



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

104TACD2024

[REDACTED]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This appeal comes before the Tax Appeals Commission (hereinafter the "Commission") against Notices of Amended Assessment to income tax for the years 2017 and 2019 raised by the Revenue Commissioners (hereinafter the "Respondent") on 9 December 2022.
2. The Appellant lodged a Notice of Appeal with the Commission in relation to the Notices of Amended Assessment on 22 December 2022.
3. The amount of tax in dispute is €63,875.32.

Background

4. Mr [REDACTED] (hereinafter the "Appellant") is a taxpayer who, in 2007, made an investment in the [REDACTED] (hereinafter the "Fund").
5. The Fund was incorporated in [REDACTED] on [REDACTED] and was not tax resident in Ireland. The Fund was promoted by [REDACTED] (hereinafter the "Bank") and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.
6. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which he entered into for a total amount of €205,000. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant.
7. As a result of the Capital Commitment Agreement entered into by the Appellant, he invested in and was issued 50 Participating Shares at a value of €1,000 per share, representing a value of €50,000. The Commissioner has not been furnished with documentary evidence of the share certificates issued to the Appellant as a result of entering into the Capital Commitment Agreement.
8. In addition, as part of the Capital Commitment Agreement entered into by the Appellant, the Appellant advanced a total of €155,000 to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
9. The Fund was wound up voluntarily by resolution on 31 July 2015 with [REDACTED] [REDACTED] (hereinafter the "Liquidator") being appointed as Liquidator.

10. In 2017 the Appellant received distributions totalling €171,629 in respect of "Distributions by way of a liquidation distribution" on foot of the liquidation of the Fund (hereinafter the "liquidation distribution").
11. In addition, in 2019 the Appellant received distributions totalling €9,440.00 in respect of the liquidation distribution.
12. The payments received by the Appellant from the Fund in 2017 and 2019 by way of liquidation distributions were not included in the Appellant's income tax returns for those years, however the Appellant did submit a Capital Gains Tax return to the Respondent for those years.
13. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as "Schedule D - Offshore Income Gain" in the amount of €124,236. The balance of tax payable in the Notice of Amended Assessment to income tax for 2017 is €63,123.69.
14. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2019 as "Schedule D - Offshore Income Gain" in the amount of €6,833. The balance of tax payable in the Notice of Amended Assessment to income tax for 2019 is €751.63.
15. The total additional "Schedule D - Offshore Income Gain" amount for 2017 and 2019 included in the Notices of Amended Assessment was €131,069.
16. The Appellant, through his tax agent, submitted a Notice of Appeal to the Commission on 22 December 2022 appealing the Notices of Amended Assessment to income tax for 2017 and 2019 issued by the Respondent on 9 December 2022.
17. This appeal is part of a group of appeals submitted to the Commission in relation to the same subject matter, that is to say Notices of Amended Assessment raised by the Respondent in relation to the liquidation distributions made by the Fund in 2017 and 2019 (hereinafter the "group"). Following correspondence with the parties to all of the appeals in the group, the Commissioner placed a stay on the progression of all of the appeals save and except for one appeal which, it was decided by the Commissioner, would be determined prior to the balance of the appeals in the group being determined.
18. On 20 December 2023, following an oral hearing, a Determination was issued in the first appeal in the group of appeals and has been published on the Commission's website as

42TACD2024¹. A request to sign and state a case for the opinion of the High Court was received in relation to Determination 42TACD2024. Following the Commissioner issuing the signed Case Stated to the appellant, the appellant in similar appeal 42TACD2024 notified the Commissioner that the Case Stated would not be lodged in the High Court. Therefore, no Case Stated relating to the subject matter of Determination 42TACD2024 has been taken.

19. On 23 February 2024 the Commissioner wrote to the parties to this appeal informing them of:
 - 19.1. the fact of the publication of Determination 42TACD2024;
 - 19.2. that a request to sign and state a case for the opinion of the High Court had been received in relation to Determination 42TACD2024;
 - 19.3. informing them that the determination of this appeal pursuant to the provisions of section 949AN of the Taxes Consolidation Act 1997 (hereinafter the "TCA 1997") was being considered by the Commissioner; and
 - 19.4. seeking the parties' views as to whether they wished this appeal to be stayed until such time as the High Court issued its opinion in the case stated or whether they wished their appeal to be determined. No response to that correspondence was received from the parties.
20. Subject to certain conditions being fulfilled, section 949AN of the TCA 1997, which is entitled "*Appeals raising common or related issues*", provides that where an Appeal Commissioner considers it appropriate, they may determine an appeal having regard to a previous determination issued by the Commission (hereinafter the "similar appeal") where the matter under appeal and the similar appeal share common or related issues.
21. Where those provisions apply, the Commission is required to send a copy of the similar appeal Determination, redacted for privacy, to the Appellant and the Respondent (hereinafter the "parties"). The Commission is also required to request arguments from the parties, to be received within 21 days after the date of the request, in relation to why it would not be appropriate for the Appeal Commissioner to have regard to the similar appeal determination in determining their appeal. In addition, the Commission is required to request each of the parties to state whether they wish the Appeal Commissioner to hold a hearing in their appeal and, where a party so wishes, to explain why such a hearing is considered to be necessary or desirable.

¹ Available at <https://www.taxappeals.ie/en/determinations/42tacd2024-income-tax->

22. In accordance with section 949AN of the TCA 1997, the Commission wrote to the parties on 22 March 2024 and:
- 22.1. enclosed a copy of the similar appeal Determination 42TACD2024;
 - 22.2. requested arguments from the parties, to be received within 21 days after the date of the request, in relation to why it would not be appropriate for the Appeal Commissioner to have regard to the similar appeal determination in determining their appeal; and
 - 22.3. requested each of the parties to state whether they wish the Appeal Commissioner to hold a hearing in their appeal and, where a party so wishes, to explain why such a hearing is considered to be necessary or desirable.
23. No response to the Commission’s correspondence of 22 March 2024 was received and the Commission wrote to the parties on 16 April 2024 confirming that the Commissioner would proceed to determine this appeal pursuant to the provisions of section 949AN of the TCA 1997 and would consider the submissions already received from the parties when making the determination.
24. This appeal is, therefore, determined without an oral hearing and is, in accordance with the provisions of section 949AN of the TCA 1997, based upon the similar appeal Determination 42TACD2024 and the submissions and documentation received from both parties.

Legislation and Guidelines

25. The legislation relevant to the within appeal is as follows:

Section 740 of the TCA 1997 (as in force from 30 November 1997 onwards)

“740 Interpretation (Chapter 2 and Schedules 19 and 20).

In this Chapter and in Schedules 19 and 20—

“account period” shall be construed in accordance with subsections (8) to (10) of section 744;

“disposal” shall be construed in accordance with section 741(2);

“distributing fund” shall be construed in accordance with subsections (2) and (3) of section 744;

“the equalisation account” has the meaning assigned to it by section 742(1);

“Irish equivalent profits” has the meaning assigned to it by paragraph 5 of Schedule 19;

“material interest” shall be construed in accordance with section 743(2);

“non-qualifying fund” has the meaning assigned to it by section 744(1);

“offshore fund” has the meaning assigned to it by section 743(1);

“offshore income gain” shall be construed in accordance with paragraphs 5 and 6(1) of Schedule 20.”

Section 743 of the TCA 1997 (as in force from 30 November 1997 to 14 March 2021)

“743. Material interest in offshore funds.

(1)In this Chapter, references to a material interest in an offshore fund shall be construed as references to such an interest in any of the following -

(a)a company resident outside the State,

(b)a unit trust scheme the trustees of which are not resident in the State, and

(c)any arrangements not within paragraph (a) or (b) which take effect by virtue of the law of a territory outside the State and which under that law create rights in the nature of co-ownership (without restricting that expression to its meaning in the law of the State),

and any reference in this Chapter to an offshore fund shall be construed as a reference to any such company, unit trust scheme or arrangements in which any person has an interest which is a material interest.

(2)Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).

(3)For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.

(4)For the purposes of subsections (2) and (3) -

(a) a person shall be deemed to be able to realise a particular amount if the person is able to obtain that amount either in money or in the form of assets to the value of that amount, and

(b) if at any time an interest in an offshore fund has a market value which is substantially greater than the portion which the interest represents, as mentioned in subsection (3), of the market value at that time of the assets concerned, the ability to realise such a market value of the interest shall not be regarded as an ability to realise such an amount as is referred to in that subsection.

(5) An interest in a company, scheme or arrangements shall be deemed not to be a material interest if it is either -

(a) an interest in respect of any loan capital or debt issued or incurred for money which in the ordinary course of business of banking is loaned by a person carrying on that business, or

(b) a right arising under a policy of insurance.

(6) Shares in a company within subsection (1)(a) (in this section referred to as "the overseas company") shall not constitute a material interest if -

(a) the shares are held by a company and the holding of them is necessary or desirable for the maintenance and development of a trade carried on by the company or a company associated with it,

(b) the shares confer at least 10 per cent of the total voting rights in the overseas company and a right in the event of a winding up to at least 10 per cent of the assets of that company remaining after the discharge of all liabilities having priority over the shares,

(c) not more than 10 persons hold shares in the overseas company and all the shares in that company confer both voting rights and a right to participate in the assets on a winding up, and

(d) at the time of its acquisition of the shares the company had such a reasonable expectation as is referred to in subsection (2) by reason only of the existence of either or both -

(i)an arrangement under which, at some time within the period of 7 years beginning at the time of acquisition, that company may require the other participators to purchase its shares, and

(ii)provisions of either an agreement between the participators or the constitution of the overseas company under which the company will be wound up within a period which is or is reasonably expected to be shorter than the period referred to in subsection (2),

and in this paragraph "participators" means the persons holding shares which are within paragraph (c).

(7)For the purposes of subsection (6)(a), a company shall be associated with another company if one company has control (within the meaning of section 432) of the other company or both companies are under the control (within the meaning of that section) of the same person or persons.

(8)An interest in a company within subsection (1)(a) shall be deemed not to be a material interest at any time when the following conditions are satisfied -

(a)that the holder of the interest has the right to have the company wound up, and

(b)that in the event of a winding up the holder is, by virtue of the interest and any other interest which the holder then holds in the same capacity, entitled to more than 50 per cent of the assets remaining after the discharge of all liabilities having priority over the interest or interests concerned.

(9)The market value of any asset for the purposes of this Chapter shall be determined in the like manner as it would be determined for the purposes of the Capital Gains Tax Acts except that, in the case of an interest in an offshore fund for which there are separate published buying and selling prices, section 548(5) shall apply with any necessary modifications for determining the market value of the interest for the purposes of this Chapter."

Section 745 of the TCA 1997 (as in force from 30 November 1997 onwards)

“745. Charge to income tax or corporation tax of offshore income gain.

(1)Where a disposal to which this Chapter applies gives rise, in accordance with Schedule 20, to an offshore income gain, then, subject to this section, the amount of that gain shall be treated for the purposes of the Tax Acts as -

(a)income arising at the time of the disposal to the person making the disposal, and

(b)constituting profits or gains chargeable to tax under Case IV of Schedule D for the chargeable period (within the meaning of section 321 (2)) in which the disposal is made.

(2)Subject to subsection (3), sections 25(2)(b), 29 and 30 shall apply in relation to income tax or corporation tax in respect of offshore income gains as they apply in relation to capital gains tax or corporation tax in respect of chargeable gains.

(3)In the application of sections 29 and 30 in accordance with subsection (2), section 29(3)(c) shall apply with the deletion of "situated in the State".

(4)In the case of individuals resident or ordinarily resident but not domiciled in the State, subsections (4) and (5) of section 29 shall apply in relation to income tax chargeable by virtue of subsection (1) on an offshore income gain as they apply in relation to capital gains tax in respect of gains accruing to such individuals from the disposal of assets situated outside the State.

(5)(a)In this subsection, "charity" has the same meaning as in section 208, and "market value" shall be construed in accordance with section 548.

(b)A charity shall be exempt from tax in respect of an offshore income gain if the gain is applicable and applied for charitable purposes; but, if the property held on charitable trusts ceases to be subject to charitable trusts and that property represents directly or indirectly an offshore income gain, the trustees shall be treated as if they had disposed of and immediately reacquired that property for a consideration equal to its market value, any gain (calculated in accordance with Schedule 20) accruing being treated as an offshore income gain not accruing to a charity.

(6)In any case where -

(a)a disposal to which this Chapter applies is a disposal of settled property within the meaning of the Capital Gains Tax Acts, and

(b)for the purposes of the Capital Gains Tax Acts, the general administration of the trusts is ordinarily carried on outside the State and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the State, then, subsection (1) shall not apply in relation to any offshore income gain to which the disposal gives rise.”

Submissions

Appellant

26. The Appellant submitted a written Statement of Case to the Commission on 20 April 2023 the contents of which the Commissioner has considered in full prior to finalising this determination. The material arguments made by the Appellant in his Statement of Case may be summarised as follows:

26.1. The Appellant submitted that the question before the Commissioner is whether the Appellant held a material interest in the Fund pursuant to the provisions of section 743 of the TCA 1997.

26.2. The Appellant submitted that his interest in the Fund was not a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA 1997 as:

26.2.1. the Fund was not an offshore fund;

26.2.2. even if the Fund was an offshore fund, the interest which he held in the Fund was not a material interest.

26.2.3. at the time of making the investment in the Fund in 2007, it could not have been reasonably expected that at some time during the period of 7 years beginning at the time of the investment, he would have been able to realise the value of his interest in the Fund whether by transfer, surrender or in any other manner.

Respondent

27. The Respondent submitted a written Statement of Case to the Commission on 30 March 2023 the contents of which the Commissioner has considered in full prior to finalising this determination. The material arguments made by the Respondent in its Statement of Case may be summarised as follows:

- 27.1.1. The Respondent submitted that the interest which the Appellant held in the Fund was a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA 1997.
- 27.1.2. The Respondent submitted the payments made to the Appellant by the Fund during 2017 and 2019 by way of liquidation distributions are consideration for the Appellant's disposal of a material interest in an offshore fund.
- 27.1.3. In accordance with section 745 of the TCA 1997, gains arising from the disposal of a material interest in an offshore fund are chargeable to income tax under Schedule D, Case IV, and as this is income determined in accordance with Chapter 2 of Part 27 of the TCA 1997, USC and PRSI apply.
- 27.1.4. It is therefore the Respondent's position that as the Fund was an offshore fund located in [REDACTED], and as the terms of the Appellant's investment make it a material interest in such an offshore fund, the payments received by the Appellant from the fund by way of liquidation distributions in the amount of €124,236 for 2017 and in the amount of €6,883 for 2019, fall to be treated as offshore income gains having regard to the provisions of sections 743 and 745 of the TCA 1997.

Uncontested Material Facts

28. The following material facts are not at issue in the within appeal and the Commissioner accepts the following as material facts:
- 28.1. The Appellant is a taxpayer who, in 2007, made an investment in the Fund.
- 28.2. The Fund was incorporated in [REDACTED] on [REDACTED] and was not tax resident in Ireland. The Fund was promoted by the Bank and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.
- 28.3. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which he entered into for a total amount of €205,000. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant.
- 28.4. As a result of the Capital Commitment Agreement entered into by the Appellant, he invested in and was issued 50 Participating Shares at a value of €1,000 per share, representing a value of €50,000. The Commissioner has not been

furnished with documentary evidence of share certificates issued to the Appellant as a result of entering into the Capital Commitment Agreement.

- 28.5. As part of the Capital Commitment Agreement entered into by the Appellant, the Appellant advanced a total of €155,000 to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
- 28.6. The Fund was wound up voluntarily by resolution on 31 July 2015 with the Liquidator being appointed as liquidator.
- 28.7. In 2017 the Appellant received distributions totalling €171,629 in respect of the liquidation distribution on foot of the liquidation of the Fund.
- 28.8. In 2019 the Appellant received distributions totalling €9,440.00 in respect of the liquidation distribution on foot of the liquidation of the Fund.
- 28.9. The payments received by the Appellant from the Fund in 2017 and 2019 by way of liquidation distributions were not included in the Appellant's income tax returns for those years.
- 28.10. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D - Offshore Income Gain in the amount of €124,236. The balance of tax payable in the Notice of Amended Assessment to income tax for 2017 is €63,123.69.
- 28.11. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2019 as Schedule D - Offshore Income Gain in the amount of €6,833. The balance of tax payable in the Notice of Amended Assessment to income tax for 2019 is €751.63.
- 28.12. The total additional Schedule D - Offshore Income Gain amount for 2017 and 2019 included in the Notices of Amended Assessment was €131,069.
- 28.13. The Appellant, through his tax agent, submitted a Notice of Appeal to the Commission on 22 December 2022 appealing the Notices of Amended Assessment to income tax for 2017 and 2019 issued by the Respondent on 9 December 2022.

Contested Material Facts

29. The following material facts are at issue in the within appeal:

29.1. Whether the Fund was an “offshore fund”;

29.2. Whether the interest which the Appellant held in the Fund was a material interest.

29.3. Whether at the time of making the investment in the Fund in 2007, it could have been reasonably expected that at some time during the period of 7 years beginning at the time of the investment, the Appellant would have been able to realise the value of his interest in the Fund whether by transfer, surrender or in any other manner.

30. The appropriate starting point for the examination of material facts is to confirm that in an appeal before the Commissioner, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49 (hereinafter “*Menolly Homes*”), at paragraph 22, Charleton J. stated:

“The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable”.

31. More recently the High Court has confirmed the position as set out in *Menolly Homes* in the decision of Barr J. in *Thomas McNamara v The Revenue Commissioners* [2023] IEHC 15 (hereinafter “*McNamara*”), at paragraph 46 where he stated:

“In relation to the onus of proof at an appeal hearing before the TAC, case law makes it clear that the onus of proof rests on the taxpayer who is challenging the assessment. As noted above, in Menolly Homes Limited v. the Appeal Commissioners and the Revenue Commissioners [2010] IEHC 49, Charleton J. stated at para. 22, that the burden of proof in the appeal process, was, as in all taxation appeals, on the taxpayer. He stated that it was not a plenary civil hearing. It was an inquiry by the Appeal Commissioners as to whether the taxpayer had shown that the relevant tax was not payable. That dictum was adopted with approval by Twomey J. in Byrne v. The Revenue Commissioners. In the course of that judgment, he referred to the decision of Sanfey J. in O’Sullivan v. Revenue Commissioners [2021] IEHC 118, where the judge had stated as follows at para. 90: -

“...The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer’s position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position...”

Whether the Fund was an “offshore fund”:

32. In his submissions to the Commissioner, the Appellant has claimed that the Fund was not an “offshore fund”.

33. Section 740 of the TCA 1997 provides that “offshore fund” *“... has the meaning assigned to it by section 743(1)”*.

34. Section 743(1) of the TCA 1997 states that:

“(1)In this Chapter, references to a material interest in an offshore fund shall be construed as references to such an interest in any of the following -

(a)a company resident outside the State,

(b)a unit trust scheme the trustees of which are not resident in the State, and

(c)any arrangements not within paragraph (a) or (b) which take effect by virtue of the law of a territory outside the State and which under that law create rights in the nature of co-ownership (without restricting that expression to its meaning in the law of the State),

and any reference in this Chapter to an offshore fund shall be construed as a reference to any such company, unit trust scheme or arrangements in which any person has an interest which is a material interest.”

35. As held in similar appeal Determination 42TACD2024, the Fund was a fund which was incorporated in [REDACTED] on [REDACTED] and was not tax resident in Ireland. As section 743(1)(a) of the TCA 1997 provides that an offshore fund shall be construed as a company resident outside the State, the Commissioner must find that the Fund was an “offshore fund” for the purposes of this appeal.

36. **As a result, the Commissioner finds as a material fact that the Fund was an “offshore fund” pursuant to the provisions of section 743 of the TCA 1997.**

37. The Appellant has further contested the following material facts:
- 37.1. Whether the interest which the Appellant held in the Fund was a material interest.
 - 37.2. Whether at the time of making the investment in the Fund in 2007, it could have been reasonably expected that at some time during the period of 7 years beginning at the time of the investment, the Appellant would have been able to realise the value of his interest in the Fund whether by transfer, surrender or in any other manner.
38. As the Commissioner is determining this appeal pursuant to the provisions of section 949AN of the TCA 1997, the Commissioner has had regard to the following matters determined in similar appeal Determination 42TACD2024:
39. In Determination 42TACD2024 the Commissioner was required to consider the following contested material facts:
- 39.1. Whether a secondary market existed for investments in the Fund in June 2007;
 - 39.2. Whether, at the time of the acquisition of the appellant's interest in the Fund in May / June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest whether by transfer, surrender or in any other manner.
 - 39.3. Whether the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares.
 - 39.4. Whether the Net Asset Value (hereinafter the "NAV") of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.

Whether a secondary market existed for investments in the Fund in June 2007:

40. The Commissioner found as a material fact in Determination 42TACD2024 that a secondary market did exist for investments in the Fund in June 2007.
41. The Commissioner heard evidence at the oral hearing in appeal 42TACD2024 from an expert, [REDACTED], on behalf of the Respondent (hereinafter the "Expert") that, in his opinion, a secondary market existed for investment in the Fund in June 2007. The basis for the Expert's opinion was that:

41.1. the Fund was oversubscribed;

41.2. there was no evidence of escalating international liquidity risks in June 2007; and

41.3. the Fund documentation made direct reference to the expected process to follow when transferring ownership.

42. Under cross examination, it was put to the Expert that the Fund documentation contained a restriction on the sharing, copying and further circulation of the Memorandum. The Expert agreed with this but stated that, in his opinion, the publishing of an article on [REDACTED] 2007 in the [REDACTED] which is entitled "[REDACTED]" did away with the effectiveness of that restriction. He stated that once the article was published, the fact of the Fund was available for all members of the public to see. The Expert did not agree that after [REDACTED] 2007 the restriction on the sharing, copying and further circulation of the Memorandum presented a difficulty in transferring the Participating Shares and Loan Notes on the secondary market.

43. The Commissioner considered the article published in the [REDACTED] on [REDACTED] 2007 which stated:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

44. The Expert stated that the article had led him to form an opinion that the Fund was oversubscribed, based on the fact that Fund had raised €200m in circumstances where it had originally been intended to raise between €100m and €150m. It was put to the Expert that he could not be certain that the raising of an addition €50m to €100m meant that the fund was oversubscribed.
45. The appellant did not contest the Expert's evidence that there was no evidence of escalating international liquidity risks in June 2007. It was not contested by the appellant that the Fund documentation made direct reference to the expected process to follow when transferring ownership of Participating Shares or Loan Notes in the Fund.
46. The appellant did not adduce any evidence in relation to whether a secondary market for Participating Shares and Loan Notes in the Fund existed. In addition, the appellant did not adduce any evidence as to whether the Fund was oversubscribed.
47. The appellant submitted at section 6.6 of his Outline of Arguments that the Loan Notes and Participating Shares had no active market for transactions. No evidence in support of this claim was adduced by or on behalf of the appellant.
48. Having considered the evidence adduced and the submissions made by the parties, the Commissioner found in Determination 42TACD2024 that, on the balance of probabilities, a secondary market for the Participating Shares and Loan Notes in the Fund did exist. This was on the basis of the Expert's evidence which the Commissioner accepted and on the basis that the appellant, on whom the burden of proof rested, did not adduce any evidence to the Commissioner in relation to this material fact. The Commissioner noted that it was open to the appellant to call evidence from the Bank or from the Directors of the Fund in relation to this material fact but that he did not do so.
49. As a result of the above the Commissioner found as a material fact in Determination 42TACD2024 that a secondary market existed for investments in the Fund in June 2007.
50. The facts of this appeal are identical to the facts in the similar appeal Determination 42TACD2024, save and except for the amount invested in the Fund by the Appellant in this appeal differs from the amount invested in the Fund by the appellant in the similar appeal Determination 42TACD2024. It therefore follows that the findings of material fact made by the Commissioner in the similar appeal Determination 42TACD2024 apply to this appeal.

51. **As a result, the Commissioner finds as a material fact in this appeal that a secondary market existed for investments in the Fund in June 2007.**

Whether, at the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner:

52. The appellant in similar appeal Determination 42TACD2024 argued that, at the time of the appellant's investment in the Fund in June 2007, it could not have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.
53. In considering this material fact, the Commissioner first considered the meaning of "reasonably expected" in section 743(2) of the TCA 1997.
54. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter "*Perrigo*"), McDonald J. reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

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

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

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

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

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

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

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

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

55. These principles had been confirmed in the more recent decision of the Supreme Court in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 (hereinafter “*Heather Hill*”).
56. The Commissioner noted that the word “*reasonably*” is defined in the Oxford English Dictionary as meaning “*fairly or pretty well; sufficiently, suitably; moderately, fairly*”. The Commissioner further noted that the word “*reasonably*” is defined in the Cambridge Dictionary as meaning “*using good judgment*”.
57. The Commissioner noted that the word “*expected*” is defined in the Oxford English Dictionary as meaning “*to regard as probable or imminent; to envisage; to anticipate*”. The Commissioner further noted that the word “*expected*” is defined in the Cambridge Dictionary as meaning “*believed to be going to happen or arrive*”.
58. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in *Heather Hill*, the Commissioner found that the ordinary, basic and natural meaning of the words “*reasonably expected*” in section 743(2) of the TCA 1997 is: **something which is regarded as probable, or could have been envisaged, when good judgment is used.**
59. The Commissioner noted that the appellant had urged her, when considering the meaning of “*reasonably expected*”, to apply the “*reasonable man*” test, that is to say to consider what a reasonable person of ordinary prudence would have done or in this instance, regarded as probable or would have envisaged. The Commissioner considered that there is no substantive dichotomy between the basic and natural meaning of the words “*reasonably expected*” in section 743(2) of the TCA 1997 which she had found and the “*reasonable man*” test urged on her by the appellant.
60. The question which the Commissioner therefore considered was whether, in June 2007, using good judgment, it was probable, or could have been envisaged, that at some time during the 7 years following the investment, a person investing in the Fund would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.
61. No expert evidence was adduced on behalf of the Appellant.
62. In the oral hearing of the similar appeal, the Commissioner heard evidence and received a written report from the Expert . The Expert gave evidence to the effect that:
- 62.1. In the period between 30 April 2007 and 30 June 2007, the [REDACTED] economy and property markets were performing very well;

- 62.2. In the period between 30 April 2007 and 30 June 2007, media in Ireland were not widely reporting on an economic and/or property market downturn or crash;
- 62.3. In the period between 30 April 2007 and 30 June 2007 there were no negative United States or European financial signals available when observing the VIX and VSTOXX indices, the so called “fear gauges” of the United States and European financial markets.
63. The Expert was cross examined by Counsel for the appellant during the course of the hearing and was asked about the following substantive matters in relation to the second question which he was asked by the Respondent to consider in his Report as follows:
- 63.1. The Expert was asked whether all of the information which the Expert used in compiling his Report was readily available to investors in May / June 2007 at the time of their investments. The Expert stated that all of the information which he had used in compiling his Report was readily available to investors in May / June 2007. He stated that he had taken the view when compiling his Report, that the sources he would use should be those which could have been obtained by a rational investor sitting in April through June 2007.
- 63.2. The Expert was asked in relation to the key term at Part 2 of the Memorandum which provides that “*Investors should not expect to realise their investment for at least 7 years. The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of the investments.*” The Expert stated that, in his opinion, there is a material difference in the use of the word “should” and the use of the word “could” in this section of the Memorandum. He stated that the use of the word “should” indicates that there was a possibility that the life of the Fund might be shorter or longer than 7 years and that the word “should” is not absolute. He stated that the Directors of the Fund could have made a decision to “kill” the fund prior to the expiry of 7 years. The Expert agreed with Counsel for the appellant that the terms of the Memorandum are clear in that it provides that an investor was not permitted to call for the redemption of the Participating Shares or a repayment of the Loan Notes, however, he stated, the Memorandum does not state that transfers of Participating Shares or Loan Notes were not permitted.
64. The Commissioner noted that the Memorandum contained economic information relating to the [REDACTED] economy and to the [REDACTED] property market. This information was set out over two Parts in the Memorandum as follows:

64.1. Part 3 entitled “*Economic Profile of [REDACTED]*” which is sub-divided as follows:

- “3.1 *Summary*
- 3.2 *Political and Economic Transformation from the early 1999s*
- 3.3 *Industry Transformation*
- 3.4 *European Union Accession*
- 3.5 *Overview of the Economy in 2006*
 - 3.5.1 *Summary*
 - 3.5.2 *Summary*
 - 3.5.3 *Foreign Direct Investment*
- 3.6 *Prospects for 2007 and 2008”*

64.2. Part 4 entitled “*An Overview of the [REDACTED] Property Sector*” which is sub-divided as follows:

- “4.1 *Overview*
- 4.2 *Investment Market Overview*
- 4.3 *Residential Market Overview*
- 4.4 [REDACTED]
 - 4.4.1 *Office Market*
 - 4.4.2 *Retail Market*
 - 4.4.3 *Warehouse Market*
- 4.5 [REDACTED]
 - 4.5.1 *Office Market*
 - 4.5.2 *Retail Market*
- 4.6 [REDACTED]
 - 4.6.1 *Office Market*
 - 4.6.2 *Retail Market*
 - 4.6.3 *Warehouse Market*
- 4.7 [REDACTED] *Market*
 - 4.7.1 *Office Market*
 - 4.7.2 *Retail Market*
 - 4.7.3 *Industrial Market*
- 4.8 [REDACTED] *Market*
 - 4.8.1 *Office Market*
 - 4.8.2 *Retail Market”*

65. Having considered the market information available in June 2007, the Memorandum and the Expert's Report, the Commissioner found as a material fact, on the balance of probabilities, that in June 2007, using good judgment, it was probable, or could have been envisaged, that at some time during the 7 years following the investment, a person investing in the Fund would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.
66. This finding of material fact was on the basis that:
- 66.1. The economic information available in May / June 2007 suggested that the growth of the [REDACTED] economy and in particular the growth of the [REDACTED] property market would continue as it had been growing in the years prior to the investment. This was set out in the Memorandum and was also set out by the Expert.
- 66.2. [REDACTED] national rental price performance had increased by approximately 20% during the period 2005 to 2007.
- 66.3. The [REDACTED] property price-to-income index value had increased from 100 in early 2006 to 180 mid-way through 2007.
- 66.4. No negative United States or European financial market signals were evident when observing the VIX and VSTOXX indices in May / June 2007.
- 66.5. There was no evidence of an elevation of the use of negative language relating to the economy generally or to the property market in the Irish media in the period ending in June 2007.
67. No evidence contesting or contradicting the economic analysis carried out by the Expert has been adduced to the Commissioner. The Commissioner found the Expert's evidence to be credible and well researched.
68. As a result of the above the Commissioner found as a material fact in Determination 42TACD2024 that in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.
69. The facts of this appeal are identical to the facts in the similar appeal Determination 42TACD2024, save and except for the amount invested in the Fund by the Appellant in this appeal differs from the amount invested in the Fund by the appellant in the similar appeal Determination 42TACD2024. It therefore follows that the findings of material fact

made by the Commissioner in the similar appeal Determination 42TACD2024 apply to this appeal.

70. **As a result, the Commissioner finds as a material fact in this appeal that in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.**

Whether the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same amounted to an effective prohibition on the transfer of Participating Shares:

71. The appellant in similar appeal Determination 42TACD2024 submitted that there were restrictions on the transfer and redemption of the Participating Shares and Loan Notes in the Fund which required the Fund's permission for the transfer and/or redemption of same such that these restrictions amounted to an effective prohibition on the transfer of the Participating Shares.

72. It was not disputed between the Parties that the Fund's Articles of Association and Memorandum contained restrictions on the transfer and redemption of Participating Shares in the Fund. What the Commissioner was required to consider was whether the restrictions on the transfer and redemption of Participating Shares in the Fund amounted to an effective prohibition on the transfer of the Participating Shares.

73. The Commissioner in similar appeal Determination 42TACD2024 noted that Article 6 of the Articles of Association as amended on [REDACTED] is entitled "*The Shares*" and provided that:

"6.1 Participating Shares shall:

...

6.1.5 be transferable in accordance with Article 17;

..."

74. Article 8 of the Articles of Association as amended on [REDACTED] is entitled "*Issue and Redemption of Shares*" and provides as follows:

"...

8.13 The Directors shall have the power (but shall not be under any duty) to impose such restrictions as they may think necessary for the purpose of ensuring that no shares or Loan Notes of the Company are acquired or held by or transferred to any person in breach of the law or requirements of any country or

governmental or regulatory authority or in circumstances which in the opinion of the Directors might result in the Company incurring any liability to taxation or suffering any other pecuniary or other disadvantage which the Company might not otherwise have incurred or which may cause the Company to be classified as an “investment company” under the United States Investment Company Act of 1940.

8.14 *Subject to the provision of the Laws the redemption of Participating Shares shall be at the sole discretion of the Directors and redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine.*

...”

75. Article 17 of the Articles of Association as amended on [REDACTED] is entitled “Transfer and Transmission of Shares” and provides as follows:

“17.1 *All transfers of shares and Loan Notes shall be effected by transfer in writing in any usual or common form in use in the [REDACTED] or in any form approved by the Directors but need not be under seal, and every form of transfer shall state the full name and address of the transferor and transferee and be signed by or on behalf of the transferor. The transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register in respect thereof.*

17.2 *The Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-*

17.2.1 *if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;*

17.2.2 *if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an “investment company” under the United States Investment Company Act of 1940;*

17.2.3 if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.

17.3 The Directors shall decline to recognise any transfer of shares unless:-

17.3.1 the instrument of transfer is deposited at the Office or such other place as the Directors may reasonably require, accompanied by such evidence as the Directors may reasonably require to show the right of the transferor to make the transfer; and

17.3.2 the instrument of transfer relates to shares of one class only.

17.4 If the Directors declined to register a transfer of any share they shall, within one month after the date on which the transfer was lodged with the Company sent to the transferee notice of the refusal.

17.5 The registration of transfers may be suspended at such times and for such periods as the Directors may from time to time determine, PROVIDED ALWAYS that such registration of transfers shall not be suspended for more than 30 days in any year.

17.6 The Directors may, by notice to a Member, at any time request a Member to furnish a declaration, in a form satisfactory to the Directors, as to his place of residence, citizenship or domicile and any such information as may be reasonably required by the Directors to satisfy themselves that such person is qualified to hold shares in the Company.

17.7 All instruments of transfer which shall be registered shall be retained by the Company, but any instrument of transfer which the Directors may decline to register shall (except in any case of fraud) be returned to the person depositing the same.

17.8 In case of the death of a member, the survivors or survivor where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole or only surviving holder, shall be the only persons recognised by the company as having title to his interest in the shares, but nothing in this Article shall release the estate of the deceased holder whether sole or joint from any liability in respect of any share solely or jointly held by him.

17.9 Any Guardian of an infant Member and any Guardian or other legal representative of a Member under a legal disability and any person entitled to a share in consequence of the death or insolvency of a Member shall, upon

producing such evidence of his title as the Directors may require, have the right either to be registered himself as the holder of the share or to make such a transfer thereof as the infant, deceased or insolvent Member could have made.

17.10 A person becoming entitled to a share in consequence of the insolvency of a member shall have the right to receive and may give a discharge for all moneys payable or other advantages due on or in respect of the share, but he shall not be entitled to receive notice of or to attend or vote at meetings of the Company, nor save as aforesaid, to any of the rights or privileges of a Member unless and until he shall be registered as a Member in respect of the share PROVIDED ALWAYS that the Directors may at any given time give notice requiring any such person to elect either to be registered himself or to transfer the share and if the notice is not complied with within ninety days the Directors may thereafter withhold all moneys payable or other advantages due in respect of the share until the requirements of the notice have been complied with.”

76. The Commissioner also considered the contents of the Memorandum as it relates to transfers of Participating Shares and Loan Notes.

77. At Part 2 of the Memorandum it states that *“Investors should not expect to realise their investment for at least 7 years. The Company has a life of seven years subject to a one year extension at the discretion of the Company in order to ensure an orderly winding up of the investments.”*

78. Section 8.3.7 of the Memorandum is entitled *“Rights attaching to the Participating Shares”* and section 8.3.7.3 of the Memorandum entitled *“Redemption”* provides that *“The Participating Shares do not carry a right to redemption by Shareholders. Redemption of Participating Shares and the repayment of Loan Notes are at the absolute discretion of the Directors.”*

79. Section 8.3.8 of the Memorandum is entitled *“Form and transfer of shares”* and provides that:

“Subject to the laws of [REDACTED], the Board may issue shares, and Loan Notes as certificated or uncertificated shares in its absolute discretion.

Subject to any restrictions on transfers described below:

8.3.8.1 Any Shareholder may transfer all or any of his certificated shares by an instrument of transfer in any usual form, or in any other form which the

Board may approve, signed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee.

The Directors may, subject to the Articles, refuse to register a transfer of shares unless: it is delivered for registration to the registered office of the Company or such other place as the Board may decide, accompanied by such evidence as the Board may reasonably require.

The Director's [sic] may also refuse in their absolute discretion and without providing any reason therefore, to register a transfer, including without limitation if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating Shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors from time to time or if it appears to the Directors that the transferee is not qualified to hold Participating Shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have incurred or suffered or which may cause the Company to be classified as an "investment company" under the United States Investment Company Act of 1940 or if the transferee fails or refuses to furnish the directors with such information or declarations as they may require."

80. It was not disputed by the Parties in similar appeal Determination 42TACD2024, and the Commissioner noted, that Article 8.14 of the Fund's Articles of Association provides that the redemption of Participating Shares shall be at the sole discretion of the Directors and that redemptions shall be at such times and shall be effected in such manner as the Directors shall from time to time determine. Therefore, the Commissioner found that there was a restriction on investors' ability to call for a redemption of their investment in the Fund.
81. The Commissioner also noted that Article 17 of the Fund's Articles of Association is entitled "*Transfer and Transmission of Shares*" and sets out the process which must be followed when transferring shares in the Fund.
82. Under cross examination at the oral hearing of the similar appeal, the Expert was asked about the restriction on investors' ability to call for the redemption of Participating Shares

and Loan Notes. The Expert agreed that such a restriction was contained in the Fund documentation.

83. The Expert stated that, in his expert opinion, the Fund documentation did not restrict the transfer of Participating Shares and Loan Notes such that a secondary market did not exist.
84. The Commissioner noted in similar appeal Determination 42TACD2024 that the appellant in that appeal did not adduce any evidence in support of his claim that the Fund documentation contained restrictions on the transfer of funds such that the restrictions amounted to an effective prohibition on the transfer of Participating Shares. The Commissioner noted that it was open to the appellant to call evidence from the Bank or from the Directors of the Fund or from other investors in relation to this material fact but that he did not do so.
85. The Commissioner, having considered the evidence adduced, the submissions received and the Fund documentation, noted that Article 17 of the Articles of Association sets out the process which must be followed when transferring shares and Loan Notes in the Fund. The Commissioner considered that the transfer process contained in Article 17 does not establish that an effective prohibition on the transfer of Participating Shares and Loan Notes existed. This was on the basis that:

85.1. Article 17 does not state that the transfer of Participating Shares is prohibited;

85.2. Article 17 states the format and mechanism for the making and registration of transfers;

85.3. Article 17.2 sets out that the Directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of Participating Shares or Loan Notes including, without limitation:-

“17.2.1 if the transfer would result in the transferor or the transferee being the holder of less than the minimum number of Participating shares or Loan Notes or minimum amount in value of a holding of Participating Shares or Loan Notes specified by the Directors pursuant to Article 9;

17.2.2 if it appears to the Directors that the transferee is not qualified to hold shares or Loan Notes in the Company or that the registration of the transferee as a Member will or may result in the Company incurring any liability to taxation or suffering any pecuniary or other disadvantage which the Company might not otherwise have

incurred or suffered or which may cause the Company to be classified as an “investment company” under the United States Investment Company Act of 1940; and

17.2.3 if the transferee fails or refuses to furnish the Directors with such information or declarations as they may require.”

- 85.4. No evidence was adduced by the appellant which tended to establish that the restrictions contained in the Fund Documentation on the transfer of Participating Shares and Loan Notes amounted to an effective prohibition on the transfer of Participating Shares and Loan Notes.
86. As a result of the above the Commissioner found as a material fact in Determination 42TACD2024 that the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund’s permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.
87. The facts of this appeal are identical to the facts in the similar appeal Determination 42TACD2024, save and except for the amount invested in the Fund by the Appellant in this appeal differs from the amount invested in the Fund by the appellant in the similar appeal Determination 42TACD2024. It therefore follows that the findings of material fact made by the Commissioner in the similar appeal Determination 42TACD2024 apply to this appeal.
- 88. As a result, the Commissioner finds as a material fact in this appeal that the restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund’s permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.**

Whether the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund:

89. The appellant in similar appeal Determination 42TACD2024 submitted that section 743(3) of the TCA 1997 gives guidance on the meaning of “*value of the interest*” contained in section 743(2) of the TCA 1997. Section 743(3) of the TCA 1997 provides:

“For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the

market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

90. The appellant in similar appeal Determination 42TACD2024 submitted that the effect of section 743(3) of the TCA 1997 is that, in order to establish the market value of the assets of the Fund, the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.
91. It was submitted in similar appeal Determination 42TACD2024 that even if there was a secondary market, it would be impossible to determine whether or not an investor could have realised a value proportionate to the NAV on the secondary market. The appellant in similar appeal Determination 42TACD2024 submitted that, in circumstances where he could not realise a value proportionate to the NAV on the secondary market, it follows that his investment in the Fund could not be a material interest in an offshore fund as set out in section 743 of the TCA 1997.
92. In considering this material fact, the Commissioner noted that the Expert gave evidence under cross examination at the oral hearing in similar appeal Determination 42TACD2024 that the NAV of a primary market product, such as publicly quoted shares, is easy to establish in that all of the information pertaining to the asset and the market will be built in to the share price by the primary market. The Expert in similar appeal Determination 42TACD2024 stated under cross examination that the calculation of the NAV of construction property, a portfolio of property or portfolios of rental income is more difficult. He stated that in order to establish the NAV of such a portfolio a valuation for each property would need to be established.
93. The Commissioner noted in similar appeal Determination 42TACD2024 that Article 11 of the Articles of Association of the Fund is entitled “*Determination of Net Asset Value*” and provides as follows:

“11.1 The Net Asset Value shall be determined by the Directors as at the Accounting Date and/or on such other occasions as the Directors may direct from time to time, and shall be determined in accordance with the provisions of this Article. The Gross Asset Value shall also be calculated by adding to the Net Asset Value the amount of any debt drawn down by the Company.

11.2 The assets of the Company shall be deemed to include:-

11.2.1 all cash in hand, on loan or on deposit, or on-call including any interest accrued thereon;

11.2.2 *all bills, demand notes, promissory notes, certificates of deposit and accounts receivable;*

11.2.3 *all bonds, time notes, shares, stock, debentures, debenture stock, subscription rights, warrants, options, futures and all other investments in securities owned or contracted for by the Company, other than rights and securities issued by it;*

11.2.4 *all stock and cash dividends and cash distributions to be received by the Company and not yet received by it but declared payable to stockholders of record on a date on or before the relevant determination of the Net Asset Value;*

11.2.5 *all interest accrued on any interest-bearing securities owned by the Company except to the extent that the same is included or reflected in the principal value of such security;*

11.2.6 *all other Investments of the Company;*

11.2.7 *the preliminary expenses of the Company in so far as the same have not been written off; and*

11.2.8 *all other assets of the Company of every kind and nature including prepaid expenses as valued and defined from time to time by the Directors.*

11.3 *The assets of the Company shall be valued as follows:-*

11.3.1 *the value of any collective investment scheme shall be the price as notified to the Directors by the Directors or administrator thereof;*

11.3.2 *the value of any investment which is quoted, listed or normally dealt in on a securities market will normally be based on the middle market price (if calculable, being the mean price between the bid and offer prices) for such security last available to the Directors on the calculation date. Where such investment is listed or dealt in on more than one securities market, the Directors may select any one of such markets for the foregoing purposes, which shall be the market which, in the opinion of the Directors, constitutes the main market in relation to such investment or the market, which in relation to such investment, the Directors in its absolute discretion considers most accurately reflects the true value of such investment. Notwithstanding the generality of the foregoing, the*

Directors may adjust the value of any such investment if, having regard to currency exchange costs, marketability and/or such other considerations as it may deem relevant, it considers that such adjustment is required to reflect the probable realisation value thereof;

11.3.3 the value of any investment which is not listed or dealt in on a securities market or which is normally listed or dealt in on a market but in respect of which no price is currently available will be the market value of such investment;

11.3.4 the value of any cash in hand or on deposit, prepaid expenses, cash dividends and interest declared or accrued as aforesaid and not yet received shall be deemed to be the face value thereof unless, in any case, the Directors is of the opinion that the same is unlikely to be paid or received in full, in which case the value thereof will be arrived at after making such adjustment as the Directors considers appropriate in such case to reflect the true value thereof;

11.3.5 the value of any demand notes, promissory notes and accounts receivable will be deemed to be the face value or full amount thereof after making such adjustment as the Directors considers appropriate to reflect the true current value thereof;

11.3.6 certificates of deposit, Treasury bills, bank acceptances, trade bills and other negotiable instruments shall each be marked to market as at the calculation date;

11.3.7 if extraordinary circumstances render a valuation pursuant to the above principles impracticable or inadequate, the Directors will determine whether alternative methodologies should be adopted and, if so, decide what these alternative methodologies should be. The relevant assets would then be valued accordingly. Notices of the Net Asset Value sent to the Members will describe any such alternative methodology used which is material in the circumstances;

11.3.8 if in any case a particular value is not ascertainable in accordance with the above principles or if the Directors consider that some other method of valuation better reflects the fair value of the relevant investment, then in such circumstances the method of valuation of the relevant

investment will be such as the Directors, in its absolute discretion, determines; and

11.3.9 notwithstanding the foregoing, where at the time of any valuation any asset has been realised or contracted to be realised, there will be included in the assets in place of such asset the net amount receivable by the Company in respect thereof provided that, if such amount is not then known exactly, its value will be the net amount estimated by the Directors to be receivable by the Company provided that if the net amount receivable is not payable until some future time after the time of any valuation the Directors will make such adjustment as it considers appropriate to reflect the true current value thereof.

11.4 The liabilities of the company shall be deemed to include:-

11.4.1 all bills, notes and accounts payable;

11.4.2 all administrative expenses payable and/or accrued (the latter on a day-to-day basis);

11.4.3 all known liabilities present and future including the amount of any unpaid dividends declared upon the Participating Shares, contractual obligations for the acquisition of investments or other property or for the payment of money and outstanding payments on any Participating Shares previously redeemed;

11.4.4 an appropriate provision for taxes as determined from time to time by the Directors;

11.4.5 all other liabilities of the Company of whatsoever kind and nature except liabilities represented by shares in the Company and reserves (other than reserves authorised or approved by the Directors); and

11.4.6 such allowance as the directors consider appropriate for contingent liabilities.

In determining the amount of such liabilities, the Directors may calculate administrative and other expenses of a regular or recurring nature on an estimated figure for yearly or other periods in advance and accrue the same in equal proportions over any such period.

11.5 The Net Asset Value shall be calculated by deducting the total of the Company's liabilities from the gross value of the Company's assets.

11.6 Any valuations made pursuant to this article shall be binding on all persons."

94. The appellant in similar appeal Determination 42TACD2024 did not call any expert evidence in support of this material fact and did not submit any documentary evidence in support of this claim. Pursuant to the provisions of Article 11 of the Articles of Association of the Fund, the NAV of the Fund was required to be determined by the Directors of the Fund on the Accounting Date, that being 31 December annually commencing on 31 December 2007.
95. The Commissioner noted in similar appeal Determination 42TACD2024 that the appellant had not submitted any of the annual reports of the Fund or any other Fund information which he was in receipt of from June 2007 until September 2019 when the final distribution of the Fund was made. The appellant had, in addition, not given any evidence to the Commissioner whether oral or documentary as to whether he was in receipt of the determined NAV of the Fund on an annual basis or whether he at any time requested or received the NAV from the Fund.
96. The Commissioner in similar appeal Determination 42TACD2024 did not accept that the appellant had discharged the burden of proof to establish that the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund. In particular, the Commissioner noted that, pursuant to Article 11 of the Fund's Articles of Association, the NAV of the Fund was to have been determined at minimum on an annual basis. It therefore followed that, even if the NAV was not automatically provided to an investor by the Fund on an annual basis, an investor would have been in a position to approach the Fund to request and receive the NAV of the Fund on at least an annual basis.
97. The Commissioner had already found as a fact that a secondary market existed for investments in the Fund. In addition, an investor was, pursuant to the provisions of Article 11 of the Articles of Association, in a position to receive the NAV of the Fund on at least an annual basis.
98. As a result of the above the Commissioner found as a material fact in Determination 42TACD2024 that an investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of

the Fund on the secondary market by way of the acquiring the NAV which the Fund determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.

99. The facts of this appeal are identical to the facts in the similar appeal Determination 42TACD2024, save and except for the amount invested in the Fund by the Appellant in this appeal differs from the amount invested in the Fund by the appellant in the similar appeal Determination 42TACD2024. It therefore follows that the findings of material fact made by the Commissioner in the similar appeal Determination 42TACD2024 apply to this appeal.

100. **As a result, the Commissioner finds as a material fact in this appeal that an investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund on the secondary market by way of the acquiring the NAV which the Fund determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.**

Findings of Material Facts

101. For the avoidance of doubt, the Commissioner makes the following findings of material facts in this appeal:

101.1. The Appellant is a taxpayer who, in 2007, made an investment in the Fund.

101.2. The Fund was incorporated in [REDACTED] on [REDACTED] and was not tax resident in Ireland. The Fund was promoted by the Bank and was incorporated for the purpose of raising funds for investment, in the main, in [REDACTED] investment properties.

101.3. The Appellant's investment in the Fund took the form of a Capital Commitment Agreement which he entered into for a total amount of €205,000. The Commissioner has not been furnished with a copy of the Capital Commitment Agreement entered into by the Appellant.

101.4. As a result of the Capital Commitment Agreement entered into by the Appellant, he invested in and was issued 50 Participating Shares at a value of €1,000 per share, representing a value of €50,000. The Commissioner has not been furnished with documentary evidence of share certificates issued to the Appellant as a result of entering into the Capital Commitment Agreement.

- 101.5. As part of the Capital Commitment Agreement entered into by the Appellant, the Appellant advanced a total of €155,000 to the Fund in the form of an interest free, non-recourse, subordinated loan on foot of which Loan Notes were issued. The Commissioner has not been furnished with documentary evidence in relation to the Loan Notes issued to the Appellant.
- 101.6. The Fund was wound up voluntarily by resolution on 31 July 2015 with the Liquidator being appointed as liquidator.
- 101.7. In 2017 the Appellant received distributions totalling €171,629 in respect of the liquidation distribution on foot of the liquidation of the Fund.
- 101.8. In 2019 the Appellant received distributions totalling €9,440.00 in respect of the liquidation distribution on foot of the liquidation of the Fund.
- 101.9. The payments received by the Appellant from the Fund in 2017 and 2019 by way of liquidation distributions were not included in the Appellant's income tax returns for those years.
- 101.10. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2017 which included the net proceeds of the liquidation distributions received by the Appellant in 2017 as Schedule D - Offshore Income Gain in the amount of €124,236. The balance of tax payable in the Notice of Amended Assessment to income tax for 2017 is €63,123.69.
- 101.11. On 9 December 2022, the Respondent issued a Notice of Amended Assessment to income tax for the tax year 2019 which included the net proceeds of the liquidation distributions received by the Appellant in 2019 as Schedule D - Offshore Income Gain in the amount of €6,833. The balance of tax payable in the Notice of Amended Assessment to income tax for 2019 is €751.63.
- 101.12. The total additional Schedule D - Offshore Income Gain amount for 2017 and 2019 included in the Notices of Amended Assessment was €131,069.
- 101.13. The Appellant, through his tax agent, submitted a Notice of Appeal to the Commission on 22 December 2022 appealing the Notices of Amended Assessment to income tax for 2017 and 2019 issued by the Respondent on 9 December 2022.
- 101.14. The Fund was an "offshore fund" pursuant to the provisions of section 743 of the TCA 1997.

101.15.A secondary market existed for investments in the Fund in June 2007.

101.16.It could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

101.17.The restrictions on the transfer and redemption of the Participating Shares and Loan Notes which required the Fund's permission for the transfer and/or redemption of same did not amount to an effective prohibition on the transfer of Participating Shares.

101.18.An investor in the Fund would have been able to establish whether he or she could realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund on the secondary market by way of the acquiring the NAV which the Fund determined on an annual basis pursuant to the provisions of Article 11 of the Fund's Articles of Association.

Analysis

102. The facts of the appeal in the similar appeal Determination 42TACD2024 are identical to the facts of this appeal save and exception for the amounts invested in the fund which differed.

103. Section 745 of the TCA 1997 is entitled "Charge to income tax or corporation tax of offshore income gain" and provides that:

(1)Where a disposal to which this Chapter applies gives rise, in accordance with Schedule 20, to an offshore income gain, then, subject to this section, the amount of that gain shall be treated for the purposes of the Tax Acts as -

(a)income arising at the time of the disposal to the person making the disposal, and

(b)constituting profits or gains chargeable to tax under Case IV of Schedule D for the chargeable period (within the meaning of section 321 (2)) in which the disposal is made.

..."

104. The issue which the Commissioner must consider is whether the investment which the Appellant made in the Fund was a material interest in an offshore fund as set out in section 743 of the TCA 1997.

105. The Commissioner has found as a material fact, that the Fund was an offshore fund for the purposes of section 743(1) of the TCA 1997.

106. Section 743(2) of the TCA 1997 provides that:

“(2) Subject to subsections (3) to (9), a person's interest in a company, unit trust scheme or arrangements shall be a material interest if at the time when the person acquired the interest it could be reasonably expected that at some time during the period of 7 years beginning at the time of the acquisition the person would be able to realise the value of the interest (whether by transfer, surrender or in any other manner).”

107. The Commissioner has already found as a material fact that at the time of the acquisition of the Appellant's interest in the Fund in June 2007, it could have been reasonably expected that at some time during the period of the following 7 years an investor would be able to realise the value of the interest in the Fund whether by transfer, surrender or in any other manner.

108. It therefore follows that the Appellant's interest in the Fund was a material interest subject to the provisions of sections 743(3) to 743(9) of the TCA 1997.

109. Section 743(3) of the TCA 1997 provides that:

“(3) For the purposes of subsection (2), a person shall be deemed to be able to realise the value of an interest if the person can realise an amount which is reasonably approximate to that portion which the interest represents (directly or indirectly) of the market value of the assets of the company or, as the case may be, of the assets subject to the scheme or arrangements.”

110. Section 743(3) of the TCA 1997 is a deeming provision and sets out one circumstance in which a person shall be deemed to be able to realise the value of an interest in an offshore fund. The Commissioner considers that the provisions of section 743(3) do not provide that if an investor does not fall within the provisions of section 743(3) then their interest in a fund or company cannot or will not be a material interest pursuant to the provisions of section 743(2) of the TCA 1997.

111. The Commissioner has already found that the Appellant has not established on the balance of probabilities that the NAV of the Fund could only have been realised by an investor if he or she had the right to approach the Fund and ask it to pay out on his or her Participating Shares at a value proportionate to the NAV of the Fund.

112. The NAV was, pursuant to Article 11 of the Articles of Association of the Fund, available to investors and to the Appellant on an annual basis from 31 December 2007.

113. The Appellant has therefore not discharged the burden of proof to establish that an investor could not realise an amount which was reasonably approximate to that portion which his or her interest represented (directly or indirectly) of the market value of the assets of the Fund as provided for in section 743(3) of the TCA 1997.

114. Section 743(4) of the TCA 1997 provides that:

“(4)For the purposes of subsections (2) and (3) -

(a) a person shall be deemed to be able to realise a particular amount if the person is able to obtain that amount either in money or in the form of assets to the value of that amount, and

(b) if at any time an interest in an offshore fund has a market value which is substantially greater than the portion which the interest represents, as mentioned in subsection (3), of the market value at that time of the assets concerned, the ability to realise such a market value of the interest shall not be regarded as an ability to realise such an amount as is referred to in that subsection.”

115. No submissions have been made to the Commissioner such that if a transfer of the Participating Shares and Loan Notes were to occur an investor would realise anything other than money or assets to the value of that amount as set out in section 743(4)(a) of the TCA 1997.

116. The provisions of sections 743(4)(b) to section 743(9) of the TCA 1997 do not apply to the circumstances of this appeal.

117. As a result of the foregoing, the Commissioner finds that the Appellant's interest in the Fund was a material interest in an offshore fund pursuant to the provisions of section 743 of the TCA 1997.

118. Having made that finding, it follows that the Commissioner must find that the gains of €124,336 in 2017 and €6,833 in 2019 relating to the Fund were offshore income gains and are therefore subject to income tax pursuant to the provisions of section 745(1) of the TCA 1997.

Determination

119. As such and for the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the Respondent was incorrect to issue the Notices of Amended Assessment to income tax for the tax years 2017 and 2019. The Notices of Amended Assessment to income tax raised by the Respondent for the tax years 2017 and 2019 therefore stand.

120. This appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK and 949AN thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

121. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) of the TCA 1997 and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the Parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The Parties shall not receive any other notification of this determination by any other methods of communication.

Appeal

122. Any party dissatisfied with the determination has a right of appeal on a point or points of law only to the High Court within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Clare O'Driscoll
Appeal Commissioner
26 June 2024