to inform him of the right of appeal was in breach of his legitimate expectation that the Charter (which he admitted he was not aware of) would be honoured. His position was upheld by the Supreme Court. In the course of his judgment in that case, Keane C.J. observed, at p. 174:

> *"It is beyond argument that [The Revenue] and their agents, as public authorities, are bound to observe fair procedures in the exercise of the powers conferred on them by the tax code and, where an actionable breach of those requirements has been established, that does not mean that the statute has been in any way amended as a result of a decision to that effect by a court. That view would be impossible to reconcile, in my judgment, with the obligation of the courts to ensure that public authorities perform the functions entrusted to them by statute in accordance with the Constitution and the law".*

259. In making those observations, it seems to me that Keane C.J. clearly had in mind the well-established principle (which emerges from the decision of the Supreme Court in *East Donegal Co-operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317) that

procedures prescribed under post 1937 statutes will be conducted in accordance with the requirements of constitutional justice. The relevant principle is expressed in the following way by Walsh J. in *East Donegal* at p. 341:

> *"…the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation … is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts".*

260. However, in *Keogh*, Keane C.J. went further and took the view that the same principle also applied in the context of the Tax Payers Charter. At p. 176 he said:

> *"In this case, we are concerned with a specific undertaking to give taxpayers full, timely and accurate information as to the provisions of a notoriously opaque and difficult code. While it is manifestly not the function of the [Revenue] or their inspectors to give gratuitous advice in all circumstances to members of the public as to their legal position, it was not asking too much of them in the present case not to respond to a letter such as that from the applicant in a manner which they must have known could have left him in the dark as to his rights. That would seem to me to be at variance with both the letter and the spirit of the undertaking in the Charter. In the result, I am satisfied that the fair procedures which it was reasonable to suppose the respondents would observe were not applied in his case and that, in the light of the authorities to which I have referred, he was entitled to be placed in the same position as if they had been met".*

261. It should be noted that the authorities to which Keane C.J. refers in that passage were all in the context of legitimate expectation. Thus, it would appear that the ultimate decision of the Supreme Court in that case was to uphold the claim of the applicant on the basis of legitimate expectation rather than on the grounds of procedural unfairness. Nonetheless, in arriving at that conclusion, it is clear that the Supreme Court took into account the obligation which stems from the Constitution that proceedings, procedures, discretions and adjudications which are permitted or prescribed by an act of the Oireachtas must be conducted in accordance with the principles of constitutional justice. The approach taken by the Supreme Court appears to have been prompted by the specific instance of procedural unfairness in that case arising from the failure of the Revenue to draw attention to the relevant statutory right of appeal. I cannot see any parallel between that case and the facts which arise here.

262. There may well be a distinction to be drawn between cases of procedural unfairness (which traditionally have been regarded as classic grounds for maintaining judicial review proceedings) and cases of substantive unfairness (which may be caught by the decision in the *Gallaher* case). Ultimately, I do not believe that it is necessary to reach any conclusion on that issue. In my view, even on the assumption that there is a legal basis for this element of its claim, Perrigo has failed, in the present case, to establish any level of unfairness on the part of the Revenue. For all of the reasons outlined in the earlier sections of this judgment, I have come to the conclusion that there is no basis for the legitimate expectation claim by Perrigo. In circumstances where there is no basis for Perrigo to have a legitimate expectation that an amended assessment would not be issued, it is difficult to see how it can be suggested that the Revenue acted unfairly in exercising the statutory power available under the 1997 Act to issue an amended assessment in respect of the 2013 tax year. The present case is quite unlike *Unilever* where there was a settled practice agreed between the UK Revenue and the

tax payer which had been operated for many years in relation to a single issue namely the making of claims for losses. Those claims specifically requested a determination by the UK Revenue as to the validity of the claims. In contrast, there was no equivalent procedure put in place here by which EPIL requested rulings by the Revenue as to whether any of its transactions constitute trading. That is a process which could have been initiated by EPIL. As TB 57 explained, it is open to a tax payer to request an opinion from the Revenue under Tax Briefing 48. In addition, TB 57 stated that, in cases of doubt, a tax payer can express doubt under s. 955 of the 1997 Act and thereby obtain protection in respect of interest and penalties in the event that the Revenue, in the context of an audit, take a different view of the tax treatment at a later date. Furthermore, in the course of EPIL's dealings with the respondents, it has consistently been made clear that the question whether a particular transaction will qualify as a trading transaction is a matter which falls to be determined retrospectively. This is exemplified in the exchange of correspondence which took place between Mr. Hurley of EPIL and Mr. O'Leary of the Department of Finance (summarised in paras. 109 to 113 above). That culminated in Mr. O'Leary's letter of 21st September, 2000 in which he refused to provide the confirmation sought by Mr. Hurley and instead stated that the issue whether any company is trading is *"a matter of fact to be determined after the activities in question have taken place".* That position was reiterated in the terms of the proviso to the Shannon Certificate issued in 2002 (quoted in para. 46 above) which expressly stated that the question whether EPIL was trading and *"if so whether any of its particular operations are trading operations … is primarily one of fact to be determined after the events in question have taken place".*

263. It is true that, over a period of years, EPIL made information available to the Revenue which, if interrogated, might have led the Revenue to undertake a train of enquiry that would have led to the conclusion that EPIL was treating disposals of IP as trading transactions.

However, as noted in para. 176 above, it was acknowledged by Perrigo that, in the EPIL financial statements which were furnished to the Revenue, IP was treated as though it were a capital asset. Thus, the information provided to the Revenue did not plainly disclose that IP was being treated as stock in trade. More importantly, the fact that a particular disposal of IP might be characterised as trading did not mean that every disposal of IP must likewise constitute trading. While the frequency of transactions of a particular kind is one of the factors taken into account in the context of the *"badges of trade",* there may be circumstances peculiar to a particular transaction which takes it outside the trade of the tax payer concerned. In this context, significant issues have been raised both in paras. 5 and 6 of the audit findings letter (summarised in para. 246 above) and in the affidavits sworn by Professor Eamonn Walsh and Mr. McNamara on behalf of the respondent as to why the disposal of the Tysabri IP cannot be said to be a trading transaction. It is no part of my function in these proceedings to determine whether the views expressed by Mr. McNamara or Professor Walsh or by the writer of the audit findings letter are correct. However, there are clearly arguments available to the Revenue as to why the disposal of the Tysabri IP should not be regarded as a trading transaction. That is an issue which will have to be addressed in due course by the TAC. The key point for present purposes is that, irrespective of the view that might be taken in relation to previous disposals of IP, it is arguable that there are features of the treatment of the Tysabri IP which are unique to it which will have to be considered in the context of any determination as to whether the disposal of the Tysabri IP was or was not a trading transaction.

264. In the context of the issue of fairness, it should also be recalled that a complaint is made in the statement of grounds (as summarised in para. 170 above) that Perrigo will be forced to incur considerable costs and expense if it is to be required, in the context of the appeal to the TAC, to address the correct characterisation of historic transactions. As noted

in para. 170, Perrigo draws attention to the fact that, in 2005, the death occurred of its former chairman, Mr. Donal Geaney and that none of the management team of EPIL in the period prior to 2015 are currently employed by the Perrigo Group and furthermore that Perrigo has encountered significant difficulty in recovering its records. However, no case was made in the statement of grounds by reference to the well-established case law relating to delay. Nor were any authorities opened to me on the issue of delay.

265. Moreover, it is clear from the affidavit evidence before the court that Mr. Hurley remains available to Perrigo. Not only has he sworn affidavits in these proceedings but it is clear from the underlying materials that he was personally involved in the consideration of the tax treatment of the activities of EPIL in Shannon. Furthermore, it is clear from the statement of grounds that efforts are still ongoing to recover and review the available documents. As I understand it, the evidence in relation to the death of Mr. Geaney and the expense and inconvenience which Perrigo says it will have to incur for the purposes of the TAC hearing was put before the court with a view to assisting the legitimate expectation case advanced by Perrigo. Had Perrigo established the existence of a representation by words or conduct, the existence of prejudice would have arguably assisted it in establishing a legitimate expectation. However, in circumstances where it has failed to establish a representation, it seems to me that this evidence does not avail Perrigo.

266. In my view, Perrigo has failed to establish that there is anything in the course of dealing between the parties which would make it unfair in the present case for the Revenue to exercise its statutory powers under the 1997 Act to issue an amended assessment.

The alternative case based on Perrigo's constitutional rights

267. This issue was addressed quite briefly in the oral submissions of counsel for Perrigo. It was also addressed in very brief terms in the written submissions. The relevant case is summarised as follows in para. 113 of the written submissions:

"It is submitted that the issuance of the Assessment … was an unjust exercise of Revenue's discretion. Having regard to the Certificate, the Tax Briefing, the consistent submissions and processing of returns over 20 years and the assurances received, the retrospective determination in 2018 that the Applicant had never conducted a trade which included selling IP and the consequent making of an Assessment … in 2013 and the amount of €1.6 bn was an unjust attack".

268. It is clear, therefore, that, insofar as this element of Perrigo's case is concerned, it relies on the same material which I have already addressed in the context of the legitimate expectation and abuse of power/unfairness issue. In circumstances where I have concluded that Perrigo has failed to establish a basis for either the legitimate expectation or the abuse of power/unfairness claims, it seems to me that its argument based on the Constitution must also fail. I therefore do not believe that it necessary to say anything further in relation to this issue.

Conclusion

269. For all of the reasons discussed in this judgment, I have come to the conclusion that Perrigo has failed to establish any basis to interfere with the assessment issued in respect of the disposal of the Tysabri IP and, accordingly, its claim must be dismissed. I stress, however, that this judgment deals solely with the issues raised in these judicial review proceedings. The question whether the disposal of the Tysabri IP constituted a trading or a capital transaction is a matter that will have to be resolved in due course before the TAC.

270. In light of the fact that Perrigo has failed in its claim, the respondents are presumptively entitled to their costs of the proceedings subject to any case which Perrigo may wish to make to the contrary. If Perrigo intends to argue for a different conclusion in relation to costs or if it wishes to seek a stay on any order for costs, it is at liberty to furnish by email to the registrar (copied to the solicitor for the respondents) within 14 days from the date of

delivery of this judgment its submissions to that effect, in which case the respondents will have a period of 14 days thereafter in which to furnish replying submissions (to be copied to Perrigo's solicitors), following which I will issue a written ruling on costs and on any contested application for a stay.

271. I should make clear that, in the event that Perrigo intends to appeal, and in the event that an order for costs is to be made against it, I am provisionally of the view that there should be a stay on the order for costs until the determination of the appeal. However, I stress that this is a provisional view and the respondents are at liberty within the period mentioned in para. 270 above to make such submissions on the issue as they may be advised.