Neutral Citation Number: [2008] IEHC 403

THE HIGH COURT
REVENUE

2006 No. 572 R

BETWEEN

J.J. QUIGLEY
(INSPECTOR OF TAXES)

APPELLANT

AND
ROBERT HARRIS

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 28th day of November, 2008.

The proceedings
1. These proceedings are by way of case stated under s. 941 of the Taxes Consolidation Act 1997 (the Act of 1997) by Ronan Kelly, Appeal Commissioner (the Commissioner), at the request of the appellant inspector of taxes (the appellant) following the Commissioner's finding for the respondent taxpayer (the taxpayer) on his appeal against assessments for income tax for the following periods and in the following amounts:

(a) for the year ended 5th April, 2001, €3,166,025.87;

(b) for the period ended 31st December, 2001, €3,408,336.72; and

(c) for the year ended 31st December, 2002, €2,552,384.00.

2. In broad terms, the appeal concerned a claim by the Irish resident taxpayer to be entitled to set off against his general liability for income tax in this jurisdiction under Schedule E capital allowances and other reliefs (losses and interest incurred) in respect of expenditure incurred by him in his capacity as a partner in a limited partnership registered under the laws of Cook Islands, which was disallowed by the appellant. That partnership, which is known as the Christina Limited Partnership (the C.L. Partnership), carries on the business of the acquisition and operation of luxury yachts. A single net question is posed in the case stated for the opinion of the Court. Before identifying that question, I propose outlining the relevant taxation legislation which gives rise to the question.

Taxation legislation
3. The question posed on the case stated concerns the construction of one provision of s. 1013 of the Act of 1997. The Court is concerned with s. 1013 as amended with effect from 29th February, 2000 by virtue of the provisions of the Finance Act 2000 but prior to its amendment by the Finance Act 2005.

4. The substantive provision of s. 1013 for present purposes is subs. (2). The following truncated version of subs. (2), as applicable at the relevant time and material to the issue with which the Court is concerned, illustrates how the issue on the case stated arises:

> "(a) Where, in the case of an individual who is a limited partner in relation to a trade, an amount may apart from this section be given or allowed under any of the specified provisions –
>
> (i) in respect of a loss sustained by the individual in the trade … in a relevant year of assessment, or
>
> (ii) as an allowance to be made to the individual for the relevant year of assessment either in taxing the trade or by means of discharge or repayment of tax to which he or she is entitled by reason of his or her participation in the trade,
>
> such an amount may be given or allowed –
>
> (I) …
>
> (II) …
>
> (III) where the individual is a limited partner in relation to a trade by virtue of paragraph (d) of the definition of 'limited partner' and the relevant year of assessment is –
>
> (A) …
>
> (B) in any other case, the year of assessment 1999 – 2000 or any subsequent year of assessment …
>
> only against income consisting of profits or gains arising from the trade,
>
> and only to the extent that the amount given or allowed or, as the case may be, the aggregate amount in relation to that trade does not exceed the amount of his or her contribution to the trade at the relevant time."

5. The effect of that provision, which is an anti-avoidance provision, in the case of an individual being a limited partner, as defined in s. 1013, is to "ring fence", as counsel for the appellant put it, capital allowances, losses and interest otherwise available under specified provisions, for example, s. 305 of the Act of 1997, so that they are only given or allowed against his or her income consisting of his or her share of the profits from the partnership trade and are subject to the limitation that the amount given or allowed should not exceed the amount of his or her contribution to the partnership trade at the relevant time.

6. Subsection (1) of s. 1013 contains section-specific definitions of various expressions found in the section, including the expression "limited partner". That definition, as applicable at the relevant time, provided as follows:

> ""Limited partner", in relation to a trade, means –

(a) a person carrying on the trade as a limited partner in a limited partnership registered under the Limited Partnerships Act 1907,

(b) a person carrying on the trade as a general partner in a partnership who is not entitled to take part in the management of the trade but is entitled to have the person's liabilities, or those liabilities beyond a certain limit, for debts or obligations incurred for the purposes of the trade, discharged or reimbursed by some other person,

(c) a person who carries on trade jointly with others and, under the law of any territory outside the State, is not entitled to take part in the management of the trade and is not liable beyond a certain limit for debts or obligations incurred for the purposes of the trade, or

(d) a person who carries on the trade as a general partner in a partnership otherwise than as an active partner;"

7. Section 1013 was originally enacted in s. 46 of the Finance Act, 1986, where it was captioned "Limited partnerships: relief restrictions". As originally enacted the definition of limited partnership did not include paragraph (d). Paragraph (d) as quoted above was a substituted provision enacted by the Finance Act, 2000, with effect from 29th February, 2000, the earlier version of para. (d) introduced in the Finance Act, 1998 being limited to partnerships where the activities of the trade included film and video tape production and exploration for oil and gas.

8. Subsequent to the decision of the Commissioner, which was given on 29th October, 2004, the definition of "limited partner" was amended by s. 37 of the Finance Act 2005. By virtue of the amendment the following two paragraphs were inserted after paragraph (d) in the definition of "limited partnership":

"(e) a person who carries on the trade as a partner in a partnership registered under the law of any territory outside the State, otherwise than as an active partner, or

(f) a person who carries on the trade jointly with others under any agreement, arrangement, scheme or understanding which is governed by the law of any territory outside the State, otherwise than as a person who works for the greater part of his or her time on the day-to-day management or conduct of that trade;"

9. It was submitted by counsel for the appellant that the fact that s. 1013 of the Act of 1997 has been amended by the insertion of paragraphs (e) and (f) in the definition of "limited partnership" is of no assistance to the taxpayer in construing the effect of the section in the years of assessment at issue here, citing the following passage from the judgment of Griffin J., speaking for the Supreme Court, in *Cronin(Inspector of Taxes) v. Cork and County Property Company Limited* [1986] I.R. 59 (at p. 572):

"With regard to the submission of counsel for the company that the amendment of s. 18 by s. 29 of the Finance Act, 1981, was an implied acceptance by the Oireachtas of the construction of s. 18 for which they contended, the court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."

10. In subs. (1) of s. 1013 there is a definition of "active partner", which was introduced in the Finance Act, 1998, which provides that, in relation to a partnership trade, the expression means "a partner who works for the greater part of his or her time on the day-to-day management or conduct of the partnership trade".

11. Significantly, there is no definition of the expression "general partner" in s. 1013.

Question posed in case stated

12. It is common case that the participation of the taxpayer in the C. L. Partnership was not captured by either paragraphs (a), (b) or (c) of the definition of limited partner in s. 1013(1). It being accepted by the taxpayer that he is not an "active partner" within the meaning of s. 1013(1), the issue is whether he was a "general partner" within the meaning of that expression in paragraph (d) of the definition at the material time. The question on which the Commissioner has sought the opinion of this Court is "whether the taxpayer falls within paragraph (d) of the definition of limited partner in s. 1013(1) of the Act of 1997 as amended."

13. Apart from that issue, there were two other issues before the Commissioner: whether or not the C.L. Partnership carried on trade with a view to a profit; and whether the m/y Christina O. had been put to use for the purposes of the trade by 5th April, 2001. The Court is not concerned with those two issues.

Relevant facts as set out in the case stated

14. Having recorded that at the hearing of the appeal he was provided with a document entitled "Summary of Transaction Documents", the content of which was agreed by the parties and which is annexed to the case stated, the Commissioner went on to record in paragraph 4 that certain facts were either proved or admitted. Paragraph 4, which is set out in full although some of its content, notably paragraph 4.6, would appear to be relevant to matters with which the Court is not concerned, states:

"4.1 The Christina Limited Partnership (the "Partnership") is a limited partnership registered under the laws of the Cook Islands. The partnership was established by a partnership agreement dated 12 April, 2000 made between Christina GP Limited, the general partner, and a limited partner. The business of the Partnership was acquiring and operating high-class luxury cruise yachts and conducting all types of business incidental thereto. The relevant terms of the partnership agreement are set out in paragraph 3 of the Summary of Transaction Documents.

4.2 The taxpayer was admitted to the Partnership, together with two other partners, on 11 August, 2000, when the partnership agreement was amended and re-stated. Material terms of the amended and re-stated partnership agreement are set out in paragraphs 4 and 5 of the Summary of Transaction Documents.

4.3 On 11 August 2000 the Partnership agreed to purchase the m/y Christina O. for €65,755,810 from Christina Yachting Inc. The Christina O. is a luxury ship which was formerly owned by shipping magnate, Aristotle Onassis. Details of the finance and security arrangements for the purchase of the ship are set out in paragraphs 8 to 10(b) and 10(c) respectively of the Summary of Transaction Documents.

4.4 Under the terms of the Partnership Agreement the taxpayer held 4.142% of the assets of the partnership and was entitled to 82.85% of the Partnership profits or losses up to 5 April, 2007. Thereafter he was entitled to 4.142% of the partnership profits or losses. Details of capital contributions are set out in paragraph 5 of the Summary of Transaction Documents.

4.5 The partnership acquired, refurbished and marketed the Christina O. at considerable expense and the venture was at all times planned as a profitable venture. The taxpayer's adviser assessed the project on at least four grounds (i.e. limitation of liability, ability to participate in management, security and profitability) and also formed the view that there was potential to generate income in excess of that set out in the financial projections included in the placing document.

4.6 The yacht as refurbished was originally scheduled for delivery in November, 2000, but that delivery date was delayed until January, 2001 and she was finally delivered in March, 2001. The Partnership trade was not confined to 'pure' cruising: technical events (such as promoting the quality of the refurbishment, the equipment and machinery installed and other events whereby the yacht would host receptions and promotional events while stationary) were regarded by the partners as part of the trade of the Partnership. Activities of the ship prior to an event in Rijeka at the end of March, 2001 did not in my view represent the putting to use of the ship for the purposes of the trade. However, I found that the events held in conjunction with the launching ceremony and associated ceremonies and events at Rijeka represented the first use of the ship for the purposes of the trade.

4.7 It was agreed by the parties that under the law of the Cook Islands the taxpayer was regarded as a limited partner in the Partnership."

15. Arising out of their incorporation in the foregoing findings of fact the following statements contained in the Summary of Transaction Documents are relevant for present purposes:-

• Paragraph 3(e), which states that the business of the C.L. Partnership was to be conducted by the partners, "the General Partner" and the original limited partner, as a whole (clause 7.02). I understand this to be the source of the admitted fact that, under the terms of the C.L. Partnership, each partner has the right to take part in the management of the C.L. Partnership business.

• In relation to paragraph 4.2 quoted above –

? paragraph 4, which states that ôthree additional limited partnersö were admitted to the C.L. Partnership on 11th August, 2000, one of them being the taxpayer.

? a table in sub-paragraph (b) of paragraph 5, which discloses that the taxpayer's capital contribution was €144,889, but that he also made a loan contribution in excess of €14 million.

? sub-paragraph (f) of paragraph 5, which states that under the terms of the partnership agreement (as amended and restated), the liability of each limited partner is limited to the amount of its/his contribution (clause 8.03).

16. Although this is not recorded as a proved or admitted fact by the Commissioner, as I have stated, the taxpayer accepted that he was not an active partner.

Limited partnership legislation
17. It is convenient at this juncture to set out the statutory provisions in relation to limited partnerships which counsel for the parties drew on in making their submissions and to make some comments on them.

Limited Partnership Act 1907
18. The Partnership Act 1890 (the Act of 1890) did not provide for limited partnerships, so the starting point is the Limited Partnerships Act 1907 (the Act of 1907), which is referred to in the definition of "limited partner" in s. 1013. The following provisions of the Act of 1907 were referred to by counsel in their submissions:

• Section 3, the interpretation section, which, in addition to ascribing to certain expressions the same meanings as they have in the Act of 1890, contains, for the purposes of the construction of the Act of 1907, a definition of "general partner" which provides that that expression "shall mean any partner who is not a limited partner as defined by this Act".

• Section 4, which is headed "Definition and constitution of limited partnership". Subsection (1) of s. 4 provides that, from and after the commencement of the Act, limited partnerships may be formed in the manner and subject to the conditions by the Act provided. Subsection (2) provides as follows:

"A limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and, in the case of any other partnership, of more than twenty persons, and must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed."

19. Counsel for the taxpayer drew attention to the fact that in that provision both "general partners" and "limited partners" are defined by reference to liability for the debts and obligations of the firm.

• Section 5, which stipulates that registration of a limited partnership under the Act is required, is the section which is the linch-pin of the appellant's case. It provides:

"Every limited partnership must be registered as such in accordance with the provisions of this Act, or in default thereof it shall be deemed to be a general partnership, and every limited partner shall be deemed to be a general partner."

• Section 6, which is headed "Modification of general law in case of limited partnerships", which provides in subs. (1) as follows:

> "A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:
>
> provided that …
>
> If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner."

20. Counsel for the taxpayer made the point that the consequence of a limited partner taking part in the management of the partnership business is not to constitute him a general partner, but to impose liability for the debts and obligations of the firm on him for a limited time.

• Section 8, which stipulates the manner in which registration is to be effected, and the succeeding two sections are only of minor significance in the context of the issue with which the Court is concerned. The particulars which have to be given to procure registration include the principal place of business (para. (c)), which it is envisaged is within the jurisdiction, and a statement that the partnership is limited and the description of every limited partner as such (para. (f)).

• Section 9, which requires registration of changes in partnerships, for example, a change in the liability of any partner by reason of his becoming a limited instead of a general partner and vice versa (para. (g)).

• Section 10(1), which requires notice by advertisement in Iris Oifigiúil of an arrangement or transaction under which any person will cease to be a general partner and become a limited partner in a firm or under which the share of a limited partner is assigned to any person.

Investment Limited Partnerships Act 1994

21. A new model of limited partnership was introduced in this jurisdiction in the Investment Limited Partnerships Act 1994 (the Act of 1994), which was designed primarily to create an investment vehicle which would be attractive to foreign investors, particularly, investors from the United States of America, as is explained in an article by Declan Murphy B.L., "Investment Limited Partnerships" (1994) 1(11) C.L.P. 287.

22. Section 4(2) of the Act of 1994 expressly disapplies the provisions of the Act of 1907 to investment limited partnerships.

23. The expression "investment limited partnership" is defined in the interpretation section, s. 3, as meaning a partnership which holds a certificate of authorisation issued by the Central Bank in accordance with the Act of 1994. Section 3 also contains definitions of "general partner" and "limited partner" which are statute-specific in that they are definitions expressed to be for the purpose of the Act of 1994 and they relate to a person who has been admitted to an investment limited partnership as a general partner or a limited partner "in accordance with the partnership agreement". However, the definitions manifest the same essential defining characteristics as are manifested in s. 4(2) of the Act of 1907, in that a general partner is a person who shall be personally liable for the debts and obligations of the investment limited partnership and a limited partner (subject to exceptions provided for later, for example, in s. 6(2) and (3) under which liability is modified if a limited partner takes part in the conduct of the business) is a person who is not liable for the debts or obligations of the investment limited partnership beyond the amount contributed or undertaken to be contributed by him. The expression "partnership agreement" is defined in s. 3 as meaning –

> "… any valid written agreement of the partners governed by the law of the State and subject to the exclusive jurisdiction of the courts of the State, as to the affairs of the investment limited partnership and the conduct of its business as may be amended, supplemented or restated from time to time."

24. One of the main planks in the taxpayer's case is reliance on s. 43 of the Act of 1994 which provides:

> "In any proceedings involving a limited partnership established under, or by its terms governed by, the law of another state, the liability of the partners, its organisation and internal affairs shall be determined according to the law of that state."

25. It is common case that s. 43 is of general application and is not confined to investment limited partnerships.

26. The rationale for the inclusion of s. 43 in the Act of 1994 is explained in para. 2.3 of Mr. Murphy's article as an aspect of the legislative policy designed to encourage recognition abroad of the limitation on liability conferred by Irish investment limited partnerships. It was hoped that the comity shown by Irish law for foreign law in s. 43 in recognising the limitation of liability of foreign limited partnerships would ensure reciprocal treatment.

Outline of appellant's case and the response to it

27. The appellant's starting point was to identify the kernel of the taxpayer's case that he does not fall within paragraph (d) of s. 1013(1) as the contention that, because under the law of the Cook Islands he is regarded as a limited partner in the C. L. Partnership, he cannot be a general partner within the meaning of paragraph (d). That contention is incorrect, it was submitted on behalf of the appellant, because paragraph (d) and the meaning of "general partner" must be construed in accordance with Irish law and given the meaning the term has under Irish law.

28. On the construction of paragraph (d), counsel for the appellant submitted that the term "general partner" in Irish law means every partner in a partnership other than a limited partner of a registered limited partnership under the Act of 1907 and a limited partner of an authorised investment limited partnership under the Act of 1994. The term general partner in Irish law covers not only a general partner as defined in the Act of 1907 and a general partner as defined in the Act of 1994 but it also covers every partner in an "ordinary" or "normal" partnership because of the default provision provided for in s. 5 of the Act of 1907.

29. Counsel for the taxpayer contended that the appellant had mischaracterised the taxpayer's case. Whatever the taxpayer's position was before the Commissioner, the case was not made in this Court that, merely by reason of being designated a limited

partner under Cook Islands law, he was not a general partner within para. (d) or that Cook Islands law was determinative of the issue before the Court. On the contrary, counsel for the taxpayer unequivocally accepted that the Court has to apply Irish law and, in particular, the rules governing the construction of taxing statutes, in determining the question raised on the case stated.

30. On that basis, counsel for the taxpayer set out to demonstrate that the appellant's construction of paragraph (d) is not correct. In doing so, it was submitted that the following three propositions of law are correct. First, Irish law recognises limited liability under a partnership established under the law of a foreign state and that arises by virtue of s. 43 and the common law. Secondly, such limited liability under foreign partnerships is not excluded from s. 1013 (in the sense, as I understand the argument, that s. 1013 sets out to restrict relief given or allowed to limited partners without distinguishing domestic and foreign partnerships). Thirdly, foreign partnerships being included (in that sense), the expression "general partner" cannot be limited by reference to a concept which is referable only to domestic partnerships. In determining whether a partner is a general partner, the acid test, it was submitted, is whether he is personally liable without limitation for the debts and liabilities of the firm.

31. As to the crucial step of establishing that the taxpayer is a partner whose liability is limited (so that he cannot be a general partner within the meaning of para. (d)), counsel for the taxpayer argued that this could be achieved by two routes, either in reliance on s. 43 of the Act of 1994 or in reliance on the common law and, in particular, the private international law principle of comity of nations.

32. In response to that last proposition, counsel for the appellant contended that, on its proper construction, s. 43 has no application to the issue which arises on the case stated. Further, it was submitted that the principle of comity of nations has no application because it does not apply to organisations which do not have a separate legal personality. A partnership does not have a separate legal personality and, accordingly, the principles invoked on behalf of the taxpayer have no application.

33. As to the correct approach in determining the taxpayer's status under Irish law, it was submitted on behalf of the appellant that one should isolate the incidents of the foreign entity under foreign law first and one should then assess those characteristics under domestic law, the approach which was applied by the Court of Appeal of England and Wales in *Memec plc v. Commissioners of Inland Revenue* (1998) T.C. 71. Adopting that approach, the appellant contended, the taxpayer comes within the ambit of para. (d). The taxpayer's answer was that on the proper application of the *Memec* decision the result is the opposite; the taxpayer would not be caught by s. 1013.

Decision of the Commissioner

34. The Commissioner set out his determination in paragraph 11 of the case stated.

35. In paragraph 11.1 he dealt with the appellant's submission that s. 43 of the Act of 1994 had no application to the appeal and he stated as follows:

> "I accept the submission of the appellant that, as a limited partnership is not a party to these proceedings, s. 43 of the 1994 Act is not of relevance to this appeal and is not, as argued by the taxpayer, determinative."

36. In paragraph 11.2 the Commissioner dealt with a submission which the taxpayer had made that, on the basis of the decision of the Supreme Court in *Kutchera v. Buckingham International Holdings Limited* [1988] I.R. 61, as the parties to the C. L. Partnership had in clause 22.01 of the partnership agreement provided that the agreement should be governed by and construed in accordance with the laws of the Cook Islands, effect should be given to that agreement on the appeal. The Commissioner agreed with the submission made on behalf of the appellant that the *Kutchera* decision was concerned with the position as between the parties to a contract and did not govern a situation such as he was concerned with – the situation between the taxpayer and an inspector of taxes – and held that the *Kutchera* case was not of assistance. As I understand the position, the taxpayer has abandoned that argument.

37. In paragraph 11.3 the Commissioner outlined the private international law argument made to him and his decision on it as follows:

> "The taxpayer argued, on the basis of Rule 156 in The Conflict of Laws by Dicey and Morris, supported by paragraph 1.3 of Blackett-Ord on Partnership, for the proposition that the status of the taxpayer as a limited partner, is governed by Cook Islands law and not Irish law.
>
> The Appellant argued that the above authorities deal with case where, under foreign law, the foreign entity has a separate legal personality and that, as Cook Island law does not confer a separate legal personality on the limited partnership, the authorities do not have application in the instant case.
>
> I agree with the argument of the Appellant in this matter."

38. Finally, in paragraph 11.4 the Commissioner dealt with the arguments derived from the *Memec* decision and stated:

> "In my decision of 29th October, 2004, I stated that I was in agreement with the interpretation of the *Memec* decision advanced by counsel for the taxpayer and that consequently, although the taxpayer was a limited partner under the law of Cook Islands, he was not a 'limited partner' within the meaning of section 1013 of the 1997 Act and in particular, section 1013(1)(d). Having regard to my decision on the *Memec* case, it was not necessary for me to consider and determine submissions advanced by counsel for the inspector of taxes on the interpretation of the term 'general partner' under Irish law."

The structure of this judgment

39. On the basis of the submissions advanced on the hearing of the case stated, I propose dealing with the questions which arise in the following order:

> (a) principles governing the interpretation of taxation statutes;
>
> (b) the construction of paragraph (d);
>
> (c) whether s. 43 of the Act of 1994 has any application to the issue with which the Court is concerned and, if so, what is its effect;

(d) the application of the *Memec* principle; and

(e) the comity of nations argument.

Principles governing the interpretation of taxation statutes

40. In their written submissions, the parties have referred the court to all of the important Irish authorities on the principles applicable to the proper construction of taxation statutes. Each party has referred to the judgment of Kennedy C.J. in *Revenue Commissioners v. Doorley* [1933] I.R. 750. In an oft-quoted passage, Kennedy C.J. stated (at p. 765):

> "The duty of the Court, as it appears to me, is to reject an a *priori* line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance with the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred.
>
> I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

41. Counsel for the taxpayer suggested that s. 1013 operates like a charging provision, in that it takes away relief otherwise generally available, while counsel for the appellant submitted that it is part of the relieving provision in that it imposes a boundary on relief that can be claimed. While I think the latter characterisation of the provision is correct, what is clear is that the provision must be strictly construed, whichever analysis is correct. Neither party raised any burden of proof issue.

42. It is of interest that in proceedings brought by the taxpayer against the appellant to recover the tax paid on foot of the assessments referred to at the outset pending the final determination of this case stated (*Harris v. Quigley* [2006] 1 I.R. 165) Geoghegan J., with whom the other two Judges of the Supreme Court concurred, stated (at p. 183):-

> "While, as far as possible, a taxing statute should be interpreted in the same way as any other statute and should not be interpreted, if at all possible, as to create an absurdity, nevertheless there is a countervailing principle that where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer."

43. Counsel for the appellant relied on a passage from Bennion on *Statutory Interpretation*, (4th ed., 2002) dealing with technical legal terms, the text of which (at p. 1027) is as follows:

> "If a word or phrase has a technical meaning in a certain branch of law, and is used in a context dealing with that branch, it is to be given that meaning unless the contrary intention appears."

44. It was submitted that the approach advocated by Bennion is consistent with the judgment of Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R. 117, in which, at p. 121, a distinction was drawn between a statutory provision which is directed to the public at large and one which is directed "to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation or as a term of art …". Henchy J. continued:-

> "As Lord Esher M.R. put it in *Unwin v. Hanson* [[1891] 2 QB 115] at p. 119 of the report:-
>
> > 'If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.'"

45. Counsel for the taxpayer submitted that the statement in Bennion is only applicable to a free-standing legal term, which Bennion (at p. 1028) describes as one that stands on its own feet without the need of any definition and has a legal meaning which exists for all purposes, not just for those of a particular enactment.

46. Arising out of the foregoing, I state the following general propositions. Firstly, I agree with the submission made on behalf of the taxpayer that the definition of "limited partner" in s. 1013(1) does not incorporate the definitions of general partner and limited partner contained in the Act of 1907 or the corresponding definitions contained in the Act of 1994 by reference, because those definitions are statute-specific. Secondly, I do not accept that the expression "general partner" in para. (d) is directed to a particular class as distinct from the public at large in the sense envisaged by Henchy J. in the Kiernan case.

Construction of paragraph (d)

47. As I have already outlined, the nub of the appellant's argument on the construction of paragraph (d) is that, as a matter of Irish law, all partners other than limited partners as defined in the Act of 1907 and in the Act of 1994 are general partners, actual or deemed. Counsel for the taxpayer submitted that that proposition is fundamentally wrong in that –

(a) it interpolates something into the definition in s. 1013(1) which is not there, but could easily have been included,

(b) it is inconsistent with the express reference to the Act of 1907 in paragraph (a),

(c) it ignores the fact that paragraph (c) envisages a foreign element, and

(d) it ignores the overriding principle of private international law, the comity principle, which applies unless expressly excluded.

48. Both sides resorted to *Lindley and Banks on Partnership*, (18th ed., 2002) to define the concepts of limited partner and general partner.

49. Counsel for the taxpayer cited the following passage (at p. 841) in which the "essence of a limited partnership" is described as:-

> "…the combination in a firm of (1) one or more partners whose liability for
>
> the debts and obligations of the firm is unlimited and who alone are entitled to manage the firm's affairs, and (2) one or more partners whose liability for such debts and obligations is limited in amount and who are *excluded* from all management functions."

50. Apropos of the second characteristic of a limited partner, Lindley and Banks note that "in some countries, a limited partner may take part in the firm's management".

51. Counsel for the appellant focused on the following passage (at p. 842) as setting out the essential features of a general partnership:

> "[The Act of 1907] for the first time under English law enabled a partnership to be formed which did not display three of the normal characteristics of a normal or general partnership:
>
> (1) the unlimited liability of every partner;
>
> (2) the implied authority of each partner to bind the firm and its co-partners in all matters within the ordinary scope of the partnership business; and
>
> (3) the right of each partner, subject to any contrary agreement, to take part in the management of that business."

52. When one examines the taxpayer's position as a partner under the C.L. Partnership against the indicia of a general partner as set out in that passage, it was acknowledged by counsel for the appellant that indicia (1) and (2) are not present, because –

(a) his liability as a partner in the C.L. Partnership is limited, and

(b) by virtue of s. 61 of the Cook Islands statute entitled International Partnership Act, 1984, as amended, he does not have implied authority to bind the firm, in that, if in carrying on the business of the C. L. Partnership, or in carrying on any contract connected therewith, he "obligates" the partnership without express authority of the general partners, he is personally liable for the obligation.

53. However, one of the indicia of a general partner is present, counsel for the appellant submitted, because the taxpayer is entitled to take part in the management of the business of the C.L. Partnership. It was pointed out that, if he was not so entitled, the taxpayer would be caught by either para. (b) or (c) of the definition of "limited partner" in s. 1013(1). The inference which I understand the Court was invited to draw from that observation was that the C.L. Partnership was deliberately structured so that the taxpayer would not be caught by those elements of the definition. Be that as it may, in my view, it is irrelevant. Returning to the main argument, it was asserted on behalf of the appellant that to qualify as a limited partnership, the partnership must not display any of the indicia of a general partnership listed by Lindley and Banks. Therefore, the argument goes, the taxpayer's entitlement to take part in the management of the partnership business precludes him from being a limited partner, so that he is a general partner. Further, the absence of registration under the Act of 1907 also renders the C. L. Partnership a general partnership and the taxpayer a general partner.

54. Counsel for the taxpayer submitted, as I have stated in outlining the submissions, that, in determining whether a person involved in a partnership is a general partner, the acid test is whether he has personal liability for the debts of the firm. As the taxpayer is not personally liable for the debts of the C.L. Partnership, which the appellant acknowledged, he is not a general partner.

55. The matters which I have recorded in the two preceding paragraphs as having been acknowledged by the appellant (that the liability of the taxpayer as a partner in the C.L. Partnership is limited and that he does not have implied authority to bind the partnership), *prima facie*, in my view, open the door to construing the expression "general partner" in paragraph (d) without the necessity to identify the legal basis for such conclusions, as I now propose to demonstrate.

56. In construing the definition of "limited partner" in s. 1013, it seems to me that it is necessary to identify the type of agreements or arrangements recognised by Irish law under which a partner with limited liability can exist.

57. By virtue of the Act of 1994 and, in particular, s. 43 thereof, the existence of foreign limited partnerships is statutorily expressly recognised. In paragraph (c) of the definition of limited partner in s. 1013 (1) the existence of joint trading ventures subject to the jurisdiction of foreign states is statutorily expressly recognised. Therefore, the type of partnership or joint trading arrangement which the Revenue Commissioners may have to take cognisance of in assessing an individual's liability to tax are various and include:

(i) what Lindley and Banks call "normal or general" partnerships, domestic or foreign;

(ii) limited partnerships regulated by the Act of 1907;

(iii) investment limited partnerships regulated by the Act of 1994, although not subject to the provisions of s. 1013(1) because of their specialised nature as vehicles for collective investments;

(iv) foreign limited partnerships; and

(v) other joint trading ventures regulated by foreign law.

58. The question of construction which arises here is whether the expression "general partner" in paragraph (d) expressly and in clear and unambiguous terms encompasses a person who is a partner under a partnership established in a foreign jurisdiction whose liability is limited and who has no implied authority to bind the firm but who is entitled to participate in the management of the partnership business, as the appellant contends. In my view, it does not.

59. I do not accept that the expression "general partner" has a legal meaning which exists for all purposes. In particular, the default provision in s. 5 of the Act of 1907 does not have the universal effect contended for by the appellant nor does the deeming provision operate for all purposes. In my view, s. 5 was never intended to apply to a partnership established under, or governed by, the law of a foreign jurisdiction which does not trade in this jurisdiction, because the Act of 1907 envisages a limited partnership registered thereunder having its principal place of business in this jurisdiction and, in general, compliance with ss. 8, 9 and 10 in the case of a foreign partnership would seem to give rise to considerable, perhaps even insurmountable, practical difficulty. Even if I am wrong in that conclusion, at any rate since the enactment of s. 43 of the Act of 1994, s. 5 cannot operate so as to negative the effect of that provision. Most significantly, in considering the text of the definition of "limited partner" in sub-s. (1) of s. 1013 to formulate the appropriate test to be applied to identify a "general partner" within the meaning of paragraph (d), I cannot conclude that the appellant's contention – that if the partner bears any of the three characteristics of a general partner listed by Lindley and Banks, he is a general partner – is correct.

60. The principal feature which distinguishes a general partner from a limited partner under Irish law is that, in the case of the latter, his liability for the debts of the partnership is limited in amount, whereas, in the case of the former, it is unlimited. As regards the additional distinguishing feature recognised in s. 6 of the Act of 1907 and in s. 6 of the Act of 1994 – the prohibition on the limited partner taking part in the management of the partnership, or in the conduct of the business of an investment limited partnership, and having power to bind the firm – non-compliance does not, as counsel for the taxpayer submitted, turn the limited partner into a general partner, although it affects his liability for the duration of his participation in the management or conduct of the business. In relation to the application of s. 1013 to a partner in a foreign partnership, I see no basis for finding that "general partner" in paragraph (d) encompasses such a partner whose liability is limited merely on account of the fact that, under the partnership agreement and in accordance with the law of the jurisdiction which governs the partnership, he is entitled to participate in the management of the partnership.

61. This conclusion is not at variance with the analysis of the concepts of general partner and limited partner as defined in Lindley and Banks quoted earlier and relied on by the parties. The third essential feature of a general partner identified – the right to take part in the management of the business – is subject to the qualification that it is "subject to any contrary agreement". Similarly, it is recognised that in foreign jurisdictions a limited partner may take part in the firm's management. In neither concept is participation or non-participation in the management of the firm's business an absolute requirement.

62. In enacting paragraph (d) in 2000 the Oireachtas chose an expression, "general partner", which is not a term of art and the Oireachtas chose not to define it. Aside from a situation in which the default effect and the deeming provision of s. 5 of the Act of 1907 operates and, in my view, clearly it cannot operate in a situation to which s. 43 of the Act of 1994 applies, it is inconceivable that anybody, whether within the class of persons to which the appellant contends paragraph (d) is directed (members of limited partnerships or partnerships generally) or not, would attach a meaning to the expression which would ignore the most basic characteristic of a general partner, that his liability is unlimited. The Oireachtas cannot have intended that it should be so interpreted. When it is recognised, by whatever route, that the taxpayer's liability as a partner in the C.L. Partnership is not unlimited, in my view, the conclusion that he is a general partner within the meaning of paragraph (d) is not open.

63. That, it seems to me, answers the question of construction. However, I will proceed to consider the arguments in support of and counter arguments against various routes by which it is asserted that the taxpayer's limited liability qua partner may be recognised.

Section 43

64. As I have stated, the appellant accepted that s. 43 applies to limited partnerships generally and is not confined to investment limited partnerships. However, the appellant argued that s. 43 has no application to this case stated on a number of grounds.

65. First, s. 43 applies to "proceedings". The raising of an assessment to tax, and any appeal consequent thereon, does not constitute, it was submitted, "proceedings" within the meaning of s. 43. The taxpayer's response was that these are proceedings within s. 43 in that what is involved is the invocation of legal jurisdiction to determine issues of law. The authorities cited by counsel for the appellant (*Deighan v. Hearne* [1986] I.R. 603 (HC), [1990] 1 I.R. 499 (SC); and *The State (Calcul International Limited and Solatrex International Limited) v. Appeal Commissioners* [1986] 3 I.T.R. 254) were cases addressing the issue of the administration of justice, not what constituted "proceedings", counsel for the taxpayer submitted.

66. Secondly, the appellant submitted that, even if the assessment to tax and any subsequent appeal constitute "proceedings", this case stated does not constitute proceedings "involving a limited partnership", but rather is limited to assessing liability to tax in the case of the income of an Irish-resident limited partner, who is only one of the partners. It was pointed out that other partners residing elsewhere are subject to tax according to the applicable tax laws of the jurisdiction in which they reside. The taxpayer's response was to emphasise the meaning of the word "involving" and to cite a Canadian case, *Boliden Limited v. Liberty Mutual Insurance Company* 85 O.R. (3d) 492 (2007), in which the words "in any way involving" were interpreted as meaning "in any way tied to or concerned with".

67. Thirdly, the appellant contended that, as regards "the liability of the partners", s. 43, on its proper construction, is intended to give effect to the provisions of foreign law limiting the liability of individual partners for the debts of the partnership and is intended to ensure that limited partners in a partnership established under foreign law are not liable for debts and obligations of the partnership beyond the amount provided for under foreign law. In their written submissions, counsel for the taxpayer clarified the taxpayer's position in relation to the application of s. 43 to the issue before the Court. It was stated that the position of the taxpayer is that, in assessing his tax liability, it is necessary to apply Irish law and, on the basis of the laws at issue – s. 1013 of the Act of 1997, s. 43 of the Act of 1994 and the common law – it is clear that the taxpayer is a limited partner with limited liability and not a general partner within the meaning of paragraph (d) of s. 1013(1). The taxpayer is entitled to invoke the protection afforded by s. 43 in this jurisdiction and, that being so, the appellant is unable to establish that the taxpayer fulfils the most fundamental characteristic of a general partner, that liability is unlimited, and therefore is unable to establish that the taxpayer is a general partner within the meaning of paragraph (d).

68. In my view, the interpretation of s. 43 put forward by the appellant is unduly analytical and does not have sufficient regard to the overall thrust of the provision. What the Oireachtas intended in enacting s. 43 was that, when an Irish court is required to determine any question which involves the ascertainment, in whatever context, of the existence or extent of the liability of the partners, or any of them, under a foreign limited partnership, that question is to be determined in accordance with the law of the jurisdiction under

which the limited partnership is established or, as a matter of contract, is governed. Therefore, in my view, this process does constitute "proceedings involving a limited partnership" in which "the liability of the partners" or more correctly, one of the partners, requires to be determined. However, the taxpayer's reliance on s. 43, while determinative of the liability of the taxpayer qua partner under the C.L. Partnership, is not determinative of his liability to tax under Irish law. Indeed, as I have outlined previously, counsel for the taxpayer did not contend that it is. The label which attaches to the taxpayer of "limited partner" by application of Cook Islands law by virtue of s. 43 does not resolve the issue before the Court. In short, the application of s. 43 on its own does not clarify the meaning of "general partner" in paragraph (d) nor determine whether the taxpayer is captured by it.

69. As I propose to illustrate, the effect of the interpretation and application of s. 43 in the manner which I have suggested the Oireachtas intended, parallels the effect of the application of the *Memec* principles advocated by counsel for the appellant in the resolution of the issue raised on the case stated.

Memec

70. Because of the significance attached to it by the appellant, and the divergent views of the parties as to the application of the principle enunciated in it to the taxpayer, I consider it necessary, but also instructive, to consider the *Memec* case is some detail.

71. The facts in *Memec* were that Memec plc (plc), an English company resident in the United Kingdom, owned, directly or through subsidiaries resident in the United Kingdom, the share capital of Memec GmbH (GmbH), a German company which was resident in Germany, as also were GmbH's two trading subsidiaries. Until 1985 the trading subsidiaries paid dividends to GmbH, which, in turn paid dividends to its shareholders (plc and its subsidiaries). In 1985 GmbH and plc entered into a silent partnership (*stille gesellschaft*) under which plc, in return for an investment of just over DM2m, was entitled to 87.84% of the profits, that is to say, dividends paid by GmbH's trading subsidiaries less expenses. In respect of accounting periods comprising the calendar years 1986, 1987 and 1988, plc claimed double taxation relief – that it was entitled to credit against U.K. corporation tax for the German trade tax paid by the German trading subsidiaries. The claim was advanced on two bases:

> (1) that the trade tax was available as a credit under the relevant provision of the U.K. tax code and Article XVIII of the Double Taxation Convention between the United Kingdom and Germany, because the silent partnership was transparent in the sense that the dividends paid by the trading subsidiaries were paid as to 87.84% to plc (the transparency issue); and,
>
> (2) that "dividend" in Article XVIII should be interpreted in accordance with the wide definition (which included a silent partner's income) in another article of the Convention and that such meaning should also apply for the purposes of construing "dividend" in the U.K. taxing statute, so that plc's share of the profits was a dividend and unilateral relief would be available (the dividend issue).

72. The Inland Revenue's refusal of plc's claim for relief was upheld by both the Chancery Division of the High Court and the Court of Appeal.

73. In delivering his judgment in the High Court, Robert Walker J. dealt with the principles to be applied by a court in applying the provisions of a taxing statute to an arrangement or entity which is governed by foreign law, stating (at p. 92):

> "When an English tribunal has to apply the provisions of an United Kingdom taxing statute to some transaction, arrangement or entity which is governed by a foreign system of law, the tribunal must take account of the rules of that foreign system (properly proved if not admitted) in order to determine the nature and characteristics of the transaction, arrangement or entity. But having informed itself in this way, the tribunal must then apply the taxing statute as part of English law. The point is made in several of the speeches in the House of Lords in *Rae v. Lazard Investment Company* 41 TC 1. Lord Pearce (at page 31) put it concisely,
>
> > 'The factual situation (which includes the foreign law) has to be examined in order to apply the English law.'
>
> He then referred to what Rowlatt J. said in *Garland v. Archer-Shee* 15 TC 693, 711,
>
> > 'The question of the American law is, what are exactly the rights and duties of the parties under an American trust, and when you find what those rights and duties are, you see what category they come in, and the place they fill in the scheme of English Income Tax Acts which the Courts here must construe.'"

74. The significance of that passage, in my view, is that it points to the existence of a binding common law rule, not some principle of private international law which states and courts implement out of mutual respect. It is a rule which is necessary in order to give effect to domestic taxation legislation where the taxpayer's liability to tax is affected by a transaction (for example, a trust instrument) or an agreement or arrangement (for example, a partnership agreement), which is governed by foreign law. That common law rule, in my view, must be part of Irish law. In reality, in the context of determining the taxpayer's characteristics, rights and obligations *qua* partner under the C.L. Partnership, it does precisely what I have suggested the Oireachtas intended to do in enacting s. 43 of the Act of 1994.

75. In applying the rule, Robert Walker J. decided that the arrangement embodied in the silent partnership was not transparent for U. K. tax purposes and that the source of plc's taxable income was not dividends of the trading subsidiaries but rather plc's contractual rights under the silent partnership. He explained how he arrived at that conclusion in the following passage (at p. 98):

> "Whether or not the arrangement is called a partnership, its essential features (established by the evidence of German law) are that there was a commercial arrangement under which plc, in consideration of a lump-sum investment with a holding company, had the contractual right to an annual payment equal to a large share of the holding company's dividend income from its subsidiaries, less expenses. In my judgment, the decisive point, on the first main issue, must be the absence of any proprietary right, legal or equitable, enjoyed by plc in the shares of the trading subsidiaries, or in the dividends accruing on those shares. The accruing dividends belonged to GmbH as the subsidiaries' holding company, and the contractual arrangements under which a sum equal to 87.84 per cent share of the dividends, less expenses, was due to plc must be regarded as a separate source of income. Metaphorical language is not a substitute for analysis, but it may help to explain the conclusion: adopting Lord Asquith's phrases, I conclude that plc's rights under the partnership agreement did have independent vitality and were not mere incidental machinery. Without those rights under the partnership agreement, plc would have continued to receive dividends from GmbH, and nothing from the trading subsidiaries."

76. In the Court of Appeal, Peter Gibson L.J. reached the same conclusion but with a different emphasis in applying the rule. He dealt with the approach to be adopted in relation to the transparency issue in the following passage (at p. 111):

> "What, in my judgment, we have to do in the present case is to consider the characteristics of an English or Scottish partnership which make it transparent and then to see to what extent those characteristics are shared or not by the silent partnership in order to determine whether this silent partnership should be treated for corporation tax purposes in the same way. The judge aptly cited the remark of Rowlett J. in Garland v. Archer-Shee … in relation to an American trust …"

77. Peter Gibson L.J. then went on to examine the relevant characteristics of English partnerships stating:

> "The relevant characteristics of an ordinary English partnership are these:
>
> (1) the partnership is not a legal entity;
>
> (2) the partners carry on business of the partnership in common with a view to profit (s.1(1) Partnership Act, 1890);
>
> (3) each does so both as principal and (s.5 ibid) as agent for each other, binding the firm and his partners in all matters within his authority;
>
> (4) each partner is liable jointly with the other partners for all debts and obligations of the firm (s. 9 ibid); and
>
> (5) the partners own the business, having a beneficial interest in the form of an undivided share, in the partnership assets …, including any profits of the business.
>
> A limited partnership differs relevantly only in the following respects:
>
> (a) (2) and (3) above are modified in that the limited partner takes no part in the management of the partnership business (s. 6(1) Limited Partnership Act, 1907) the ordinary partners acting on his behalf as well as on their own behalf;
>
> (b) the limited partner on entering the partnership is obliged to make a contribution of a sum or sums as capital or property of a stated amount and (4) above is modified in that the limited partner is only liable up to, but not beyond, the amount so contributed."

78. Having also examined the characteristics of a Scottish partnership, Peter Gibson L.J. found that it differed in certain respects from an English partnership. He observed (at p. 113) that it was not difficult to see why an English partnership (including a limited partnership) is treated as transparent, the partners carrying on business (whether by themselves or by the other partners as their agents) in common and owning the business and having a beneficial interest in the partnership assets and profits. He went on to consider how the silent partnership differed from both English and Scottish partnerships. In relation to what Robert Walker J. had considered the decisive point – the absence of any proprietary right, legal or equitable, enjoyed by plc in the shares of the subsidiaries or in the dividends accruing on those shares – he considered that to be a strong point of distinction from an English partnership. He then identified what he considered to be "a clearer distinction" in the following passage (at p. 113):

> "… unlike in English or Scottish partnership in the silent partnership no business is carried on by plc and GmbH in common with a view to profit. The business is that of GmbH as sole owner. Plc is not jointly liable with GmbH to creditors of GmbH for the debts and obligations of GmbH. The liabilities of the business are those of GmbH alone, although plc can be called on by GmbH to bear its share of losses computed at the end of the year to the extent of its capital contribution. To a third party, plc's role in the silent partnership is irrelevant and may not be known."

79. Peter Gibson J. went on to quote with approval the last two sentences of the passage from the judgment of Robert Walker J. (at p. 98), which I have quoted earlier, and he concluded on the transparency issue as follows (at p. 114):

> "The agreement was, in my judgment, the source of plc's share of the profits of the GmbH business, not the trading operations of the subsidiaries or the shares owned by GmbH in the subsidiaries producing the dividend paid to GmbH. Accordingly I would reject the first basis advanced on behalf of plc."

80. Sir Christopher Staughton, who concurred on the transparency issue, identified the difference between a *stille gesellschaft* and an English partnership as follows (at p. 118):

> "A silent partner in such an organisation (in this case plc) does not carry on the business, and does not incur the rights and liabilities of the business. It is interested only in its share of the net profits. Section 230(2) of the German Commercial Code provides: 'The owner alone has the rights and obligations with respect to transactions concluded within the operation of the business'. The owner, in that section, is the one who runs the enterprise, in contrast to the silent partner. I, therefore, conclude that the German subsidiaries in the present case cannot be treated, for tax purposes, as having paid dividends to plc."

81. The "dividend" argument in *Memec* was two-pronged. First, there was an issue as to the meaning of "dividend" in the Double Taxation Convention, which involved consideration of the proper approach to construction of a double taxation treaty, which does not arise in this case. Secondly, and with more relevance to this case, there was an issue in relation to the meaning of dividend in the U.K. taxing statute, which contained no special definition of dividend. On the latter point, it was held that "dividend" had its ordinary meaning in U.K. law, that is to say, a payment of part of the profits for a period in respect of a share in the company and that express wording would have been needed for an extended meaning to have applied. Robert Walker J., at first instance, accepted a submission that the meaning of dividend was the same as a businessman's understanding (p. 103).

82. The appellant's analysis of the taxpayer's submission, which I have already rejected, was that it advocated that the Irish court must look at the conclusion as to the taxpayer's status under the relevant foreign law, that he is a limited partner, and apply the Irish tax code to that conclusion. The appellant submitted that any such approach would be incorrect; the correct approach, as illustrated by *Memec*, is to isolate all of the indicia of the foreign entity and analyse those under Irish law. As I have already outlined, at the

hearing of the case stated, the taxpayer was in agreement that the *Memec* decision points to the correct approach. Where the parties disagreed was in the application of the *Memec* principles.

83. When one adopts the *Memec* approach, it was submitted on behalf of the appellant that there is a significant mismatch between the indicia of the taxpayer's position under the C.L. Partnership and the characteristics of what is regarded as a limited partner in Irish law. Two aspects of the position of the taxpayer, which I have already analysed in the course of construing paragraph (d), were identified as supporting that conclusion. The first is his entitlement to participate in the management of the business and the fact that he did so. Section 6 of the Act of 1907, it was submitted, expressly identifies non-participation in the management of the business as one of the indicia of a limited partnership under Irish law. Accordingly, the taxpayer is not a limited partner under Irish law, but is a general partner. The second is that the taxpayer is not a member of a partnership that is registered under the Act of 1907 (or authorised under the Act of 1994) and, accordingly, he lacks the essential characteristic required to be a "limited partner" and, therefore, for the purposes of s. 1013 he is a general partner.

84. It is undoubtedly true that the application of the *Memec* principles to ascertain the characteristics, rights and obligations of the taxpayer qua limited partner under the C.L. Partnership in accordance with the law of Cook Islands does produce a mismatch with the rights and duties of a limited partner under Irish law. However, the fundamental question is whether the taxpayer with the benefit of those rights and subject to the burdens of those obligations is a "general partner" within the meaning of paragraph (d). For the reasons set out in considering the construction of paragraph (d), in my view, he is not.

85. The appellant submitted that an examination of the *schema* of the definition of "limited partner" in s. 1013(1) supports the appellant's submissions on the proper application of the *Memec* principles. That submission, in my view, does not stand up to analysis for a number of reasons.

86. First, paragraph (d) was not part of the original scheme of s. 1013 but was added on to the definition of "limited partner". By the year 2000, when paragraph (d) in the form at issue in these proceedings was enacted, there had been a significant legislative advance in relation to limited partnerships, in that s. 43 of the Act of 1994 had come into force. In 2000, the Oireachtas can hardly have intended that foreign limited partnerships would be registered under the Act of 1907 or that the default mechanism in s. 5 of that Act would operate to constitute them general partnerships in the event of non-registration.

87. Secondly, there is a certain symmetry between paragraphs (b) and (c) of the definition of "limited partner" in s. 1013(1) in that –

> (1) the liability of a person who comes within paragraph (c) is limited and the person who comes within paragraph (b) has the benefit of an indemnity against liability beyond a certain limit, and,
>
> (2) a person who comes within either paragraph is not entitled to take part in the management and, consequently, is precluded from binding the firm.

88. Therefore, in substance, a person within either category (b) or (c) has none of the characteristics of a general partner identified by Lindley and Banks. Paragraph (d) does not share the symmetry which exists between paragraphs (b) and (c). It refers to a general partner without qualification other than that he does not work on a full-time, or almost full-time, basis in the partnership business.

89. Thirdly, when paragraph (d) is juxtaposed with paragraph (b), it is impossible to interpret the expression "general partner" in paragraph (d) as meaning a partner subject to the further qualification of lacking one or more of the normal characteristics of a general partner. In paragraph (b) the draftsman spelt out that qualification and he could easily have done so in paragraph (d), if that was the intention of the Oireachtas.

The comity of nations' argument.

90. The invocation of the principle of comity of nations and, in particular, its invocation as a tool to establish the legal status of the C.L. Partnership results in consideration of legal and factual situations which are not relevant to the issues in this case stated. It also provokes the inevitable response that a partnership, unlike a corporation, does not have a legal personality distinct from its members. Accordingly, the contention of counsel for the appellant that many of the authorities relied on by the taxpayer as evidencing the application of the comity principle in this jurisdiction are of little relevance for present purposes is correct. What the authorities reflect is the willingness of the Irish courts to facilitate mutual co-operation between states and to show due deference to the courts in other jurisdictions in many areas of law.

91. What I understand to be the real thrust of the taxpayer's argument based on the comity of nations principle is that under the common law, that is to say, domestic law, the courts in this jurisdiction, where necessary, recognise and give effect to the rights and obligations of partners in a foreign limited partnership as determined in accordance with the law of the state in which the partnership is established. That proposition, in my view, is correct and it is reflected in the *Memec* decision, although the principle of comity is not referred to in *Memec*. It is also reflected in another authority relied on by the taxpayer, *Dreyfus v. Commissioners of Inland Revenue* (1929) 14 Tax Cas. 560, in which the principle of comity was referred to.

92. In the *Dreyfus* case, the appellants were two individuals who, in the material tax years, were the only persons interested in the profits of " a société en nom collectif", a business organisation under French law, which, in many respects, was similar to a partnership (the Société). The Société was directed and controlled in France but carried out business in various countries including the United Kingdom. It was assessed to income tax in respect of the profits and trade carried on in the United Kingdom and discharged the tax. The issue in the appeals related to assessments for Super tax made on the appellants on the footing that they were in the position of partners in a partnership. Super tax was exigible on individuals, not on corporations. The appellants contended that the trade exercised in the United Kingdom from which the profits assessed arose was the trade of the Société, that the Société was an entity distinct from themselves, that they were not partners in a partnership exercising a trade in the United Kingdom, that no profits arose to themselves individually in the United Kingdom, and that there was therefore no liability to Super tax. It was held by the Court of Appeal, upholding a decision of the High Court, that the Société was a legal person distinct from the individuals composing it and that the profits in question were not profits of a partnership within the meaning of the relevant provision of the U.K. tax code. The Commissioners of Inland Revenue had made findings, on the evidence before them, as to the position and characteristics of a "société en nom collectif" in French law, which are set out at page 565 in the report.

93. In delivering judgment in the Court of Appeal Lord Hanworth, M.R. stated (at p. 575):

> "Now it is to be remembered that no company which is registered or incorporated in a foreign country can bring over its laws and be for all purposes a company over here. By the comity of nations we do recognise the incorporation of other legal entities in other countries, but a company registered in a foreign country is of course a foreign company. It is only

> by that comity we accept the conditions which are imposed by foreign law, and so to take a simple illustration of that, it is well found in the case to which [counsel for the Crown] called our attention this morning, that you may have a body to which recognition is given in the English Courts by reason of the status it has reached in the foreign Courts. You may, on the other hand, have some indicia from a foreign country which are not recognised over here, because they are merely matters of the *lex fori*, and in our law matters of procedure are governed by our own *lex fori*."

94. Later on, in the passage emphasised by counsel for the taxpayer, Lord Hanworth stated: (at p. 576)

> "… if there has been a body established by foreign law, the courts will recognise the juristic status of that body and thus the Court says that the principle of the liability of members of a foreign corporation to third parties is to be referred to the law under which that corporation was established, and if the law does show that it was established as a separate entity, then effect should be given to it, and it is otherwise with matters which are merely matters of the *lex fori*."

95. On the facts, Lord Hanworth stated that it must be held that the arrangement involving the appellants was not a legal partnership and that there was no means of imposing liability to Super tax on them.

96. In the *Dreyfus* case, the Court of Appeal recognised the distinct legal personality of the Société by reference to French law. But it did more. It recognised that the profits were the profits of the Société, not the profits of the appellants. The exercise carried out was much the same as the exercise later carried out in *Memec*.

97. Counsel for the appellant referred the Court to another decision of the Courts in the United Kingdom subsequent to *Memec* in which similar principles were applied, *Major (Inspector of Taxes) v. Brodie* [1998] S.T.C. 491. In his judgment Park J. stated as follows (at p. 511):

> "In any case, if the tax liability of an English taxpayer depends on the nature of some entity or structure which is not constituted under English law, the matter is determined by reference to what the Commissioner finds to be the actual legal characteristics of that entity or structure under its own governing law (see, for example, *Dreyfus v. I.R.C.* …and, much more recently *Memec* …)".

98. In reality, in my view, the principles enunciated in *Memec* are common law rules which are applied when, as happened in *Dreyfus, Memec* and *Brodie*, the application of a U.K. taxation provision necessitates the ascertainment of the rights and obligations of the taxpayer under a transaction, arrangement or structure governed by foreign law. *Dreyfus* suggests that the foundation of the principles is to be found in the principle of comity of nations. Even if that is so, it seems to me that the principles have evolved into rules of domestic law. As *Memec* illustrates, the principles are not confined to giving recognition to an artificial entity which has a separate legal existence from the individuals and entities of which it is made up.

99. The appellant's acceptance of the *Memec* principles is acceptance that those principles apply as rules of law in this jurisdiction, which I consider to be the case.

Summary of conclusions

100. The determination of whether the taxpayer is a limited partner by reference to paragraph (d) of the definition in s. 1013(1) so as to be subject to the restrictions on the availability of relief imposed by s. 1013 is a two stage process. The first stage is to determine the characteristics, rights and obligations of the taxpayer *qua* partner under the C.L. Partnership by reference to the law of Cook Islands. That approach is mandated by common law and by statute (s. 43 of the Act of 1994). The second stage is to determine whether, applying Irish law, the characteristics, rights and obligations of the taxpayer *qua* partner match the characteristics, rights and obligations of a general partner within the meaning of paragraph (d) in the context of s. 1013 as a whole to the extent that one can conclude that the expression "general partner" in paragraph (d) clearly and unambiguously captures the taxpayer.

101. The outcome of the two stage process in this case is that, as a matter of fact (including Cook Islands law), the characteristics, rights and obligations of the taxpayer *qua* partner under the C.L. Partnership, primarily that his liability is not unlimited, mean that, as a matter of Irish law, he is not a general partner within the meaning of paragraph (d).

102. It is possible to observe, without violating the principle enunciated by the Supreme Court in *Cronin v. Cork and Country Property Company Limited* referred to earlier, that the inclusion by the Oireachtas of the epithet "general" before the word "partner" in paragraph (d) prevented paragraph (d) having the application to the taxpayer contended for by the appellant.

Answer to question posed in the case stated

103. The answer to the question posed in the case stated is that the taxpayer does not fall within paragraph (d) of the definition of limited partner in s. 1013(1) of the Act of 1997, as amended.