



69TACD2024

Between

[REDACTED]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction	3
Background.....	3
Legislation and Guidelines	6
Section 2 of the CATCA 2003:.....	6
Section 19 of the CATCA 2003 – “Interpretation (Chapter 3)”	7
Section 20 of the CATCA 2003 – “Annual acquisitions by discretionary trusts”:	7
Grounds of Appeal	8
Submissions and Evidence	13
Witness Evidence	13
Witness Evidence 1 – [REDACTED]	13
Expert Evidence 1 and 2 – [REDACTED] and [REDACTED]	14
Expert Evidence 3 – [REDACTED]	20
Expert Evidence 4 – [REDACTED]	24
Appellant’s Submissions.....	25
Respondent’s Submissions	34
Material Facts	45
Accepted material facts	45
Analysis	48
“Similar in its effect”	49
Section 20 of the CATCA 2003.....	57
New Ground of Appeal	58
Determination	59
Notification	60
Appeal	60

Introduction

1. This is an appeal to the Tax Appeals Commission (hereinafter the "Commission") pursuant to and in accordance with the provisions of the Taxes Consolidation Act 1997 (hereinafter the "TCA 1997") brought on behalf of [REDACTED] (hereinafter the "the Appellant") against Notices of Assessment to Discretionary Trust Tax (hereinafter "DTT") for the years 2012 to 2014 inclusive issued by the Revenue Commissioners (hereinafter the "Respondent").
2. The amount of tax in dispute in these appeals is €1,577,909.

Background

3. [REDACTED] (hereinafter the "Settlor") was born in [REDACTED]. The Settlor's domicile of origin was England.
4. [REDACTED]
5. On [REDACTED], the Settlor settled a discretionary trust in [REDACTED] (hereinafter the "Trust").
6. Having settled the Trust, the Settlor transferred his interest in [REDACTED] into the Trust. The Trust established a [REDACTED] company, [REDACTED], which held investments purchased with the distributions received by the Trust from [REDACTED]. The Trust held bearer shares in [REDACTED].
7. On [REDACTED], the Appellant was established as a foundation under the laws of Liechtenstein.
8. The Constitutional documentation of the Appellant includes the following:
 - 8.1. The Statute (Articles of Incorporation) dated [REDACTED];
 - 8.2. The First By-Laws dated [REDACTED];
 - 8.3. The Special By-Laws dated [REDACTED];
 - 8.4. The Circular Resolution of the Board of the Appellant dated [REDACTED];
 - 8.5. The Amended First By-Laws dated [REDACTED]; and
 - 8.6. The Authentic Interpretation of the Resolution date [REDACTED].

9. On [REDACTED] all of the shares in [REDACTED], along with all of the interests in [REDACTED], were transferred from the Trust into the Appellant.
10. The Trust was brought to an end by a Deed of Termination dated [REDACTED].
11. A dispute arose between the parties to this appeal as to the domicile of the Settlor, with the Appellant maintaining that the Settlor's domicile was England and the Respondent maintaining that the Settlor's domicile was Ireland.
12. On 2 March 2015, the Appellant made a request for the Respondent to engage in the Mutual Agreement Procedure (hereinafter "MAP") provided for under Article 11 of Statutory Instrument 279/1978 Double Taxation Relief (Taxes on Estates of Deceased Persons and Inheritances and on Gifts)(United Kingdom) Order, 1978 requesting them to reach an agreed position on the Settlor's domicile with Her (as it was then) Majesty's Revenue and Customs (hereinafter "HMRC").
13. By way of letter dated 23 November 2016, following conclusion of the MAP procedure, agreement was reached between the Respondent and HMRC which established that the Settlor was domiciled in Ireland at all times from [REDACTED] until the date of his death.
14. By letter dated 20 March 2015 to the Respondent, the Agent for the Appellant confirmed the value of the Appellant as being €52,690,878.
15. On 15 December 2016, the Respondent raised the following Notices to Capital Acquisition Tax (hereinafter "CAT"): Discretionary Trust – Annual Inheritance Tax for the years 2011, 2012, 2013, 2014 and 2015 pursuant to the provisions of section 49 of the Capital Acquisitions Tax Consolidation Act 2003 (hereinafter the "CATCA 2003") on the Appellant:

Year	Taxable Value of Appellant €	Tax at 1% €	Tax Paid €	Tax Due €
2011	52,500,000	525,000	0.00	525,000
2012	52,500,000	525,000	0.00	525,000
2013	52,600,000	526,000	0.00	526,000
2014	52,690,878	526,909	0.00	526,909
2015	52,750,000	527,500	0.00	527,500

Total				2,630,409
-------	--	--	--	-----------

16. The Appellant appealed the Notices of Amended Assessment raised by the Respondent on 15 December 2016 by way of a Notice of Appeal dated 13 January 2017 which was submitted to the Commission. The Commission's appeal reference relating to that Notice of Appeal is Y51/17.
17. On 18 October 2018, the Respondent raised the following Notices to Capital Acquisitions Tax: Discretionary Trust – Annual Inheritance Tax for the years 2016 and 2017 pursuant to the provisions of section 49 of the CATCA 2003 on the Appellant:

Year	Taxable Value of Appellant €	Tax at 1% €	Tax Paid €	Tax Due €
2016	53,000,000	530,000	0.00	530,000
2017	53,500,000	535,000	0.00	535,000
Total				1,065,000

18. The Appellant appealed the Notices of Amended Assessment raised by the Respondent on 18 October 2018 by way of a Notice of Appeal dated 16 November 2018 which was submitted to the Commission. The Commission's appeal reference relating to that Notice of Appeal is M1078/18. Appeals Y51/17 and M1078/18 were consolidated by way of a direction issued by the Commission on 11 April 2019. The total amount under appeal in the consolidated appeal was €3,695,409.
19. By letter dated 27 March 2020, the Respondent informed the Appellant that it was withdrawing the Notices of Assessment raised for the years 2011, 2015, 2016 and 2017 totalling €2,117,500. The Notices of Assessment raised for the years 2012, 2013 and 2014 (hereinafter the "Relevant Periods") totalling €1,577,909 were not withdrawn by the Respondent.
20. On the final day of the oral hearing, the Appellant confirmed to the Commissioner that it was withdrawing the appeals relating to the Notices of Amended Assessment raised by the Respondent in relation to the years 2011, 2015, 2016 and 2017. The withdrawal of those appeals were subsequently confirmed in writing to the Commission by the Appellant.

21. This appeal, therefore, relates to the Notices of Amended Assessment to Capital Acquisitions Tax: Discretionary Trust – Annual Inheritance Tax raised by the Respondent on 15 December 2016 for the years 2012, 2013 and 2014 on the Appellant as follows:

Year	Taxable Value of Appellant €	Tax at 1% €	Tax Paid €	Tax Due €
2012	52,500,000	525,000	0.00	525,000
2013	52,600,000	526,000	0.00	526,000
2014	52,690,878	526,909	0.00	526,909
Total				1,577,906

Legislation and Guidelines

22. The legislation relevant to the appeal, and in force during the Relevant Periods, is as follows:

Section 2 of the CATCA 2003:

“1 ...

“discretionary trust” means any trust whereby, or by virtue or in consequence of which—

(a) property is held on trust to accumulate the income or part of the income of the property, or

(b) property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income;

...

(1A) For the purposes of the definition of 'discretionary trust' in subsection (1), any entity which is similar in its effect to a discretionary trust shall be treated as a discretionary trust irrespective of how it is described in the place where it is established.

(1B) Any reference in this Act to trustees in relation to a discretionary trust shall be deemed to include persons acting in a similar capacity to trustees in relation to an entity referred to in subsection (1A).

...

Section 19 of the CATCA 2003 – “Interpretation (Chapter 3)”

“In this Chapter -

“chargeable date”, in relation to any year, means -

- (a) in respect of the year 2006, 5 April and 31 December in that year, and
- (b) in respect of the year 2007 and subsequent years, 31 December in the year concerned;

“chargeable discretionary trust” means a discretionary trust in relation to which -

- (a) the disponent is dead, and
- (b) none of the principal objects of the trust, if any, is under the age of 21 years;

“object” and “principal objects”, in relation to a discretionary trust, have the meanings respectively assigned to them by section 14.”

Section 20 of the CATCA 2003 – “Annual acquisitions by discretionary trusts”:

“(1) Where, in any year commencing with the year 2003, under or in consequence of any disposition, property is subject to a chargeable discretionary trust on the chargeable date, the trust is deemed on each such date to become beneficially entitled in possession to an absolute interest in that property, and to take on each such date an inheritance accordingly as if the trust, and the trustees as such for the time being of the trust, were together a person for the purposes of this Act, and each such chargeable date shall be the date of such inheritance.

(2) (a) In this subsection, “property” includes property representing such property.

(b) Where -

(i) under or in consequence of any disposition, property was subject to a discretionary trust prior to a chargeable date,

(ii) that property is not on that chargeable date subject to that discretionary trust (being on that date a chargeable discretionary trust)

because such property is on that date property to which for the time being a person is beneficially entitled for an interest in possession, and

(iii) on that chargeable date that property is property which is limited to become subject again to that chargeable discretionary trust, or will do so by the exercise of a power of revocation,

that property is deemed to be subject to that chargeable discretionary trust on that chargeable date if that interest in possession is an interest which is revocable or which is limited to cease on an event other than -

(I) the death of that person, or

(II) the expiration of a specified period, where that interest is taken by that person under a power of appointment contained in that disposition and is, at the time of the appointment of that interest, an interest for a period certain of 5 years or more.

(3) For the purposes of this section -

(a) an interest in expectancy is not property until an event happens whereby the interest ceases to be an interest in expectancy or is represented by property which is not an interest in expectancy;

(b) an interest in a policy of assurance on human life is not property until, and then only to the extent that, the interest becomes an interest in possession under the provisions of section 41 or is represented by property which is not an interest in expectancy.

(4) This section shall not apply in relation to property which is subject to a chargeable discretionary trust on a chargeable date if that property or property representing that property is subject to a charge for tax arising under or in consequence of the same disposition by reason of section 15, or that provision of the repealed enactments which corresponds with section 15, on that same date or within the year prior to that date."

Grounds of Appeal

23. The Appellant submitted the following grounds of appeal in its Notice of Appeal dated 13 January 2017:

"It is denied that the Fondation is liable to DTT for the years 2011 to 2015 inclusive, whether pursuant to s. 20 of the Capital Acquisitions Tax Consolidation Act 2003 ("CATCA") or otherwise.

S. 20 of CATCA provides that where property is subject to a “chargeable discretionary trust” on the chargeable date, the trust is deemed on each such date to become beneficially entitled in possession to an absolute interest in that property.

A “chargeable discretionary trust” is defined under s. 19 of CATCA as a “discretionary trust” (as defined in s. 2 CATCA, discussed below) where the disposer is dead none of the principal objects of the trust, if any, are under the age of 21 years.

Pursuant to s 2 of CATCA, A “discretionary trust”

“means any trust whereby, or by virtue or in consequence of which –

- (a) property is held on trust to accumulate the income or part of the income of the property, or*
- (b) property other than property which for the item [sic] being a person is beneficially entitled for an interest in possession is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income”.*

Assessment in respect of DTT arising on 31 December 2011.

In addition to the denials set out below denying that a foundation is “similar in its effect to a discretionary trust” which also apply to the assessment for chargeable date 31 December 2011, it is clear from the definition of discretionary trust on 31 December 2011 that CATCA refers strictly to trusts (any “trust”) and does not, on any construction, extend or apply to any other entities, including foundations. Therefore, it is denied that a DTT liability arises to the Fondation as of 31 December 2011.

It is denied that the Fondation is a “trust” for the purposes of s. 20 CATCA.

It is denied that the board of the Fondation is an “accountable person” pursuant to s. 45 CATCA.

It is denied that the sum assessed is accurate.

It is denied that a charge to DTT arises to the Fondation as of 31 December 2011 as the assessment is unconstitutional, out of time, and further or in the alternative, the Revenue Commissioners have been guilty of laches.

The Fondation has paid a periodic tax charged under IHT Legislation to HMRC in 2005 which discharged the liability to tax in full to October 2015. Further or in the alternative, in the event that any DTT arises (which is denied), the Revenue Commissioners must seek a refund from HMRC set off against any DTT liability arising. In the alternative, any payment of DTT due to be made (which is denied) should be stayed until such time as the refund of IHT paid has been made to the Fondation by HMRC.

Assessment in respect of DTT arising on 31 December 2012, 2013 and 2014.

Section 111(1)A [sic] Finance Act 2012, inserted 2 additional provisions into s. 2 of CATCA with effect from and on 8 February 2012, stating

“(1A) For the purposes of the definition of ‘discretionary trust’ in subsection (1), any entity which is similar in its effect to a discretionary trust shall be treated as a discretionary trust irrespective of how it is described in the place where it is established.”

“1(B) [sic] Any reference in this Act to trustees in relation to a discretionary trust shall be deemed to include persons acting in a similar capacity to trustees in relation to an entity referred to in subsection 1A [sic].”

It is denied that the Fondation is “similar in its effect to a discretionary trust” or that the board of the Fondation acts “in a similar capacity to trustees” as a matter of the relevant law pursuant to which it subsists and in particular for the following reasons:

- The Fondation is a separate and distinct corporate legal entity, without shareholders. It has its own corporate name, can acquire assets and rights in its own name, can enter into commitments for its own account and in its own name, can be sued.*
- As a separate legal entity the Fondation is the legal and beneficial owner of the Fondation’s assets - no other party has any ownership interest in the Fondation.*
- The Fondation’s administration and operation is carried out in accordance with contractual, rather than fiduciary principles. The beneficiaries of a Fondation are not owed a fiduciary duty by the board of the Fondation. The Board of the Fondation owes its duty to the Fondation.*

- *A beneficiary of the Fondation has no interest until such time as a distribution is made to them from the Fondation.*
- *A beneficiary has no control over a foundation.*
- *Beneficiaries of the Fondation cannot rely on the protections warranted by Equity.*
- *Founders of foundations may retain more directional power over the assets vested in a foundation.*
- *The board of the Fondation has no personal liability exposure as the Fondation is a separate legal entity.*
- *As a separate legal entity, the Fondation is chargeable to Liechtenstein Corporation tax.*
- *Contracts entered into by the Fondation, like a company, do not have to be assigned or novated when its council members (or officer) change.*

It is denied that for the purposes of s. 20 CATCA the Fondation is a “trust” or has any of the attributes which are regarded as the core irreducible fiduciary principles which render a trust to be in existence under Irish law.

It is denied that the board of the Fondation is an “accountable person” or acts “in a similar capacity to trustees” whether pursuant to s. 2(1)B [sic] or s. 45 CATCA or otherwise.

It is denied that the sums assessed are accurate.

The Fondation has paid a periodic tax charge under IHT Legislation to HMRC in 2005 which discharged the liability to tax in full to October 2015. Further or in the alternative, in the event that any DTT arises (which is denied), the Revenue Commissioners must seek a refund from HMRC to set off against any DTT liability arising. In the alternative, any payment of DTT due to be made (which is denied) should be stayed until such time as the refund of IHT paid has been made to the Fondation by HMRC.

Assessments [sic] in respect of DTT arising on 31 December 2015.

In addition to the denials set out above which also apply to the assessment for chargeable date 31 December 2015, the Board of the Fondation granted an interest in possession to [REDACTED] on 23 December 2015, therefore, pursuant to s. 20(2) CATCA, it is denied that a DTT liability arose to the Fondation on 31 December 2015 in any event.”

24. The Appellant also submitted a Notice of Appeal dated 16 November 2018 relating to the years 2016 and 2017. On foot of the Respondent's withdrawal of the Notices of Amended Assessment for the years 2011, 2015, 2016 and 2017, and on foot of the Appellant's withdrawal of the appeals relating to those Notices of Assessment on the final day of the oral hearing of this appeal, the contents of the Notice of Appeal dated 16 November 2018 are now no longer relevant to this determination.
25. The Appellant submitted an Outline of Arguments to the Commission dated 3 October 2019 which addressed the Grounds of Appeal identified in the Notice of Appeal dated 13 January 2017. The Respondent submitted an Outline of Arguments to the Commission dated 2 October 2019 which also addressed the Grounds of Appeal identified in the Notice of Appeal dated 13 January 2017.
26. By way of a Supplemental Outline of Arguments dated 15 July 2020, the Appellant introduced an additional Ground of Appeal (hereinafter the "New Ground of Appeal") to the effect that, should the Appellant be found to be similar in its effect to a discretionary trust, this would amount to discrimination against non-Irish entities. This would, the Appellant submitted, be an impermissible restriction of fundamental freedoms enshrined in the Treaty on the Functioning of the European Union (hereinafter the "TFEU") and the European Economic Area Agreement (hereinafter the "EEA Agreement"). In particular, the Appellant submitted that, if the Appellant is found to be similar in its effect to a discretionary trust pursuant to the provisions of section 2(1A) of the CATCA 2003, this would amount to an unlawful interference with free movement of capital and the freedom of establishment contrary to the TFEU and the EEA Agreement.
27. The Respondent has submitted a preliminary objection to the introduction of the New Ground of Appeal as follows:

27.1. The Respondent submitted that, as the Appellant's Notice of Appeal did not identify the New Ground of Appeal at all, it cannot be said that the New Ground of Appeal was identified in sufficient detail for the Commissioner to be able to understand that ground pursuant to the provisions of section 949I(2)(d) of the TCA 1997 which imposes an obligation on any appellant that:

"A notice of appeal shall specify –

...

(d) The grounds of appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds.

...”

27.2. The Commissioner does not have the jurisdiction to admit and consider the New Ground of Appeal in circumstances where section 949I(6) of the TCA 1997 provides that:

“A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.”

27.3. The Respondent submitted that the Appellant was at all material times professionally advised and that it is not clear on what grounds it could assert that the New Ground of Appeal could not have been included in its Notice of Appeal dated 13 January 2017. In addition, the Respondent submitted that the Appellant had not precisely specified the New Ground of Appeal as submitted in its Supplemental Outline of Arguments dated 15 July 2020.

Submissions and Evidence

Witness Evidence

28. The following is a summary of the witness evidence adduced by both parties at the oral hearing. The Commissioner has had regard to all of the witness evidence whether orally adduced or submitted in written reports when considering this determination.

Witness Evidence 1 – [REDACTED]

29. The following is a summary of the direct evidence adduced to the Commissioner by [REDACTED] [REDACTED] (hereinafter “Witness 1”) on behalf of the Appellant. Witness 1 is a retired solicitor and is Protector of the Appellant having been appointed on [REDACTED].

30. Witness 1 stated that a Protector of a Liechtenstein foundation has limited powers which relate to the appointment of the Board Members of the foundation, to which the Protector is required to consent, in addition to ensuring that a sufficient number of Members have been appointed to the foundation Board. In addition, he stated, a Protector is required to expressly consent to any amendment concerning the beneficial rights of beneficiaries of a foundation under the statutes and by-laws of the foundation.

31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

32. [REDACTED]

33. [REDACTED]

34. [REDACTED]

Expert Evidence 1 and 2 – [REDACTED] and [REDACTED]

35. The following is a summary of the direct evidence adduced to the Commission by experts in Liechtenstein law.

36. [REDACTED] (hereinafter “Expert 1”) is an attorney in Liechtenstein and is a Senior Partner [REDACTED]. Expert 1 was retained by the Appellant. Expert 1 prepared a report dated 12 December 2019, which was submitted to the Commissioner, wherein he was requested, by the Appellant, to address the following issues:

- 36.1. *“Identify, with particularity, the legal characteristics of a foundation under the laws of Liechtenstein;”*
- 36.2. *“Identify, with particularity, the legal characteristics of (i) a trust, and (ii) a discretionary trust, under the laws of Liechtenstein;”*
- 36.3. *“State how (i) a trust, and (ii) a discretionary trust constitutes under the laws of Liechtenstein, differ from a foundation constituted under the laws of Liechtenstein;”*

36.4. *“Opine on whether, having regard to the legal characteristics of both a foundation and a trust (including a discretionary trust) under the laws of Liechtenstein, the Appellant is a trust or a discretionary trust under the laws of Liechtenstein;”*

36.5. *“Opine on whether, having regard to the legal characteristics of both a foundation and a discretionary trust under the laws of Liechtenstein, the Appellant is “similar in effect” to a discretionary trust under the laws of Liechtenstein;”*

36.6. *“Opine on the persons who have control of a foundation constitutes under the laws of Liechtenstein and whether such persons can be said to be acting in the same capacity as a trustee of a discretionary trust;”*

36.7. *“Opine on the legal effect of a resolution executed by the board of directors of a foundation;”*

36.8. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

37. [REDACTED] (hereinafter “Expert 2”) is an attorney in Liechtenstein and is a Senior Partner [REDACTED]. Expert 2 was retained by the Respondent. Expert 2 prepared a report dated 11 January 2020, which was submitted to the Commissioner, wherein he was requested, by the Respondent, to address the following issues:

37.1. *“What are the characteristics of a Liechtenstein foundation?”*

37.2. *“What are the rights of such a foundation?”*

37.3. *“What are the obligations of such a foundation?”*

37.4. *“What are the characteristics of the foundation board?”*

37.5. *“What are the rights of the foundation board?”*

37.6. *“What are the obligations of the foundation board?”*

37.7. *“How are the beneficiaries of a foundation to be regarded by the foundation board?”*

37.8. *“What rights do the beneficiaries of a foundation have over the assets of the foundation?”*

37.9. *“What duties does the foundation board owe to the beneficiaries of a foundation?”*

- 37.10. *“Are any of the provisions contained in the Appellant’s Foundation Documents unusual or would alter the general view of a Liechtenstein foundation?”*
- 37.11. *“What legal nature and effect does the Circular Resolution have?”*
- 37.12. *“What is the use of these types of foundations and what is the usual use of same?”*
- 37.13. *“Is the view set out a page 3 of the Notice of Appeal correct?”*
38. Expert 1 and Expert 2 also prepared a joint memorandum, dated 3 June 2022 (hereinafter the “joint memorandum”), which was submitted by the parties during the course of this appeal.
39. The direct evidence adduced by both Expert 1 and Expert 2 to the Commissioner related to the contents of the individual reports prepared by Expert 1 and Expert 2 and to the contents of the joint memorandum.
40. Annex 1 of the joint memorandum sets out points of agreement between Expert 1 and Expert 2 under the following headings:
- 40.1. *“The legal characteristics of a foundation under the laws of Liechtenstein;”*
- 40.2. *“The legal characteristics of a trust under the laws of Liechtenstein;”* and
- 40.3. *“The difference between a (discretionary) trust and a foundation constituted under the laws of Liechtenstein.”*
41. The following legal characteristics of a foundation under the laws of Liechtenstein are set out in Annex 1 of the joint memorandum:
- “
- *A foundation is a legal entity with separate legal personality distinct from its founder.*
 - *A foundation has its own rights and obligations.*
 - *A foundation is the legal owner of assets contributed to the foundation; it has full ownership of the assets contributed to the foundation. As an independent legal entity, it has full legal capacity and has all the rights of a legal person including the right to own property.*
 - *The minimum capital requirement for the establishment of a foundation is CHF/EUR/USD 30,000.*

- *A foundation is established unilaterally, normally by a written declaration of establishment, or by testamentary disposition.*
- *Private-benefit foundations do not have to be registered in the Commercial Register, they acquire their legal personality through formation by the declaration of establishment.*
- *A foundation has no members or shareholders, but beneficiaries who may enjoy the foundation assets and/or income according to the intention of the founder as laid down in the foundation documents (such as statutes, by-laws, regulations etc.). Beneficiaries may be beneficiaries with an entitlement or discretionary beneficiaries with no legally enforceable claim to receive any particular benefit from the foundation. In case of a discretionary foundation, it is up to the discretion of the foundation Council whether or not a part or all of the capital or income of the foundation's assets is distributed to one or more of the members of the class of (discretionary) beneficiaries. It is therefore possible for the foundation to accumulate all or any part of the income if the foundation Council in his discretion so decides.*
- *The intention of the founder freezes upon the formation of the foundation; in principle, the foundation documents cannot be changed after the formation of the foundation, unless the founder has expressly retained in the statutes the right to amend the foundation documents, or such power of amendment has expressly been given to the board of the foundation or another executive body, as the case may be.*
- *The liability of the foundation is limited to the value of the foundation fund.*
- *There is a wide range of possible purposes (common-benefit, private-benefit or mixed).*
- *A foundation may establish facilities of commercial business, but only engage in commercial activities to a very limited extent, for instance, if the business directly serves the purpose of a common-benefit foundation, or if a business run along commercial lines is necessary for the orderly investment and management of the foundation assets (e.g. The management of underlying companies).*
- *The only mandatory executive body of a foundation is the Board of Foundation.*
 - *Pursuant to the new law on foundations it must consist of at least two members;*
 - *The board of foundation manages the business of the foundation and represents it vis-à-vis third parties;*

- *It is responsible for the fulfilment of the foundation's purpose in accordance with the (petrified) intention of the founder as laid down in the foundation documents.*
- *A legal representative is to be appointed. It serves as a domestic process agent entitled to accept service of official documents and correspondence.*
- *Additional bodies such as protectors or advisory or management committees may be created; these bodies may exercise rights of supervision, instruction or veto as regards resolutions of the board of directors or similar duties.*
- *Foundations are generally subject to corporate income tax at a flat rate of 12.5%. Foundations may apply for the flat tax regime for Private Asset Structures (PAS) in which case a flat income tax of CHF 1,800 applies. However, Private Asset Structures are subject to a number of restrictions. In particular, the activities of a PAS are essentially limited to the management and distribution of its own assets and it must not conduct any economic activity. Participations may only be held if it can be proved that the beneficiaries have no influence on the administration of the company.*
- *Beneficiaries of a Liechtenstein discretionary foundation:*
 - *May inspect the files of a foundation insofar as their rights are concerned;*
 - *May apply to the judge for an order for appropriate measures to oppose asset management and appropriation by the executive bodies of the foundation conflicting with the purpose of the foundation;*
 - *May file a claim for a declaratory judgment if it is uncertain whether a beneficiary belongs to the scope of beneficiaries or not;*
 - *Do not have the right to follow the assets of the foundation fund in case of a breach of duty of the board members;*
 - *Cannot file damage claims against the board of foundation but may file a complaint with the supervisory court who in turn may appoint a curator to assert damage claims.”*

42. In addition, Annex 1 of the joint memorandum sets out the legal characteristics of a trust under the laws of Liechtenstein. Annex 1 of the joint memorandum also sets out the difference between foundations and (discretionary) trusts under the laws of Liechtenstein as follows:

Foundation	(Discretionary) Trust
<i>Is a legal entity with separate legal personality.</i>	<i>Is an agreement (a contract) between the trustee and the settlor.</i>
<i>Is the legal owner of the assets contributed to the foundation.</i>	<i>Shall, subject to the trustee's obligations arising from the deed of trust, be entitled to dispose of the trust property in the same manner as an independent holder of rights and duties</i>
<i>Minimum capital requirement for establishment is CHF/EUR/USD 30,000.</i>	<i>No minimum capital requirement for establishment.</i>
<i>Is established unilaterally. Acceptance of the mandate as a member of the foundation council by designated members is required.</i>	<i>Is established by way of an agreement or deed between the settlor and the trustee(s). May also be established pursuant to a testamentary disposition of a settlor or by way of a declaration of trust issued by a trustee, each being subsequently accepted by the trustee.</i>
<i>No provision in relation to continuous instructions.</i>	<i>The settlor may not draw up conditions which bind the trustee to continuous instructions by the settlor.</i>
<i>No requirement to register foundation in the Commercial Register. Where not registered, notification of formation must be deposited with the Commercial Register. Vast majority of foundations are not registered.</i>	<i>Trusts created for a period of longer than 12 months must be registered in the Commercial Register as a general rule. Where not registered, a copy of the trust deed must be deposited with the Commercial Register. Vast majority of trusts are registered.</i>
<i>Liability for debts is limited to the value of the foundation fund. No personal liability of the founder or other persons.</i>	<i>Trustees are generally personally liable for the debts of the trust property incurred by the trustee on behalf of the trust property without limitation.</i>

<i>A legal representative must be appointed.</i>	<i>A legal representative may only be appointed if none of the trustees is resident or domiciled in Liechtenstein.</i>
<i>Generally subject to corporate income tax of 12.5%</i>	<i>Subject to annual flat rate income tax of CHF 1,800.</i>
<i>Beneficiaries can inspect foundation files. Beneficiaries can follow foundation property. Beneficiaries can file damage claims if the founder is no longer alive.</i>	<i>Beneficiaries cannot inspect foundation files. Beneficiaries cannot follow foundation property. Beneficiaries cannot file damage claims if the settlor is no longer alive.</i>

43. The following points of disagreement exist between Expert 1 and Expert 2 and are discussed in the joint memorandum:

- 43.1. Ownership of trust assets as a distinguishing factor;
- 43.2. Filing of damage claims by discretionary beneficiaries;
- 43.3. The ability to draw analogies between foundations and trusts;
- 43.4. Whether a foundation is similar in effect to a discretionary trust under the laws of Liechtenstein;
- 43.5. Key differences between a foundation and a trust under the laws of Liechtenstein;
- 43.6. Protection of beneficiaries of a discretionary trust.

Expert Evidence 3 – [REDACTED]

44. The following is a summary of the direct evidence adduced to the Commissioner by [REDACTED] [REDACTED] (hereinafter “Expert 3”) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Expert 3 was retained by the Appellant to give expert evidence to the Commissioner.

45. Expert 3 prepared a report dated 19 October 2022, which was submitted to the Commissioner, in which she provided her opinion on the following questions which were put to her on behalf of the Appellant:

45.1. *“Please identify and provide an overview of the principal types of structures available under the laws of Ireland for estate planning purposes and the reasons why one structure might be selected over another;”*

45.2. *“Please identify and provide an overview of the principal types of structures available under the laws of jurisdictions other than Ireland, which differ from the structures described in response to question i. In your response, please explain the extent to which such structures differ from the structures described in response to question i and, if you consider there are any similarities between the structures, please expand;”*

45.3. *“In relation to structures available under the laws of jurisdictions other than Ireland, would the application of DTT to:*

- a. one or more structures (including by having regard to the jurisdiction in which it is located) be a factor in the selection of an appropriate structure to achieve the estate planning objectives of a client?; and/or*
- b. a Liechtenstein foundation be a factor in the selection of an Irish structure in preference to either a Liechtenstein discretionary trust or a Liechtenstein foundation?”*

45.4. *“Insofar as it is within your knowledge and experience:*

- a. Has DTT been imposed on any of the Irish structures identified by you other than discretionary trusts?*
- b. Has DTT been imposed on any non-Irish structure other than foundations established under the laws of a civil law jurisdiction of the type identified by the Respondent in the Tax and Duty Manual – CAT – Part 5 Discretionary Trust Tax (at para 5.2.2), since the amendment effected by Finance Act 2012?”*

46. She stated that, in her experience, the principal types of structures available under Irish law which are most commonly used for estate planning purposes are trusts (both *inter vivos* and Will trusts), companies and, less commonly, partnerships.

47. She stated that the reasons why one structure might be selected over another will depend on a broad range of factors in the specific circumstances of family members involved such as the ages of potential beneficiaries; disability of a beneficiary; vulnerability of a

beneficiary; involvement of a family member in matrimonial or other proceedings; whether protection of limited liability is considered necessary or desirable; personal perception or attitude of family towards one structure or another and the tax treatment of the structure.

48. She stated that in her experience, a key feature of a discretionary trust as an estate planning structure is that there is a split between the legal and beneficial ownership of the assets held in trust. She stated that such a split achieves asset protection, which is a very important consideration where the beneficiaries are young; improvident or under a disability, or where the settlor intends assets to be retained so that the benefit of wealth can be passed down through future generations.
49. In addition, she stated that the cost of the suspension of beneficial ownership is a potentially adverse tax implication, depending on the circumstances, in the form of a charge to DTT. In her experience, she stated, this is a factor that influences conduct and decision-making in that it deters some families from using a discretionary trust as an estate planning structure. She stated that the charge to DTT also results in others proceeding with a discretionary trust, but stipulating that it would be wound up before their youngest child reaches the age of 21 years so that the charge to DTT is not triggered.
50. She stated that the onerous duty of care of trustees to the beneficiaries of a trust, and the fact that trustees face unlimited liability in the event of litigation or a claim, is also factor in determining what structure to use.
51. She stated that companies are commonly used for private benefit purposes for family members and are commonly used for asset protection to ensure family assets are kept together across generations, which, she stated, is similar to the use or effect of a discretionary trust. She stated that if children of the family are mature adults, it might be considered appropriate to gift or bequeath shares in a family company to them.
52. She stated that the rights attaching to each class of share within a company can differ dramatically, and that flexibility can be useful in estate planning terms by using different classes of shares to give different types of rights to different shareholders.
53. She stated that the fact that companies which have limited liability can be used can be an important feature. She also pointed to the comprehensive statutory framework which is in place for limited liability companies which codifies and defines the role and responsibilities of the directors of a company and which emphasises that the directors' duties are owed to the company. This, she stated, can be contrasted with the onerous duty of care the trustees of the trust owe to beneficiaries, and the fact that the principles

of trust law dealing with this issue are not statute based, but spread over centuries of case law.

54. Expert 3 stated that partnership structures are also employed in estate planning, particularly in the case of adult children, to give a gradual introduction to business matters. Partnerships can give children an equity interest in assets, while their parents retain control of decision-making through weighted voting rights for an initial period at least until the children have demonstrated financial responsibility. She stated that partnerships are more frequently used for property and other types of investment assets, whereas any trading or commercial activities are more likely to be conducted through a company which offers the attraction of limited liability, or a limited partnership.
55. Expert 3 stated that, in her experience, a client would select a non-Irish structure over an Irish structure usually because the client is domiciled outside Ireland, or has been resident outside Ireland for a protracted period, and their business interests are often centred outside Ireland.
56. She stated that the principal types of structures used for estate planning purposes available under the laws of jurisdictions other than Ireland which she typically encounters are also trusts, companies and partnerships. These, she stated are generally subject to specific legislative provisions in their domestic jurisdictions and as a result, there are some differences between Irish structures and their foreign counterparts.
57. She stated that, in her experience, clients who are accustomed to civil law systems and structures struggle to understand the concept of the common law trust. She stated that clients regard the fact that a foundation is a separate legal entity, which can shield the assets owned by it from exposure to beneficiary claims and with the benefit of limited liability, as important features. This, she stated, results in greater protection being afforded to the foundation board in the event of legal proceedings, as the Board owes its duty to the foundation and not to the beneficiaries. Further, she stated, a Liechtenstein foundation is beneficially entitled in possession to its property in just the same way as an Irish company is beneficially entitled in possession to its property. In contrast, she stated, it is the suspension of beneficial ownership that is a decisive factor to be considered in advising clients on the use of a discretionary trust.
58. She stated that the taxation treatment of any potential structure would be one of the factors taken into account in the selection of an appropriate structure to achieve the estate planning objectives of a client. She stated that, if DTT were to apply to a Liechtenstein foundation, then this would be one of a number of factors of consideration in the selection of a structure. It might, she stated, result in the client choosing an Irish structure such as

a company or partnership, which would not be subject to DTT rather than a Liechtenstein discretionary trust or a Liechtenstein foundation.

Expert Evidence 4 – [REDACTED]

59. The following is a summary of the direct evidence adduced to the Commissioner by [REDACTED] [REDACTED] (hereinafter “Expert 4”) [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Expert 4 was retained by the Respondent to give expert evidence to the Commissioner.
60. Expert 4 prepared a report dated 2 November 2022, which was submitted to the Commissioner, in which she provided her response to the report of Expert 3.
61. Expert 4 agreed with the factors set out by Expert 3 which influence the decision a client might make around what structure to adopt and she also agreed with Expert 3, that familiarity is a significant factor where a family and their advisers are more familiar with a local structure than one abroad.
62. Expert 4 agreed with Expert 3 that the main types of structures in Ireland commonly used for estate planning purposes are trusts (*inter vivos* and Will trusts) and partnerships. She cautioned that the specific use of companies is, in her experience, more limited in use in that it is her experience that a newly formed company is not a commonly used structure for either estate planning or asset protection purposes. She stated that a company structure, where a family already owns a company, would more commonly be amended to reflect the position outlined by Expert 3 rather than a company being promoted as an estate planning or asset protection structure in itself.
63. Expert 4 explained that her reasons for her view that an existing company structure would more commonly be used for estate planning or asset protection purposes include the fact that leaving an inheritance or gift of shares in a company in and of itself is not a protection from creditors. She stated that creditors are capable of accessing shares in a debt recovery situation and that the use of a company holding non-trading (investment) assets is unlikely to be recommended because of the additional taxes which arise over and above the taxes which would otherwise arise on a gift or an inheritance of an asset. A beneficiary of shares in a company is in a stronger position to question decisions of a company which a beneficiary does not agree with, even if those decisions are within the

power of the board, than the beneficiary of a discretionary trust who must prove a breach of trust in challenging decisions of trustees.

64. Expert 4 agreed with Expert 3 that the transfer of shares to family members, combined with a shareholders' agreement and the allocation of share classes with different rights attached, can be a method of managing the existing structure of a company to seek to secure the continuity of the company across generations.
65. Expert 4 stated that partnerships as an asset protection structure or estate planning structure are used in either limited partnership form or in unlimited form for estate planning. She stated that partnerships would not be considered an asset protection mechanism from creditors as the asset is owned by the beneficiary and is subject to attack. However, she stated, partnerships would be considered a useful structure in terms of managing control yet getting the value of an asset to a child at an early stage.
66. She stated that in her experience in Ireland the discretionary trust is most commonly used for either estate or asset protection purposes (or both) where the priority is protection of the asset or the beneficiary. She stated that the discretionary trust is the ideal structure for asset protection to the extent that a person listed in the class of beneficiaries is unable to say that he or she has any entitlement to the assets of the trust and so creditors would struggle to access these assets from the trustees.
67. She stated that tax considerations will also inform the use of a discretionary trust with clients weighing the need for protection against the tax implications of a discretionary trust.
68. Expert 4 stated that it is clear to her that it is not possible to equate a foundation to either an Irish company or an Irish discretionary trust of itself. However, she stated, it is her opinion, based on her particular experience of Irish discretionary trusts, that the Liechtenstein foundation is more comparable to an Irish discretionary trust than to any other structure.

Appellant's Submissions

69. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.
70. The Appellant submitted that it does not come within the provisions of section 2(1A) of the CATCA 2003 and that it is not an entity which is similar in its effect to a discretionary

trust as defined in section 2(1) of the CATCA 2003. As a result, the Appellant submitted that, it does not come within the charge to DTT as set out in section 20 of the CATCA 2003.

71. The Appellant submitted that the charge to mainstream CAT under the CATCA 2003 operates by imposing a charge to gift or inheritance tax. Section 5 of the CATCA 2003 imposes a charge to gift tax on the taxable value of every taxable gift "*taken by a donee*". Section 9 of the CATCA 2003 imposes a charge to inheritance tax on the taxable value of every taxable inheritance "*taken by a successor*".
72. The Appellant submitted that the criterion to be applied to determine whether a gift or inheritance has been taken is whether a person has become beneficially entitled in possession to any benefit under a disposition.
73. The Appellant submitted that in the case of a trust, trustees do not receive a beneficial interest in trust property, unless the trustee is also a beneficiary with an interest in possession in its capacity as a beneficiary. However, in the case of some types of trusts, neither does a beneficiary obtain a beneficial interest in possession. In those situations, the Appellant submitted, no mainstream CAT arises.
74. Section 2(1) of the CATCA 2003 defines a discretionary trust as follows:

““discretionary trust” means any trust whereby, or by virtue or in consequence of which—

(a) property is held on trust to accumulate the income or part of the income of the property, or

(b) property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income”

75. The Appellant submitted that the definition of a discretionary trust at section 2(1) of the CATCA 2003 has not been amended since the passing into law of the CATCA 2003.

76. The Appellant submitted that the definition of a discretionary trust pursuant to section 2(1) of the CATCA 2003 applies where property is held on trust and, for the time being, no person is beneficially entitled to an interest in possession in that property.
77. The Appellant submitted that section 20(1) of the CATCA 2003 provides that where, at the chargeable date of 31 December each year, no person is beneficially entitled in possession to an absolute interest in the trust property, the trust is deemed to become beneficially entitled in possession to an absolute interest in the trust property.
78. The Appellant submitted that section 20(2) of the CATCA 2003 is a specific anti-avoidance provision directed at situations whereby a beneficial interest in possession in trust property might immediately, or shortly before the chargeable date, be transferred to a person only to revert to the trust immediately or shortly after the chargeable date. Unless the person beneficially entitled for an interest in possession in the property as at the chargeable date has either a life interest in the property or an interest for 5 years or more, the Appellant submitted that section 20(2) CATCA deems the property to be subject to the discretionary trust as at the chargeable date;
79. The Appellant submitted that section 111 of the Finance Act 2012 introduced sections 2(1A) and 2(1B) into the CATCA 2003 with effect from 8 February 2012 as follows:
- “(1A) For the purposes of the definition of ‘discretionary trust’ in subsection (1), any entity which is similar in its effect to a discretionary trust shall be treated as a discretionary trust irrespective of how it is described in the place where it is established.*
- (1B) Any reference in this Act to trustees in relation to a discretionary trust shall be deemed to include persons acting in a similar capacity to trustees in relation to an entity referred to in subsection (1A).”*
80. The Appellant submitted that, as the charge to DTT within section 20 of the CATCA 2003 has not been amended since its introduction in 2003, it must apply equally to entities within the similar in its effect definition contained in section 2(1A) of the CATCA 2003 as it does to trusts within the original discretionary trust definition.
81. The Appellant submitted that the similar in its effect definition contained in section 2(1A) of the CATCA 2003 does not identify the “effect” of a discretionary trust against which the “effect” of “any entity” is to be compared so as to assess whether one is “similar” to another.

82. In addition, the Appellant submitted that the similar in its effect definition contained in section 2(1A) of the CATCA 2003 does not identify the type of “entity” that is to “be treated as a discretionary trust”.
83. As a result, the Appellant submitted that the similar in its effect definition operates by reference to the definition of a “discretionary trust” contained in section 2(1) of the CATCA 2003.
84. The Appellant submitted that, as both the definition of a discretionary trust contained in section 2(1) of the CATCA 2003, and the charge to DTT contained in section 20 of the CATCA 2003, specifically target property in which no person is beneficially entitled to an interest in possession, the similar in its effect definition contained in section 2(1A) of the CATCA 2003 must therefore be interpreted as applying to entities that have that effect, that is to say, to entities in respect of which no person is beneficially entitled to the property of those entities.
85. The Appellant submitted that, as a result, the similar in its effect definition contained in section 2(1A) of the CATCA 2003 does not capture entities such as a Liechtenstein foundation which, the experts agree, is the full owner of its assets. The Appellant submitted that as a Liechtenstein foundation owns its assets absolutely and is necessarily beneficially entitled to an interest in possession in those assets, consequently, it is not similar in its effect to a discretionary trust as defined in section 2(1) of the CATCA 2003.
86. The Appellant submitted that the following factors apply when considering the comparability of the Appellant with a discretionary trust for the purposes of the charge to DTT:
 - 86.1. The CATCA 2003 provides for a scheme for the taxation of gifts and inheritances taken by donors and successors. A gift or inheritance will be taken where a person becomes beneficially entitled in possession to the gift or inheritance;
 - 86.2. The charge to DTT, based on the definition of a discretionary trust contained in section 2(1) of the CATCA 2003, and based the provisions of section 20 of the CATCA 2003, is a charge to tax on property held in such a manner that no person is beneficially entitled in possession to that property, subject to the provisions of section 20(2) of the CATCA 2003;
 - 86.3. Prior to the introduction of the similar in its effect provision of section 2(1A) of the CATCA 2003 by the Finance Act 2012, the sole criterion emerging from the definition of a discretionary trust in section 2(1) of the CATCA 2003 was the

absence of any person beneficially entitled in possession to the underlying property, subject to the provisions of section 20(2) CATCA 2003; and

- 86.4. The charge to DTT does not apply to Irish companies which are beneficially entitled in possession to their assets and, which on the evidence of the expert Trust and Estate Practitioners might also be used in wealth and estate planning.
87. The Appellant submitted that, if the Commissioner concludes that more than one interpretation of the similar in its effect definition contained in section 2(1A) of the CATCA 2003 is possible, then, the Commissioner is required, as a matter of law, to apply the narrow construction of the CATCA 2003 contended for by the Appellant and that the Appellant is entitled to the benefit of the principle against doubtful penalisation.
88. The Appellant made submissions in relation to the correct approach to the interpretation of the similar in its effect definition and submitted that the main legal principles concerning the interpretation of taxation statutes are set out in the judgments of the Supreme Court in *Dunnes Stores v. Revenue Commissioners* [2020] 3 IR 480 (hereinafter "*Dunnes Stores*") and in *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60 (hereinafter "*Bookfinders*").
89. The Appellant submitted that the following key principles of statutory interpretation as they relate to the interpretation of taxation statutes emerge from the case law of the Supreme Court which should be applied in determining this appeal:
 - 89.1. A purposive approach to interpretation within the meaning of section 5 of the Interpretation Act 2005 is not a permissible approach;
 - 89.2. The Commissioner must determine the ordinary meaning of the words used in the similar in its effect definition, as set out at paragraph 52 of *Bookfinders*;
 - 89.3. The task is the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation, as set out at paragraph 55 of *Bookfinders*;
 - 89.4. In determining the meaning of the similar in its effect definition, the Commissioner can have regard to the purpose of the provision, if discernible, and its context, as set out at paragraphs 47 and 48 of *Bookfinders*. In this appeal, the Appellant submitted, the provision in question is the similar in its effect definition and its context is the charging section, that is to say section 20 of the CATCA 2003;

- 89.5. While it is to be presumed that the Oireachtas did not intend to use surplusage or have words or phrases without meaning, the Commissioner cannot speculate as to meaning or import words that are not found in the statute, either expressly or by necessary inference;
- 89.6. This means that “*if on the only interpretation available the provision in question is ineffectual, then ... that consequence must prevail*” as set out in *Dunnes Stores*;
- 89.7. If, after applying the general principles of statutory interpretation, it is not possible to say clearly that a statutory provision applies to a particular situation, and, if a narrower interpretation is possible, then effect must be given to that interpretation, as set out at paragraph 52 of *Bookfinders*;
- 89.8. If the Commissioner is “*genuinely in doubt as to the imposition of a liability*” the text construed must be given a strict construction “*to prevent a fresh and unfair imposition of liability by the use of oblique or slack language*”, as set out at paragraph 54 of *Bookfinders*.
90. The Appellant submitted that the interpretation contended for by the Respondent, if correct, would result in an unjustified restriction on its free movement rights protected by the TFEU and the EEA Agreement.
91. In relation to the preliminary objection submitted by the Respondent to the inclusion of the New Ground of Appeal, the Appellant submitted that:
- 91.1. The Notice of Appeal in this appeal raised the issue of the proper interpretation of the similar in its effect definition contained in section 2(1A) of the CATCA 2003 and in section 20 of the CATCA 2003;
- 91.2. The jurisprudence of the Supreme Court is that a court interpreting legislation may consider, of its own motion and in accordance with the obligation to achieve a conforming interpretation, issues of EU law which might impact on the proper interpretation of the national measures¹. In those cases, the Appellant submitted, the appellants were not prevented from raising in the Supreme Court issues of EU law relevant to interpretation, even though they were not pleaded. The Supreme Court decided that, to exclude those issues, would create the risk of the Supreme Court coming to an incorrect interpretation of the relevant

¹ See *Callaghan v. An Bord Pleanála* [2017] IESC 60 and *Friends of the Irish Environment Ltd. v. An Bord Pleanála* [2019] IESC 53.

provisions. This approach, the Appellant submitted is binding on the Commissioner;

- 91.3. The Appellant submitted that an argument based on the fundamental freedoms, including the requirement on the Commissioner to consider the compatibility of the Respondent's interpretation of the similar in its effect definition contained in section 2(1A) of the CATCA 2003 with EU law and to disapply section 2(1A) of the CATCA 2003 to the extent of any incompatibility with EU law, could not reasonably have been included in the Notice of Appeal;
 - 91.4. The Appellant submitted that, at the time the Notice of Appeal was filed on 13 January 2017, the state of the law in Ireland was that such arguments could not be raised before the Commission. The Appellant submitted that the duty of Irish administrative bodies to disapply national legislation which is contrary to EU law was not confirmed by the Court of Justice of the European Union (hereinafter the "CJEU") until the judgment in Case C-378/17 *Minister for Justice v. Workplace Relations Commission* on 4 December 2018 (hereinafter the "WRC case");
 - 91.5. The Appellant submitted that, notwithstanding the judgment in the WRC case, the Respondent continued to maintain that the Commission did not have a jurisdiction to disapply national law, which contention was rejected by the Commission in *Determination 08TACD2021* issued on 8 December 2020.
 - 91.6. The Appellant submitted that the jurisdiction of the Commission and Appeal Commissioners to disapply national law that infringes EU law was confirmed by the Court of Appeal (Murray J) in *Lee v. Revenue Commissioners* [2021] IECA 18 (hereinafter "Lee").
92. The Appellant submitted the following in relation to the substantive issues of EU law which the Appellant submitted arise in this appeal:
- 92.1. The parties are in agreement that the free movement of capital is engaged by the facts, and consequently, the parties agree that it is not necessary for the Commissioner to consider the issue of the freedom of establishment;
 - 92.2. The parties are in agreement that in order for a direct taxation measure to amount to a restriction on free movement rights under the TFEU and/or the EEA Agreement, the measure must give rise to a discriminatory treatment which is likely to discourage the exercise of free movement rights. In other words, the

Appellant submitted, a national measure can amount to a “restriction” on free movement if it:

- a. treats taxpayers which are in an objectively comparable position as regards the tax differently; and / or
- b. treats taxpayers which are not in an objectively comparable position as regards the tax in the same way.

93. The Appellant submitted that if the Respondent’s interpretation of the similar in its effect definition as contained in section 2(1A) of the CATCA 2003 were correct, this would result in a difference of treatment within the statutory scheme of Irish resident entities which are beneficially entitled in possession to their assets and non-resident entities such as the Appellant which are beneficially entitled in possession to their assets. If correct, the Appellant submitted, the Respondent’s interpretation would lead to the Appellant being treated:

93.1. In the same manner as discretionary trusts despite the fact that the Appellant is not in an objectively comparable position to a discretionary trust. The Appellant submitted that the position of a discretionary trust within the meaning of the definition of a discretionary trust as contained in section 2(1) of the CATCA 2003, for the purposes the CATCA 2003, is characterised by the absence of any person who is beneficially entitled in possession to the underlying property. The Appellant submitted that it is not in this position, having become beneficially entitled in possession to its assets when it received them; and

93.2. Less favourably as regards the charge to DTT than any Irish entity which is beneficially entitled in possession to its own assets.

94. The Appellant submitted that, if the Respondent’s interpretation of the similar in its effect definition contained in section 2(1A) of the CATCA 2003 is correct, the State would have captured the Appellant in the same charge to tax as a discretionary trust as defined in section 2(1) of the CATCA 2003, by creating a new criterion which cuts across that definition and the original scheme of DTT. This, the Appellant submitted, ignores a core aspect of the section 20 of the CATCA 2003 charging provision.

95. The Appellant submitted that, such a difference in treatment would amount to discriminatory treatment of the Appellant as a non-Irish entity and would likely discourage Irish persons exercising their freedom of movement to transfer assets to Liechtenstein entities. This, the Appellant submitted, would amount to a restriction on free movement of capital which must be justified.

96. The Appellant submitted that the Respondent has failed to demonstrate how this difference of treatment could be justified. The Appellant submitted that the Respondent cites the established justifications of the need to prevent tax avoidance and the need to ensure fiscal supervision. However, the Appellant submitted, the Respondent has made no effort to engage with the legal principles governing those justifications. The Appellant submitted that the case law of the CJEU demonstrates that:

96.1. To rely on a justification of the need to prevent tax avoidance, a national measure must specifically target wholly artificial arrangements which do not reflect economic reality and must on each occasion on which the existence of artificial transactions cannot be ruled out, give the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for the transaction at issue; and

96.2. To rely on a justification of the need to ensure fiscal supervision is likewise so constrained, as the concept of fiscal supervision relates to measures designed to combat tax avoidance;

97. The Appellant submitted that the similar in its effect definition contained in section 2(1A) of the CATCA 2003 is not limited by reference to the prevention of conduct that consists of the creation of wholly artificial arrangements. For this reason alone, the Appellant submitted, the measure, if it pursues the objective of preventing tax evasion, is disproportionate;

98. The Appellant submitted that case law demonstrates that a national measure cannot be a proportionate interference with free movement rights if it does not respect the principle of legal certainty. The Appellant submitted that the similar in its effect definition contained in section 2(1A) of the CATCA 2003 is unclear, imprecise and unpredictable. The Appellant submitted that it operates by reference to a vague criterion of an entity being "similar in its effect" to a discretionary trust without defining the effect at issue. The Appellant submitted that, on the Respondent's case, the "effect" which the Oireachtas intended was an effect on "beneficiaries". The Appellant submitted that the term "beneficiary" is not defined in the CATCA 2003 and is not used in section 20 of the CATCA 2003.

99. The Appellant submitted that the Respondent, in interpreting the similar in its effect definition contained in section 2(1A) of the CATCA 2003, is purporting to articulate multi-stage tests as to what the relevant "effect" is and to rely on terms not used in the legislation. The Appellant submitted that, as a result, if the Respondent is correct, the

similar in its effect definition contained in section 2(1A) of the CATCA 2003 cannot be described as clear.

100. The Appellant submitted that, in the event that the Commissioner finds that the interpretation proposed by the Respondent would constitute an unjustified restriction on free movement rights, the Commissioner must:

100.1. Seek a conforming interpretation of the similar in its effect definition contained in section 2(1A) of the CATCA 2003 which would avoid the discriminatory treatment of the Appellant; or

100.2. If this is not possible, disapply the similar in its effect definition contained in section 2(1A) of the CATCA 2003 in this case.

101. The Appellant submitted that, in either event, it would not fall within the charge to DTT, and the assessments would be reduced to nil.

Respondent's Submissions

102. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

103. The Respondent submitted that it is apparent that DTT was introduced as an anti-avoidance measure because discretionary trusts were previously being used to "*deliberately postpone CAT indefinitely*".²

104. The Respondent submitted that DTT encourages distributions to be made from discretionary trusts, and from entities similar in their effect to discretionary trusts, so that no charge to DTT arises.

105. The Respondent submitted that it is clear that the purpose and scheme of the CATCA 2003 is to impose a charge to tax on beneficiaries when they become beneficially entitled in possession to a benefit for less than full consideration. This, the Respondent submitted, arises by the imposition of Capital Acquisitions Tax (hereinafter "CAT") when a beneficiary becomes entitled in possession to a benefit or, following the introduction of DTT, by encouraging such an event by imposing both an initial and annual charge to DTT while the asset remains in the trust and the beneficiary is not entitled in possession to the benefit.

² Keogan, Mee and Wylie, *The Law and Taxation of Trusts*, 2006 paragraphs 27.012 to 27.013.

106. The Respondent submitted that section 2(1A) of the CATCA 2003 applies to an “*entity which is similar in its effect to a discretionary trust*” and that it is not necessary for an entity to be “*the same as*” a discretionary trust in order for it to come under the provisions of this section. Rather, the Respondent submitted that, it suffices for an entity to be similar in its effect to a discretionary trust for DTT, as provided for in section 20 of the CATCA 2003, in order for the provisions of that section to apply.

107. The Respondent submitted that the Appellant is an entity that is similar in its effect to a discretionary trust as defined in section 2(1A) of the CATCA 2003 for the following reasons:

107.1. A foundation and a trust are similar in their effects because the assets in both are held back on a discretionary basis;

107.2. With a trust, property is managed for the benefit of a person who is not beneficially entitled to an interest in possession in the trust asset but who could at a certain point be so entitled depending on the decision of the trustee;

107.3. With a foundation, property is owned and managed for the benefit of a person who is not beneficially entitled in possession to the foundation asset, but who could at a certain point be so entitled depending on the decision of the foundation board;

107.4. In both cases, the holding back delays the charge to mainstream CAT, as it delays the ultimate beneficiary from becoming beneficially entitled in possession to the property, and this therefore activates the charge to DTT pursuant to section 20 of the CATCA 2003.

108. The Respondent submitted that its claim that the Appellant is an entity that is similar in its effect to a discretionary trust as defined in section 2(1A) of the CATCA 2003 is supported by:

108.1. Consideration of section 2(1A) of the CATCA 2003 in its statutory context and in light of the scheme of charging to CAT established by the CATCA 2003; and

108.2. Consideration of section 2(1A) of the CATCA 2003 in accordance with the legislative purpose of imposing DTT to encourage early winding up of discretionary trusts and bringing forward the charge to mainstream CAT.

109. The Respondent submitted in relation to statutory interpretation, that in *Dunnes Stores* McKechnie J described the exercise of statutory interpretation at paragraph 64 as follows:

“As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament.”

110. The Respondent also submitted that Murray J noted in the Supreme Court in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43 (hereinafter “Heather Hill”), stated at paragraph 113:

“‘legislative intent’ as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation”.

111. Rather, the Respondent submitted, Murray J stated at paragraph 114 of *Heather Hill* that the exercise of statutory interpretation involves the application of a set of rules and presumptions *“...to ascertain the legal effect attributed to the legislation.”*

112. The Respondent also submitted that at paragraph 115 of *Heather Hill*, Murray J stated that:

*“...**the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about.** The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members’ objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.”* (emphasis added)

113. The Respondent submitted that it is, however, well-established that the words must be considered in their context and in light of the purpose of the legislation. As further noted in *Heather Hill*, Murray J stated at paragraph 116:

*“...at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and **it does so in a pre-existing context and for a purpose.** The best guide to that purpose, for this very reason, **is the language of the statute read as a whole**, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in *Brown*. However-and in resolving this appeal this is the key and critical point -the ‘context’ that is deployed to that end and ‘purpose’ so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively*

probative of an alternative construction that is itself capable of being accommodated within the statutory language.” (emphasis added)

114. The Respondent submitted that the importance of interpreting statutory language in context has often been emphasised by the Courts.

115. The Respondent submitted that in *Dunnes Stores*, McKechnie J noted at paragraph 64 that:

“...context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that”.

116. In *O’Rourke v Revenue Commissioners* [2016] 2 IR 625, Charleton J stated at paragraph 2 that:

“...a statute is to be construed according to its plain meaning and that such emerges from the text of the provision, considered within its proper context”.

117. The Respondent submitted that also of relevance is the approach of the Supreme Court in *Bederev v Ireland* [2016] 2 ILRM 340. The Respondent submitted that at paragraph 23 of that case, Charleton J endorsed the following passage from Bennion, *Statutory Interpretation*, (6th edn, 2013), 540:

*“The interpreter should treat the express words of an enactment as illumined by consideration of its context or setting. The words are not deployed in a vacuum... Courts accordingly may have regard to the legislative history, the statutory context furnished by legislation in pari materia [on the same subject], **and the common law context.**”*
(emphasis added)

118. The Respondent submitted that it is well-established that liability for tax must be clearly imposed and that the provisions of tax statutes are strictly construed. Here too, the Respondent submitted, context is critical. In *Inspector of Taxes v Kiernan* [1981] IR 117, Henchy J set out three principles of construction, also referred to by McKechnie J in *Dunnes Stores* as follows:

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

(2) *“If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business*

or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.”

(3) “..., if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language...as used in the statutory provision in question here, the word “cattle” calls for such a strict interpretation.”

119. In relation to (1) above, McKechnie J in *Dunnes Stores* stated at paragraph 70:

*“The point first made is of common application: **a provision should be construed in context having regard to the purpose and scheme of the Act as a whole, and in a manner which gives effect to what is intended.**” (emphasis added)*

120. The Respondent submitted that it is also important to understand precisely what is meant by the principle that taxation statutes are to be interpreted strictly.

121. The Respondent submitted that in *Bookfinders*, O’Donnell J explained at paragraphs 47 and 48 that the principle of strict statutory interpretation of tax legislation:

*“... **should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision in particular,** or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.*

It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the purpose of the provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes...” (emphasis added)

122. The Respondent submitted that the fact that the meaning of a statutory provision may only be elicited upon rigorous scrutiny does not mean that the statute is ambiguous. O’Donnell J observed at paragraph 52 of *Bookfinders*:

*“The task of statutory interpretation in any context is the ascertainment of meaning communicated in the highly formal context of legislation. **But some degree of uncertainty or lack of clarity is almost inevitable, and the principles of statutory interpretation are designed to assist in achieving clarity of communication...** It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. **The rule of strict construction is best described as a rule against doubtful penalisation.** If, **after the application of the general principles of statutory interpretation,** it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in *Kiernan*, the words should then be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language.” (emphasis added)*

123. The Respondent submitted that the following observation of O’Donnell J in *Bookfinders* at paragraph 54 is also of relevance:

*“It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. **Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque.** However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, **after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability,** that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.” (emphasis added)*

124. Thus, the Respondent submitted, the rule against doubtful penalisation only takes effect if, after the principles of statutory interpretation have been applied properly and robustly, ambiguity remains.

125. The Respondent submitted that, in order to ascertain whether or not a foundation is similar in its effect to a statutory trust, it is not necessary for the Commissioner to undertake a full-scale comparison of the characteristics of a trust and a foundation. The Respondent submitted that the language in section 2(1A) of the CATCA 2003 is “effect”

and this does not mean that a foundation has to be premised on the same fundamental concepts of a trust in order to fall within the scope of section 2(1A) of the CATCA 2003.

126. The Respondent submitted that the evidence of Expert 3 and Expert 4 on the various structures available for succession planning and wealth preservation in Ireland is not relevant to the matter to be determined by the Commissioner.

127. The Respondent submitted that, having established that the Appellant is similar in its effect to a discretionary trust, it is clear that the Appellant's board is the accountable person for the purposes of the charge to DTT, given that it is "someone who acts in a similar capacity to a trustee" for the purposes of Section 2(1B) of the CATCA 2003.

128. Therefore, the Respondent submitted, DTT has been correctly charged to the Appellant under Section 20 of the CATCA 2003.

129. The Respondent submitted that this suffices to determine this appeal and that no other issue arises for the consideration of the Appeal Commissioner.

130. The Respondent submitted that, as a result of the provisions of section 949I(6) of the TCA 1997, the Commissioner does not have jurisdiction to consider the New Ground of Appeal as it was not included in the Notice of Appeal dated 13 January 2017 submitted by the Appellant.

131. Section 949I(6) of the TCA 1997 provides that:

"A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice."

132. The Respondent submitted that the fact that the Appellant is raising a point of EU law does not disturb this conclusion.

133. The Respondent submitted that the reasons advanced by the Appellant as to why it failed to include the New Ground in its Notice of Appeal do not alter this conclusion.

134. The Respondent does not agree with the Appellant's reason for not including the New Ground of Appeal in its Notice of Appeal which relies on the fact that the *WRC* case was not decided by the CJEU until 4 December 2018.

135. The Respondent cited Case C-106/89 *Marleasing* EU:C:1990:395 as establishing the obligation to interpret national legislation in conformity with EU law.

136. The Respondent submitted that, at all times relevant to this appeal, administrative bodies had an obligation to interpret national law in conformity with EU law. The Respondent

submitted that this position was made clear by the High Court judgment *Minister for Justice v Director of the Equality Tribunal* [2009] IEHC 72, [2010] 2 IR 455 where the following is noted at paragraph 2 of the headnote:

*“In circumstances where an ambiguity arose, national legislation was to be construed in line with the obligation under European law in which it had its origin both by the High Court **and by any administrative body**. That obligation did not extend to rewriting or doing violence to the language, but nevertheless the obligation of conforming interpretation is clearly indicated to be **applicable and to have been applicable to an administrative body**.”*(emphasis added)

137. In that regard, the Respondent also relied on the judgment in *An Taoiseach v The Commissioner for Environmental Information* [2013] 2 IR 510 in support of its submission that the principle of conforming interpretation was well established prior to the date of the submission of the Appellant’s Notice of Appeal in this appeal.

138. In addition, the Respondent also relied on the Supreme Court judgment in *Minister for Justice v The Workplace Relations Commission* [2020] 2 IR 244 in support of its submission that the principle of conforming interpretation was well established prior to the date of the submission of the Appellant’s Notice of Appeal in this appeal and that the Commissioner had, at all material times relevant to this appeal, an obligation to consider EU law and to deliver a remedy of confirming interpretation.

139. As a result, the Respondent submitted, that there was no reason for the Appellant not to have included the New Ground of Appeal in its Notice of Appeal.

140. The Respondent also submitted that notwithstanding the Commissioner’s obligation consider EU law and to deliver a remedy of confirming interpretation, the Commissioner does not have jurisdiction to disapply national law where it contravenes EU law.

141. The Respondent submitted that the question before the CJEU in the *WRC* case was very specific as set out at paragraph 1 of the judgment, as follows:

*“This request for preliminary ruling concerns the question whether a national body **established by law in order to ensure enforcement of EU law in a particular** area must be able to disapply a rule of national law that is contrary to EU law.”* (emphasis added)

142. The Respondent submitted that the Commission is not a body established by law in order to ensure enforcement of EU law and, as such, an Appeal Commissioner does not have the jurisdiction to disapply a rule of national law which is contrary to EU law.

143. In that regard the Respondent referred to section 6 of the Finance (Tax Appeals) Act 2015 which states:

“(1) The Commissioners may perform such functions as are assigned to them by this Act and by the Taxation Acts.

(2) Without prejudice to the generality of subsection (1), the Commissioners shall perform the following functions in relation to the Taxation Acts—

(a) deciding whether or not to accept an appeal,

(b) deciding whether to declare, under section 949N(3) (inserted by section 34) of the Act of 1997, that a refusal to accept an appeal is final,

(c) deciding on the appropriate procedure to be adopted in relation to an adjudication of an appeal,

(d) giving directions to the parties to an appeal,

(e) fixing dates, times and places for the hearing of appeals,

(f) hearing an appeal where the Commissioners have decided that a hearing is the appropriate method of adjudicating on the appeal,

(g) determining appeals,

(h) providing written determinations,

(i) publishing determinations,

(j) stating and signing cases stated for the opinion of the High Court,

(k) establishing and maintaining efficient and effective systems and procedures so as to secure the processing, adjudication and determination of appeals in a timely and effective manner, and

(l) doing all such other things as they consider conducive to the resolution of disputes between appellants and the Revenue Commissioners and the establishment of the correct liability to tax of appellants.”

144. The Respondent submitted that in *An Taisce v An Bord Pleanála* [2020] IESC 39 (hereinafter “*An Taisce*”), McKechnie J, expressed concern at the implications of the WRC case as follows:

*“163. **If applied literally**, that judgment is capable of having widespread ramifications for the jurisdiction of national non-court bodies, or administrative entities, which are*

called upon to apply national legislation where an EU measure is relevant. Such bodies, under whose remit EU rights may arise, include the Environmental Protection Agency, the Tax Appeals Commission, the Valuation Tribunal, the Refugee Appeals Commission, the Information Commissioner as well as the District and Circuit Courts (*The Bar Review* 2019 24(4) 103- 106, Bolger & McVeigh). The problems which may arise could vary enormously. I will endeavour to give just one or two plausible examples. Whilst there may seem to be no difficulty in disapplying a provision of national law which leaves in place a regime by which the subject issue can immediately be dealt with, it would be an entirely different prospect, if one had to go further and positively create a system, to include remedy, so as to give full force and effect to an EU measure. Or a situation could very easily arise wherein a multiplicity of conflicting rulings by differently composed panels of the same body would be made, all of which would then inevitably end up before the High Court for resolution either by way of judicial review or by way of a case stated. Some years ago, well in advance of the court's decision in the *Workplace Relations* case, Dr. Elaine Fahey, an esteemed academic, made the observation that the inconsistent and sometimes incorrect application of EU law principles by administrative decision makers had resulted in a stream of strange case law coming before the Irish courts (*EU Law in Ireland*, Clarus Press, 2010). **Such evidently cannot be a welcome development.** (emphasis added)

145. The Respondent submitted that McKechnie J urged caution on the part of decision makers of relevant administrative tribunals, adding

*“164. Whilst fully respecting the primacy of EU law, it is still worthwhile to acknowledge that subject to the principles of equivalence and effectiveness, **Member States, at least in general, have autonomy over domestic procedural rules.** In accommodating both, in the circumstances arising, it is I think necessary to see how the decision of the Court of Justice works in practice in the various and myriad situations which on a daily basis a multitude of entities, tribunals, decision makers and the like, have to face. It would be highly undesirable and I think counterproductive if the overarching effect of such decision was to result in the operation of any underlying legislative scheme becoming disjointed and disorderly. One would hope that a coherent system for the disapplication of national law would emerge in any given situation. **To avoid possible conflict, it would be prudent for a decision maker to search for the most efficient way of dealing with, not only the issue immediately at hand but also with the consequences which any singular decision may have on other situations. This may very well involve a view that the most effective,***

useful and timesaving way in which the issue can be disposed of, would be by way of a High Court determination. The mere fact of having the required power does not necessarily mean that in all situations, it must be used. Given this early stage of how the decision is being implemented, I would prefer to leave this matter stand as now until it becomes necessary for this Court, in a concrete set of circumstances before it, to further develop this issue. Consequently because of that and in light of my views on Issues One and Two, I will leave this matter rest for the moment.” (emphasis added)

146. The Respondent submitted that in *Zalewski v Workplace Relations Commission* [2021] IESC 24 (hereinafter “*Zalewski*”, O’Donnell J expressed concern regarding a broad interpretation of the *WRC* case noting at paragraph 128 that it is “...the function of the Court under the constitution to determine in any given case how a particular jurisdiction is to be analysed and categorised.”

147. The Respondent submitted that this approach was confirmed by the decision in *Lee* in which, the Respondent submitted, Murray J confirmed that the *WRC* case had not expanded the jurisdiction of the Appeal Commissioners:

“74. Finally, in the course of his submissions counsel for the plaintiff submitted that since the decision of the CJEU in C-378/17 *Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission* [ECLI:EU:C:2018:979], the Appeal Commissioners may be invited to disapply domestic legislation which they determine to be incompatible with European law. The principle is only engaged where the Appeal Commissioners are dealing with an issue within their remit, whether in an appeal against an assessment to tax or otherwise. **It was suggested that this in some sense implied a broadening of their jurisdiction as a matter of national law. This does not at all follow.** The *Workplace Relations Commission* decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the *TCA* breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates

of European law. **Neither expand the jurisdiction of the body as a matter of national law.**” (emphasis added)

148. The Respondent submitted that, without prejudice to this preliminary objection, if the Appeal Commissioner permits the Appellant to rely on the New Ground, the New Ground of Appeal does not add to the Appellant’s case and need not therefore be determined.

149. The Respondent submitted that, if the Appellant is correct that the foundation is not similar in its effect to a discretionary trust, it follows that no DTT arises and there is no requirement for the Commissioner to consider the EU law argument.

150. The Respondent submitted that, if it is correct that a foundation is similar in its effect to a discretionary trust, no discrimination arises for the purpose of the free movement provisions, as the Appellant and a discretionary trust are comparable and are being treated comparably. In this respect, the Respondent submitted, it is not enough to say that the statutory provision might capture an entity that is not Irish in order to demonstrate that discrimination arises

151. The Respondent submitted that even if the Appellant is entitled to rely on free movement of capital, no discrimination arises against the Appellant in this appeal or that if any discrimination arises it is justified.

Material Facts

Accepted material facts

152. There are no disputed material facts between the parties and the Commissioner accepts and finds same as material facts:

152.1. The Settlor was born in [REDACTED]. The Settlor’s domicile of origin was England.

152.2. [REDACTED]
[REDACTED]

152.3. [REDACTED]
[REDACTED]

152.4. On [REDACTED], the Settlor settled the Trust which was a discretionary trust [REDACTED].

152.5. [REDACTED]
[REDACTED]

152.6. The Trust established a [REDACTED] company, [REDACTED], which held investments purchased with the distributions received by the Trust [REDACTED].

152.7. The Trust held bearer shares in [REDACTED].

152.8. On [REDACTED], the Appellant was established.

152.9. The Appellant is a foundation established under the laws of Liechtenstein.

152.10. The Constitutional documentation of the Appellant includes the following:

- The Statute (Articles of Incorporation) dated [REDACTED];
- The First By-Laws dated [REDACTED];
- The Special By-Laws dated [REDACTED];
- The Circular Resolution of the Board of the Appellant dated [REDACTED]
[REDACTED];
- The Amended First By-Laws dated [REDACTED]; and
- The Authentic Interpretation of the Resolution date [REDACTED].

152.11. On [REDACTED] all of the shares in [REDACTED] and the interests in [REDACTED] were transferred from the Trust into the Appellant.

152.12. The Trust was brought to an end by Deed of Termination dated [REDACTED].

152.13. A dispute arose between the parties as to the domicile of the Settlor, with the Appellant maintaining that the Settlor's domicile was English and the Respondent maintaining that the Settlor's domicile was Irish.

152.14. By way of letter dated 23 November 2016, following conclusion of a MAP procedure agreement was reached between the Respondent and HMRC which established that the Settlor was domiciled in Ireland at all times from [REDACTED]
[REDACTED] until the date of his death.

152.15. By letter dated 20 March 2015 to the Respondent, the Agent for the Appellant confirmed the value of the Appellant as being €52,690,878.

152.16. On 15 December 2016, the Respondent raised the following Notices to Capital Acquisitions Tax: Discretionary Trust – Annual Inheritance Tax for the years 2011, 2012, 2013, 2014 and 2015 pursuant to the provisions of section 49 of the CATCA 2003 on the Appellant:

Year	Taxable Value of Appellant €	Tax at 1% €	Tax Paid €	Tax Due €
2011	52,500,000	525,000	0.00	525,000
2012	52,500,000	525,000	0.00	525,000
2013	52,600,000	526,000	0.00	526,000
2014	52,690,878	526,909	0.00	526,909
2015	52,750,000	527,500	0.00	527,500
Total				2,630,409

152.17. The Appellant appealed the Notices of Amended Assessment raised by the Respondent on 15 December 2016 by way of a Notice of Appeal dated 13 January 2017 which was submitted to the Commission. The appeal reference relating to that Notice of Appeal is Y51/17.

152.18. On 18 October 2018, the Respondent raised the following Notices to Capital Acquisitions Tax: Discretionary Trust – Annual Inheritance Tax for the years 2016 and 2017 pursuant to the provisions of section 49 of the CATCA 2003 on the Appellant:

Year	Taxable Value of Appellant €	Tax at 1% €	Tax Paid €	Tax Due €
2016	53,000,000	530,000	0.00	530,000
2017	53,500,000	535,000	0.00	535,000
Total				1,065,000

152.19. The Appellant appealed the Notices of Amended Assessment raised by the Respondent on 18 October 2018 by way of a Notice of Appeal dated 16 November 2018 which was submitted to the Commission. The appeal reference relating to that Notice of Appeal is M1078/18. Appeals Y51/17 and M1078/18 were consolidated by way of direction issued on 11 April 2019. The total amount under appeal in the consolidated appeal was €3,695,409.

152.20. By letter dated 27 March 2020, the Respondent informed the Appellant that it was withdrawing the Notices of Assessment raised for the years 2011, 2015, 2016 and 2017 totalling €2,117,500.

152.21. The Notices of Assessment raised for the years 2012, 2013 and 2014 totalling €1,577,909 were not withdrawn by the Respondent.

Analysis

153. This appeal is made on the basis that the Appellant claims that a Liechtenstein foundation is not an entity which is similar in its effect to a discretionary trust as defined in section 2(1) of the CATCA 2003.

154. The Appellant has made an alternative claim, the New Ground of Appeal, to the effect that should the Commissioner find that a Liechtenstein foundation is an entity which is similar in its effect to a discretionary trust, the provisions of sections 2 and 20 of the CATCA 2003 would amount to discrimination against non-Irish entities. This would, the Appellant claims, be an impermissible restriction of fundamental freedoms enshrined in the TFEU and in the EEA Agreement.

155. Consideration by the Commissioner of the New Ground of Appeal, both the Appellant and the Respondent submit, only arises if the Appellant fails in its claim that a Liechtenstein foundation is not an entity which is similar in its effect, pursuant to the provisions of section 2(1A) of the CATCA 2003, to a discretionary trust as defined in section 2(1) of the CATCA 2003.

156. The first issue, therefore, which the Commissioner must consider in this appeal is whether the Appellant is an entity which is similar in its effect to a discretionary trust as defined in section 2(1) of the CATCA 2003.

157. Should the Appellant not succeed in its arguments that it is not an entity which is similar in its effect to a discretionary trust as defined in section 2(1) of the CATCA 2003, then the Commissioner will proceed to consider whether the New Ground of Appeal can be admitted in light of the objection raised by the Respondent. Should the Appellant succeed in its arguments that it is not an entity which is similar in its effect to a discretionary trust as defined in section 2(1) of the CATCA 2003, then the Commissioner will not proceed to consider whether the New Ground of Appeal can be admitted.

158. The Commissioner considers that the appropriate starting point is to confirm that in an appeal before the Commission, 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.”

“Similar in its effect”

159. Section 2(1A) of the CATCA 2003 provides that:

“(1A) For the purposes of the definition of 'discretionary trust' in subsection (1), any entity which is similar in its effect to a discretionary trust shall be treated as a discretionary trust irrespective of how it is described in the place where it is established.”

160. Section 2(1B) of the CATCA 2003 provides that:

“(1B) Any reference in this Act to trustees in relation to a discretionary trust shall be deemed to include persons acting in a similar capacity to trustees in relation to an entity referred to in subsection (1A).”

161. Section 2(1) of the CATCA 2003 defines a discretionary trust as meaning:

“... any trust whereby, or by virtue or in consequence of which—

(a) property is held on trust to accumulate the income or part of the income of the property, or

(b) property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income;”

162. It is agreed between the parties that the Appellant does not come within the definition of a discretionary trust as contained in section 2(1) of the CATCA 2003. Both parties submit, and the Commissioner agrees, that the issue in this appeal is whether the Appellant, being a foundation established in Liechtenstein, is similar in its effect, pursuant to the

provisions of section 2(1A) of the CATCA 2003, as a discretionary trust as defined in section 2(1) of the CATCA 2003.

163. Both parties have made submissions to the Commissioner in relation to statutory interpretation.

164. 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”.

165. These principles have been confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill*.

166. As a result of the case law as summarised in *Perrigo*, the Commissioner must look to consider if it is possible to establish whether the words of section 2(1A) of the CATCA 2003 are plain and their meaning is self-evident.

167. Section 2(1A) of the CATCA 2003 provides that:

“For the purposes of the definition of ‘discretionary trust’ in subsection (1), any entity which is similar in its effect to a discretionary trust shall be treated as a discretionary trust irrespective of how it is described in the place where it is established.”

168. The Commissioner must consider the meaning of the words “*similar in its effect*” as contained in section 2(1A) of the CATCA 2003.

169. The Oxford English dictionary defines “similar” as “having a significant or notable resemblance or likeness, in appearance, form, character, quantity, etc., to something stated or implied (though generally without being identical).”

170. The Oxford English dictionary defines “effect” as “Something accomplished, caused, or produced; a result, consequence.”

171. The Commissioner is satisfied that the words of section 2(1A) of the CATCA 2003 are plain and that their meaning is self-evident. The Commissioner is satisfied that the meaning of the words in section 2(1A) of the CATCA 2003 is that any entity which is similar in its effect or result to a discretionary trust shall be treated as a discretionary trust, irrespective of how it is described in the place where it is established.

172. Section 2(1) of the CATCA 2003 defines a discretionary trust as being:

“...any trust whereby, or by virtue or in consequence of which—

(a) property is held on trust to accumulate the income or part of the income of the property, or

(b) property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income;”

173. The Commissioner is alert to the fact that section 2(1A) of the CATCA 2003 begins with a refining clause which states “For the purposes of the definition of a discretionary trust in subsection (1), any entity which is similar in its effect to a discretionary trust shall be treated as a discretionary trust irrespective of how it is described in the place where it is established.” (emphasis added)

174. The Commissioner, considers that the meaning of the words “*For the purposes of the definition of a discretionary trust in subsection (1)*” contained in section 2(1A) of the CATCA 2003 are plain and that their meaning is self-evident. The Commissioner considers that these words refer her back to the definition of a discretionary trust contained in section 2(1) of the CATCA 2003 and that, in considering whether the Appellant is similar in its effect to a discretionary trust, the definition of a discretionary trust contained in section 2(1) of the CATCA 2003 is the starting point of her consideration.

175. The Commissioner considers that, applying or incorporating the similar in its effect provision contained in section 2(1A) of the CATCA 2003, to the definition of a discretionary trust as set out at section 2(1)(a) of the CACTCA 2003, it follows that a discretionary trust for the purposes of the CATCA 2003 means any entity, or by virtue or in consequences of which:

- Property;
- Is held on trust;
- To accumulate the income or part of the income of the property.

176. The Commissioner considers that, applying or incorporating the similar in its effect provision contained in section 2(1A) of the CATCA 2003, to the definition of a discretionary trust as set out at section 2(1) of the CACTCA 2003, it follows that a discretionary trust means (b) any entity, or by virtue or in consequences of which:

- Property (other than property to which for the time being a person is beneficially entitled for an interest in possession);
- Is held on trust;
- To apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income.

177. In considering whether the Appellant is an entity which is similar in its effect to a discretionary trust, and having regard to the fundamental principles of statutory interpretation, the Commissioner considers that it is neither correct nor permissible to ignore or disregard any one of the identified characteristics of a discretionary trust as identified in section 2(1) of the CATCA2003 as they apply to the Appellant.

178. Therefore, the Commissioner considers that in order to consider whether an entity is similar in its effect to a discretionary trust, she must look to each part of the definition of a discretionary trust as contained in section 2(1) of the CATCA 2003 and consider whether the entity falls into each such part.

179. The Commissioner will therefore first consider part (a) of the definition of a discretionary trust to establish whether the Appellant falls under that definition: “(a) *property is held on trust to accumulate the income or part of the income of the property*”.

180. In considering the first part of this test, that is to say whether the Appellant holds property, the Commissioner notes that there is no disagreement or controversy between the parties and it is agreed that the Appellant holds property. This was set out in the joint memorandum submitted by Experts 1 and 2 and in their oral evidence to the Commissioner.³

181. Having established that the Appellant holds property, the Commissioner must move to consider whether that property is held on trust. In considering this second part of this test, the Commissioner also notes that there is no disagreement or controversy between the parties and that it is agreed that the property which the Appellant holds is **not** held on trust, but, rather, is owned by the Appellant as a separate legal personality, distinct from its founder.

182. The Commissioner notes that at Annex 1 of the joint memorandum, Expert 1 and Expert 2 are in agreement that:

“ A foundation is a legal entity with separate legal personality distinct from its founder.

A foundation has its own rights and obligations.

A foundation is the legal owner of assets contributed to the foundation; it has full ownership of the assets contributed to the foundation; as an independent legal entity, it has full legal capacity and has all the rights of a legal person, including the right to own property...”

183. It therefore follows, that the property which a Liechtenstein foundation, and therefore the Appellant, holds is **not** property which is held on trust.

184. As the Appellant’s property is not held on trust, it follows that the Appellant does not and cannot fall within the definition of a discretionary trust as set out in section 2(1)(a) of the CATCA 2003. As the property is not held on trust by the Appellant, the Commissioner is therefore not required to consider whether the property is held to accumulate the income or part of the income of the property.

185. Having established that the Appellant does not come within part (a) of the definition of a discretionary trust as set out in section 2(1) of the CATCA 2003, the Commissioner must now move to part (b) of the definition of a discretionary trust to establish whether the Appellant falls under that part of the definition:

³ Transcript, day 2, page 23 lines 15 and 16 (Expert 1); Transcript, day 2, page 89 lines 17 and 18 (Expert 2).

“(b) property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of any one or more of a number or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or any part of the income;”

186. Having established that the Appellant’s property is owned by the Appellant and is not held on trust, it follows that the Appellant property does **not** and **cannot** fall within the definition of a discretionary trust as set out in section 2(1)(b) of the CATCA 2003.

187. The Commissioner notes that the Respondent has urged the Commissioner to find that the Appellant is similar in its effect to a discretionary trust on the basis that:

187.1. A foundation and a trust are similar in their effect because the assets in both are held back on a discretionary basis;

187.2. With a trust, property is managed for the benefit of a person who is not beneficially entitled to an interest in possession in the trust asset but who could at a certain point be so entitled depending on the decision of the trustee;

187.3. With a foundation, property is owned and managed for the benefit of a person who is not beneficially entitled in possession to the foundation asset, but who could at a certain point be so entitled depending on the decision of the foundation board;

187.4. In both cases, the holding back delays the charge to mainstream CAT, as it delays the ultimate beneficiary from becoming beneficially entitled in possession to the property, and this therefore activates the charge to DTT pursuant to section 20 of the CATCA 2003.

188. The Commissioner has considered the Respondent’s submission in this regard and does not agree with the approach advocated. The Commissioner has found that the meaning of the words of the definition of “*similar in effect*” as set out in section 2(1A) of the CATCA 2003 are plain and that their meaning is self-evident. What the Respondent is advocating suggests that the Commissioner should ignore the elements of the definition of a discretionary trust as set out in section 2(1) of the CATCA 2003 and also that she should ignore the refinement of the definition of a discretionary trust provided for in section 2(1A) of the CATCA 2003 to reach a conclusion that the Appellant is similar in its effect to a

discretionary trust. The Commissioner considers that an impermissible approach to the interpretation of the CATCA 2003.

189. The Commissioner also notes that the Respondent contends that its submission that the Appellant is an entity that is similar in its effect to a discretionary trust as defined in section 2(1A) of the CATCA 2003 is supported by:

189.1. Consideration of section 2(1A) of the CATCA 2003 in its statutory context and in light of the scheme of charging to CAT established by the CATCA 2003; and

189.2. Consideration of section 2(1A) of the CATCA 2003 in accordance with the legislative purpose of imposing DTT to encourage early winding up of discretionary trusts and bringing forward the charge to mainstream CAT.

190. The Commissioner agrees with the Respondent that the principles of statutory interpretation as set out in *Perrigo* and *Heather Hill* direct the Commissioner to consider section 2(1A) of the CATCA 2003 in its statutory context and in light of the scheme of charging to CAT established by the CATCA 2003.

191. The charge to tax in relation to a discretionary trust is contained in section 20 of the CATCA 2003 which is entitled "*Annual acquisitions by discretionary trusts*". That charging section applies to entities which are discretionary trusts as defined in section 2(1) of the CATCA 2003, inclusive of entities which come within the definition of a discretionary trust as contained in section 2(1A) of the CATCA 2003.

192. The Commissioner has applied the rules of statutory interpretation to those definitions and has found that the Appellant does not fall within the definition of a discretionary trust as contained in section 2(1A) of the CATCA 2003. It must, the Commissioner considers, therefore follow that as the Appellant does not fall within the definition of a discretionary trust, the charge to DTT in section 20 of the CATCA 2003, which is the statutory context, does not and cannot apply to the Appellant.

193. The Commissioner does not agree with the Respondent that the principles of statutory interpretation as set out in *Perrigo* and *Heather Hill* direct the Commissioner to consider section 2(1A) of the CATCA 2003 in accordance with the legislative purpose of imposing DTT to encourage early winding up of discretionary trusts and bringing forward the charge to mainstream CAT.

194. The Court in *Perrigo* held at paragraph 74(c) that:

“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;”

195. The Commissioner has already found that the meaning of the definition of a discretionary trust as set out in section 2(1) of the CATCA 2003 is clear and that the meaning of section 2(1A) of the CATCA 2003 is clear, it therefore follows that the “*further rules of construction*” do not “*come into play*” and that a purposive interpretation approach advocated for by the Respondent is neither appropriate nor permitted.

196. As a result of the above, the Commissioner finds that the Appellant is not similar in its effect to a discretionary trust as provided for in section 2(1A) of the CATCA 2003.

197. Having found that the Appellant is not similar in its effect to a discretionary trust, it therefore follows that the Appellant does not fall within the definition of a discretionary trust as defined in section 2(1) of the CATCA 2003.

Section 20 of the CATCA 2003

198. Section 20 of the CATCA 2003 is entitled “*Annual acquisitions by discretionary trusts*” and provides:

“(1)Where, in any year commencing with the year 2003, under or in consequence of any disposition, property is subject to a chargeable discretionary trust on the chargeable date, the trust is deemed on each such date to become beneficially entitled in possession to an absolute interest in that property, and to take on each such date an inheritance accordingly as if the trust, and the trustees as such for the time being of the trust, were together a person for the purposes of this Act, and each such chargeable date shall be the date of such inheritance.

...”

199. As a result of:

199.1. The fact that there is no disagreement between the parties that the Appellant does not come within the definition of a discretionary trust as contained in section 2(1) of the CATCA 2003;

199.2. The Commissioner’s finding that the Appellant is not similar in its effect to a discretionary trust; and

199.3. the Commissioner’s finding that the Appellant is not a chargeable discretionary trust for the purposes of section 20 of the CATCA 2003,

the Commissioner must find that the Appellant is not subject to a charge to DTT as provided for in section 20 of the CATCA 2003.

New Ground of Appeal

200. Having found that the Appellant is not a chargeable discretionary trust and therefore is not subject to a charge to DTT as provided for in section 20 of the CATCA 2003, both parties agree and have submitted that there is no requirement for the Commissioner to consider the question of the New Ground of Appeal.

201. For completeness and to ensure the parties are aware that the Commissioner considered all representations, the Commissioner has considered the Respondent's submissions on the disapplication of domestic national law. The Commissioner does, however, not agree with the Respondent's submission that an Appeal Commissioner does not have jurisdiction to disapply national law where it contravenes EU law.

202. The CJEU has made clear that a duty exists on bodies dealing with disputes, such as the Commission, to apply EU law. In the *WRC* case, the court stated that:

“38. As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law...”

39. It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.”

203. The Commissioner notes that all organs of the State must apply EU law. This would include the Respondent.

204. The jurisdiction of the predecessor of the Commission was considered in detail by the Court of Appeal in *Lee*. Murray J held at paragraph 20 of the judgment in *Lee* that:

“The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation.”

205. He further held at paragraph 64 of his judgment that:

“From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge.”

206. Murray J further considered the jurisdiction of the Commission’s predecessor under EU law following the WRC case. At paragraph 74 of *Lee*, he stated, *obiter*, that

“The Workplace Relations Commission decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law.”

207. While these remarks were *obiter* and concerned the Commission’s predecessor, the Commissioner considers those remarks as authority that Appeal Commissioners have jurisdiction to disapply national law where it contravenes EU law. In any event, the Commissioner has determined that the Appellant does not fall within the definition of a discretionary trust. Hence the application of EU law and any interaction with domestic law does not need to be considered.

Determination

208. The determination which the Commissioner is required to make in this appeal is whether the Appellant is an entity which falls within the definition of a discretionary trust as contained in section 2(1) of the CATCA 2003 and section 2(1A) of the CATCA 2003 and therefore whether it comes within the charge to DTT as contained in section 20 of the CATCA 2003. That is the charge to tax on which Commissioner’s focus is required to be placed as held by Murray J at paragraph 64 of his decision in *Lee*.

209. The evidence adduced to the Commissioner by Expert 3 and Expert 4 did not, and indeed could not, relate to whether the Appellant is similar in its effect to a discretionary trust. Neither Expert 3 nor Expert 4 are legally qualified in Liechtenstein and neither are qualified to speak to the characteristics of a Liechtenstein foundation. The Commissioner

notes, and is grateful, that both Expert 3 and Expert 4 were careful in their evidence not to stray into areas which might have resulted in them opining on the characteristics of a discretionary trust as compared to a Liechtenstein foundation. Both Expert 3 and Expert 4 are eminently qualified and recognised experts in their fields and the Commissioner acknowledges the breadth of their expertise and knowledge.

210. However, the Commissioner agrees with the Respondent's submission that the evidence of Expert 3 and Expert 4 on the various structures available for succession planning and wealth preservation in Ireland is not relevant to the matter to be determined by the Commissioner.

211. As such, and for the reasons set out above, the Commissioner determines that the Appellant has succeeded, based on statutory interpretation, in showing that the Respondent was incorrect to issue the Notices of Assessment to Discretionary Trust Tax in respect of the years 2012 to 2014 inclusive as the Appellant is **not** similar in its effect to a discretionary trust.

212. The Commissioner further determines that the Notices of Assessment to Discretionary Trust Tax in respect of the years 2012 to 2014 inclusive shall be reduced to nil.

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

Notification

214. 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

215. 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
12 April 2024