THE HIGH COURT

[2022] IEHC 396

[2020 61 R]

BETWEEN

BRENDAN THORNTON

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

AND

[2020 67 R]

BETWEEN

PAUL McDERMOTT

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Egan delivered on the 1st day of July, 2022

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General Introduction

1. These are appeals by way of a case stated under s. 949 AQ of the Taxes Consolidation Act, 1997 ("TCA 1997") from a determination of the Tax Appeals Commission ("TAC") dated the 13th December, 2019 ("the Determination"). Brendan Thornton ("the appellant") is one of 32 individuals who had appealed to the TAC against amended Schedule D assessments raised by the Revenue Commissioner ("the respondent") in respect of the tax years 2009 and 2010. Some of these individuals did not partake in or proceed with their appeals to this court. In respect of those that did, it has been agreed that the court's decision in relation to this appellant will govern the outcome of the appeals of the other appellants.

2. The appellant claims that he incurred trading losses in 2009 and 2010 as a result of his participation in Liberty Syndicates 1 and 2 ("the syndicates"). In brief, the syndicates bought and sold various investments, by far the most significant of which was the purchase from a company incorporated in the British Virgin Islands ("BVI") of the right to receive a dividend ("the dividend right") declared by a second company, also incorporated in the BVI. The appellant claims a tax deduction for the purchase cost of the dividend right on the basis that it was a trading loss which he is entitled to offset against his taxable income. As part of the same series of transactions, a dividend was declared, pursuant to which the appellant received a dividend payment roughly equivalent to the cost of the purchase. The appellant claims that, based on the provisions of s. 812 TCA 1997 ("s. 812", as to which see below), the dividend income is deemed not to have been received by him. Essentially, the appellant's case is that the purchase of the dividend right is an allowable trading loss but that the dividend income is excluded from his tax computation, resulting in substantially increased losses with which to shelter his other taxable income.

3. Three issues were before the court:

4. First, was the appellant, through his involvement in the syndicates, carrying on a trade in financial instruments and securities? If these transactions were not trading transactions, then they cannot be offset against taxable income. The respondent's case is that the appellant's capital contribution to the syndicates was an investment and that his involvement therein constituted investing and not trading.

5. Second, although under Irish income tax law, a dividend, including a foreign dividend, is generally taxable in the hands of the recipient, does s. 812 deem the dividend to be the income of the owner of the shares, rather than the appellant? In brief, s. 812 applies when an owner of shares sells the right to receive a dividend declared on those shares, but does not sell the shares themselves. The section deems any dividend income to be that of the owner of the shares. The

respondent's case is that, because the owner of the shares is a BVI company and is not therefore chargeable to Irish tax on the dividend income, s. 812 does not apply; accordingly the dividend income is taxable in the hands of the recipient, the appellant, in the usual way.

6. It will be apparent that the appellant needs to succeed on both of these issues if he is to benefit from the tax write off sought. The Determination found for the respondent on both issues.

7. This in turn led to the requirement to consider the third issue before the court. The appellant had submitted an "expression of doubt" with his tax returns pursuant to s. 955 (4) TCA 1997. This provides that, where a tax payer is in doubt as to the treatment of a matter for tax purposes, he may deliver a return specifying the doubt. Thereafter, if it is subsequently found that the view taken by the tax payer was incorrect, they will nevertheless be regarded as having made a full and true disclosure. Although any additional tax is still payable, the expression of doubt affords the taxpayer protection from interest and surcharges. The appellant challenges the TAC's finding that he was acting with a view to the avoidance of tax and that the expression of doubt filed was ineffective on the basis that it failed to specify the doubt in the manner required and was not genuine.

Background

8. The appellant signed up for and contributed funds to the syndicate. Documents provided to the appellant pre-contribution, confirmed that persons who wished to participate in the syndicate must be individuals resident or ordinarily resident in Ireland for tax purposes, that the opportunity would be best suited to higher rate tax payers and that the initial capital contribution would not be returned. In the case of the appellant, his initial capital contribution was €25,000, half of which was immediately deducted by way of fees and charges. The

appellant also contributed to other Liberty syndicates in the following tax years resulting in an overall investment over a period of five years of €100,000 in such syndicates.

9. Among the transactions in which the syndicates engaged was the purchase of the right to receive a dividend payable by a company incorporated in the BVI, Astratide Limited ("Astratide"). The vendor of these dividends rights was also a company incorporated in the BVI, Candle Maze Limited ("Candle Maze"). The syndicate did not purchase the shares on which the dividend was payable. The vast majority (over 90%) of the funds which the appellant and the other syndicate members ("the members") contributed to the syndicate was applied towards the purchase of dividend rights. The purchase was funded by a limited recourse loan from a third BVI company, Burgos Investments Ltd ("Burgos") to the members. The loan agreement with Burgos provided for a term of no more than 30 days and the loan was repayable only if, and to the extent that, dividends from Astratide were actually paid to the members. The monies lent by Burgos to the members were drawn down by a transfer of funds directly to the vendor of the dividend, Candle Maze, as consideration for the purchase of the dividend right. Burgos also advanced a loan to Candle Maze in an amount which was slightly higher (by less than 0.1%) than the amount of the dividend which was purchased by the members. The proceeds of the loan from Burgos to the vendor of the dividend, Candle Maze, were used to make a capital investment in its subsidiary, Astratide, which duly declared the dividend. The vendor of the dividend, Candle Maze used the proceeds of the sale of the dividend right to repay the vast majority of the loan which it owed to Burgos, leaving a small deficit. The members repaid the loan and discharged fees levied by Burgos under the loan agreements by paying the dividend amounts directly to Burgos.

10. Prior to his involvement in the syndicate, in the year ended 31st December, 2008, the appellant had claimed trading losses of €12,492. In the year ended 31st December, 2009, the

appellant claimed a trading loss, including the cost of purchasing the dividend right, of €267,510.

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

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

<u>Court's jurisdiction on an appeal by way of case stated</u>

13. The correct approach to be taken by the High Court in considering a case stated on a question of law is set out in Blaney J.'s judgment in *Ó Cúlacháin v. McMullan Brothers Ltd* [1995] 2 IR 217:

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
> *(2) Inferences from primary fact are mixed questions of fact and law.*
> *(3) If the judge's conclusion show that he has adopted the wrong view of the law, they should be set aside.*
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
> (5) *Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the Court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."*

14. In this case, the appellant does not challenge the findings of primary fact of the TAC. In addition, the appellant does not challenge the TAC's inferences from primary fact. Rather, the appellant maintains that, in applying the law to these facts, the TAC erred in law.

<u>Principles of law applicable to construing taxing statutes</u>

15. There was a considerable difference of emphasis as between the parties in relation to the principles of law applicable to construing tax statutes. The resolution of this issue is in no way determinative of the first question before the court, the trading issue. The question of whether or not the appellant is trading is not a question of statutory interpretation. The definition and scope of the concept of trading is to be found primarily in the case law. By contrast, the second issue, the application of the s. 812 deeming provision, is primarily a

question of statutory interpretation. Both parties rely upon the literal interpretation, which they each contend favours their case. However there remains a difference between the parties as to the extent to which regard may be had to the purpose of the provision and as to whether the court must adopt a construction that favours the tax payer.

16. The appellant argues that the only permissible interpretation of tax statutes is a literal interpretation and that very little or no regard can be had to the purpose of the legislative provision. The respondent emphasises that, even within the literal approach, context is critical and that the task of statutory interpretation is always to give effect to the intent of the legislature.

17. On this particular issue I think that the respondents submissions are to be preferred. The appellant relies upon a passage drawn from the judgment of O'Donnell J. (as he then was) in *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60 in which the learned judge stated that s. 5 of the Interpretation Act did not allow a "purposive interpretation" of taxation statutes. However, the judgment emphasises that this should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision. Therefore, the purpose of the provision, if discernible remains a helpful guide to its interpretation.

18. The appellant is correct to say that where there is an ambiguity in a tax statute it must be interpreted in the tax payer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words 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"*. However, I agree with the respondent's suggested qualification that this applies

only to the extent that there is in fact a doubt or ambiguity present. O'Donnell J. stated that it would be a mistake to come to a statute, even a tax statute, seeking ambiguity.

19. I will comment further below, as necessary, upon the applicable principles of statutory interpretation. For the moment, I gratefully adopt the following summary of the relevant principles emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50 and the judgment of O'Donnell J. in *Bookfinders,* as helpfully set out by McDonald J. in *Perrigo Pharma International Designated Activity Company v. John McNamara & Ors* [2020] IEHC 552:

> *"(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 paragraph 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…****"* [Emphasis added].

The trading issue

Introduction

20. The appellant claims that his participation in the syndicates constituted a trade. "*Trade*" is defined in s. 3 TCA 1997 as including *"every trade, manufacture, adventure or concern in the nature of trade"*. No attempt has been made by the legislature to provide a comprehensive statutory definition of "*trade*" and as observed by McDonald J. in *Perrigo,* the definition in the 1997 Act is quite circular and of no real assistance.

21. In the absence of a comprehensive statutory definition of the term *"trade",* the question of whether particular transactions form part of a trade for tax purposes requires consideration of the specific underlying facts and circumstances. Essentially, a case by case analysis must be carried out. In carrying out this analysis, guidance may be obtained from a 1955 report of the Royal Commission on Taxation of Profits and Income which sought to identify a number of indicia of trading and badges of trade, which are regularly used to determine whether particular transactions fall within the definition of trade. These factors, which are of course no more than a guide, include the subject matter of the property realised in the contended for trade; the length of the period of ownership; the frequency of similar transactions; whether supplementary work was undertaken in connection with the property disposed of; the circumstances that were responsible for the realisation and; critically in the present context, motive. The weight to be attached to these factors will vary according to the individual facts and circumstances of each case.

TAC findings and Determination on the trading issue

22. In light of the appellant's specific grounds of challenge, it is necessary to set out the Determination of the TAC in some detail. The Determination set out the commissioner's findings, including material findings of fact, as follows:

"1. It was a matter of undisputed fact that, as per the background information document and the syndicate agreement, the initial contribution would not be returned to the Appellants.

2. I find as a material fact that there was no risk undertaken by the Appellants in respect of the dividend purchase transaction. The documentation provided and the Appellants knew and were on notice of the fact that their capital would not be returned. They each made capital contributions to participate in the syndicate in the knowledge that their capital would not be returned. They were not at risk of not having their capital returned. They consented to not having their capital returned.

3. In relation to the dividend purchase transactions, I am satisfied that there was no risk for the syndicate participants in respect of these transactions as the loan funding the transactions was limited recourse. The syndicate granted a charge to Burgos Investments Limited over the dividends payable. In addition, the dividend was not paid directly to the syndicate members but was paid to Burgos Investments Limited.

4. I find that the fees and charges incurred by the Appellants were significantly referable to the dividend purchase transaction, which was inherently loss making.

5. I find that the complex structured arrangements underlying the syndicates point away from the existence of real, market driven commercial transactions and away from the existence of a genuine and authentic trade. In addition, the strategic design of these complex transactions points towards an objective other than trading and other than profit namely, tax advantages in the form of substantial tax losses generated by the syndicates.

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

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

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

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

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

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

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

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

23. On the trading issue the Determination ultimately held that "*the Appellants were not carrying on a trade in financial instruments and securities"* and *"that the nature of the Appellants' involvement in the syndicate(s) was that of investor and that each capital*

contribution to the syndicate was in the nature of an investment." The appellant's case on the trading issue is that, in making this decision, the Determination proceeded on a mistaken view of the law.

24. As the appellant does not challenge either the findings of primary fact or the inferences from primary fact in the Determination, it is not necessary to parse and analyse each of the above 13 findings in order to distinguish between the two. On the other hand, I should say that the language used to describe the nature of certain of these findings, for example the finding at paragraph 7 above, is somewhat loose. The question of whether or not the appellant is carrying on a trade is not in truth a finding of material fact (or even an inference from primary fact), but is rather a mixed question of fact and law.

Approach of the court to the trading issue

25. Three considerations inform the approach of the court to the trading issue.

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

27. Second, the court must be cognisant that the evaluation of whether a particular transaction is or is not a trading transaction is itself based upon an assessment of the interplay between a number of factual considerations derived from the relevant findings of fact. Not only is it no part of this court's jurisdiction to revisit the findings of facts and inferences therefrom, but it is also no function of the court to second guess the approach of the TAC to its assessment of this factual interplay.

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

Appellant's arguments

29. The appellant's primary argument is that the TAC erred in law in considering that the purpose and motive of the appellant's participation in the syndicates and in the dividend purchase transactions in particular was the generation of a tax advantage. This, they say, was an error of law because the presence or absence of tax avoidance purposes can only be considered in the context of the general anti-avoidance provisions set out in s. 811 TCA 1997 ("s. 811"). Second the appellant submits that the underlying purpose or motive of a transaction is either of no relevance or of little relevance to the issue of whether or not a transaction constitutes trading. Third, the appellant maintains that the TAC erred in relying upon certain authorities from the courts of England and Wales regarding transactions of this general nature as it is said that they place too much emphasis on the fiscal motivation of the relevant transaction. Fourth, it is said that the TAC in any event misapplied this case law to the facts of the present case.

Impact of *McGrath* decision and of s. 811 on the relevance of tax advantage purpose or motive

30. The appellant submits that any consideration of the purpose of the relevant transactions, as opposed to the objective nature of the transactions, is impermissible outside the confines of s. 811. Some background may assist in understanding this argument: in *Patrick McGrath & Ors v. J.E. McDermott (Inspector of Taxes)* [1988] IR 258, the High Court, per Carroll J., stated that the so called doctrine of "fiscal nullity" developed in England in *W T Ramsay Ltd v IRC* [1982] AC 300 was not part of Irish law and that the court should not intervene to render inapplicable a statutory provision which on its face appeared to apply to the transactions in suit and create a tax loss, merely because of the absence of a "real loss". Carroll J.'s approach was upheld by the Supreme Court which did not accept the contention of the Revenue Commissioners that the real, as distinct from what was described as the artificial, nature of the

transactions should be looked at by the court. That, Finlay C.J. stated, was not the function of the court in interpreting a statute of the Oireachtas. The court's function was strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from the provisions of the statute. Finlay C.J. found that the Revenue submissions effectively involved the court in implying a new sub clause into the relevant subsection to the effect that a condition precedent to the computing of an allowable loss was that same had to be coextensive with an actual loss incurred by the tax payer. Finlay C.J. rejected this approach and observed that the transactions in issue were not a sham and that in those circumstances, for the court to avoid the application of the relevant provision would constitute an invasion by the judiciary upon the powers and functions of the legislature, in plain breach of the constitutional separation of powers.

31. Of course, *McGrath* predated the promulgation by the legislature of general anti-avoidance provisions, s. 86 of the Finance Act, 1989, (the precursor to the current general anti-avoidance provision, s. 811). S. 811 is a complex provision, but in essence it permits the respondent to form an opinion that a transaction is a tax avoidance transaction, to give notice to the taxpayer and thereafter to take steps to defeat the tax avoidance scheme. A tax avoidance transaction is defined by s. 811 (2) TCA 1997 as follows:

> *"(2) For the purposes of this section and subject to subsection (3), a transaction shall be a "tax avoidance transaction" if having regard to any one or more of the following—*
> *(a) the results of the transaction,*
> *(b) its use as a means of achieving those results, and*
> *(c) any other means by which the results or any part of the results could have been achieved,*
> *the Revenue Commissioners form the opinion that—*
> *(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and*

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

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

32. The appellant argues that the s. 811 process is the only process by which the respondent or the TAC can consider whether the purpose of a transaction is to generate a tax advantage. Therefore, whilst the appellant accepts that had the respondent invoked the provisions of s. 811 in this particular case, it would have been open to the TAC to consider whether or not the transaction was for the purposes of giving rise to a tax advantage, this did not occur; any such purpose or motive is therefore an irrelevant consideration.

33. I cannot accept this argument. The appellant's submission focusses exclusively on ss. 811 (2)(c)(ii) TCA 1997, the purpose of the transaction. However, ss. 811 (2)(c)(i) is also crucial. It is clear from ss. 811 (2)(c)(i) that in order to constitute a "*tax avoidance transaction*" within the meaning of s. 811, the respondent must have formed the opinion that the transaction gives rise to, or but for the section would give rise to, a tax advantage. In common parlance, the respondent must have formed the opinion that the scheme "works".

34. On the facts of this case, the syndicate transactions do not "work" (and thus constitute a "*tax avoidance transaction*" within the meaning of s. 811) unless the respondent formed the opinion that the appellant was trading and that the s. 812 deeming provision applied. Yet both the respondent's decision and the TAC Determination, are to precisely the opposite effect.

35. The mere fact that the TAC considered a tax advantage motivation as relevant to its decision on the trading/non-trading issue does not bring the process within the exclusive purview of s. 811. There is a distinction between considering that a tax advantage motivation is relevant in the general sense to the issue presenting and the particular kind of opinion that is

required to trigger s. 811. Nothing in *McGrath* or indeed in s. 811 forecloses the consideration of the purpose or motive of a transaction if same is otherwise relevant.

Is a tax advantage motivation irrelevant or was inappropriate weight afforded to this factor?

36. For good reason, the appellant did not go so far as to argue that purpose or motive is entirely irrelevant to the trading issue. The Royal Commission on the badges of trade, which has been accepted as relevant in this jurisdiction for decades, states that motive is *"never irrelevant"* in these cases and that motive can be inferred from the surrounding circumstances in the absence of direct evidence of the parties' intentions and even, if necessary, in the face of their own evidence.

37. In this case, the TAC made various findings of primary fact and drew inferences from primary fact, including those set out at paragraphs 5, 8 and 10-13 above, dealing with the purpose of the transactions. No argument is made by the appellant that these findings of fact should be overturned. Rather, the argument appears to be that, although motive generally is not irrelevant, the TAC was only entitled to consider motive to the extent that such consideration did not involve it in assessing whether or not the relevant motive was to obtain a tax advantage. The TAC was therefore only entitled to consider whether or not the transaction was put in place for trading purposes; but was not entitled to consider for what other purpose it might have been put in place if this involved consideration of a tax advantage motivation.

38. I reject this argument. The TAC and the court do not have to be blind to fiscal considerations. The TAC was entitled to consider all identifiable motives and purposes, including the generation of a tax advantage. In fact, the TAC determined that the generation of a tax advantage was the *only* purpose which it was able to discern; that the appellant had failed to identify any commercial rationale for the syndicate transactions and that the evidence did not support his claim that there was a profit motive. At the risk of repetition, no challenge was made to these findings. I can see no legal error in the approach taken by the TAC.

39. Thus the Determination considered the following factors in considerable detail: the background information documents which *inter alia* demonstrated that the initial contribution would not be returned to the members; the pattern of dividend purchase transactions, which, in each case, were of an entirely different scale (being vastly larger) to the portfolio transactions; the fact that the dividend purchase transactions were inherently loss making and the fact that the dividend transactions could not be categorised as market driven commercial transactions. This comprises a careful analysis of the objective facts concerning the dividend purchase transactions. The Determination made it absolutely clear that the approach adopted was that if, looking at the facts objectively, it was clear that the transactions were trading transactions, then the subjective intention of the tax payer – and whether or not a tax advantage motivation was present – could not convert what was otherwise a trading transaction into another such transaction. As a matter of law this is, in my view, the correct approach. Crucially, it does not unduly elevate purpose, motive or intention into the primary guiding factor.

40. Unlike in *McGrath*, this was not an exercise pursuant to which the TAC sought to insert into the statutory definition of "trade" a new sub clause or subsection, for example that a condition precedent to the carrying out of a trade was the absence of a tax advantage motivation, or the presence of a profit motive. The TAC considered and applied relevant aspects of the badges of trade identified by the Royal Commission, as it was clearly entitled to do. For example, the TAC noted that the dividend purchase transactions were isolated transactions, making it less likely that they were trading transactions (consideration 3 of the badges of trade); that the passive nature of the appellant's involvement pointed against the carrying out of a trade (consideration 4 of the badges of trade) and that the motivation was fiscal (consideration 6 of the badges of trade).

41. The TAC found as a fact that none of the appellants had identified a commercial rationale for the dividend purchase transactions and rejected their evidence that the rationale

was to generate a profit. Crucially, although expressly accepting that a trade can exist without a profit seeking motive, the TAC concluded that the fact that the syndicate members would never receive a return of their initial contribution was relevant and was not a term that one would expect to find included in a commercial trading scheme. In addition, although not determinative, the TAC considered that the absence of risk in the dividend purchase transactions was again an indication that this was not a trade.

42. None of this implies an unwarranted focus on the purpose or motive of the transaction as contended for by the appellant. Further, the TAC's finding that the appellant was not trading is not premised upon any finding that this was a tax avoidance transaction, either within the meaning of s. 811 or otherwise. Purpose or motive was clearly only one of the factors properly taken into account by the TAC.

Did the TAC err in law in relying on *Lupton?*

43. The appellant submits the TAC erred in relying upon *Lupton v. F.A & A.B Ltd* [1971] 3 All ER 948, because it places too much emphasis on the fiscal motivation of the relevant transaction. In my view, the TAC was correct to rely upon *Lupton*, which is a persuasive authority in this jurisdiction.

44. In *Lupton,* the House of Lords considered the taxation of a number of "dividend stripping transactions", in which shares were acquired, a dividend paid, and then the reduced value of the shares used to generate a loss to shelter trading income. McGarry J. identified the coordinates of the analysis to be conducted in assessing whether or not a particular arrangement constituted trading and stated:

"As in all such cases, it may well be difficult to draw the line. At one extreme lies a transaction which is merely a trading transaction. In such a case the transaction is not deprived of its trading nature merely by the presence of a fiscal motive for carrying it out, nor by the fact that as a trading transaction it makes a loss and not a profit ... At the other extreme lies the transaction that is far removed from trading, designed to secure a tax advantage. There the

mere fact that the transaction includes the purchase and sale of shares by a trader in shares does not in itself suffice to make it a trading transaction. … Between those two extremes lies a continuous spectrum of possible transactions in which the elements of trading become smaller and smaller in relation to the elements of securing a tax advantage. A sufficiency of reported cases may in due course provide the co-ordinates which will make it possible to plot the position of the dividing line; but in this case I am not required to do more than decide whether these transactions fall on the right side or the wrong side of any reasonable line that could be drawn.

In doing that, it seems to me that I must have regard to the following principles. If upon analysis it is found that the greater part of the transaction consists of elements for which there is some trading purpose or explanation (whether ordinary or extraordinary), then the presence of what I may call "fiscal elements", inserted solely or mainly for the purpose of producing a fiscal benefit, may not suffice to deprive the transaction of its trading status. The question is whether, viewed as a whole, the transaction is one which can fairly be regarded as a trading transaction. If it is, then it will not be denatured merely because it was entered into with motives of reaping a fiscal advantage. Neither fiscal elements nor fiscal motives will prevent what in substance is a trading transaction from ranking as such. On the other hand, if the greater part of the transaction is explicable only on fiscal grounds, the mere presence of elements of trading will not suffice to translate the transaction into the realms of trading. In particular, if what is erected is predominantly an artificial structure, remote from trading and fashioned so as to secure a tax advantage, the mere presence in that structure of certain elements which by themselves could fairly be described as trading will not cast the cloak of trade over the whole structure. In speaking of the greater part of the transaction I am not, of course, referring to mere bulk. A long document, like a long speech, may do and say remarkably little. What seems to me to be of particular importance is the relative extent of the significant provisions which are made."

45. This passage, which was cited in the TAC Determination, makes it clear that the primary question is whether, viewed as a whole, the transaction is one which can fairly be regarded as a trading transaction; and that the presence or absence of a fiscal motive will not be determinative. The same approach was adopted by Lord Morris speaking for the House of Lords in *Lupton*:

"So it becomes necessary carefully to examine this … transaction. Ought it, when viewed fairly and rationally, to be classed as a trading transaction coming within the trade of a dealer in shares? Ultimately this becomes a matter of judgment. In such cases as these some help may be derived from considering the decisions of courts as to how other transactions have been regarded. One transaction with certain features may have been held to have been a transaction properly to be regarded as being within the trade of a dealer in shares. Another transaction with other features may have been held not to have been one which could properly be so regarded. Deriving such help as a consideration of other cases may yield, the question for decision will be whether the particular transaction under review can and should be regarded as a trading transaction within the course of the trade of a dealer in shares.
This enquiry may or may not involve or necessitate a consideration of the profitability of a transaction or of the tax results of a transaction. One trading transaction may result in a profit. Another may result in a loss. If each of these, fairly judged, is undoubtedly a trading transaction its nature is not altered accordingly to whether from a financial point of view it works out favourably or unfavourably. Nor is such a transaction altered in its nature according to how the revenue laws determine the tax position which results from the financial position."

46. The principles set out by the court in *Lupton* were cited with approval in Ireland in *MacCarthaigh v. D* [1985] IR 73 by O'Hanlon J. who quoted the following passage of McGarry J.:

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

47. Although in *MacCarthaigh,* O'Hanlon J. was not prepared to hold that the relevant transaction was so obviously devoid of commercial characteristics as not to qualify it as trading, this was a fact specific conclusion which does not impact upon the court's approval of the *Lupton* principles.

48. The appellant argues that neither the *Lupton* principles, nor their acceptance in *MacCarthaigh,* can be good law in light of the *McGrath* decision. I reject this argument. *Lupton* is not based on the application of the *Ramsay* principle of fiscal nullity which was rejected in *McGrath.* Rather, *Lupton* directs a detailed analysis of the nature of the transaction viewed both as a whole and in light of its specific features and expressly disavows any attempt to denature the transaction merely because its motive may be the reaping of a fiscal advantage. In the present case, the TAC was entitled to conclude that features of the transactions under consideration - such as the generation of a tax advantage over ten thousand times the value of any trading profits, the absence of any risk and the fact that the loan for the dividend purchase transaction was repayable only to the extent of the dividend declared - were non-indicative of ordinary trade.

Did the TAC misapply *Lupton?*

49. The appellant also makes the case that, even applying the *Lupton* principles, the transactions under consideration are in the nature of a trade. He submits that the TAC has misunderstood *Lupton*. *Lupton*, he submits, was decided against the taxpayer because the vendor and seller involved in the relevant share purchase transaction were involved in a joint venture, whereas he has no connection with the BVI companies.

50. Before addressing this specific point, it is relevant to note that *Lupton* is the third case in a triumvirate of cases considering the tax treatment of dividend stripping schemes. The first such case is *J.P Harrison (Watford) Ltd v Griffiths* [1961] EWCA Civ J0505-1, in which the tax payer successfully argued that the transactions in question were entered into in the course of trading. For a variety of reasons, the decisions in the subsequent two cases, *Finsbury Securities Ltd v Commissioners of Inland Revenue* [1966] 1 WLR 1402 and *Lupton* itself, were that the taxpayer was not trading. The appellant submits that his transactions, correctly

regarded, fall on the *Harrison* side of the spectrum and not on the *Finsbury/Lupton* side of the spectrum.

51. Each of these three cases is highly fact specific and it is not necessary to set out the facts of *Harrison, Finsbury* and *Lupton* in detail in order to deal with this submission. It is absolutely clear that the transactions in *Harrison* were regarded by the court as solely and unambiguously trading transactions. No fiscal consideration or arrangement had intruded itself in any way into the bargain that was made in that case. Granted, the court noted that fiscal advantage was what had inspired one of the parties to enter into the transactions. However, this did not alter the fact that the transactions in *Harrison* were found to have all of the characteristics of trading and none of the characteristics that were not trading. In *Harrisson,* there was, as Lord Morris later stated in *Lupton,* "*nothing equivocal*"; and there was "*no problem to be solved*" as to the nature of the transactions. Therefore, in *Harrison* it could not be contended that the fiscal purpose alone could prevail over the objective nature of the transactions. That, to my mind is the true distinction between the result in *Harrison* on the one hand, and that in *Finsbury* and *Lupton* on the other. The underlying facts in *Harrison* can be contrasted with the present case in which it is fair to say that "*the fiscal element has so invaded the transaction itself that it is moulded and shaped by the fiscal elements*" (as stated by Megarry J. in *Lupton).*

52. I therefore reject the appellant's submission that the *Lupton* line of authority cannot apply, absent a joint venture or other *'non arm's length dealing'* between the vendor and the purchaser of the right to the dividends. Indeed, such a proposition was expressly rejected by the court in *Lupton* in which Viscount Dilhorne stated:

> *"While I do not doubt that it is right to have regard to the position of the vendors in that in some cases that may be illuminating, I do not see how an arrangement between the purchasers and vendors to share the proceeds of any tax recovered can alter or affect the nature of the purchaser's activity."*

53. The present case cannot be distinguished from *Lupton* merely because of the absence of a joint venture or some other form of partnership agreement between Candle Maze and the syndicate members. In any event, in assessing onto which side of the *Harrison/Lupton* line the relevant transactions fall, the TAC is engaging in an exercise of judgment in weighing and assessing the various characteristics of the syndicate and dividend purchase transactions, some of which might bear the indicia of trade and some of which might not. There is in my view no basis for concluding that the mere absence of one of the factors held to be of potential relevance in the *Finsbury* and *Lupton* cases necessarily disrupts the entire analysis to the extent that same involves an error of law.

54. Although I have found that the TAC did not err in its finding that the dividend purchase transactions constituted trading, I have some doubt as to whether it was correct to conclude that the appellant's involvement in the syndicate was as an investor. However, it appears to me that the question for consideration by this court is whether or not the appellant is trading. As this court has found that the appellant is not trading, it does not seem to me to be necessary to attempt to find another label to attach to his activities. I do not think that the choice here is binary as between trading and investment. The question for the court is whether this was a trade or a venture in a nature of a trade. To answer the question posed in the case stated, it suffices to find that it was not.

S. 812 of the 1997 Act

Parties' Submissions and TAC Determination

55. As originally enacted, s. 812 of the TCA 1997 provided in material part as follows:

> *"(1) "interest" includes dividends, annuities and shares of annuities;*
> *"securities" include stocks and shares of all descriptions.*
> *(2) Where in any year of assessment or accounting period an owner (in this section referred to as "the owner") of any securities sells or transfers the right to receive any*

particular interest payable (whether before or after such sale or transfer) in respect of those securities without selling or transferring those securities, then, and in every such case, the following provisions shall apply:

(a) ***for the purposes of the Tax Acts*** *that interest (whether it would or would not be chargeable to tax if this section had not been enacted)—*
(i) shall be ***deemed to be the income of the owner*** *or,…* [Emphasis added]
(ii) shall be deemed to be income of the owner… for that year of assessment or accounting period, as the case may be,
(iii) shall not be deemed to be income of any other person, <u>(this sub-section was deleted by s. 40 (1) of the Finance Act, 2006)</u>
(iv) shall, where the proceeds of the sale or transfer are chargeable to tax under Schedule C or under Chapter 2 of Part 4, be deemed to be equal in amount to the amount of those proceeds;
(b) where the right to receive that particular interest is subsequently sold, transferred or otherwise realised, the proceeds of such subsequent sale, transfer or other realisation shall not be deemed for any of the purposes of the Tax Acts to be income of the person by or on whose behalf such subsequent sale, transfer or other realisation is made or effected;" <u>(this sub-section was deleted by s. 40 (1) of the Finance Act, 2006).</u>

56. Both the appellant and the respondent contend that the literal interpretation of this provision favours their case. The appellant submits that the natural and ordinary meaning of s. 812 is that the income is deemed to be that of the owner. In such circumstances, it is said, the income cannot also be deemed to be that of another party, namely the appellant. The appellant contends that, as this interpretation is clear and is in no way imprecise or ambiguous, further rules of construction, including the presumption against extra-territoriality and discerning the purpose of the provision, do not come into play.

57. The respondent argues that the provision is clear and that its basic and plain meaning is that "*income*" must be interpreted as meaning "*income chargeable to tax*". This, it is said, is because income which is not chargeable to tax is not "income for the purposes of the Tax Acts" (to slightly paraphrase the words of s. 812 (2)(a)(i)). Therefore, the argument goes, the only

sensible construction of the word "*income*" is that the dividend income of an owner who is not chargeable to tax is not "*income*" for the purposes of the section and as a result, the deeming provision does not apply. This argument was accepted by the TAC.

58. The TAC thus determined that as a matter of law s. 812 did not apply to deem the dividend to be the income of the owner of the underlying securities where that owner is established outside the State and is neither within the jurisdiction of the Oireachtas nor within the charge to Irish tax. The TAC found that s. 812 could not be interpreted so as to afford it extra-territorial effect by purporting to make Candle Maze liable to Irish tax, notwithstanding the fact that as a BVI resident company, it would not otherwise be so liable. The TAC therefore found that, on the facts of this case, the transaction fell outside the territorial scope of s. 812.

59. The TAC also found that even if s. 812 applied to deem the dividend income to be that of Candle Maze, the deletion of ss. 812 (2)(a)(iii) by s. 40 (1) of the Finance Act, 2006 ("the amendment") meant that there was nothing to prevent the dividend payments in this case from also being the income of the appellant for tax purposes. Foreign dividend income received by Irish residents is taxable pursuant to s. 18 TCA. Therefore, the TAC determined that the appellant, who is an Irish tax resident, fell squarely within the charge to tax in s. 18 in respect of this foreign dividend income.

Consideration of the four authorities relied upon by the respondent

60. The respondent urges this court to adopt the same approach to s. 812 as the TAC. To support its interpretation, the respondent relies primarily upon the presumption that a statute does not have extra-territorial scope unless it explicitly so provides and cites four authorities from the courts of England and Wales, which I will consider in turn.

61. First, in *Colquhoun v. Brooks* [1889] LR 14 App Cas 493, the House of Lords considered whether a person resident in the United Kingdom and engaged in a trade carried on entirely abroad was liable to income tax in respect of all the profits of the trade, or only in

respect of so much of those profits as were remitted to the United Kingdom. The precise question under consideration, as Lord MacNaughton observed, lay in a narrow compass, namely, did the income fall within Schedule D, Case I (in which case all such income was taxable) or within Schedule D, Case V (in which case the income was taxable only on a remittance basis). Lord Herschell, giving the majority judgment for the House, accepted that, giving the language of the enactment its natural and ordinary meaning, the facts stated apparently brought the case within Schedule D, Case I. The words of the statute therefore *prima facie* supported the contention that the income was taxable, irrespective of remittance. However, Lord Herschell was of the view that, on this interpretation, the incidence of the tax would be "*strangely anomalous*". It was, he stated, *"beyond dispute that the courts were entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act"*

62. Therefore, in light of the potentially anomalous consequences of literal interpretation and the lack of any machinery for assessing and enforcing the duty on trade profits arising and remaining abroad, it was concluded that the legislature had not intended to charge them to tax. In so deciding, Lord Herschell uttered the following famous dictum:

> *"It is urged, however, on behalf of the Respondent, that if this construction be adopted a foreigner residing for a short time only in this country would be subjected to taxation here in respect of the whole of his business earnings in his own country or elsewhere, that so to tax him would be opposed to international comity, and that a construction which would involve such a consequence cannot be correct. I think the learned counsel for the Respondent are right in saying that the result which they point out would follow in the case of a foreigner, but I do not feel satisfied that it would involve a violation of international law, and that the construction contended for by the Crown ought on that ground to be summarily rejected. Reliance was placed upon the decisions under the Legacy and Succession Duty Acts, which have imposed a limit upon the broad language*

of the enactments, subjecting legacies and successions to taxation. But it must be re-membered that it was necessary to put some limit upon these general terms in order to bring the matters dealt with within our territorial jurisdiction. Without such a limitation the Legacy Duty Act, for example, would have been applicable although neither the testator nor the legatee, nor the property devised or bequeathed, was within or had any relation to the British do-minions. A construction leading to this result was obviously inadmissible. The Income Tax Acts, however, themselves impose a territorial limit, either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there. If the latter condition be fulfilled, I think it is competent for the Legislature to determine the measure of taxation to be applied in the case of a person so resident."

63. I would make the following observations concerning this passage. First, notwithstanding that the provision could operate unreasonably in respect of foreign persons temporarily in Britain, it does not appear that that what influenced Lord Herschell to adopt the construction argued by the respondent taxpayer was necessarily the dictates of comity and international law (although he does of course reference these considerations). Second, the remark that the Income Tax Acts themselves impose a generally applicable territorial limit is uncontroversial and accepted by both parties before this court. The question, however, is whether that general limit applies to the specific and express deeming provision under consideration in this case, s. 812. Third, it is clear that in *Colquhoun v Broo*ks, the House of Lords determined that it had to depart from the natural and ordinary meaning of the provision in question not only to respect the territorial limits of the Income Tax Acts but also to prevent anomalous and unworkable results (which it detailed in its judgment). Yet in the case before me, both parties argue for a literal construction (albeit that the respondent correctly contends that context is important as an aid to construction) and I am not being invited by the respondent to reject the natural and ordinary meaning of the provision in question. Nor does the respondent contend that the literal interpretation provides anomalous or unworkable results. Therefore,

save that the respondent wishes me to reach the same *result* at the end of the interpretative exercise, the respondent does not actually invite this court to mirror the *interpretative approach* of the House of Lords in *Colquhoun v Brooks* (which as I say, departs from the literal interpretation of the provision).

64. The second case relied upon by the respondent is *Colquhoun v. Heddon* [1890] 25 QBD 120, in which the Court of Appeal considered a section of the Income Tax Act, 1853 which made provision for the deduction from assessments under schedule D, of premiums paid in respect of a life assurance policy entered into by the tax payer "*with any insurance company existing on 1st November, 1844 or .. with any insurance company registered pursuant to* [particular English legislation]". The tax payer claimed to be entitled to an allowance for a premium paid to a New York based insurance company incorporated under New York law. The question which arose was whether the New York insurance company could be said to fall within the provisions of the relevant tax statute, in other words, whether the insurance company fell within the ambit of *"any insurance company existing on 1st November, 1844".* The Court of Appeal held that it did not. In this respect, Lord Esher MR stated:

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

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

65. The emphasis and meaning which the respondent seeks to place on the above dictum is potentially at odds with the approach taken by the High Court in *Re Clarkes of Ranelagh* (in liquidation) [2004] 3 IR 264. In *Re Clarkes*, liquidators sought directions from the court in respect of a dividend otherwise payable to a company incorporated outside the jurisdiction which had been dissolved. S. 28 of the State Property Act 1954 provides that where a body corporate is dissolved, its property becomes vested in the State. The question for the court was whether or not a company incorporated outside the State is a *"body corporate"* to which s. 28 applied.

66. Finlay Geoghegan J. was referred to the following two passages from *Bennion on Statutory Interpretation:*

> *"Unless the contrary intention appears, and subject to any privilege, immunity or disability arising under the law of the territory to which an enactment extends (that is within which it is law), and to any relevant rule of private international law, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters"*
>
> and:
>
> *"Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language."*

67. Finlay Geoghegan J. accepted the submission that the principles of territoriality applying to statutory interpretation should be followed. However, she took the view that s. 28 was intended to apply to all property located in Ireland such as the debt owed by the companies in liquidation. Finlay Geoghegan J. observed that there was nothing in the Act which indicated that a body corporate must be incorporated or formed in the State. She did not accept that a construction of s. 28, as applying, at a minimum, to all property located in the State, offended against the presumption of territoriality. The court took the view that s. 28, by providing for the transmission to the State upon the happening of certain events of property located in the State which might in accordance with the laws of Ireland otherwise be considered to be ownerless, did not purport to take effect extra-territorially.

68. It is of course correct to say that if one interprets s. 812 as deeming the dividend income to be that of the owner of the shares, Candle Maze, a BVI company, this is to some extent "*dealing, directly or indirectly with a foreign person …which is outside the jurisdiction.*" (to use the words of Lord Esher in *Colquhoun v Heddon,* see paragraph 64 above). However, this could equally be said of a construction of s. 28 of the State Property Act which vests the ownership of the property (albeit situated in Ireland) of a dissolved United Kingdom registered corporate body in the Irish State. Yet, Finlay Geoghegan J. did not feel constrained to interpret *"body corporate"* in s. 28 in a manner which would confine its meaning to Irish registered companies in order to avoid any impact upon such a foreign corporate entity. It seems to me therefore there is no absolute rule of interpretation, such as might be suggested by focussing only upon this particular passage from the judgment of Lord Esher.

69. The third and fourth cases upon which the respondent places reliance are *Astor v. Perry* [1935] AC 398, a decision of the House of Lords, and *Becker v. Wright* [1966] 1 WLR 215, a decision of Stamp J. in the Chancery Division. These cases are the particular focus of the

respondent's argument because they both deal with the interpretation of the phrase "*income*" in the context of a deeming provision.

70. In *Astor v Perry,* pursuant to the provision in question, s. 20 (1) of the Finance Act, 1922, "*any income*" of a trust would be deemed for income tax purposes, to be the income of the settler, rather than the income of the trustee or beneficiary, "*and not to be the income of any other person"*. Lord MacMillan held that:

> "*the result of the process of "deeming" which the section directs is .. not to bring into tax income not previously chargeable but to substitute one person for another as the person liable to be charged in respect of income already chargeable. To justify reading the section as on the one hand imposing a charge on income not at present subject to charge and on the other hand as exempting from charge altogether income which is at present chargeable – for that is the result of the crowns contention – would in my view require much more express and precise language than the section contains*."

71. Lord MacMillan cited with approval the observation of Lord Loreburn L.C. in *Drummond v* Collins [1915] A.C. 1011 to the effect that courts of law have "*cut down on or even contradicted*" the language of the legislature when on a full view of the Act, considering its scheme, its machinery and its manifest purpose, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the crown. Therefore Lord MacMillan determined that the words "*any income*" were to be construed as meaning "*any income chargeable with tax under the British Tax Act of the year.*"

72. The following observations occur. First, the approach endorsed taken by Lord MacMillan, permitting the court to "*cut down on or even contradict[ed]*" the language of the legislature is quite a distance from the literal interpretation to taxation statutes favoured by the Irish courts which affords to the provision its natural and ordinary meaning. Second, the provision under consideration in *Astor v Perry* did not contain words similar to those in parenthesis in s. 812 which apply the deeming provision whether the income *"would or would*

not be chargeable to tax if this section had not been enacted" ("the words in parenthesis") . I will comment further on this below. For the moment suffice it to say that this is to my mind, an important distinction as it suggests that s. 812 TCA 1997 unlike s. 20 (1) goes beyond the mere substitution of one chargeable person for another. Third, in the present case, in contrast to the courts view in *Astor v Perry,* it does not seem to me that the interpretation urged upon the court by the respondent is necessary to give effect to the apparent purpose of s. 812 (see further paragraph 102 and 103 below). The invitation extended to the court to depart from the literal interpretation of the provision is therefore commensurately weaker.

73. The case most closely relied upon by the respondent is *Becker (Inspector of Taxes) v. Wright* [1966] 1 WLR 215. In *Becker,* an appeal by way of case stated, the court considered a deeming provision, s. 392 of the Income Tax Act, 1952, which provided that in certain circumstances, income of a covenanter "*shall be deemed for all purposes of this Act to be the income of (the covenanter), and not to be the income of any other person.*" The covenanter was resident abroad and therefore, if the deeming provision applied, the income would not be taxable in the hands of the UK resident covenantee. Stamp J. held that s. 392 must be read in the context of the Income Tax Acts as a whole. He held that it was clear that the words "*any income*" at the beginning of the section "*do not refer to that which is not income within the meaning of the Income Tax Acts but which might be treated as income in another context for example income derived from playing bridge or backing horses or income received by a man by way of allowance from his father*". The section was therefore confined to income which under the Income Tax Acts is taxable. Stamp J. observed that whatever may be the effect of s. 392 it could not be to subject to the covenanter to UK income tax. Stamp J. stated:

> "*Paying regard to the considerations to which I have alluded, I find sufficient in s. 392 itself to lead me to the inevitable conclusion that the section is concerned only with any income which, when the deeming process contemplated by the section has taken place, can be, for all of the purposes of the Income Tax Acts, the income of the person by*

whom the disposition was made. For the reasons I have given – that the covenanter is resident abroad ... it is impossible to deem this income to be "for all the purposes of" the Income Tax Act, 1952, the income of the covenanter ... No doubt the income in this case is susceptible of being deemed to belong to the covenanter, but it is not, in my judgment susceptible of being deemed to be the income of the covenanter for all, or indeed, any of the purposes of the Income Tax Acts. To deem it to belong to him will be to deem it be money which is not income within the meaning or for the purposes of the Act and since the process contemplated by the section is an impossible one if the phrase "any income" is to be taken to include "all" income subject to the United Kingdom income tax, it must, in my judgment be construed in a sense which will exclude from its ambit income which cannot be subjected to the treatment which this section contemplates".

74. It is pertinent to note that in *Becker*, the tax payer was legally unrepresented and the court stated that it regretted having to make a decision of such consequence without the benefit of full legal argument. This must somewhat undermine the authority of the *Becker* decision. Furthermore, in *Becker,* as in *Astor,* the provision in question also had no equivalent to the words in parenthesis in s. 812.

75. Relying on *Brooks, Heddon, Astor and Becker,* the respondent's argument is that the presumed territorial scope of s. 812 mandates that "income for the purposes of the Tax Acts" can only mean income within the charge to Irish tax. Therefore, if the result of the deeming effected by the section would be that the income is no longer chargeable to Irish tax, then it ceases to be "income for the purposes of the Tax Acts" and the section does not operate. However, for the reasons set out above, each of these cases is distinguishable from the present, either because the legislation involved was differently drafted or because the court concluded that any other interpretation would defeat the purpose of the legislation (which is not the case here).

<u>Literal interpretation of "*income*"/"income for the purposes of the Tax Acts"</u>

76. The respondent accepts that the dividend payments in the present case are *"income"* in the broadest sense, in that they are from an identifiable source, namely the shares in the company which declared the dividend, and are not capital in nature. However, the respondent argues that, even on a literal interpretation of s. 812, "income for the purposes of the Tax Acts" means "income chargeable to Irish tax".

77. There are in my view significant difficulties with the respondent's argument.

78. As a starting point, although the word "*income*" is not defined in the Tax Acts, it is an ordinary word in the English language and unless the context otherwise requires, should be given its ordinary meaning connoting a profit or gain. The starting point must be that on its ordinary, basic and natural meaning, *"income"* does not necessarily mean "income chargeable to Irish tax". Is there a particular reason why the phrase income for the purposes of the Tax Acts" should necessarily have a different meaning?

79. To answer this question, it is necessary to consider the proximate context of the term, which as McDonald J. points out in *Perrigo* is critical even to the literal interpretation. To this end, the parties made submissions on the term "*income*" as it appears in the TCA 1997 as a whole. On considering these submissions, I agree that there may be many instances in the TCA 1997 in which the phrase "*income*" is reasonably construed as meaning income chargeable to tax. This however is not invariably the case and there are several instances in which the word "*income*" in the TCA 1997 does not necessarily mean income chargeable to tax.

80. For example, under the heading "*Interpretation*", s. 2 (1) provides that "*a source of income is within the charge to corporation tax or income tax if that tax is chargeable on the income arising from it* ...". Without more, this suggests that neither the word "*income*" *simpliciter,* nor the paraphrased words "income for the purposes of the Tax Acts", are interchangeable with the phrase "income chargeable to Irish tax".

81. S. 3 (1) separately defines "*taxable income*" as having the meaning assigned to it by s. 458. S. 458, in turn provides that a person who, in the manner prescribed by the Income Tax Act makes a return of "*total income*", shall be entitled for the purposes of ascertaining "*the amount of income on which he is to be charged to income tax (in the Income Tax Acts referred to as "the taxable income")*" to have such deductions as are specified. One finds the definition of "*total income*" in s. 3 (1) as meaning "*total income from all sources as estimated in accordance with the Income Tax Acts*".

82. S. 188 (1) has a specific definition of "*total income*" for its purposes and states that total income has the same meaning as in s. 3 but includes "*income arising outside the State which is not chargeable to tax*".

83. S. 16 of the Act states that "*in estimating the total income of any person under the Income Tax Acts, any income chargeable with tax by means of deduction, at the standard rate shall be deemed to be the income of that year…*".

84. S. 59 utilises the phrase "*the relevant income*" in defining the income to be taken into account in computing "*the total income of an individual for any year of assessment for the purposes of charging that total income to tax*".

85. Other sections of the Tax Acts define "*appropriate income*", (s. 381 (1)(3a)) "*relevant income*" (s. 734), "*residuary income*" and "*aggregate income*" (s. 802). Clearly, the word "*income*" is deployed in a myriad of different ways.

86. These sections all imply that, for the purposes of the Tax Acts, the use of the word "*income*" does not necessarily connote income chargeable to tax. The phrase "income for the purposes of the Tax Acts" must be capable of contemplating income that is not taxable.

87. I also observe that s. 794, which governs the taxation treatment of settlers in respect of settlements on children generally, states:

"In this Chapter – income .. includes any income chargeable to income tax by deduction or otherwise and any income which would have been so chargeable if it had been received in the State by a person resident or ordinarily resident in the State."

88. The respondent correctly points out that this definition of income is for the purposes of Part 31 of the Act only and that it does not apply to s. 812. It does however demonstrate that at times the legislature has expressly distinguished between income chargeable and not chargeable to tax when same is necessary and relevant to the intendment of the particular section and yet, s. 812 does not expressly provide that income will only be deemed to be that of that owner of the shares provided if, as a result of the deeming, that income is chargeable to tax.

89. The Tax Acts govern the circumstances in which income is or is not chargeable to tax. What, as income, is chargeable to tax (and in what amount) is left to be determined according to particular heads of charge in the schedules to the Act. There may be many circumstances in which income is not chargeable to tax, such as where, as here, the deemed income of a non-resident person is not remitted to the State. This does not prevent it qualifying as "income for the purposes of the Tax Acts". It seems to me, therefore that on the plain and ordinary meaning of s. 812, one simply cannot interpret the phrase "*income*" or the paraphrase "income for the purposes of the Tax Acts" as presupposing that the income is chargeable to tax.

90. The respondent submits that one must avoid an inconsistency between s. 812 and s. 18 TCA 1997, which provides that income received by Irish residents from securities outside the State is chargeable. It is true that, when the owner of the dividend is non-resident, there is an inconsistency between the application of the deeming provision in s. 812 (which deems the income to be that of the owner and thus not chargeable to tax) and s. 18 (which provides that the income is taxable in the hands of the Irish tax resident recipient). However, that

inconsistency is, the effect of the more specific deeming provision and, absent an absurdity or at the very least an ambiguity in s. 812 the literal interpretation must prevail.

<u>Words in parenthesis in s. 812</u>

91. The words in parenthesis in s. 812 (2)(a) ("*whether it would or would not be chargeable to tax if this section had not been enacted*") cannot be overlooked. These words are, after all, part of the immediate context. Furthermore, as the legislature is to be presumed not to have used surplusage, these words must be given meaning. The words in parenthesis make it clear that the interest (or income) the subject matter of the deeming provision may not otherwise be chargeable to tax. Income can therefore be imputed to an individual, in this instance, the owner of the securities, whether or not it would otherwise have been chargeable to tax.

92. Furthermore, the words in parenthesis demonstrate that the legislature has specifically directed its mind to a scenario where the interest, the subject matter of the deeming provision, would not have been chargeable to tax (were it not for the section). It would be surprising if a provision which literally states that it applies whether or not but for its existence the income would be chargeable to tax, is then to be interpreted as meaning that it applies only if the result of the deeming provision is that the income in question is chargeable to tax. If the legislature has taken the trouble to insert the words in parenthesis in s. 812 and to clarify that the pre-deeming tax status of the income is irrelevant, why would it not also have inserted similar words to regulate or limit its impact depending upon the post-deeming tax status of the income?

93. In my view, therefore the natural and ordinary meaning of s. 812, taking into account its context, both immediate and proximate, is that the income generated by the dividends is deemed to be that of the owner.

94. This does not mean that the respondent's contended for interpretation should be rejected. It does however mean that some positive justification must exist for departing from the natural and ordinary meaning of the provision. What justification has been suggested in this

case? I will first consider the presumption against extra-territorial effect and will then consider whether it could be said that the literal meaning ought to be rejected as an absurdity in failing to reflect the true intention of the legislature.

Consideration of the presumption against extraterritorial effect

95. The respondent relies upon the presumption against extraterritorial effect as compelling the court to adopt its interpretation. I accept that, unless a contrary intention appears, there is a presumption that an Irish Act will apply to all persons or matters within the Irish territory but not to other persons or matters.

96. However, it seems to me that the impact of s. 812 is not inexorably to render Candle Maze liable to Irish Tax. Its impact is simply to deem the income from the dividend to be received by Candle Maze. Whether or not the BVI company is thereafter liable to Irish tax is to be determined by the TCA 1997 as a whole.

97. The respondent's argument that its interpretation is necessary in order to avoid extraterritorial effect is putting the cart before the horse. Thus, the respondent maintains that "income for the purposes of the Tax Acts" must be interpreted in such a way that the income deemed by the section to be that of the owner is chargeable to tax. Gearing off this argument, the defendant submits that the deeming provision cannot apply if the owner of the securities is a non-Irish resident company (or some other entity otherwise not chargeable to Irish tax) as this would give the section extra-territorial effect. However, this is a somewhat circular argument. If the word "*income*" or the phrase "income for the purposes of the Tax Acts" is not interpreted as necessarily requiring that the income is chargeable to tax after the deeming process contemplated by the section has taken place, then this difficulty disappears.

98. Having regard to the words in parenthesis, one sees that the deeming provision is blind to the issue of whether or not the income would otherwise have been chargeable to tax in the hands of either the owner or the recipient. This means that if either the owner of the securities

or the recipient of the income are foreign entities, the deeming provision unavoidably has some impact or effect on that foreign entity. A foreign entity is impacted or effected irrespective of whether the owner of the securities is tax domiciled in Ireland and the recipient of the dividend is domiciled in BVI or vice versa. In either case, the income is deemed to be that of the owner. In the former case, the BVI owner, is deemed to be in receipt of income which it does not in fact receive; in the latter case, the BVI recipient of the dividend is deemed not to be in receipt of dividend income which, plainly it *de facto* receives. In either scenario, however, the provision impacts upon or effects the non-resident BVI entity by either notionally stripping it of the income that it receives or attributing to it income that it does not receive.

99. The key point, however, is that irrespective of this deeming provision, s. 812 does no more than deem the dividend to be the income of the BVI company or otherwise; it does not in and of itself result in a charge to tax being imposed upon a non-Irish registered entity. It is the Irish tax payer whose tax position is altered by the attribution or non-attribution of the income.

100. The respondent's interpretation would seem to mean that, if the owner of the shares were an Irish pension fund, whose income was equally not chargeable to tax, the deeming provision would also not apply and the recipient of the income would instead be taxable. Yet this result is not required by the principle against extra-territorial effect. The contended for interpretation of the words "*income*" or of "income for the purpose of the Tax Acts" would therefore go further than justified by the principle against extra-territorial effect.

101. Given that the section expressly announces itself as agnostic to the question of whether the income would be chargeable to tax but for its existence, it seems to me that the most logical way to proceed, is to accord to the section the interpretation contended for by the appellant which also most closely accords with its wording. Therefore, whilst I fully accept, that unless a contrary intention appears, there is a presumption that an Irish Act will apply only to all

persons or matters within the Irish territory, this is no more than a presumption and it must give way to the clear language of the section.

Absurdity; consideration of the purpose and intendment of the provision

102. Corrigan (*Revenue Law, Ciaran Corrigan Vol. 2 Roundhall Sweet & Maxwell 2000)* states that s. 812 was introduced to counter the effects of *IRC v. Pagett* [1938] 21 TC 677 in which a Ms. Pagett held Hungarian government bearer bonds carrying the right to interest payable in sterling in London. The entitlement to the income had fallen into arrears. Hungarian legislation then altered the terms of the bond with the result that the interest was no longer payable in sterling but in Hungarian currency. Rather than receive the payment in Hungarian currency, Ms. Pagett sold the interest coupons to dealers in London but retained the bonds. The Commissioners of Inland Revenue sought to treat the sum received from the sale of the coupons as taxable income. The Court of Appeal held that the sum received from selling the right to the interest payment was not interest and could not be taxed as such. As a result of *Pagett*, anti-avoidance legislation was introduced which became s. 730 of the Income and Corporation Tax Act, 1988. An equivalent section was introduced in Ireland and is now comprised in s. 812.

103. The purpose therefore of s. 812 was to ensure that an owner of shares did not avoid income tax by transferring the interest in the dividend to another party. Applying the literal interpretation of the section does not impact upon that primary objective as the appellant is not the owner of the securities. The difficulty, or the unintended consequence, merely arises because the owner of the securities, Candle Maze, is a BVI registered company and as a result the Irish recipient of the income is advantaged by the deeming provision. The section was not however enacted to place liability on the recipient of the income and its purpose is not frustrated by this court’s interpretation. The fact that the section has an unintended consequence in the context of this particular scheme is not the same as saying that the interpretation contended for by the appellant is absurd or renders the legislative intent nugatory.

Consideration of the amendment

104. The respondent submits that the amendment to the original s. 812 by the Finance Act, 2006 deleting the phrase "*shall not be deemed to be the income of any other person*" means that the income may be deemed to be simultaneously that of the owner (who is not subject to tax) and the appellant (who would thus be subject to tax on the income from foreign dividends under s. 18).

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

106. Indeed, the very next section in the TCA 1997, s. 813, also an anti-avoidance section, provides an example of such clear words. S. 813 governs the tax consequences of transactions associated with loans or credits and is intended to counteract arrangements under which credit might be given in consideration for what would be, in substance but not in form, interest, with the aim of reducing the tax liability of the debtor. This anti-avoidance measure was required following the imposition of restrictions on the amount of interest which could be deducted for tax purposes by an individual. The precise details of this section are not relevant for present purposes. However, it is relevant to note that s. 813 (4) provides that the owner of the security shall be chargeable to tax and that this is to be "*without prejudice to the liability of any other person*." It is striking that such a "*without prejudice*" provision is entirely absent from s. 812.

107. I do not accept that the deletion of the phrase "*shall not be deemed to be the income of any other person*" means that income, which the section deems to be that of the owner, should in certain entirely unspecified circumstances also be treated as that of the purchaser of the dividend. S. 40 (1) of the Finance Act, 2006 merely deleted a provision to the effect that the

income would not be *deemed* to be the income of any other person. This does not necessarily mean that the legislature intended to ensure that the income could not be treated as the income of another person.

108. I therefore do not believe that the amendment particularly assists the parties' arguments one way or another.

Closing remarks on s. 812 TCA 1997

109. The respondent submits that if the effect of a deeming provision in a statute is that income would be deemed to be that of a person not under the jurisdiction of the enacting parliament and whose income is not subject to the Income Tax Acts, then the section directing the deeming provision will not apply. Such a qualification could easily have been inserted by the legislature but was not. In reality the respondent requests the court to import into the section words that are not to be found therein. This would be a trespass on the part of the judiciary into the legislative domain under the guise of seeking to effectuate the intent of the legislature.

110. In short, I hold that the TAC erred in law in its approach to s. 812 and that the section applies to deem the dividend income to be that of Candle Maze. In light of my finding on the issue of trading, this does not result in the appellant (or the other members of the syndicate) securing the tax advantage sought. To a large extent, therefore my finding on the interpretation of s. 812 is moot. I have however embarked upon it as this was specifically requested of me by the parties in the event of an appeal on the trading issue.

Expressions of doubt

111. S. 955 of the TCA provides in material part:

> *"(2)(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after*

the end of the period of 6 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 and no tax shall be repaid to the chargeable person after the end of the period of 6 years by reason of any matter contained in the return.

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

"(4) (a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.

(b) This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question."

112. As set out in the Determination, the appellant's 2009 Income Tax Return contains the standard question: *"You have indicated that you are unsure about the tax treatment of an item in your return"*. The answer provided by the appellant on the form is "*Yes*". The details provided on the form are as follows: "*We have been advised that a transaction entered into as part of the Schedule D case 1 trade could fall within s. 812 of the Taxes Consolidation Act, 1997. The computation of the relevant Schedule D case 1 trade has been prepared on the basis of s. 812 TCA 1997.*"

113. The TAC determined that this expression of doubt failed to specify the doubt as required by s. 955 (4)(a). In addition, pursuant to s. 955 (4)(b) TCA 1997 it found that the expressions of doubt were not genuine and furthermore that the appellants were acting with a view to the avoidance of tax.

114. In reviewing the evidence on this issue, the Determination records that during the course of the hearing, the answers of the appellant in response to questions concerning the expression of doubt were focused on the fact that he had been advised to file expressions of doubt by his tax advisors. In this respect, the appellant stated that "*under advice from my accountant, that's what I did*".

115. The TAC observed that the appellant did not identify what particular doubt he had about the "*application of law*" or the treatment of the matter for tax purposes as required by s. 955 (4)(a). The TAC stated that the appellant had given no details as to the substance of the doubt and did not articulate what the doubt was.

116. Having considered this evidence, the relevant documentation and the legislative provisions underlying the syndicate transactions, the TAC was satisfied that many of the appellants, including this appellant, had no genuine doubt about the application of the law but rather paid over capital based on an erroneous view of s. 812. The TAC concluded that although the appellant harboured a hope or an expectation that the syndicate tax arrangements would withstand scrutiny if they were to be challenged by the respondent at a future date, such hopes and expectations do not equate to a genuinely held doubt about the application of the law. The TAC therefore concluded that the appellant did not have a genuine doubt as to the application of the law but merely took a risk and invested in the Liberty syndicate in order to create losses for offset against other income.

117. The appellant argues that excessive and inappropriate emphasis was placed by the TAC on the fact that any doubt was that of his tax advisors, rather than his own doubt. He submits

that it is irrelevant whether or not the expressions of doubt were filed by an agent or not, provided that they were filed on the basis of advice received. The appellant, it is said, cannot be expected to understand the minutiae of tax legislation and should be entitled to act on the basis of advice. Therefore, the doubt of the appellant's agent should be considered to be that of the principal.

118. I accept the appellant's argument in this regard. Although s. 955 (4) refers to the doubt being that of "*the chargeable person*", it is in my view sufficient if the doubt is drawn to their attention by one of their advisors who then files the return on their behalf.

119. However, this does not mean that the requirements of s. 955 (4)(a) have been complied with in this case. On the contrary, my view is that the requirements of s. 955 (4)(a), minimalistic though they may be, have not been met in this case.

120. In order for s. 955 (4)(a) to apply, the return must draw the attention of the inspector to the matter in question, which is the subject matter of the doubt as to the application of law or its treatment for tax purposes.

121. There is to date no authority on the level of detail which is required to be specified in an expression of doubt under the section as it stood in 2009 and 2010. I do not accept the argument of the respondent that it was necessary, in order for the expression of doubt to adequately specify the doubt, that the appellant or his agent set out a significant level of detail in relation to the scheme pursuant to which the dividend purchase transaction took place. I equally accept that, by their nature, expressions of doubt are likely to be approached by tax payers and their advisors on a reasonably minimalistic basis.

122. However, having regard to the fact that the filing of a valid expression of doubt prevents the accrual of interest and surcharges, at a bare minimum, the expression of doubt must adequately alert the inspector to the essential issues giving rise to the existence of the relevant doubt (or doubts).

123. Insofar as concerns s. 812, I would have thought that a valid expression of doubt would draw the inspector's attention to the relevant matter in question being, broadly, the fact that the appellant or his advisers have a doubt as to whether the deeming provision applies in the case of a purchase of dividend rights from a non-resident owner of securities who will not themselves be paying tax on the income.

124. The expression of doubt in this case does not identify or specify the basis upon which s. 812 might or might not apply. In particular, it makes no mention of the fact that s. 812 is intended to apply to deem the income from the dividend to be that of an owner not chargeable to Irish tax. There is therefore no identification of any reason why s. 812 might or might not apply. In circumstances where I have formed the view that s. 812 of the Act does in fact apply, this may not in and of itself be sufficient to justify a finding that the doubt has not been adequately specified.

125. Insofar as concerns the trading issue, I would have thought that a valid expression of doubt would draw the inspector's attention to the relevant matter in question which is, broadly, that there is a doubt as to whether the dividend purchase transactions constitute trading.

126. Although it is probably not necessary for the expression of doubt to provide details of a highly granular nature, one would think that it should provide sufficient information to understand why such a doubt as to the trading status of the dividend purchase transactions may be said to arise. Although it would not be appropriate for me to be in any way prescriptive in this regard, it is reasonable to assume that at least some of the factors comprising the findings of fact of the TAC on the trading issue ought to have been notified before it could be said that the doubt has been specified or the relevant matters in question identified. There was, however nothing in the expression of doubt, or indeed in the tax return as a whole, which would alert the inspector to any of these factors.

127. All that the tax return would reveal was that the appellant claimed to have been involved in a trade in financial instruments and that this had given rise to a very significant trading loss. No further information is provided.

128. The applicant emphasises that, in addition to the expression of doubt, a provisional notification was submitted on his behalf pursuant to s. 812. This, in my view cannot cure any defect in the expression of doubt. The provisional notification is made at a different time and for a different purpose to the expression of doubt.

129. Furthermore, having regard to the wording and content of the provisional notifications filed by the appellant, even if one were to have regard thereto, it would not advance his case. The provisional notification was virtually identical in the two tax years under consideration and stated:

> "***Transaction Details***
>
> *In December 2009, the client entered into a syndicate formed for the purposes of trading in financial instruments on a pooled basis. The trading strategy of the syndicate is to take advantage of short-term opportunities to make trading profits by acquiring various financial instruments or income sources with a view to realising them to make a profit in a short space of time. The syndicate uses leverage to enhance the returns to individual syndicate members.*
>
> *One of the transactions undertaken by the syndicate involved the acquisitions of the right to receive a dividend payment from a company. The syndicate did not acquire the underlying shares from which the right to receive the dividend arose but instead acquired the right to receive the future dividend in exchange for a discounted payment to the shareholder up front.*
>
> *While this transaction netted the syndicate members a trading profit net of costs, we have been advised that the transaction could come within s812 of the Taxes*

Consolidation Act 1997 which could result in the income received by the syndicate members being deemed to be that of the owner of the shares from which the right to receive the dividend arose.

Relevant provisions of the Act

We have been advised that the transaction undertaken by the investment manager on behalf of the syndicate members could fall within s812 of the Taxes Consolidation Act 1997.

How the relevant provisions of the Acts apply to the transaction

We have been advised that the operation of s812 of the Taxes Consolidation Act 1997 could deem the income received by the individual syndicate members to be the income of the owner of the shares from which the right to receive the dividend arose and not the income of the syndicate members."

130. The language here does not in any sense alert the inspector to the essential characteristics of the syndicate and the dividend purchase transactions or to any of the matters forming the subject matter of the TACs findings of fact.

131. On the contrary, the notification would lead the inspector to believe that the syndicate's raison d'etre was to make trading profits by acquiring financial instruments with a view to making a profit on their sale in a short period of time. The notification thus alerts the inspector to the acquiring of financial instruments and income sources with a view to realising them to make a profit in a short space of time. This is presumably a reference to the dividend purchase transactions. The notification states that the right to acquire the dividend was purchased for "*discounted payment(s)"* to the shareholder upfront. This is somewhat misleading as it suggests that the right to the dividend income was acquired for a discount. However, the reality is that the dividend purchase transaction was, within its own four corners, fiscally neutral (indeed as it was expressly designed to be so). The purchase price of the right to the dividend by the

appellant mirrored, and was designed to mirror the dividend ultimately received. There was in reality no discount on the purchase of this stream of income.

132. Whilst the notification does state that the dividend purchase transaction "*could come within s. 812 resulting in the income being that of the owner,*" this information is relevant only to the s. 812 issue and does not illuminate anything on the trading issue. On the trading issue, the notification is overall potentially misleading, expressly stating that the dividend purchase transaction netted a profit to the syndicate members.

133. I therefore find no legal error in the TAC's Determination that the expressions of doubt filed by the appellant fail to specify the doubt as required by s. 955 (4)(a). It is therefore not necessary to determine whether, were it otherwise, the TAC was correct or incorrect in determining that the expressions of doubt were not genuine and that the appellants were acting with a view to the avoidance of tax.

Conclusion

134. Accordingly, I answer the questions set out in the case stated as follows:

I and II-Yes

III-Not necessary to answer in light of the answer to No. II

IV-No

V-No, in light of the answer to No. IV

VI-Yes

VII-Not necessary to answer in light of the answer to No. VI

VIII-Yes.