THE SUPREME COURT

[Appeal No: 2008/229]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.

BETWEEN/

EDWARD CUSSENS, JOHN JENNINGS AND VINCENT KINGSTON

APPELLANTS

AND

T. G. BROSNAN (INSPECTOR OF TAXES)

RESPONDENT

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 1st November, 2019.

1. Introduction

1.1 Value Added Tax is, to a very significant extent, governed by the law of the European Union. The various Value Added Tax directives required member states to introduce that tax and make significant provision for the parameters within which the tax is to operate. It follows that many cases involving issues surrounding Value Added Tax have a significant EU law dimension to them. This case is no exception.

1.2 These proceedings have a very lengthy history which it will be necessary to outline in a little greater detail in due course. However, when this appeal first came before the Court, it was considered necessary to refer certain questions of EU law to the Court of Justice of the European Union ("the CJEU") under the preliminary reference procedure set out in Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). At the core of the issues in these proceedings and in the questions referred by this Court to the CJEU were matters concerning the potential applicability of the principle that abusive practices are prohibited (that is, the abuse doctrine) in EU law to the circumstances of this case.

1.3 While it will be again necessary to consider that doctrine in greater detail in due course, it has a lengthy history and it has been clear that the abuse doctrine has application in the field of tax (where that tax is governed by EU law) since the judgment of the CJEU of 21 February 2006 in *Halifax and Others v. Commissioners of Customs and Excise* (Case C-255/02) [2006] E.C.R. I-01609, ECLI:EU:C:2006:121. However, the basic problem which emerged in these proceedings was that the transactions, whose tax treatment was the subject of dispute between the parties, were carried out prior to the decision of the CJEU in *Halifax*. In those circumstances, a question arose as to the extent to which the abuse doctrine which was applied by the CJEU to tax matters in *Halifax* could be said to be applicable.

1.4 The CJEU delivered its judgment on the preliminary reference made by this Court on 22nd November 2017, *Cussens and Others v. Brosnan* (Case C-251/16), ECLI:EU:C:2017:881, in terms which it will be necessary to analyse in due course. The matter was subsequently listed before the Court to obtain the views of the parties as to the

consequences for this appeal of the response given by the CJEU. At that stage, it became clear that there were significant differences between the parties which, I think it can be said, fell into two categories.

1.5 First, it was said on behalf of the appellants ("the taxpayers") that at least some of the answers given by the CJEU were insufficiently clear and also that a subsequent decision of the CJEU cast doubt about the correctness of the judgment given in this case so that, it was argued, in accordance with the jurisprudence of the CJEU itself, it was appropriate to treat this as one of those exceptional cases where it would be permissible and appropriate to resend questions to the CJEU.

1.6 Second, it was said that it was still not possible to finally determine this appeal given that, for the reasons set out in its judgment, the CJEU did not consider it necessary or appropriate to answer some of the questions which were referred by this Court.

1.7 Thereafter, further written submissions were filed and an oral hearing ensued. This judgment is directed towards the issues which thus arose.

1.8 The facts and the underlying issues which arise on this appeal are set out in the earlier judgment of this Court delivered by Laffoy J. on 21 April 2016 (*Cussens v. Brosnan* [2016] IESC 79) and it is unnecessary, therefore, to repeat either those facts or the issues. The starting point for a consideration of the remaining questions which this Court must address is, in those circumstances, the questions referred by this Court to the CJEU and the answers given.

2. The Reference

2.1 The first and second questions referred by this Court, which the CJEU found appropriate to consider together, were as follows:-

> *"(1) Is the principle of abuse of rights, as recognised in the judgment of the Court in Halifax as being applicable in the sphere of VAT, directly effective against an individual in the absence of a national measure, whether legislative or judicial, giving effect to that principle, in circumstances where, as here, the redefining of the pre-sale transactions and the purchaser sales transactions (collectively referred to as the appellants' transactions) as advocated by the Commissioners, would give rise to a liability on the part of the appellants to VAT where such liability, on the proper application of the provisions of national legislation in force at the relevant time to the appellants' transactions did not arise?*
>
> *(2) If the answer to question (1) is that the principle of abuse of rights is directly effective against an individual, even in the absence of a national measure whether legislative or judicial giving effect to that principle was the principle sufficiently clear and precise to be applied to the appellants' transactions, which were completed before the judgment of the Court in Halifax was delivered and in particular having regard to the principles of legal certainty and the protection of the appellants' legitimate expectations?"*

2.2 In response to the first question referred, the CJEU held, amongst other things, that the principle that abusive practices are prohibited is not a rule established by a directive, but is based on the settled case law of the CJEU, as set out in paras. 68 and 69 of the Court's judgment in *Halifax*, which states that first, EU law cannot be relied on for abusive or fraudulent ends and second, the application of EU legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by EU law.

2.3 The principle that abusive practices are prohibited was held to have the general, comprehensive character which is naturally inherent in general principles of EU law. According to its case-law, the CJEU found that the refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not in fact met, and accordingly such a refusal does not require a specific legal basis. Citing the judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (Cases C 131/13, C 163/13 and C 164/13) EU:C:2014:2455, the CJEU held that, therefore, the principle that abusive practices are prohibited may be relied on against a taxable person to refuse him the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal.

2.4 Considering the second question, the CJEU held that such application of the abuse doctrine is consistent with the principles of legal certainty and of the protection of legitimate expectations. It was held that the interpretation which the CJEU, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to EU law clarifies and defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the date of its entry into force. The Court then stated that unless there are "truly exceptional circumstances", which were not claimed in the within proceedings, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation.

2.5 It was also noted that, in its judgment in *Halifax*, the CJEU expressly did not restrict the effects of the interpretation which it gave to the principle that abusive practices are prohibited in the sphere of VAT only to those events which occurred in the future. Further, dismissing the taxpayers' reliance on the principles of legal certainty and legitimate expectations to resist the refusal of the VAT exemption, the CJEU held that it is settled case-law (see the judgment of 8 June 2000, *Breitsohl* (Case C 400/98) [2000] E.C.R. I-4321, EU:C:2000:304, *Halifax* and *Italmoda*) that a taxable person who has created the conditions for obtaining a right in a fraudulent or abusive manner is not justified in relying on those principles in order to oppose the refusal to grant the right in question, pursuant to the principle that abusive practices are prohibited.

2.5 It was therefore concluded, in response to the first and second questions referred by this Court to the CJEU, that the principle that abusive practices are prohibited must be

interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt from VAT sales of immovable goods, such as the sales at issue in the within proceedings, which were carried out before the judgment of the CJEU in *Halifax* was delivered, and that the principles of legal certainty and of the protection of legitimate expectations do not preclude this.

2.6 The third question referred to the CJEU was as follows:-

> *"(3) If the principle of abuse of rights applies to the appellants' transactions so that they are to be redefined –*
>
> *(a) what is the legal mechanism by means of which the VAT due on the appellants' transactions is assessed and is collected since no VAT is due assessable or collectable in accordance with national law and*
>
> *(b) how are the national courts to impose such liability?"*

2.7 The CJEU considered that the third question essentially sought to establish how the EU directive which provides for the harmonisation of laws relating to VAT between member states, the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment ("the Sixth Directive") is to be interpreted in order to determine the legal basis on which the transactions which do not constitute an abusive practice may be subject to VAT.

2.8 Following the CJEU's decisions in *Halifax* and in its judgment of 22 December 2010, *Weald Leasing* (Case C-103/09), [2010] E.C.R. I-13589, EU:C:2010:804, it was held that where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice. That redefinition must, however, go no further than is necessary for the correct charging of the VAT and the prevention of tax evasion. That redefined situation should then be assessed in the light of the relevant provisions of national law and of the Sixth Directive.

2.9 Thus, the CJEU held that the principle that abusive practices are prohibited obliges the national authorities, in essence, to apply the relevant VAT legislation to the transactions concerned, while disregarding those of the transactions that constitute an abusive practice.

2.10 As the Sixth Directive cannot of itself impose obligations on an individual (see, the judgment of 21 September 2017, *DNB Banka* (Case C-326/15), EU:C:2017:719), the CJEU held that should this Court, as the referring court, find that the leases preceding the sales of the properties at issue in these proceedings constituted an abusive practice, the liability of those sales to VAT would have to be based on the relevant provisions of

national legislation providing for such liability, which would thus constitute the legal basis on which those sales are subject to VAT.

2.11 The CJEU therefore concluded, in response to the third question, that the Sixth Directive must be interpreted as meaning that, if the transactions at issue in the main proceedings should be redefined pursuant to the principle that abusive practices are prohibited, those of the transactions which do not constitute such a practice may be subject to VAT on the basis of the relevant provisions of national legislation providing for such liability.

2.12 The fourth question referred to the CJEU was the following:-

> *"(4) In determining whether the essential aim of the appellants' transactions was to obtain a tax advantage should the national court consider the pre-sale transactions (which it has been found were effected solely for tax reasons) in isolation or must the aim of the appellants' transactions as a whole be considered?"*

2.13 The CJEU considered this question to inquire as to whether the referring court, in seeking to determine whether the essential aim of the impugned transactions is to obtain a tax advantage, should take account, in the within proceedings, of the object of the leases preceding the sales of the property in isolation, or of the joint objective of those leases and sales as a whole.

2.14 At the outset, the CJEU held that the case-law stemming from the judgment in *Halifax* does not require it to be established that the accrual of a tax advantage is the only objective of the transactions at issue. Rather, as established in its judgment of 21 February 2008, *Part Service* (Case C 425/06), [2008] E.C.R. I-00897, EU:C:2008:108), it is sufficient to establish that the accrual of a tax advantage constitutes the essential aim of the transactions at issue.

2.15 To determine the essential aim of the transactions at issue, the CJEU held, citing *Weald Leasing* and its judgment of 17 December 2015, *WebMindLicenses* (Case C-419/14), EU:C:2015:832, that a court is to take into account and assess only the objective of the transactions which are alleged to constitute an abusive practice and not that of the supplies which, as a result of those initial transactions, formally satisfy the conditions for obtaining a tax advantage. The application of the abuse doctrine results only in the transactions which constitute an abusive practice being disregarded, whereas the relevant provisions concerning VAT must be applied to the supplies which are not constituent elements of such a practice.

2.16 The CJEU stated therefore, in response to the fourth question referred, that the principle that abusive practices are prohibited must be interpreted as meaning that, in order to determine whether the essential aim of the transactions at issue in the within proceedings is to obtain a tax advantage, account should be taken of the objective of the leases preceding the sales of immovable property at issue in isolation.

2.17 In providing clarification in order to give this Court guidance in its task of determining this appeal, the CJEU stated that in order to determine the substance and real significance of the leases at issue in the within proceedings, this Court may, in particular, take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators at issue. Such aspects are capable of demonstrating that the accrual of a tax advantage constitutes the essential aim pursued, notwithstanding the possible existence of additional economic objectives.

2.18 The CJEU rejected the taxpayers' submission that the leases were intended to achieve the sales in the most tax efficient way, holding that such an objective cannot be regarded as constituting an aim other than obtaining a tax advantage, as the desired effect was to be achieved specifically by a reduction of the tax liability.

2.19 The fifth and sixth questions referred to the CJEU were the following:-

> *"(5) Is [section] 4(9) of the VAT Act to be treated as national legislation implementing the Sixth Directive notwithstanding that it is incompatible with the legislative provision envisaged in Article 4(3) of the Sixth Directive on the proper application of which the appellants in relation to the supply before first occupation of the properties, would be treated as taxable persons notwithstanding that there had been a previous disposal which was chargeable to tax?*
>
> *(6) If [section] 4(9) [of the VAT Act] is incompatible with the Sixth Directive are the appellants by relying on that subsection engaged in an abuse of rights contrary to the principles recognised in the judgment of the Court in Halifax?"*

2.20 The two above questions were held by the CJEU to be inadmissible, on the basis that the premise for the questions referred, that s. 4(9) of the Value Added Tax Act 1972 ("the 1972 Act") is incompatible with the Sixth Directive, was not adequately explained in the order for reference provided. Thus, the order did not demonstrate how the legislative provision is not to be regarded as transposing the Sixth Directive, nor did it make it possible to determine the effect that such a finding of incompatibility could have on the application of the case law regarding the abuse doctrine on the within proceedings.

2.21 The seventh question referred to the CJEU was the following:-

> *"(7) In the alternative if [section] 4(9) [of the VAT Act] is not incompatible with the Sixth Directive have the appellants achieved a tax advantage which is contrary to the purpose of the directive and/or [section] 4?"*

2.22 The CJEU interpreted the seventh question as asking whether the abuse doctrine must be interpreted as meaning that supplies of immovable property such as those at issue in the within proceedings result in the accrual of a tax advantage which is contrary to the purpose of the relevant provisions of the Sixth Directive.

2.23 The CJEU then turned to consider the purpose of the provisions of the Sixth Directive. Article 13B(g) of the Sixth Directive, read together with Article 4(3)(a) of the directive,

exempts from VAT the supply of buildings or parts thereof, and of the land on which they stand, which have already been the subject of 'first occupation', therefore relating to supplies of immovable property occurring after the property has actually been used by its owner or its tenant. By contrast, the first supply of a new property to the final consumer is not exempt.

2.24 As per the order for reference provided to the CJEU, the properties at issue in the main proceedings had, before their sale to third party purchasers, not yet been actually used by their owner or their tenant, a matter which was stated to be for this Court to verify.

2.25 Therefore, the answer provided by the CJEU to the seventh question was that the principle that abusive practices are prohibited must be interpreted as meaning that supplies of immovable property such as those at issue in the main proceedings are liable to result in the accrual of a tax advantage contrary to the purpose of the relevant provisions of the Sixth Directive where the properties had, before their sale to third party purchasers, not yet been actually used by their owner or their tenant.

2.26 The eighth question referred to the CJEU was as follows:-

> *"(8) Even if [section] 4(9) [of the VAT Act] is not to be treated as implementing the Sixth Directive, does the principle of abuse of rights as established by the judgment of the Court in Halifax nevertheless apply to the transactions in issue by reference to the criteria laid down by the Court in Halifax?"*

2.27 The CJEU considered that the eighth question referred asked whether the principle that abusive practices are prohibited must be interpreted as being applicable in a situation such as that at issue in the main proceedings, which concerns the possible exemption of a supply of immovable property from VAT.

2.28 Considering the provisions of the Sixth Directive, the CJEU recalled that the general principle resulting from Article 2(1) of the Sixth Directive is that VAT is levied on all supplies of goods for consideration by a taxable person. Such a supply relating to immovable property is thus in principle covered by that tax. The exemption provided in Article 13B(g) of the Sixth Directive, read in conjunction with Article 4(3)(a), applies to supplies of immovable property other than supplies before first occupation of the building, or part of a building concerned.

2.29 Thus, only the first supply of a building or part of a building is, in principle, subject to VAT. However, in order to determine which supply is the first one, account should not be taken of supplies of a purely artificial nature whose essential aim is to obtain a tax advantage.

2.30 The answer provided by the CJEU, therefore, to the eighth question is that the principle that abusive practices are prohibited must be interpreted as being applicable in a situation such as that at issue in the within proceedings, which concerns the possible exemption of a supply of immovable property from VAT.

2.31 As appears from the answers given by the CJEU, it was determined that the fact that the transactions at the heart of this appeal predated the judgment of the CJEU in *Halifax* did not operate as a barrier to the application of the abuse principle to the facts of this case. It is that finding which the taxpayers say should be revisited. It is also said that the answers given by the CJEU in that regard are insufficiently clear to enable this Court to definitively resolve this appeal.

2.32 As is also clear, the CJEU did not find it necessary to answer the fifth and sixth questions referred. It is that aspect of the determination of the CJEU which leads to the second issue. I propose to deal with each in turn.

3. Should there be a Second Reference?

3.1 Essentially, two points are made under this heading. First, it is said that it is not sufficiently clear from the judgment of the CJEU and the answers given to the questions referred that the CJEU was satisfied that the abuse principle could be applied notwithstanding the principle of legal certainty. I will shortly turn to that question.

3.2 In addition, secondly, it is argued that there is an inconsistency between the judgment of the CJEU in this case and a judgment of a Grand Chamber of the CJEU, delivered less than two weeks after the judgment in these proceedings on 5 December 2017 in *M.A.S. and M.B.* (Case C-42/17), ECLI:EU:C:2017:936. It will also be necessary to turn to that question in due course.

3.3 However, the first matter which must be addressed is the jurisdiction to make a second reference of what are, in substance, the same or similar questions. There was, however, no significant dispute between the parties at the level of principle as to the existence of such a jurisdiction, so this question can be briefly dealt with.

4. The Jurisdiction to make a Second Reference

4.1 The taxpayers rely on the decision of the ECJ (as it then was) in *Da Costa* (Cases 28-30/62) [1963] E.C.R. 31, ECLI:EU:C:1963:6, to the effect that there exists the jurisdiction to make a second reference regarding a question of EU law which has previously been ruled upon by the CJEU, in circumstances where some "new factor" or argument has been raised. In *Da Costa*, it was established that there is no need to make a reference to the CJEU for a preliminary ruling under Article 267 TFEU (Article 177 of the EEC Treaty, as it then was) where a national court concludes that the CJEU has already resolved the question of EU law before it. The national court is still able, in formal terms, to refer a matter to the CJEU, even where it has ruled on the issue. However, if no new factor has been raised before the Court and the second reference is considered to be "materially identical" to that which has already been the subject of a preliminary ruling in a similar case, the CJEU will be strongly inclined to restate the substance of the earlier judgment.

4.2 This principle was elaborated on in the judgment of the ECJ in *Pretore di Salò* (Case 14/86) [1987] E.C.R. 2545, ECLI:EU:C:1987:275, where it was held that a national court which has already made a reference for a preliminary ruling which has been answered by

the Court of Justice is not precluded from making a further reference to the Court if it considers it necessary. The Court continued, at para. 12:-

> *"Such a reference may be justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the court, or again when it submits new considerations which might lead the court to give a different answer to a question submitted earlier."*

4.3 It is submitted by the taxpayers that the suggested tension between the CJEU's ruling in the within proceedings and the Court's subsequent decision in *M.A.S and M.B.* is such as to constitute a "new factor" sufficient to warrant a further reference being made by this Court.

4.4 This jurisdiction to make a second reference to the CJEU is accepted by the respondent (who, given his representative capacity as an Inspector of Taxes, I will refer to as "the Revenue Commissioners"), but it is submitted that it is a jurisdiction to be utilised exceptionally, such as in the circumstances in *Pretore di Salò*, where the criminal prosecutions at issue in the main proceedings had been brought against persons unknown.

4.5 It must, of course, also be noted that there is a difference between circumstances where separate questions to those already referred emerge in the course of the legal process within a single set of proceedings. In such circumstances, there could be no barrier to a national court referring such new questions to the CJEU should it conclude that answers to those questions had become necessary for the proper disposition of the proceedings.

4.6 However, the issue earlier noted relates to a different matter, being whether a national court can or should refer what is, in substance, the same question to the CJEU for what would amount to a reconsideration by that court of the question.

4.7 It would seem to follow that, if the answers given by the CJEU were insufficiently clear to enable the national court to deal with the proceedings in a proper fashion, the national court would be obliged to seek further clarity by means of a second reference. So far as the first limb of the argument under this heading is concerned, therefore, the question is whether the judgment of the CJEU is sufficiently clear. I turn to that question.

5. Is the Judgment of the CJEU on Abusive Practices Clear?

5.1 The underlying argument under this heading turned on the question of legal certainty. At its simplest, the argument put forward on behalf of the taxpayers was that it would be a breach of the principle of legal certainty to apply the judgment in *Halifax* to facts which predated the handing down of that judgment by the CJEU. It is said that the judgment of the CJEU in these proceeding is insufficiently clear because it does not make express reference to the principle of certainty in its answer.

5.2 However, it seems to me that the argument to that effect is without merit. The whole point behind the issue which the CJEU had to consider was whether applying *Halifax* abuse principles to facts which predated *Halifax* was impermissible precisely because it

was said that to do so would be a breach of the principle of legal certainty. A fair reading of the judgment as a whole makes it clear that, hardly surprisingly, the Court was well aware of that argument. However, it is equally clear that the Court rejected the argument and concluded that there was no barrier to the application of *Halifax* abuse principles notwithstanding the requirement for legal certainty. As I read the judgment of the CJEU it is, in substance, to the effect that the abuse principle generally formed a fundamental principle of EU law which, indeed, had been recognised and established long prior to the decision in *Halifax*. Seen in that way, the judgment of the CJEU in *Halifax* can be viewed as simply a confirmation that the general abuse principle applies in the field of tax law just as much as it may apply in any other area.

5.3 Until the proper interpretation of the law (whether that be the application of the Treaties, general principles or the proper interpretation of legislation) has been definitively determined by the CJEU, there is always the possibility that there might be legitimate debate about how that law will ultimately be interpreted. Indeed, if there were never any such questions of interpretation, then the preliminary reference procedure would be largely redundant. But, certainly in and of itself, it is also clear that the fact that there might be a legitimate debate about the proper interpretation of EU law does not necessarily mean that the principle of legal certainty is breached. The Treaties are there. The general principles of EU law are there. The legislation is there. How they are to be interpreted and applied in particular circumstances may be the subject of legitimate debate, but the existence of that debate does not mean that the law is uncertain to the extent that it breaches the principle of certainty. Indeed, if an argument to the contrary were to prevail it would almost inevitably follow that, in the vast majority of cases, a preliminary reference would be of little value given that, almost by definition, there must be some uncertainty about EU law in order to justify a national court making a preliminary reference in the first place. If that uncertainty were to require that a certain view of the law could not be applied to facts which occurred prior to the clarification of the legal issue itself, then in many cases it could not be applied in the individual case in which the reference was made and there would not, therefore, be a justification for making a reference in the first place as the clarification would not be necessary to decide the case.

5.4 In my view, the reasoning of the CJEU in its judgment in this case is clear and is to the effect that the principle of legal certainty does not place a barrier in the way of the application of the abuse principle in proceedings such as this. It follows that it is necessary to go on to consider the second leg of the argument under this heading, being as to whether doubt has now been cast on the correctness of the judgment on the reference in this case by reason of the subsequent judgment of the CJEU in *M.A.S. and M.B.*

6. Is there now doubt about the correctness of the CJEU's judgment?

6.1 The judgment in *M.A.S. and M.B.* concerned the interpretation of Article 325(1) and (2) TFEU, which require member states to counter fraud and other illegal activities affecting the financial interests of the Union through effective and deterrent measures and to take the same measures to counter fraud affecting the financial interests of the Union as

member states take to counter fraud affecting their own financial interests. The reference arose from an earlier decision of the CJEU in its judgment of 8 September 2015, *Taricco and Others* (Case C 105/14), EU:C:2015:555.

6.2 In *Taricco*, the CJEU directed that the Italian courts set aside provisions of national law which impose limitation periods in respect of the prosecution of criminal offences, where such provisions affect Italy's obligations under Article 325(1) and (2) TFEU by preventing the imposition of effective and dissuasive penalties in cases of serious fraud affecting the financial interests of the EU, or by providing for longer limitation periods in respect of cases of fraud affecting the financial interests of the member state concerned than in respect of those affecting the financial interests of the EU.

6.3 In *M.A.S. and M.B.*, the request for a preliminary ruling was also made in criminal proceedings for infringements relating to VAT, in circumstances where the referring court, the Italian Constitutional Court, had concerns that disapplying the limitation period, in accordance with the rule in *Taricco*, was incompatible with the constitutional principle of legality, which requires that rules of criminal law are precisely determined and are not retroactive.

6.4 Considering the requirements of the principle that offences and penalties must be defined by law, which was not argued before the CJEU in *Taricco*, the Court of Justice concluded that Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, unless that disapplication entails a breach of the principle of legality because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.

6.5 In the course of its reasoning, the CJEU held that the competent national courts, when deciding whether the disapply limitation periods, are required to ensure that the fundamental rights of the accused are observed. This protection must meet the level of protection provided for by the EU Charter of Fundamental Rights ("the Charter") as, in accordance with Article 51(1) thereof, the provisions of the Charter must be observed by member states in the implementation of EU law. The principle of legality in relation to the imposition of criminal penalties was held to have been enshrined in Article 49 of the Charter, in the constitutional traditions common to member states, and in other international treaties, including, in particular, in Article 7(1) of the European Convention on Human Rights ("the Convention").

6.6 As provided for by Article 52(3) of the Charter, the right guaranteed in the Charter should have the same meaning and scope as the right guaranteed by the Convention. The CJEU then proceeded to consider the case law of the European Court of Human Rights ("the ECtHR") concerning the scope of Article 7(1) and the requirements of foreseeability, precision and non-retroactivity which inhere in the principle of legality.

6.7 It is the CJEU's treatment of Convention rights in *M.A.S. and M.B.* on which the taxpayers place reliance in these proceedings. They submit that the CJEU's decision in the earlier preliminary ruling in these proceedings failed to consider and give effect to the rights protections of the Convention, specifically in relation to legal certainty.

6.8 They submit that the right to property contained in Article 17 of the Charter, which provides, amongst other things, that "[n]o one may be deprived of his or her possessions except... under the conditions provided for by law", has a corresponding provision in Article 1 of Protocol 1 to the Convention, which states that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

6.9 In light of the guarantee that the meaning and scope of a Charter right shall be the same as that which is laid down in a corresponding Convention right, the taxpayers suggest that the principle of legal certainty, which they consider to inhere in "the general principles of international law", should govern the property right protections contained within Article 17 of the Charter. This "right to legal certainty" as it is characterised by the taxpayers, is subject only to such compromise or dilution as would be permitted under Article 1 of Protocol 1 to the Convention. As, it is contended, there are no apparent exceptions to this principle of legal certainty in respect of instances of fraud or abusive practices under the jurisprudence of the ECtHR, the taxpayers submit that the finding of the CJEU, as upheld in previous judgments of *Breitsohl*, *Halifax* and *Italmoda*, that the principles of legitimate expectation and legal certainty in EU law cannot be relied upon in circumstances of fraud or abuse, has now been undermined.

6.10 This analysis, the taxpayers argue, constitutes a "new factor" or new consideration which may lead the CJEU to an alternative conclusion than that which was reached in the judgment in these proceedings. This factor is said to fulfil the criteria, as set out in *Pretore di Salò*, for this Court to make a second reference for a preliminary ruling.

6.11 The Revenue Commissioners submit that the judgment of the CJEU in *M.A.S. and M.B.* crucially concerned the principle that offences and penalties in the sphere of criminal law must be precisely defined by law, a principle which, they contend, has no application whatsoever to the present case. The criminal law context of *M.A.S. and M.B.* is said to be manifest from the underlying proceedings which gave rise to the reference made by the Italian Constitutional Court. The taxpayers contest this distinction, arguing that the CJEU in *M.A.S. and M.B.* also recognised and acknowledged the applicability of the general principle of legal certainty.

6.12 The Revenue Commissioners state that the principle of legal certainty is a general principle of EU law but it is not a general principle that has a higher status in the legal hierarchy than the principle that abusive practices are prohibited. This reasoning, it is argued, as found in *M.A.S. and M.B.* does not undermine the unequivocal findings in the CJEU's judgment in these proceedings, where, balancing the two principles, it was ruled that, in the circumstances of the case, a taxable person is not justified, pursuant to the principle that abusive practices are prohibited, in relying upon the principle of legal

certainty so as to seek to oppose the refusal to grant a VAT exemption which arises as a result of the abusive practice. This finding, they state further, is not incompatible with Article 17 of the Charter.

6.13 In order to consider the parties' dispute regarding the specificity of the context in which the judgment in *M.A.S. and M.B.* was delivered, it is appropriate to consider the following paragraphs from the judgment, which precede the conclusion of the CJEU that the provisions of Italian national law cannot be disapplied:-

> *"46. The competent national courts, for their part, when they have to decide in proceedings before them to disapply the provision of the Criminal Code at issue, are required to ensure that the fundamental rights of persons accused of committing criminal offences are observed (see, to that effect, judgment in Taricco, paragraph 53).*
>
> *47. In that respect, the national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (judgment of 26 February 2013, Åkerberg Fransson, C 617/10, EU:C:2013:105, paragraph 29 and the case-law cited).*
>
> *48. In particular, where the imposition of criminal penalties is concerned, the competent national courts must ensure that the rights of defendants flowing from the principle that offences and penalties must be defined by law are guaranteed.*
>
> *49. According to the referring court, those rights would not be observed if the provisions of the Criminal Code at issue were disapplied in the proceedings pending before it, in so far as, first, the persons concerned could not reasonably foresee before the delivery of the Taricco judgment that that Article 325 TFEU requires the national court to disapply those provisions in the circumstances set out in that judgment.*
>
> *50. Second, according to the referring court, the national court would not be able to define the particular circumstances in which it would have to disapply those provisions, namely where they prevent the imposition of effective and deterrent penalties in a significant number of cases of serious fraud, without exceeding the limits imposed on its discretion by the principle that offences and penalties must be defined by law.*
>
> *51. In this respect, the importance given, both in the EU legal order and in national legal systems, to the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability, precision and non-retroactivity of the criminal law applicable, must be recalled.*

52. *That principle, as enshrined in Article 49 of the Charter, must be observed by the Member States when they implement EU law, in accordance with Article 51(1) of the Charter, which is the case where, in the context of their obligations under Article 325 TFEU, they provide for the application of criminal penalties for infringements relating to VAT. The obligation to ensure the effective collection of the Union's resources cannot therefore run counter to that principle (see, by analogy, judgment of 29 March 2012,Belvedere Costruzioni, C 500/10, EU:C:2012:186, paragraph 23).*

53. *Moreover, the principle that offences and penalties must be defined by law forms part of the constitutional traditions common to the Member States (see, with reference to the principle of non-retroactivity of the criminal law, judgments of 13 November 1990, Fedesa and Others, C 331/88, EU:C:1990:391, paragraph 42, and of 7 January 2004, X, C 60/02, EU:C:2004:10, paragraph 63) and has been enshrined in various international treaties, in particular in Article 7(1) of the ECHR (see, to that effect, judgment of 3 May 2007, Advocaten voor de Wereld, C 303/05, EU:C:2007:261, paragraph 49).*

54. *It may be seen from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) that, in accordance with Article 52(3) of the Charter, the right guaranteed in Article 49 has the same meaning and scope as the right guaranteed by the ECHR.*

55. *As to the requirements that follow from the principle that offences and penalties must be defined by law, it must be observed, in the first place, that the European Court of Human Rights has held in relation to Article 7(1) of the ECHR that, under that principle, provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty (see ECtHR, 15 November 1996, Cantoni v. France, CE:ECHR:1996:1115JUD001786291, § 29; ECtHR, 7 February 2002, E.K. v. Turkey, CE:ECHR:2002:0207JUD002849695, § 51; ECtHR, 29 March 2006, Achour v. France, CE:ECHR:2006:0329JUD006733501, § 41; and ECtHR, 20 September 2011, OAO Neftyanaya Kompaniya Yukos v. Russia, CE:ECHR:2011:0920JUD001490204, §§ 567 to 570).*

56. *In the second place, the requirement that the applicable law must be precise, which is inherent in that principle, means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable (see, to that effect, judgment of 28 March 2017, Rosneft, C 72/15, EU:C:2017:236, paragraph 162).*

57. *In the third place, the principle of non-retroactivity of the criminal law means in particular that a court cannot, in the course of criminal proceedings, impose a criminal penalty for conduct which is not prohibited by a national rule adopted*

before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought (see, by analogy, judgment of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraphs 62 to 64 and the case-law cited)."

6.14 The 12 paragraphs just cited make continual and detailed reference to the criminal nature of the proceedings under consideration and the rights of person involved in such proceedings. Paragraph 46 is specifically directed towards the rights of "persons accused of committing criminal offences". Paragraph 48 refers to "the imposition of criminal penalties." Paragraph 50 makes specific reference to the principle "that offences and penalties must be defined by law". In particular, para. 51 emphasises the importance of that principle in both the EU legal order and in national legal systems. Paragraphs 52 and 53 again involve a discussion of that principle both in the context of EU law and in the constitutional traditions common to member states. Paragraph 55 involves a discussion of the requirements of accessibility and foreseeability which derive from the principle "that offences and penalties must be defined by law", while para. 56 states that the requirement that the applicable law must be precise is also inherent in that principle. Paragraph 57 concerns the non-retroactivity of criminal law.

6.15 That analysis clearly demonstrates that it was the criminal nature of the matters under consideration which lay at the heart of the judgment of the CJEU in *M.A.S. and M.B.* It is true, of course, that the principle of legal certainty has application well beyond the sphere of criminal law. Likewise, retrospective legislation, while typically wholly impermissible in the criminal field, may also require to be assessed for compatibility with rights in other fields. It is also true that revenue statutes are, in many legal systems, scrutinised to a greater degree for certainty than might apply in respect of what one might call ordinary civil measures.

6.16 But none of those considerations suggest that it necessarily follows that the same result must apply in assessing the application of the requirement for legal certainty in the context of, respectively, criminal and civil measures. The fact that a higher level of scrutiny must necessarily be applied in the criminal context means that there is no necessary inconsistency between a conclusion that it is impossible lawfully to remove a limitation period which breaches EU law in a criminal context and a conclusion that the abuse doctrine can be applied, in a revenue context, to transactions which occurred before the decision of the CJEU in *Halifax*.

6.17 It is also important to emphasise the point made by the CJEU in its judgment in the reference in these proceedings which recalled that the Court, in *Halifax* itself, had considered the question of whether the effects of its judgment could be applied in a partially retrospective manner and, by declining the confine the effects of its judgment to future events, determined that it could. In substance, it would have required the CJEU in its judgment in the reference in these proceedings to revisit aspects of *Halifax* for it to have come to a different conclusion.

6.18 In the light of that analysis, it does not seem to me that it can fairly be said that the subsequent judgment of the CJEU in *M.A.S. and M.B.* casts doubt on the correctness of the judgment given in these proceedings or gives rise to the consideration of a new factor which might realistically lead to a different conclusion being reached. It seems to me that this Court must operate on the assumption that the CJEU has correctly answered the questions referred to it. This is not a case where some wholly separate factor has come to light which might legitimately be said to potentially influence the result. The question of the balance between the abuse principle, on the one hand, and the protection of rights which is inherent in the principle of legal certainty, on the other, was at the heart of the argument both before this Court and before the CJEU in these proceedings. If it were possible to request a second reference simply because there might be a new way of putting an argument which had not been considered at the time of the initial reference, procedural chaos would follow.

6.19 In my view, this appeal falls a long way short of the sort of circumstances where, in accordance with the established jurisprudence, it would be appropriate for this Court to, in substance, invite the CJEU to reconsider the issues which have already been asked and answered. I would propose, therefore, that the Court reject the arguments put forward on behalf of the taxpayer to the effect that there should be a second reference based either on the alleged lack of clarity in the judgment of the CJEU or on the existence of a new factor which might reasonably be expected to lead the CJEU possibly to give different answers to similar questions. There remains the final matter for consideration, being the question of whether this Court is now in a position finally to deal with this appeal notwithstanding the fact that the CJEU did not answer certain of the questions raised. I turn to that matter.

7. The Parties' Position on whether this Court can now finally determine the Appeal

7.1 Having concluded that there is no legitimate basis for referring the same or similar issues to those which have already been answered by the CJEU back to that Court in the form of a second reference, it only remains to consider whether the answers already given enable this Court to reach a final conclusion on this appeal.

7.2 It is appropriate, therefore, at this juncture to set out the questions which remain live on the appeal. Following the dismissal of the taxpayers' appeal against the relevant VAT assessments, under the provisions of the Taxes Consolidation Act 1997 which were then in force, the Circuit Court Judge stated a case for the opinion of the High Court on certain questions of law on the basis of the facts found by him. The Circuit Court Judge found that neither the lease nor the leaseback arrangements of the pre-sale transactions had any commercial reality, finding that there was no evidence of intention to sell the property by way of lease to any third party and that, in effect, the pre-sale transactions were entered into for the purpose of reducing VAT. A more detailed account of the transactions concerned can be found in the earlier judgment of this Court in these proceedings, as previously cited.

7.3 The questions posed in the case stated for the opinion of the High Court were whether the Circuit Court Judge was correct in holding that:-

"(1) The lease dated 8th March 2002 between the Applicants and Shamrock Estates Limited was effective for the purposes of VAT, despite the absence of the prior written consent of ACC Bank Plc thereto required by clause 6.1 of the deed of charge.

(2) The lease and leaseback arrangements had no commercial reality and constitute an abusive practice within the doctrine set out in the Halifax case; and should be disregarded for the purposes of VAT.

(3) The European Court decision in Halifax and the doctrine of abusive practice have direct effect in the absence of implementing national legislation.

(4) There should be no interest on any VAT due by the Applicants."

7.4 Following the hearing of the case stated, the High Court (Charleton J.), in a judgment dated 11 June 2008 (*Cussens and ors v. Brosnan (Inspector of Taxes)* [2008] IEHC 169), provided the following answers to the questions posed by the Circuit Court Judge, at para. 51 of thereof:-

"(i) The lease dated 8th March, 2002, between the partnership and Shamrock Estates Ltd. was ineffective for the purpose of VAT because of the absence of prior written consent of the mortgagee, namely, ACC Bank, which was required by clause 6.1 of the Deed of Charge. The said lease and leaseback are void.

(ii) The lease and leaseback had no commercial reality and constituted an abusive practice within the doctrines identified by the European Court of Justice. As such, even if such lease and leaseback were apparently valid, which they are not because of the prior mortgage, they should be redefined for the purpose of VAT in order to reflect the true reality of the actions of the partnership.

(iii) The European Court decisions as to abusive process are of general application and they require national courts to redefine abusive measures in accordance with reality. As this is a matter of interpretation, and given the supremacy of European law, implementing national legislation is not required in a Member State in respect of this principle of European law and nor has any such implementing national legislation come to my attention where the doctrine of abusive practice has been applied at national level, as in the Halifax case.

(iv) As to whether interest is due on any late payment of VAT by the applicants is a matter to be decided by the Inspector of Taxes and is not something which was before His Honour Judge Harvey Kenny and neither was it before this Court."

7.5 The taxpayers' appeal to this Court is grounded on, amongst other things, the contention that Charleton J. was wrong in law and on the evidence in making the above findings. Further, it should be noted that in *Cussens and ors v. Inspector of Taxes* [2015] IESC 48, Laffoy J. granted leave to amend the notice of appeal of the taxpayers on the basis that no prejudice to the Revenue Commissioners was identified as being likely to result from

such an amendment. It is apparent that the first ground of the appeal, regarding the validity of the lease dated 8 March 2002 between the taxpayers and their connected company, Shamrock Estates Limited, is no longer in issue between the parties. It therefore appears to this Court that the grounds of appeal which remain live before this Court primarily concern whether the High Court erred in answering the questions (ii) – (iv) of the case stated, as above.

7.6 Turning to the submissions of the parties in this matter, it is the taxpayers' position that the Court is not yet in a position to consider the substantive appeal, in light of the fact that the CJEU did not answer certain of the questions referred, namely Questions 5 and 6. As previously discussed at paras. 2.18 and 2.19 above, the Court of Justice considered that the order for reference did not adequately explain the reasons behind the contention that s. 4(9) of the 1972 Act is incompatible with the Sixth Directive, instead indicating the claims of the parties to the proceedings in that regard. While not elaborating in any great detail on this matter, the taxpayers submit that the questions as to the compatibility of s. 4(9) with the Sixth Directive are relevant and require to be addressed prior to the resolution of the substantive appeal. In circumstances where this may pose uncertainty for the Court, the taxpayers submit that the appropriate course of action would be to reformulate Questions 5 and 6 and to submit these in the form of a further reference to the CJEU.

7.7 The Revenue Commissioners submit that in light of the clear and comprehensive answers provided by the CJEU, this Court is now in a position to finally determine this appeal, notwithstanding the Court's decision not to answer Questions 5 and 6. It is their position that this Court should uphold the findings of Charleton J. in relation to questions (ii) and (iii) of the case stated, which questions grounded the original order for reference to the CJEU in these proceedings. This is on the basis that, in line with the holdings of the preliminary ruling of the Court of Justice, the principle that abusive practices are prohibited, as applied in the sphere of VAT, requires that transactions should be redefined so as to put the taxpayer in to the position he would have been in had he not engaged in the abusive practice, and it is a general principle of EU law which can be applied without any national measures giving effect to it in the domestic legal order.

7.8 Applying the rulings of the CJEU to the facts of these proceedings, the Revenue Commissioners suggest that this Court can now conclude that the pre-sales transactions at issue had no commercial reality other than the accrual of a tax advantage, and that this advantage constituted the essential aim of the transactions. It is submitted that this resulted in the accrual of a tax advantage which was contrary to the purposes of relevant provisions of the Sixth Directive, such that the general principle of EU law prohibiting abusive practices applied. This, it is said, therefore requires that the pre-sale transactions are classified as abusive and that those transactions which do not constitute an abusive practice, that is, the sale of the properties to third party purchasers, are redefined as being subject to VAT on the basis of the relevant provisions of the 1972 Act. The legal basis on which VAT should be levied on the taxpayers is submitted to be the provisions of ss. 2 and 4 of the 1972 Act, which give effect to the principle set out in

Article 2(1) of the Sixth Directive that VAT is levied on all supplies of goods for consideration by a taxable person and that, accordingly, such a supply relating to immovable property was liable to VAT. Further, the Revenue Commissioners argue that the exemption from VAT contained in Article 13B(g) in respect of supplies relating to immovable property which have already been the subject of 'first occupation' is not applicable in these proceedings for the reasons identified by the CJEU.

7.9 In reference to question (iv) regarding the payment of interest on any late payment of VAT, the Revenue Commissioners submit that the question of interest payable on the late payment of VAT is a matter governed by statute and agree with the finding of the High Court that this was not a question before the Circuit Court. Further, the Revenue Commissioners suggest that the CJEU's judgment makes clear that the sales of the properties in question constituted taxable supplies for the purposes of the Sixth Directive and that the abuse doctrine requires that such transactions should be redefined so as to put a taxpayer in the same position as would have applied if the abusive practice had not been engaged in. This, it is said, means that the taxpayers, being taxable at the material time under the 1972 Act, are statutorily liable to interest on the unpaid amount in accordance with s. 21(2)(b) of the 1972 Act. On that basis, it is argued that any interest payable on VAT does not concern the imposition of any penalty, as contended by the taxpayers, and would not contravene the ruling of the CJEU in *Halifax*, at para. 93, to the effect that a finding of abusive practice must not lead to a penalty, but rather only an obligation to repay.

8. Discussion and Conclusion on the Substance of the Appeal

8.1 It is important to start by identifying the precise nature of the appeal before this Court. These proceedings followed the normal pattern which applied at the time in question in respect of appeals in tax matters. As already noted, an Inspector of Taxes raised an assessment, which a taxpayer contested. An appeal was pursued to the Appeal Commissioners, which was followed, by virtue of the appeal being unsuccessful, by a further appeal to the Circuit Court. Thereafter, the Circuit Court Judge stated a case for the opinion of the High Court on certain legal issues. It is important to re-emphasise that a case stated is a particular form of procedure which carries its own rules and operates subject to established parameters. The High Court, when considering a case stated such as this, is, to a very large extent, bound by the findings of fact of the Circuit Court Judge as set out in the case stated. The limited extent to which the High Court can consider the facts is fully set out in *Mara (Inspector of Taxes) v. Hummingbird* [1982] 2 I.L.R.M. 421.

8.2 The function of the High Court Judge in considering the case stated is simply to answer the questions posed by the Circuit Court Judge and to remit the matter back to enable the Circuit Court Judge to make a final order. It follows that the sole function of this Court, in considering an appeal from the High Court (or, indeed, in more recent times, the function of the Court of Appeal in considering an appeal from the High Court and the function of this Court in considering either a leapfrog appeal from the High Court or an appeal from the Court of Appeal under the new constitutional architecture) is simply to determine whether the answers given by the court or courts below were correct in law. It follows

that the only function of this Court in this appeal is to determine whether the answers given by the High Court to the case stated of the Circuit Court Judge in these proceedings was correct.

8.3 In passing, in that context, it should be noted that the notice of appeal in this case sets out a request that this Court should grant various declarations whose terms can be found in the notice of appeal. That form of appeal is misconceived. The proper course of action to adopt would have been to suggest that this Court should answer the questions posed by the Circuit Court Judge in a manner different to the answers given in the High Court and to set out the answers which, it was to be argued, this Court should give. However, I propose to treat the appeal on the basis that it was formulated in the correct way and that it amounts to a suggestion that this Court should answer the questions posed by the Circuit Court Judge along the lines of the declarations sought.

8.4 As noted earlier, question (i) is no longer relevant. By questions (ii) and (iii), the Circuit Court Judge sought to determine whether he was correct to hold that the lease and leaseback arrangements had no commercial reality and constituted an abuse of practice such that they should be disregarded for the purposes of VAT and further, that such a situation pertained notwithstanding the absence of implementing national legislation. On the basis of the findings of fact of the Circuit Court Judge, by which both the High Court and this Court are bound, there can be no doubt that the transactions were an abusive practice for the purposes of the *Halifax* doctrine. As has been noted on a number of occasions, the central thrust of the substantive appeal brought on behalf of the taxpayers was to the effect that the abusive practice doctrine could not be applied in this case because the transactions concerned predated *Halifax* and there were no national implementing measures to provide a proper legal basis for disregarding the abusive element of the transactions and imposing VAT on the transactions when shorn of their abusive element.

8.5 However, it is abundantly clear that the CJEU has determined that the abuse doctrine does apply to transactions which predate the decision of the CJEU in *Halifax*. In addition, it is clear that, as a matter of EU law, the application of that doctrine in practical terms does not require specific national measures (or, indeed, EU legislation), given that it derives from a fundamental principle of European Union law. In those circumstances, it does not seem to me that any question of compatibility of Irish VAT legislation with EU law now properly arises.

8.6 It is correct that Irish VAT legislation, in itself, does not make provision for disregarding certain transactions which are found to be abusive. However, it is clear from the judgment of the CJEU in this case that it is unnecessary that there be national implementing measures to enable the abuse doctrine to be applied in appropriate cases. It follows that Irish law, including, as it does, mandatory requirements of EU law which can apply in the absence of implementing measures, does itself permit the abuse doctrine to be applied notwithstanding the absence of an express measure to be found in Irish VAT legislation. Therefore, in the light of the answers given by the CJEU to the other

questions which arose on the reference to it by this Court, there can no longer be any question of the compatibility of Irish VAT law with the overarching requirements of EU law. It follows in turn that this Court is now in a position to determine the substantive issue which arises on this appeal.

8.7 In that context, it is appropriate to note that the High Court Judge agreed with the Circuit Court Judge that, on the facts set out in the case stated, the lease and leaseback arrangement concerned had no commercial reality, constituted an abusive practice and should be redefined in order to reflect the true reality of the actions of the taxpayers. The High Court Judge went on to find that such a position pertained notwithstanding the absence of relevant implementing national legislation.

8.8 In the light of the findings of fact of the Circuit Court Judge, as set out in the case stated in these proceedings, and in the light of the definitive determination of EU law to be found in the judgment of the CJEU in the reference made to it by this Court in this case, it is impossible to see any basis on which it can now properly be suggested that the High Court Judge's answer to those questions as posed by the Circuit Court Judge are incorrect. I, therefore, propose that this Court dismiss the appeal in that regard and affirm the answers given by the High Court Judge.

8.9 There remains the question of the payment of interest. It is clear from the case stated that the Circuit Court Judge was of the view that no interest should be payable. The High Court took the view that this matter was not properly before the Circuit Court and was thus not properly before the High Court. Whether, and if so in what circumstances, interest applies is a matter of law. If a taxpayer believes that the Revenue Commissioners are seeking to demand the payment of interest which is not properly due as a matter of law, then it is open to such a taxpayer to challenge what is said to be the unlawful imposition of interest by any procedural means properly open. The question of the payment or otherwise of interest on a tax found to be due because of the application of the abuse principle is, indeed, a separate matter from whether the underlying tax which is found to be due as a result of the application of that principle should itself be payable.

8.10 On the materials before this Court (which are the same materials which were before the High Court), I am not satisfied that it can properly be said that the question of whether interest was lawfully due on the tax found to be payable on foot of the application of the abuse doctrine was properly before the Circuit Court Judge. In those circumstances, I am satisfied that the High Court Judge was correct to hold that the question of interest was not a matter properly before him, notwithstanding the fact that the Circuit Court Judge had decided that no interest should be payable, but had asked a question in the case stated as to whether he was correct in that view.

8.11 I would propose that question (iv) be answered as follows:-

"The question of whether interest is properly due on any VAT which the taxpayers are liable to pay on foot of the substantive decision of the courts on these appeals is a

matter of law and not a matter within the discretion of the Circuit Court. The question of whether, as a matter of law, interest is so payable in all the circumstances of this case, was not, on the basis of the materials before this Court, properly before the Circuit Court and, in those circumstances, the Circuit Court was not correct to hold that no interest was payable. That answer is, however, without prejudice to the entitlement of the taxpayers to seek to argue, in any appropriate proceedings, that interest is not payable."

9. Conclusions

9.1 For the reasons analysed earlier in this judgment, I am not satisfied that it is appropriate for this Court to make a further reference to the Court of Justice in these proceedings. I do not consider that the answers given by the CJEU to the questions already referred are in any way unclear or are open to any legitimate suggestion to the effect that the CJEU did not deal fully with each of the questions to which it did provide answers. Likewise, I am not satisfied that the judgment of the CJEU in *M.A.S. and M.B.*, which was given shortly after the judgment of that court in these proceedings, casts doubt on the correctness of the judgment given in these proceedings or gives rise to the consideration of a new factor which might realistically lead to a different conclusion being reached. As noted earlier, I am of the view that the circumstances of this appeal fall a long way short of the sort of circumstances where, in accordance with the established jurisprudence, it would be appropriate for this Court to, in substance, invite the CJEU to reconsider the issues which have already been asked and answered.

9.2 Further, for the reasons analysed earlier in this judgment, I am also satisfied that the fact that the CJEU did not find it appropriate to answer some of the issues presented to it by this Court does not give rise to a situation where it is impossible finally to determine this appeal. Each of the questions asked were concerned with different aspects of the same fundamental issue, being as to whether there was a legitimate basis for deploying the abuse principle, as set out in *Halifax*, in circumstances where the transactions in question predated the judgment of the Court of Justice in *Halifax* itself. The context in which that question arose was the absence of any specific Irish national measure which, at the relevant time, could have been used to give rise, as a matter of national law, to the adjusted treatment of the transactions which the Revenue Commissioners determined and which the Circuit Court and the High Court upheld. For the reasons set out earlier in this judgment, I am satisfied that it is clear from the findings of the Circuit Court Judge as set out in the case stated and from the judgment of the CJEU in the reference in these proceedings, that it is appropriate to treat the transactions concerned in the matter contended for by the Revenue Commissioners.

9.3 I should only add that I have proposed one minor change to the answer to question (iv). However, with that minor exception, I would dismiss the appeal and uphold the decision of the High Court. In respect of the answer to question (iv), I would vary the order of the High Court by answering that question in the manner set out earlier in this judgment.