THE HIGH COURT

[2024] IEHC 402

RECORD NO. 2023/353R

BETWEEN:-

ARLUM LIMITED

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

<u>Judgment of Mr Justice Oisín Quinn delivered on the 3 July 2024</u>

(1) Introduction

1. This is an appeal by Arlum Limited (the "Company") by way of a Case Stated against a Determination of the Tax Appeals Commissioner ("TAC") of 24 May 2023. The TAC found in favour of the Revenue Commissioners (the "Revenue") determining that the release by a bank of a balance of just over €6million due on an original debt of €9.5million owed by the Company should be treated as a trade receipt of the Company pursuant to section 87(1) of the Taxes Consolidation Act, 1997 ("TCA 1997"). The Company had sought to treat the release of the balance of the debt as a contribution to the balance sheet in the nature of a credit sum below the gross profit line on the basis, *inter alia*, that the amount of the write off did not represent a trading profit.

2. The issue raised by the Case Stated involves a question of law as to the proper interpretation of section 87(1) of the TCA 1997. Section 87 is entitled "*Debts set off against profits and subsequently released*" and 87(1) provides that:-

> "*Where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade or profession arising in the period in which the release is effected.*"

3. The TAC determined that where the 'debt' was actually a loan; and where the Company had used that loan to buy land; and where, due to the collapse in the property market, that land had later decreased in value; and where the value of the land was (correctly) written down in the books of the Company for tax purposes over a number of years; and where this appropriately increased the losses of the Company, which were being carried forward; then, the claiming of losses (by virtue of the value of the land having been written down) should be treated as coming within the meaning of the words "*a deduction has been allowed for any debt*" in section 87(1). If that is correct, then there is no real argument but that the Revenue are entitled, under the balance of section 87(1), to treat the amount of the release of the loan as a "*receipt of trade*".

4. The Company says this decision of the TAC is an error of law as it involves impermissibly interpretating the words "*a deduction has been allowed for any debt*" as capturing the writing down of the value of the asset purchased with the loan and that this is an error of law as it goes beyond the proper meaning of the words in their plain and ordinary meaning and in the context of the provision itself and in the context of the TCA 1997 as a whole. Succinctly put, the Company claims the TAC has wrongly conflated the 'debt' with the 'asset' purchased by the debt.

(2) Background

5. The Company took out a loan from a bank in December 2006 in the amount of €9.5m to purchase a site (the "Lands") of just under 23 acres near Tuam in Co Galway which the Company hoped to develop as a residential development. The Lands were purchased but the development never happened due in large part to the financial crisis that occurred relatively shortly thereafter.

6. The loan was secured, inter alia, on both the Lands and over another nearby property at Palace Fields which the Company was in the process of finishing out as a residential

development. By virtue, in large part, of this other project, the Company was able to pay over €5m to the Bank in interest and capital repayments. However, by 2016 the view was that the Lands had only modest value as agricultural land and yet there was still over €6million due to the Bank.

7. In return for a final payment of €250k (a sum probably considered to be thereabouts the value of the Lands as of 2016) the Bank agreed to release the Company from its security and waive the balance due on the loan, net of the payment of €250k. The amount released was €6,043,555.

8. Meanwhile, from 2010 the Company had been, each year, writing down the value of the Lands in its accounts on the basis of the dramatic deterioration in property values taking place at that time due to the wider economic situation. There was no disagreement that this was properly done in accordance with accepted accountancy practice. In consequence of these write downs, the Company was, properly from a tax and accounting perspective, accumulating losses which could be carried forward. The debt to the Bank however was not reducing other than by virtue of the payments the Company could manage to make from its own resources, which were principally the sale of some 36 houses from its other development. The amount of the reduction of the debt due to the Bank was not connected to the writing down of the value of the Lands. The former was reducing, by and large, by virtue of an income stream from another development, whereas the later was being written down by virtue of a proper assessment of the deterioration in the market value of the Lands based on the wider economic situation that then pertained.

9. Ultimately in 2016, following a failed attempt to sell the Lands at auction, the Bank did the deal described above. A payment of €250k was made, the Bank released the security, and the Bank formally waived the net balance due of €6,043,555.

10. In the Company's Income Statement for the financial year ended 31 October 2016 the Company's gross profit on a turnover of €541,850 was just €15,350. In accordance with the appropriate financial reporting standard FRS 102 the forgiveness of the debt was brought into that income statement and was included as a credit sum below the gross profit line on the basis that the amount of the write off did not represent a trading profit. The Revenue does not dispute this.

11. Accordingly, the waiver of the balance of the debt of just over €6m was not included as a taxable item in the Company's corporation tax return for the financial year end 31 October 2016. As of that date the trade losses carried forward (in part boosted by the aforementioned writing down of the value of the Lands) stood at €7,177,270. Following substantial correspondence between the Revenue and the Company's tax advisors between 2018 and 2021, the Revenue ultimately decided by way of Determination of 25 May 2021 that this debt write off should be treated as taxable income, which, if correct would have the effect of reducing the losses being carried forward to €1,143,174.

12. The Company submitted an appeal pursuant to section 949 of the TCA 1997 to the TAC on 24 June 2021.

(3) The Determination of the TAC

13. The Appeal to the TAC was heard on the 5 December 2022 and the Determination of the TAC issued on 24 May 2023.

14. The TAC determined the matter on the basis of a construction of section 87(1). The TAC determined that writing down the value of the Lands in these circumstances (where those Lands had been purchased with the loan that is considered to be the debt) amounts to a "*deduction has been allowed for any debt*" where writing down the value of the Lands has led to an allowable financial loss that is being carried forward for tax purposes.

(4) The Case Stated

15. The Company indicated it wished to appeal the decision of the TAC and requested that a Case Stated be made to the High Court pursuant to section 949AP of the TCA 1997.

16. The Case Stated contained four questions of law for the opinion of the High Court, but by agreement, only two were considered relevant:-

    i. Whether the TAC was correct in determining that the writing down of values in the accounts of the Company meant that a tax deduction had been allowed in computing the profits of the trade of the Appellant for the purpose of section 87(1) of the TCA 1997?

ii. Whether the TAC was correct in determining that the forgiveness of the loan gave rise to a receipt taxable as income?

17. The Case Stated was heard in the High Court over two days on the 25 and 26 June 2024.

18. While there are two separate questions, in essence the matter distilled down to one core question as to whether or not the TAC was correct as a matter of law in her interpretation of section 87(1) and in particular whether she was correct in determining that the writing down of the values of the Lands in the accounts of the Company meant that '*a deduction has been allowed for any debt*' within the meaning of section 87(1). Both sides agreed that if she was correct in that conclusion, then the balance of section 87(1) meant inexorably that the release of the balance of the debt of just over €6m should be treated as a receipt of the trade in the accounts for that year.

19. In addition, the Revenue sought to repeat an argument made before the TAC that the matter was fully dealt with by section 76A(1) of the TCA 1997 which, it was said, brought the release of the debt into charge irrespective of whether any deduction had been claimed or whether any security was impaired. As this was not a question raised in the Case Stated, this raised an issue as to whether the Court had jurisdiction to entertain this argument.

(5) Relevant Statutory Provisions

20. The following are the most relevant statutory provisions to this Case Stated:-

<u>Section 76(1) of the TCA 1997</u>

Computation of income: application of income tax principles

76(1) Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment.

<u>Section 76A(1) of the TCA 1997</u>

Computation of profits or gains of a company accounting standards

76A(1) For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes."

Section 87(1) of the TCA 1997

Debts set off against profits and subsequently released

87(1) Where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade or profession arising in the period in which the release is effected.

Section 949AR(1) of the TCA 1997

Determinations of High Court

949AR(1) The High Court shall hear and determine any question of law arising in a case stated and –

(a) shall reverse, affirm or amend the determination of the Appeal Commissioners,

(b) shall remit the matter to the Appeal Commissioners with its opinion on the matter, or

(c) may make such other order in relation to the matter as it thinks just, and may make such order as to costs as it thinks fit.

(6) Relevant Legal Principles

21. Both Counsel very helpfully set out the relevant principles discussed in the key cases in the various areas considered pertinent to this Case Stated. There was no significant disagreement on the relevant principles.

(a) Approach to the findings of the TAC on a Case Stated

22. The governing principles are set out in the well-known dicta of Kenny J. in *Mara v Hummingbird* [1982] ILRM 421 at page 426 as to the approach that this Court should take when faced with a challenge to findings on a Case Stated.

(b) Statutory Interpretation

23. On the topic of statutory interpretation, which is at the heart of this Case Stated, the key cases referred to include the Supreme Court decisions in *Dunnes Stores v Revenue Commissioners* [2020] 3 IR 480 and *Bookfinders Ltd. The Revenue Commissioners* [2020] IESC 60 (O'Donnell J. at para 52 in particular); and then the consideration and application of the principles from those judgments by McDonald J. in *Perrigo Pharma v The Revenue Commissioners* [2020] IEHC 552, at para 74; and finally, the discussion of these developments by the Supreme Court in the judgment of Murray J. in *Heather Hill v An Bord Pleanála* [2022] IESC 43 at para.s 105 to 116 in particular.

24. As Counsel for the Revenue pointed out, to a certain degree it might be said that these cases suggest that the 'literal' and 'purposive' approaches to statutory interpretation are no longer hermetically sealed (see para 108 of *Heather Hill*).

25. Counsel for the Company helpfully drew attention to certain pertinent observations of Murray J. in *Heather Hill*. To the extent that the line between what is now permissible has become blurred Murray J. sets out 'four basic propositions that must be borne in mind' from para.s 113 to 116 of *Heather Hill* as follows:-

> *"113. First, '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 and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.*
>
> *114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276).*

115. Third, and to that end, 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.

116. Fourth, and 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."*

(c) Burden of Proof

26. As the issue at the heart of this Case Stated is one of statutory interpretation it is not necessary or appropriate to view the matter through the prism of the Company as the taxpayer bearing, pursuant to the jurisprudence, the 'burden of proof'. As Donnelly J. and Butler J. state in their joint judgment for the Court of Appeal in *Hanrahan v The Revenue Commissioners* [2024] IECA 113 at paragraphs 97-99 as follows:-

"*97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake. It is perhaps easier to use an example that might arise under a different subclause of s. 811(3) to demonstrate the importance of this issue. For example, if there was an issue as to whether a particular transaction "was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person" (pursuant to s. 811(3)(i)(I)), the placing of the burden of proof on the taxpayer would be of particular significance.*

98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law; whether a transaction, which has been found to have no commercial or business purpose, is not, by virtue of s. 811(3)(ii) TCA, a tax avoidant transaction. It is difficult to see how any particular burden, other than one of seeking to persuade by way of argument that as a matter of law the transaction is not one that falls foul of s. 811 TCA, could arise in such a situation. Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an

objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation. The High Court cannot be bound by an interpretation of law by an administrative body. It is the role of the courts to apply the law and it is therefore difficult to see how reference to this particular burden goes beyond the usual burden that a moving party would bear before a court when seeking to persuade a court of the correctness of their position at law.

99. In this appeal, Revenue's submission that the burden is on the taxpayer to show that there is no misuse of the provision has even less force. Revenue is the appellant. The High Court has found as a matter of law that this particular Transaction is not a tax avoidance transaction within the meaning of s. 811 TCA. The trial judge has so found because of her interpretation of s. 811(3)(a)(ii) and the relieving provisions of s. 31 and s. 549 TCA. Revenue bears the usual burden in this appeal; Revenue must demonstrate that there the trial judge was incorrect in law in finding as she did."

(d) Curial Deference

27. As the central issue is a pure question of law, being one of statutory interpretation, there is no need for the principles of curial deference to be considered in any detail. As Murray J. states on behalf of the Court of Appeal in *Stanberry Investments Ltd v Commissioner of Valuation* [2020] IECA 33 at para 49:-

"*Administrative tribunals, expert or otherwise, obtain no deference on pure issues of law (see Millar v. Financial Services Ombudsman [2015] IECA 126 [2015] 2 IR 156 at - in particular - para. 62). The remarks of Kelly J. in Premier Periclase Limited v. Commissioner of Valuation [1999] IEHC 8, makes it clear that errors of fact simpliciter do not present any issue of curial deference either; "[w]hen conclusions are based on an identifiable error of law or an unsustainable finding of fact by a Tribunal, such conclusions must be corrected" (at para 25). A similar statement of principle appears in Nangles Nursery v. Commissioner of Valuation [2008] IEHC 73 at para. 25. It follows that in both judicial review proceedings, and appeals on a point of law, the scope for 'deference' is limited.*"

(e) Release of debts in relation to which allowance had previously been allowed

28. In relation to the conclusion of the TAC that the writing down of an asset purchased with a loan should be equated in tax law with a '*deduction has been allowed for any debt*', both Counsel agreed that no Irish authority or indeed any common law authority could be found to support such a proposition.

29. Counsel for the Company helpfully drew attention to an extract from the textbook *The Taxation of Companies, 2020* by Maguire, published by Bloomsbury Professional and an extract therefrom at para 3.204.8 entitled '*Release of debts previously set off*'. This textbook refers to section 87 of the TCA 1997 and states as follows:-

> "*3.204.8 Release of debts previously set off*
>
> *Where a liability which has been incurred in respect of the purchase of goods or materials, for services rendered or otherwise as a trading or professional expense, has been deducted in computing taxable profits for any accounting period, and the liability is subsequently released in whole or in part during the continuance of the trade or profession, the amount released must be included as a trading receipt in the period in which the release is effected (TCA 1997, s 87(1)). In British Mexican Petroleum Co Ltd v Jackson 16 TC 570, it was held, in relation to a trader in financial difficulty who had obtained a release from a liability to one of its creditors, that this did not justify reopening the accounts for the year in which the liability was incurred. Furthermore, on the facts of the case, the release did not constitute a trading receipt, being more in the nature of an additional contribution of capital. By virtue of TCA 1997, s 87(1), a release in those circumstances would give rise to a taxable receipt.*
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> *Note that the TCA 1997, s 87 applies where a trading debt has been "released" and not, say, where it has merely been written off or simply not pursued. It can be argued that the section only applies in the case of a formal release of a trading debt and not where, for example, the creditor merely writes off the debt, fails to invoice or demand payment or fails to present a cheque for payment. Thus, the release, to come within the TCA 1997, s 87, must involve a contractual arrangement so that the debtor no longer is legally bound to pay over the amount owing. There would not be a release merely because, say, the debtor is bankrupt or in liquidation. That a proper release should be formal derives from the fact that a mere write-off or failure to pursue by the creditor does not "release" the debtor from his obligation to pay.*
>
> *Capitalisation of a debt in which the creditor receives shares may or may not amount to a release. There will not be a release where the creditor receives shares in satisfaction of the debt as this involves settlement of the debt. It might be arguable, however, that an issue of shares at a value that is less than the face value of the debt amounts to a release but this might be difficult to sustain where the capitalisation is properly documented and carried out using appropriate legal procedures. There should be no release where the documentation makes it clear that the shares are being issued in consideration of the satisfaction of the debt and does not refer to a "release" of the debt.*"

30. Counsel for the Company helpfully referred the Court to the various judgments in the aforementioned *British Mexican Petroleum Co Ltd v Jackson* 16 TC 570 which is described above in summary in the extract from *Maguire, The Taxation of Companies*. In that case,

in the High Court, the Court of Appeal and then the House of Lords every judge who considered the matter had no doubt that as a matter of law the writing off of the debt was not a receipt of the trade of the taxpayer. That position has been changed in the UK by section 36(1) of the Finance Act, 1960, which is almost in identical terms to section 87(1), including the headline description of the provision within the Act which is identical:-

> "*Debts set off against profits and subsequently released*
>
> *S. 36(1) [of the UK Finance Act, 1960]*
>
> *Where, in computing for tax purposes the profits or gains of a trade, profession or vocation, a deduction has been allowed for any debt incurred for the purposes of the trade, profession or vocation, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade, profession or vocation arising in the period in which the release is effected.*"

31. Counsel for the Revenue did draw helpful attention to the decision of the Supreme Court in *Cronin v Cork & County Property Co. Ltd.* [1986] IR 559 where Griffin J. states on page 569:-

> *"The method of computation of the balance of profits and gains for tax purposes has been considered in a number of cases. The passage most frequently cited is that of Lord President Clyde in Whimster and Co. v. The Commissioners of Inland Revenue (1925) 12 T.C. 813, at p. 823:—*
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> > *"In computing the balance of profits and gains for the purposes of Income Tax, or for the purposes of Excess Profits Duty, two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower: although there is nothing about this in the taxing statutes."*
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> *That statement of the law has in very many cases since been approved — for example, by the Judicial Committee of the Privy Council in The Minister of National Revenue v.*

Anaconda American Brass Ltd. [1956] A.C. 85; and in the House of Lords by Lord Guest in Duple Motor Bodies Ltd. v. Inland Revenue Commissioners [1961] 1 W.L.R. 739."

(f) The Jurisdictional Issue

32. In relation to the jurisdictional issue Counsel for the Revenue helpfully drew attention to the case of *Westlink Toll Bridge Limited v Commissioner of Valuation* [2013] IESC 42 where MacMenamin J. states in the context of the raising of new arguments on appeal at paragraphs 51 to 52 as follows:-

> *"51. Moreover, I think that the position of the Commissioner was circumscribed in another way. This was an appeal by way of case stated from the Tribunal as provided for in s. 39 of the Valuation Act 2001. The appeal does not proceed by way of an automatic re-hearing. The jurisdiction of the High Court is defined by s. 39(5) of the Act, which provides:*
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> > *"The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit." (emphasis added)*
>
> *52. The jurisdiction of this Court is in turn delimited by s. 39(7), which provides an appeal shall lie to the Supreme Court from the decision of the High Court. In my view, the Tribunal was not asked to make a decision on the argument sought to be raised by the Commissioner. The case stated did not address the issue. The new matter did not arise "on the case". Thus, neither the High Court, nor this Court, could embark upon a consideration of that point, whether to reverse, affirm or amend the determination. The point is a simply one of jurisdiction. Neither this Court, nor the High Court would have had jurisdiction to entertain the point as, quite simply, it did not come within the terms of s. 39(5) of the Act of 2001. There had been no "determination" on the issue in the case stated. This court had no jurisdiction to entertain the point on appeal." (underlined for emphasis).*

(7) Submissions

33. The Revenue submitted before the TAC (and in the hearing of this Case Stated) that in fact the matter could be decided by reference to section 76A(1) of the TCA, 1997 on the grounds that the taxable amount under Case I of Schedule D is the amount "booked for that period

in the P&L account" and as the Company had included the debt release in its P&L account it should have been included in the Company's calculation of taxable profit for that period.

34. Alternatively, in the context of the section 87(1) issue, the Revenue argued that because the "debt" was a "loan", and because that loan had been used to purchase the Lands, and because the Lands had been written down in value in the Books of the Company thereby creating allowable losses that were being carried forward, then this in truth amounted to a '*deduction has been allowed for any debt*' within the meaning of the first part of section 87(1) thereby triggering the release of the balance of the debt being treated as a '*receipt of the trade*' by the second part of section 87(1).

35. The Company submitted that the release of the balance of debt was recorded 'below the gross profit line' and was not a trade receipt, unless captured by section 87(1). Secondly, the Company submitted that the plain and ordinary meaning of the words 'a deduction has been allowed for any debt' simply did not capture the proper writing down of the value of an asset irrespective of whether that asset was purchased with a loan, which loan could of course constitute a debt. The Company pointed out that in fact no deduction had, or even could, be claimed for the debt (being the Loan) much less was any deduction for the loan allowed.

(8) Decision

(a) Was the core finding of the TAC properly characterised as a finding of fact?

36. The TAC found that the writing down of the loan was, for the purposes of section 87(1), the allowance of a deduction of a debt. In paragraphs 135, 136(xvii) and 138(iii) this finding is described as a 'material finding of fact'. An initial question arose at the hearing of the Case Stated as to whether this finding was correctly categorised as a 'finding of fact'.

37. It is obvious, and was not seriously disputed, that this was a legal finding, based on certain facts. For example, it is a fact that the debt in this case was a loan. It is a fact that the loan was used to purchase the Lands. It is a fact that the Company did not seek through its accounts any deduction for the actual loan. It is a fact that the Lands decreased substantially in value. It is a fact that the value of the Lands was written down from 2010 onwards in the Company accounts. It is a fact that this led to ever growing losses being carried forward by the Company.

38. Accordingly, the TAC's decision (that writing down the value of the Lands in these circumstances should be treated as coming with the phrase in section 87(1) as "*a deduction has been allowed for any debt*") is not therefore to be properly characterised as a 'material finding of fact'. It is a conclusion that involved considering and applying an interpretation of the words in section 87(1) to a set of facts. That conclusion involved adopting a view as to what the law means and applying that view to the facts. The question as to whether that view of the law is correct is therefore a question of law.

39. The foregoing analysis was not seriously disputed by the Revenue during the hearing of the Case Stated. In any event, somewhat at odds with the TAC's characterisation that this was a 'material finding of fact', the TAC describes the very same issue as a 'point of law on which the opinion of the High Court is sought'; *per* the Case Stated at paragraph 37(i) thereof.

40. Accordingly, I am satisfied that the core question in this Case Stated is a question law for the reasons set out above.

(b) The burden of proof

41. It flows from this, that it is not necessary or appropriate to view the matter through the prism of the Company as the taxpayer bearing the 'burden of proof'; see Donnelly J. and Butler J. in their joint judgment for the Court of Appeal in *Hanrahan v The Revenue Commissioners* at para.s 97-99 referred to above.

(c) Curial deference

42. Equally, as the central issue is a pure question of law, being one of statutory interpretation, there is no need for the principles of curial deference to be considered in any detail; see Murray J in *Stanberry Investments Ltd* at para 49 referred to above.

(d) Does the Court have jurisdiction to consider the Revenue argument about section 76A(1)?

43. Counsel for Revenue accepted during the hearing of the Case Stated that the Determination did not decide and nor did the Case Stated address the particular argument advanced by the Revenue based on section 76A(1) of the TCA, 1997. The Determination of the TAC and

the Case Stated is based on and only addresses the question of the law that arises on the section 87(1) point.

44. Nonetheless, during the hearing of the Case Stated the Revenue pressed the argument that irrespective of section 87(1), the release of the balance of the debt by the Bank in 2016 was a Case I Schedule D taxable receipt by virtue of section 76A(1) of the TCA 1997. Counsel for the Company adopted a sanguine position about this jurisdictional question, on the basis, largely, that he submitted the argument was wrong anyway. During the hearing I indicated that I would permit the argument to be made, without prejudice to that potential jurisdictional problem, which I felt was best reflected on and addressed in this judgment.

45. On the jurisdictional issue I am satisfied that the argument based on section 76A(1) of the TCA 1997 falls outside the Case Stated. Counsel for the Revenue accepted it was not the subject of the determination of the TAC and that the Case Stated did not address it. Section 949AR is in the same terms as the Case Stated provision considered in *Westlink Toll Bridge*, and in circumstances where the Case Stated does not address the issue then the question argued under section 76A(1) does 'not arise' on the Case Stated and falls outside the provisions of section 949AR of the TCA 1997. I satisfied that what MacMenamin J. states at para 52 in *Westlink Toll Bridge* applies here.

(e) Notwithstanding the jurisdictional issue, is the Revenue argument on section 76A(1) correct?

46. In any event, I am satisfied that the section 76A(1) argument is incorrect. While I am uncomfortable addressing this argument in light of my conclusion on the jurisdictional issue, given the careful and considered manner in which the argument was made, then in the event I am wrong on the jurisdictional issue, I propose to set out the reasoning for my conclusion that the section 76A(1) argument is incorrect. In doing so, it should be noted that this argument was also raised and carefully argued by Counsel for the Revenue before the TAC.

47. Firstly, section 76A(1) is not a charging provision. It sets out what could be described as a statutory administrative requirement that reflects pre-existing caselaw: profits of a trade are to be computed in accordance with generally accepted accounting practice (subject to adjustments allowed or required by statute).

48. Secondly, it was accepted as an agreed fact that the Company's gross profit for the relevant year ending 31 October 2016 was €15,350, which sum does not include the value of the release of the debt.

49. Thirdly, it was accepted as an agreed fact that those accounts were prepared in accordance with general accepted accounting practise, which in this case was FRS 102.

50. Fourthly, it was accepted as an agreed fact that that the debt forgiven was properly included as a credit sum below the gross profit line and in particular it was agreed that this was done "on the basis that the amount of the write off did not represent a trading profit"; *per* point 5 of the Agreed Statement of Facts, which was attached by the TAC to the Case Stated.

51. These are agreed facts. Section 76A(1) deals with Case I or II of Schedule D, which in this case for the Company is Case I Schedule D profits from trade. It has been agreed that this release 'did not represent a trading profit'.

52. Finally, the argument advanced by the Revenue on section 76A(1), if correct, would make section 87(1) pointless in so far as it relates to a company. If the release of a debt is a trading profit liable to tax under Case I Schedule D by virtue of section 76A(1), Counsel for the Revenue confirmed that this meant the release fell to be treated as taxable profit irrespective of whether a deduction had ever been claimed for the debt. However, this position then makes section 87(1) in so far as it relates to companies seem pointless.

53. To get around this problem, Counsel for the Revenue then argued that this meant section 87(1) had to be inverted to be read correctly. In other words, in so far as it relates to a company, section 87(1) should be read as meaning the release of a debt is chargeable to tax and *when* that occurs the company can *then* claim a deduction for the original loan. I propose to address that argument below in the context of my decision about the meaning of section 87(1).

(f) Did the TAC err in law in determining that section 87(1) applied?

54. Turning now to the core issue in the case, I am satisfied that the submissions on behalf of the Company in relation to section 87(1) are correct and the decision and reasoning of the TAC is incorrect and constitutes an error of law and should be reversed.

55. There is no basis for reading into the plain words of the section the interpretation contended for by the Revenue. If the Oireachtas had intended to provide that a full or partial release of a debt should be treated as a trade receipt for Case I Schedule D tax in circumstances where the debt took the original form of a loan and where that loan had been used to purchase an asset and where that asset had thereafter been appropriately written down in value, then it could have so provided.

56. In this scenario the plain ordinary meaning of the words connotes (in the context of corporation tax) a company claiming a deduction for a debt and such deduction being allowed and thereafter the creditor writing off all or part of that debt. The plain and ordinary meaning of the words 'debt' and a 'deduction being allowed' for the debt do not equate to lands or assets or a write off being allowed for lands or assets which drop in value.

57. In this case the Company did not claim a deduction for the debt. Moreover, it follows inexorably that they were not 'allowed' a deduction for the debt. The Lands purchased by the loan are not legally the same thing as the debt due by the Company to the bank. They exist separately and independently of each other. The fact that in this case the loan was secured on the Lands and that the loan happened to become impaired when the Lands dropped in value, while maybe contributing to the error of the TAC, cannot be determinative because even on the Revenue's interpretation the provision needs to make sense in the many cases where a loan or debt will not be secured on any particular asset. Indeed, part of what happened here demonstrates that separate nature. In this case the Company was able to reduce the loan by payments from the sale of other properties that had not been purchased with the loan. Separately, the value of the Lands fell due to the collapse in the property market at that time, while the debt did not.

58. Next, the Revenue submitted in effect that the narrow meaning (as they called it) contended for by the Company would be too narrow to make sense. Firstly, there is nothing intrinsically wrong with a taxation provision which is a charging provision, such as section

87(1), having a narrow meaning. Secondly the suggestion that the meaning contented for by the Company would not make sense does not withstand scrutiny. A simple example will suffice. TaxpayerCo manufactures washing machines. SupplierCo supplies it with drums that are then incorporated by TaxpayerCo into the finished product. TaxpayerCo enters the cost of these drums into its accounts and claims a deduction for this 'debt' (let us assume SupplierCo has not yet been paid in full at year end) against its Case I, Schedule D profits. TaxpayerCo is slow to pay SupplierCo (for any number of imaginable reasons that can occur as between businesses from time to time) and, over time, a debt builds up owing to SupplierCo. Now, let us suppose that SupplierCo has sold its invoices to a factoring company, FinanceCo. FinanceCo then negotiates a deal with TaxpayerCo sometime after the arrears build up and writes off part of the debt in return for the balance being paid quickly. As TaxpayerCo has already been allowed a deduction for this debt, then section 87(1) provides that the amount of the debt released by FinanceCo must be written into the accounts as a trade receipt. This scenario flows precisely from the interpretation of section 87(1) as contended for by the Company. It accords entirely with a rational and common sense application of the ordinary meaning of the words in the section. It also, as it happens, fits exactly with the description of how the provision is considered to be understand by the textbook *Maguire, The Taxation of Companies*; see above.

59. On the other hand, the Revenue's submission as to what section 87(1) means is liable to create arbitrary scenarios of significant uncertainty. It would be one thing if the Revenue's construction could be limited to cases where the debt/loan was secured on the sole asset purchased by the debt/loan and if the balance of the debt/loan released was linked to the level of impairment of the secured asset. However, there is no basis for applying any principle of construction to limit the Revenue's interpretation in that way. Nor is it appropriate to view the provision as applicable simply because there was a relatively neat overlay in this instance between the impairment of the loan and the impairment of the asset purchased by the loan, which latter impairment led to allowable losses being carried forward. As Charleton J. has observed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49 at para 12, *"[r]evenue law has no equity ... tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute."*

60. The Revenue's interpretation, aside from conflicting with the ordinary plain meaning of the words used, creates all sorts of problems in other less neat scenarios than the one here. For

example, why should it be considered that the taxpayer has claimed a deduction for a debt because the debt constitutes a loan that was used to buy an asset that may or may not fall in value depending on the wider economic market? What if only part of the loan is used to finance the purchase of the asset? What if the lender writes off part of a loan for reasons utterly unconnected to whether any asset purchased by the loan has fallen in value or not? Is it necessary for the lender to have security over the asset? If the lender lends without security over any specific asset, then how can it be determined if the borrowed monies are intermingled with other monies and, in that scenario, what asset is supposed to represent the loan? It must be borne in mind that many businesses receive loans or forms of financing that could, on the Revenue's arguments, constitute a debt. These loans are often not used to purchase real property and will not always have the benefit or burden of a fixed charge over any asset, much less the asset purchased with the monies. Indeed, a loan could be secured against a pre-existing asset of the taxpayer and the lender's view as to whether to write off the whole or a part of the loan could be based on the value of that asset or the enforceability of the security and this decision might have nothing to do with whatever other asset(s) the borrower might have acquired with the loan and over which the lender might have no security. In other words, these considerations could well have nothing to do with what happens to the monies lent or what assets are purchased by those monies. The fact that in this case the position as to what happened to the loan and the asset purchased by the loan is clear and straightforward does not justify a loose or excessive stretching of the legislative provision when the consequences of such an interpretation could lead to many arbitrary, unclear or confusing applications.

61. Equally, the Revenue's alternative argument which stemmed from the position it takes about section 76A(1) leads to a plainly incorrect interpretation of section 87(1). Faced with the question as to what the purpose of section 87(1) is, in the context of a corporate taxpayer, when, according to Revenue's submissions on section 76A(1), the release of the debt must be accounted for as a taxable trade profit anyway, it was submitted that properly read, section 87(1) should be inverted to be understood. By this argument it was contended that section 87(1) meant that if a company had a debt released then it could claim a deduction of the original loan if it had not already done so. That is plainly not what the provision says. The provision clearly provides for a charge to tax in a particular circumstance. It provides for the classic formulation of 'where X has happened, then if Y occurs, Z will become chargeable to tax'; where X is a deduction of the debt having been

allowed, Y is the release of all or part of the debt and Z is the amount of the release. There is no canon of interpretation that in this scenario enables such a clear provision to be inverted to provide that 'If Z is treated as chargeable to tax due to Y having occurred then the taxpayer is entitled to do X'. It conflicts with the plain meaning of the provision.

62. In context, the provision is obviously designed to, in the specific circumstances identified in the section itself, bring into charge as a trading receipt something that would otherwise not be a trading receipt. The provision which mirrors the equivalent section 36 in the UK Finance Act, 1960 effectively solves the problem identified by the *British Mexican Petroleum* case.

63. Accordingly, I am satisfied that the plain and ordinary meaning of the words in the section are clear, obvious and self-evident and make sense in that meaning in the context of the provision itself and the wider tax provisions. An item (the release of some or all of a debt) that would not otherwise be chargeable to tax as a trade profit becomes chargeable if a deduction for the debt has previously been allowed and thereafter the taxpayer is released from part or all of the debt. The amount of the charge is the amount of the release. This is what the words of the provision say and mean. There is no proper basis for either inverting the meaning of the provision or interpretating the word 'debt' to mean an 'asset purchased using a debt'.

(9) Conclusion

64. In summary therefore for the reasons set out above in paragraphs 54 to 63, I am satisfied that the interpretation of section 87(1) of the TCA 1997 by the TAC was incorrect and an error of law. The writing down of the value of the Lands, and carrying forward losses as a result, does not equate to having a deduction allowed for a debt. The Revenue and the TAC have erred in law in determining that the release of the balance of the loan in the amount of €6,043,555 should be treated as a receipt of the trade.

(10) Answers to the Questions raised in the Case Stated

65. For the foregoing reasons the two questions raised are answered as follows:-

(1) Whether the TAC was correct in determining that the writing down of values in the accounts of the Company meant that a tax deduction had been allowed in computing

the profits of the trade of the Appellant for the purpose of section 87(1) of the TCA 1997?

Answer: No

(2) Whether the TAC was correct in determining that the forgiveness of the loan gave rise to a receipt taxable as income?

Answer: No