36TACD2019

BETWEEN/

M.

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This appeal relates to the refusal by the Respondent to issue a refund in respect of PAYE withheld in the amount of €270,548 in respect of a distribution to the Appellant of €593,661 from an Annual Retirement Fund ('ARF'), in 2012.

2. The Appellant claimed that he was entitled to the refund under the Ireland-Malta Double Taxation Convention on the basis that he was treaty resident in Malta in 2012. The Appellant claimed that section 784A of the Taxes Consolidation Act 1997, as amended ('TCA 1997') was not applicable.

3. The question which arises is whether the Appellant was treaty resident in Ireland or in Malta in 2012 and whether and to what extent the provisions of the Ireland-Malta DTA apply and/or whether the distribution from the ARF is chargeable to income tax in Ireland in accordance with s.784A TCA 1997.

Background

4. The Appellant was the sole member of a self-administered occupational pension scheme which was established by his employer, G. Ltd. in October 2003. The Appellant drew down benefits from the scheme in January 2009 namely, a lump sum of €1.3m. The Appellant transferred the balance of €10.6m to an ARF.

5. The Appellant was tax resident in Ireland up to and including 2011. He ceased to be tax resident in Ireland in 2012 but continued to be ordinarily tax resident in Ireland.

6. In 2011, the Appellant acquired an interest in a Maltese property which he occupied periodically with his wife. He submitted that he had a permanent home available to him in Malta in 2012 and that he did not have a permanent home available to him in Ireland in 2012. The Appellant submitted a signed Form IC2 (Tax Repayment/Exemption Form for Pensions/Annuities) which included certification by the Maltese tax authorities as to his tax residence in Malta in 2012.

7. In December 2011, the Appellant disposed of his family home ('the property') to a Trust. The trustees were the Appellant and his son, Mr. A.M. The beneficiaries of the Trust were the Appellant's children (with the exception of A.M., a trustee). The trust provided that 'the beneficiaries' included: *'any other person or persons nominated by the trustees to be a beneficiary of this Settlement, provided however a person who is acting in the role of a Trustee cannot be nominated or be a Beneficiary while a current Trustee but can be so nominated or be a beneficiary on resigning as a Trustee.'*

8. In December 2012, the Appellant received a distribution of €593,661 from his ARF. This amount equated to 6% of the value of the fund. PAYE was deducted at source by the Respondent in the sum of €270,548. An assessment was raised in respect of this amount for the tax year of assessment 2012, and the Appellant duly appealed.

Legislation

[References to the Double Taxation Agreement ('DTA'), the Double Taxation Convention ('the Convention') and 'the treaty' in this determination are interchangeable references to the Convention between Ireland and Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.]

Ireland-Malta Double Taxation Convention - Article 2

TAXES COVERED

1. This Convention shall apply to taxes on income imposed by a Contracting State, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property.

3. The existing taxes to which this Convention shall apply are:

(a) in the case of Ireland: (i) the income tax; (ii) the corporation tax; (iii) the capital gains tax; (hereinafter referred to as "Irish tax");

(b) in the case of Malta: the income tax; (hereinafter referred to as "Malta tax").

4. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws.

Ireland-Malta Double Taxation Convention - Article 4

RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

(a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he

shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

(b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, h shall be deemed to be a resident only of the State in which he has an habitual abode;

(c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

(d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Ireland-Malta Double Taxation Convention - Article 10

DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but:

(a) where the dividends are paid by a company which is a resident of Ireland to a resident of Malta who is the beneficial owner thereof, the Irish tax so charged shall not exceed:

(i) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 10 per cent of the voting power of the company paying the dividends;

(ii) 15 per cent of the gross amount of the dividends in all other cases;

(b) where the dividends are paid by a company which is a resident of Malta to a resident of Ireland who is the beneficial owner thereof, Malta tax on the gross amount of the dividend shall not exceed that chargeable on the profits out of which the dividends are paid.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares by the taxation laws of the State of which the company making the distribution is a resident and also includes any other item which, under the laws of the Contracting State of which the company paying the dividend is a resident, is treated as a dividend or distribution of a company.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Ireland-Malta Double Taxation Convention - Article 11

INTEREST

1. *Interest arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State if such resident is the beneficial owner of the interest.*

2. The term "interest", as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. The term "interest" shall not include any item which is treated as a distribution under the provisions of Article 10. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Ireland-Malta Double Taxation Convention - Article 18

PENSIONS, ANNUITIES AND SIMILAR PAYMENTS

1. *Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid in consideration of past employment, or any annuity paid, to an individual who is a resident of a Contracting State shall be taxable only in that State.*

2. Notwithstanding the provisions of paragraph 1, pensions paid and other payments made under the social security legislation of a Contracting State shall be taxable only in that State.

3. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Ireland-Malta Double Taxation Convention - Article 21

OTHER INCOME

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

Section 784A(3) of the Taxes Consolidation Act 1997 – Approved retirement fund

[subject to subsections (3A) and (4)]

(a) the amount or value of any distribution by a qualifying fund manager in respect of assets held in an approved retirement fund [shall, notwithstanding anything in section 18 or 19,] be treated as a payment to the person beneficially entitled to the assets in the fund of emoluments to which Schedule E applies and, accordingly, the provisions of Chapter 4 of Part 42 shall apply to any such distribution, and

(b) ….

Submissions in brief

Treaty Residence

9. The first question concerned the residence of the Appellant in accordance with Article 4(2) of the Ireland-Malta Double Taxation Agreement ('treaty residence').

10. The Appellant submitted that in 2012, he was treaty resident in Malta on the basis that he did not have a permanent home available in Ireland but that he had a permanent home available in Malta.

11. The Respondent submitted that the Appellant was treaty resident in Ireland on the basis that he had a permanent home available in Ireland and that he did not have a permanent home available in Malta.

12. The parties agreed that if the Appellant had a permanent home available in both jurisdictions, the issue would turn on the question of the State in which the Appellant had his centre of vital interests.

13. The parties agreed that if the Appellant had a permanent home available in neither jurisdiction, the issue would turn on the question of the State in which the Appellant had an habitual abode and that if the answer to this was that the Appellant had an habitual abode in both States or neither, the matter would turn on the question of nationality.

Application of the Ireland/Malta DTA to the ARF distribution

14. In the event that there was a determination that the Appellant was treaty resident in Malta, the Appellant contended that the distribution from his ARF would be relieved from Irish tax under Article 18 of the DTA or, in the alternative, under Article 21 of the DTA. The Respondent disputed the application of Articles 18 and 21 of the DTA and contended that the treaty did not apply to the capital element of the ARF distribution.

EVIDENCE

Documentary Evidence

15. Documentation furnished in evidence included *inter alia*; the trust deed executed in December 2011, a trustee file note in December 2011, the Appellant's day planner 2012, the Appellant's boarding passes, credit card statements, phone bills, Maltese utility bills, club memberships, bank statements, correspondence from the Maltese Inland Revenue, Form IC2 for 2012 and 2013, Irish hotel receipts, utility bills in respect of the Irish property, correspondence with the Respondent, LPT and CAT returns and *inter partes* correspondence.

16. Excerpts from and references to these documents are cited, in the analysis below.

<u>The Trust ('the trust')</u>

17. The trust deed between the Appellant and his wife (the settlors) and the Appellant and A.M. (the trustees) executed in December 2011 provided for the transfer to the trust, of the property.

18. The beneficiaries of the trust were the children of the Settlors (J.M., K.M. and L.M.) with the exception of A.M., who was a trustee. The trust provided that 'the beneficiaries' included: *'any other person or persons nominated by the trustees to be a beneficiary of this Settlement, provided however a person who is acting in the role of a Trustee cannot be nominated or be a Beneficiary while a current Trustee but can be so nominated or be a beneficiary on resigning as a Trustee.'*

19. Clause 8.1 of the trust deed provided that: *'The power of appointing new Trustees shall be vested in the Settlors'.*

20. Clause 3 of Schedule 1 of the trust contained the power to permit occupation of the property and provided; *'The Trustees shall have power to permit any one or more of the Beneficiaries to occupy or reside in or upon any real or immovable property for the time being held upon these trusts on such terms as to the payment or rent, rates, taxes and other expenses and outgoings and as to insurance, repair and decoration and generally upon such terms and the trustees shall in the absolute discretion think fit.'*

21. A trustee file note dated December 2011 in relation to the execution of the Trust, at which the Appellant and his son, A.M. were present provides; *'It has been decided for now that* [L.M.] *has been granted the right to live in the property known as* [address redacted], *Ireland*. [L.M.] *will be liable for the running costs of the property.'*

22. Based on the trust and its terms, it is was possible that the Appellant could have become a beneficiary under the trust at a future date in the event that he resigned as trustee and was appointed as beneficiary by the trustees. I note that although this possibility existed, it did not occur.

23. The Appellant submitted that the disposal of the property to the trust coupled with the fact that the Appellant did not stay in the property in 2012, meant that the Appellant did not have a '*permanent home available'* to him in the State, under the Ireland-Malta DTA provisions. The Respondent submitted that the alienation of the property to the trust did not preclude the property from being categorised as a '*permanent home available'* for DTA purposes as the treaty does not require ownership of the property, but requires at a minimum that the home has been retained for the permanent use of the taxpayer and is available to him. These submissions are considered further below.

Witness evidence

24. On behalf of the Appellant, evidence was provided by; the Appellant, Mr. A.M. (the Appellant's son), Ms. L.M. (the Appellant's daughter), Mr. Y., accountant and tax adviser in Malta and Mr. X, actuary and pension consultant.

Mr. M, the Appellant.

25. The Appellant stated that he visited Malta for the first time in 2011 and that he signed a lease in respect of the Maltese property in November 2011. He stated that one of the reasons he moved to Malta was because he was concerned about his ARF and its depletion. He stated that he was advised that if he wished to avail of the Ireland-Malta DTA, he should not reside in the property in Ireland in 2012.

26. He returned to Malta on 12 February 2012. He stated that he did not take any furniture items from Ireland for the apartment in Malta as it was quite well furnished. He stated that in terms of personal belongings, himself and his wife brought clothes, books and CDs. He left Malta shortly thereafter, to go travelling and on holidays.

27. When asked what his preferred location was in 2012 he stated that: *'In 2012, we went out with an open mind and we really grew to love the place.'*

28. He stated that on the occasions when he returned to Ireland, conscious to follow the advice he had received, he did not ask his daughter if he could stay in the property but instead stayed in hotels.

29. The Appellant also spent time in Spain in 2012, where his children have a holiday home and where the Appellant has holidayed for ten years or more. In 2012, the Appellant spent 123 days in Malta, 120 days in Ireland and 149 days in other jurisdictions including Spain.

Mr. A. M.

30. Mr. A.M., son of the Appellant, was appointed trustee of the trust in late 2011. A trustee file note dated December 2011 at which both trustees were present provided: '*It has been decided for now that* [L.M.] *has been granted the right to live in the property know* [sic] *as* [ADDRESS REDACTED], *Ireland*. [L.M.] *will be liable for the running costs of the property.'*

31. As regards the reference to L.M.'s right to reside in the property '*for now'* in accordance with the file note dated December 2011, A.M. stated that the term *'for now'* meant *'for the foreseeable future until a decision was made to alter that situation.'*

32. In answer to the question by Senior Counsel for the Respondent of: *'I suggest to you it would be consistent with the evidence your father gave that it was a holding vehicle so it allowed things to…. a holding pattern until decisions were made?'* Mr. A.M. responded: *'It's probably a reasonable description of it, yes.'*

Ms. L.M.

33. Ms. L.M. described how she lived in the property with her parents prior to their departure and how, in late 2011, she was told that her parents were moving to Malta but that she would remain residing in the property. She stated that the only thing that changed from a daily point of view was that she would be taking over the management of the house and payment of the bills, which were funded from her share of a family partnership.

34. Under cross-examination by S.C. for the Respondent, the following exchange occurred;

Q: *Did* [the Appellant] *explain the reasoning behind going to Malta?*

A: *I knew he was moving his home to Malta. I knew the reasons behind it but I wasn't aware of the trust at that time. This was the only thing he didn't tell me about. He just told me that I would be remaining in the house but I would be taking if* [sic] *on from a management point of view also and I would be taking everything into my own name. That was the* [sic] *as far as the information went.*

Q: *When then did you discover about the trust?*

A: *Only recently actually to be honest, yes.*

Q: *Okay. Was that in preparation for this case?*

A: *Yes. As I say my father is a private man. He just told me what I needed to know.*

35. She stated that she did not know that her parents '*weren't necessarily allowed to stay in the house'.* She stated that *'It never arose'.* When asked why her parents didn't stay in the property on their return visits to Ireland, she stated: *'they never put me in the position so it never arose and I never offered.'* Later, when questioned in relation to whether she would have refused her parents had they asked to stay there, she stated: *'Well, I suppose I*

probably wouldn't but because the situation never arose I just don't know what I would have said.'

36. She was asked whether she had an understanding in relation to the arrangements in place and she described it as '*more of an underlying assumption rather than informative information that they gave me'.*

37. In short, Ms. L.M. was told in 2011 that she would be taking over the bills in relation to the property but she was not told of the right of residence and the existence of the Trust, until 2016. When her parents left for Malta, the house remained as it was and the furniture remained in place and was not put into storage. Some personal effects and photographs were moved to the attic.

Mr. Y.

38. Mr. Y., Maltese accountant and tax adviser recited his qualifications and experience. Mr. Y. confirmed that the ARF distribution was remitted to Malta in 2012. He stated that he was satisfied that the Appellant was resident for income tax purposes in Malta, in 2012. He stated that the remittance of capital falls outside the scope of the Ireland-Malta DTA.

Mr. X.

39. Mr. X., actuary and pension consultant recited his qualifications and experience. The import of Mr. X's evidence was that pensions were changing and evolving and that in his view, a post retirement fund was not disqualified from being considered a pension scheme. He also stated that an ARF might not be a pension but that in his opinion it was '*other similar remuneration'* under the DTA. He stated: *'Obviously it depends on how you define pension but if we took pension to mean, you know, a high degree of certainty with regard to the income you get in every month, month in, month out, I would say then the ARF income is other similar remuneration'*.

40. Under cross-examination Mr. X. was pressed by Senior Counsel for the Respondent regarding whether he considered a lump sum draw down to be the same as a periodically recurrent payment. He did not answer the question directly but stated that in his opinion one could take annual periodic payments from an ARF.

41. Senior Counsel for the Respondent questioned Mr. X. on the difference between pre-retirement pension savings vehicles and post retirement vehicles. He stated that he did not see a distinction in a fund before the benefit date (i.e. the retirement date) and afterwards.

42. In cross-examination Mr. X. was asked to comment on an excerpt from the Institute of taxation book on *Pensions: Revenue law and Practice* by Dolan, McLoughlin, Slattery, Murray and Reynolds which provides; '*The principal characteristic of the ARF is that it is a post retirement vehicle which contains a capital fund*.'

43. Referring to the excerpt from the Institute of Taxation book he stated that he did not understand the reference to '*capital fund*'. He declined to accept that an ARF contained a capital fund stating that in his view the fund was '*income or future income'*.

ANALYSIS

Treaty Residence

44. The parties agreed that the Appellant was ordinarily resident in Ireland in respect of the tax year of assessment 2012. In addition, the parties agreed that the Appellant was tax resident in Malta in accordance with Maltese law, in 2012. Expert evidence was provided by Mr. Y. in support of the Appellant's Maltese tax resident status. Certification in accordance with Maltese law was provided on behalf of the Maltese tax authorities.

<u>If the Appellant was resident in both Malta and Ireland in 2012, of which country is he a resident, under Article 4(2) of the Ireland-Malta Double Taxation Convention?</u>

46. Article 4(2) provides that the Appellant will be deemed to be a resident only of the State in which he has a '*permanent home available'* and that if he has a permanent home available to him in both States, he will be deemed to be a resident only of the State in which his personal and economic relations are closer (centre of vital interests).

47. Therefore, it is first necessary to establish whether the Appellant had a '*permanent home available'* in Malta or in Ireland or in both or neither jurisdictions.

<u>Does the Appellant have a 'permanent home available' in Ireland?</u>

48. The Respondent stated that the home in Ireland was a permanent home available to the Appellant prior to 2012. The Respondent stated that the Appellant had not done enough to render that home unavailable to him and that the transfer to the trust in which the Appellant was a trustee was insufficient for these purposes. The Respondent submitted that the alienation of the property to the trust did not preclude the property from constituting a '*permanent home available'* for DTA purposes as the treaty does not require

ownership of the property, but requires that the home is retained for the permanent use of the taxpayer and is available to him.

49. In late 2011, the Appellant's daughter, who lived in the property, was told that she had a right to reside in the property and would be responsible for bills going forward however, she was not told of the existence of the trust until 2016. In 2012, she was not aware if she could refuse her father entry based on her residence in the property. Under the terms of the trust, no express entitlement to exclusive occupation or residence was provided. Clause 3 of Schedule 1 of the Trust provided; '*The Trustees shall have power to permit any one or more of the Beneficiaries to occupy or reside in or upon any real or immovable property for the time being held upon these Trusts on such terms as to the payment of rent, rates, taxes and other expenses and outgoings and as to insurance, repair and decoration and generally upon such terms and the Trustees shall in the absolute discretion think fit.'*

50. There was no evidence adduced that Ms. L.M.'s right of residence was exclusive. When asked whether she would have refused her father entry in 2012, she answered that he never put her in that situation and that she knew it would not arise. Ms. L.M. did not change the furniture or décor in the property and she remained in her own bedroom in the property. The master bedroom, formerly her parents' room, remained unchanged and was not used by her.

51. In *O'Brien v Quigley* [2013] 1 IR 790, Laffoy J. stated that the proper approach to be adopted in interpreting and applying a DTA was that set out by Kelly J. as he then was, in *Kinsella v Revenue Commissioners,* as follows;

> *'[10] In Kinsella v Revenue Commissioners, [2007] IEHC 250, [2011] 2 I.R. 417, having outlined the provisions of arts 31 and 32 of the Vienna Convention, Kelly J stated (at para 44):*
>
> *'In accordance with what is prescribed by the Vienna Convention, I must therefore interpret the Convention in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Convention's object and purpose. Where such an interpretation leaves the meaning of the Convention ambiguous or obscure or leads to a manifestly absurd or unreasonable result then recourse can be had to supplementary means of interpretation. These means of interpretation could, in an appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon.'*

52. It is clear that the Appellant's home in Ireland was a permanent home available to him prior to 2012. The Respondent submitted that the Appellant had not done enough to

render that home *un*available to him in 2012. The Appellant contended that he did *not* have a permanent home available to him in Ireland in 2012, while the Respondent contended that his home in Ireland remained available to him, notwithstanding the execution of the trust instrument.

Home

53. Vogel, on *Double Taxation Conventions*, 4th ed., p. 271, provides that *'It is immaterial whether or not the taxpayer has legal title to the place or whether it owns or rents the place'* and further *'In cases of doubt it has to be assessed whether the intensity of the taxpayer's use is of such quality that it has a place in the everyday life of the taxpayer. For that purpose, the Taxpayer's personal attachment to the home can be taken into account.'*

54. Vogel also provides that the concept of '*home'* contains an element of personal link with the accommodation, meaning containment by the taxpayer of their personal belongings and effects and this was observed by Laffoy J. in the *O'Brien* case at page 810 of the reported judgment.

55. The OECD Model Convention Commentary on Article 4(2), paragraph 13 provides; *'.. the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which …. is necessarily of short duration…'*

56. In *O'Brien,* Laffoy J. drew guidance from the judgment of Beattie J. in *Geothermal Energy N.Z. Ltd. v Commissioner of Inland Revenue* [1979] 2 N.Z.L.R. 324 in relation to the meaning of '*home'* being '*the centre gravity for the time being of the life of the person concerned'* and to the fact that it will usually be where a taxpayer's spouse and children reside. Further, *Geothermal* is authority for the proposition that '*home*' should not be regarded as synonymous with the ownership of any interest in a house or property, but should be construed qualitatively. The guidance offered by *Geothermal* is qualified by the fact that the judgment was concerned with the interpretation of a statutory provision (not a treaty provision) in accordance with the rules of interpretation of domestic law and not in accordance with the rules of interpretation of international law and this was noted by Laffoy J. at page 803 of the judgment.

57. The Irish property in this appeal had been the Appellant's home since 1958. As an adult he continued to reside in the property. He got married and he raised his own family there. The Appellant travelled to Malta on 12 February 2012. Thus, at the commencement of 2012, he had been residing in the property with his wife and children for approximately

four decades. At that time the property was the centre of gravity of his domestic life and was a permanent home available to him.

58. The evidence demonstrated that although the Appellant did not reside in the property in 2012, there was no change to the décor or furniture and furnishings in 2012. Ms. L.M., the Appellant's daughter who resided in the property, remained in her own bedroom in the property. Her parents' master bedroom was not used and remained unchanged. Her father's personal belongings were situate in the property though some small items were moved to the attic. I am satisfied that, for the tax year of assessment 2012, the requirement of '*personal link'* was met. I am satisfied that the Appellant's personal stamp remained on the property.

59. In technical legal terms, the Appellant was no longer the beneficial owner of the property in 2012, though through his role as trustee of the trust, he retained a shared legal interest. As is clear from the judgment in *O'Brien*, as well as from the commentaries, ownership of an interest in property is not a prerequisite to having a '*permanent home available'* within the meaning of Article 4(2) of the DTA. In *O'Brien v Quigley*, Laffoy J. considered relevant, the dicta of Beattie J. in the New Zealand case of *Geothermal Energy N.Z. Ltd. v Commissioner of Inland Revenue* [1979] 2 N.Z.L.R. 324 wherein it was stated that the concept of home *'should not be regarded as synonymous with the ownership of any interest in a house or property'* but should be construed qualitatively.

60. A qualitative review of the concept of home in this appeal as it relates to the Appellant's Irish property leads to the conclusion that the Appellant's link to the property was intensive, was personal and the requirement of '*personal link*' was satisfied for the reasons set out above. As a result, I find that the property constituted a '*home'* within the meaning of Article 4(2), prior to and during 2012. The question of whether this home was permanently available to the Appellant in 2012 is dealt with below.

Available

61. Vogel, on *Double Taxation Conventions*, 4th ed., p. 271, provides; *'As a factual matter, the home must be available to the taxpayer. When an individual does not own or possess a permanent home, this does not necessarily mean that he has no such home available to him. A taxpayer who has no legal title may still have a home – factually – at his disposal and use it accordingly.'*

62. In late 2011, the Appellant's daughter (who lived in the property) was told that she had a right to reside in the property and would be responsible for bills in relation to the property going forward however, she was not told of the existence of the trust until 2016. Under the terms of the trust, no express entitlement to exclusive occupation or residence was provided. There was no evidence adduced that Ms. L.M.'s right of residence was exclusive. When asked whether she would have refused her father entry in 2012, she answered that he never put her in that situation and that she knew it would not arise. Ms. L.M. did not change the furniture or décor in the property and she remained in her own bedroom in the house. The master bedroom, formerly her parents' room, remained unchanged and was not used.

63. The Appellant's evidence was that when he was in Ireland during 2012, he stayed in hotels and not in the property. Receipts and bank statements were adduced in evidence in support of this submission.

64. Given the history of prior use of the property there can be no doubt that prior to 2012, the property was a permanent home available. While the Appellant claimed that he disposed of the property in 2011, he did not dispose of the property by way of sale of the freehold or lease to a third party at arm's length, rather, he took a shared legal interest as trustee of the trust which held the property. The terms of the trust did not grant exclusive occupation to his daughter, Ms. L.M., in respect of the property and did not exclude occupation by other beneficiaries, if authorised by the Trustees. In addition, the evidence stopped short of evidence to the effect that the Appellant would have been prevented from using this property as a permanent home had he chosen to do so. In addition, the Appellant's daughter was unaware of the trust in 2012. In evidence, Ms. L.M. stated that the situation did not arise.

65. While it was open to the Appellant to resign as trustee, to be appointed beneficiary and for the trustees to grant him a right of residence/occupation at some future date, I attach greater weight to the fact that it was open to Ms. L.M., as authorised resident of the property, to simply allow the Appellant to stay or reside in the property during his return visits to Ireland, as an invitee.

66. In *O'Brien v Quigley*, Laffoy J. rejected the submission that a home can be '*available'* without ever being availed of, however this was in circumstances where Mr. O'Brien had never occupied the property at all. There had been no history of prior occupation (or any occupation) in relation to the property, in sharp contrast to the circumstances in this appeal. In addition, the court accepted in the *O'Brien* case, that the extensive building and refurbishment works being carried out in relation to that property, rendered it

uninhabitable and thereby unavailable for residential use for the relevant tax year. There is no factual parallel in this appeal as the property was perfectly suitable for habitation.

67. The OECD Model Convention Commentary on Article 4(2), paragraph 13 provides; *'.. the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which …. is necessarily of short duration…'*

    [emphasis added]

68. It is accepted that the Appellant stayed in hotels when in Ireland in 2012 and did not stay at the property. As regards the legal position in relation to whether the home was available to him, the trust did not provide Ms. L.M. with a right of exclusive occupation, nor a right of occupation exclusive to her father. In addition, the terms of her occupancy did not prohibit invitees. The burden of proof in tax cases rests on the Appellant and in this appeal it is for the Appellant to prove that his former family home in Ireland in which his daughter resided, was unavailable to him. I find that the evidence in this regard was not such as to prove, on the balance of probabilities, that this was the case. As a result, while the Appellant chose not to avail of the property in 2012, I find as a matter of fact that it was open to him to do so, in 2012.

Permanent

69. There is no dispute in relation to the fact that prior to 2012, this home was a *permanent home available* and had a long history as such.

70. While the Appellant disposed of the property to the trust in 2011, the home did not cease to be a *permanent home available* under Article 4(2) of the DTA on account of the trust arrangements. The trust meant that the property was no longer beneficially owned by the Appellant however, the matter of ownership does not determine the question of permanency in relation to the concept of '*permanent home available*' under the DTA. Rather, the question is whether the taxpayer arranged to retain the home for his permanent use. Vogel, 4th ed., paragraph 87, provides; *'It is the permanence of the home, rather than its size or the nature of the taxpayer's ownership or tenancy, that reflects the individual's attachment to a particular State. Thus, the taxpayer must have arranged to retain it for his permanent use as opposed to staying at a particular place occasionally.'*

71. Further, Vogel p. 272, states; '*time spent in* [the property] *may be taken into account for the permanent home test*' but that a purely quantitative approach should not be applied.

Rather, all facts and circumstances of the case, both quantitative and qualitative should be taken into consideration.

72. Taking a quantitative approach in respect of the year 2012, the Appellant, following advice, opted not to occupy the property in 2012 and stayed in hotels on his return visits to the State. As a result, the Appellant did not avail of the property in 2012. In 2012, the Appellant spent 123 days in Malta, 120 days in Ireland and 149 days in other jurisdictions including Spain.

73. The property was the Appellant's permanent home since 1958, most of his personal belongings remained there and the master bedroom in the property remained there, unchanged and unused. I accept as fact that the Appellant chose to stay in hotels on the occasions when he returned to Ireland in 2012 however, the Respondent argued that if the Appellant had stayed in the property in 2012 on these occasions, it would not have been possible for the Appellant to argue that there was no permanent home available to him in Ireland and I accept this submission on behalf of the Respondent.

74. On the qualitative side, the terms of the trust did not provide Ms. L.M. with a right of exclusive occupation or a right of occupation exclusive to her father. In addition, the terms of her occupancy did not prohibit invitees. In evidence, Ms. L.M. stopped short of stating she would have refused her father entry had he sought to stay in the property. Her evidence was, that the situation simply did not arise. Thus, there was no evidence that the Appellant would have been refused or prevented from using this property as a permanent home had he sought to do so. Moreover, in 2012 the Appellant's daughter was unaware of the existence of the trust. In short, I cannot conclude that that this property was unavailable to the Appellant. The Appellant *chose* not to avail of the property but that did not mean it was unavailable to him.

75. In addition to the availability of the home in 2012, I consider relevant, the matter of prior occupation of the property as a family home for many years prior to 2012.

76. The issue of prior occupation was a relevant factor in the New Zealand case of *FFF V Commissioner of Inland Revenue* [2011] NZTRA 8, [2011] 25 N.Z.T.C. 1-012. The taxpayer in that case maintained a family home in Auckland, New Zealand while residing in various houses in Fiji over a five-year period. The houses in Fiji were provided by the taxpayer's employer. The family home was renovated and extended during the five-year period of absence and the taxpayer resided in the property when he returned from Fiji. Judge Barber in that case found that at material times, the taxpayer's family home in Auckland, remained a permanent home available to him in New Zealand within the meaning and application of article 4(2)(a) of the Double Taxation Relief (Fiji) Order 1977 (in the same terms as article

4(2)(a) of the Convention). In making this finding, significant weight was attributed to the prior occupation of the property by the taxpayer, his wife and children in the period which pre-dated his employment in Fiji.

77. In *O'Brien v Quigley*, there was no history of prior occupation of the property the subject matter of that case and this was noted by Laffoy J. on page 807 of the report as follows; ' *… the Appellant in this case stated had a permanent home available to him in Portugal at the material time and he never resided in* [the Irish property] *either prior to or during the relevant time….'* In addition, the High Court accepted in the *O'Brien* case, that the extensive building and refurbishment works being carried out in relation to that property, rendered it uninhabitable and unavailable for residential use for the relevant tax year.

78. A differentiating feature of *FFF V Commissioner of Inland Revenue* was that the taxpayer retained ownership and a power of disposition over the property in the intervening period. In this appeal, while the Appellant was no longer the beneficial owner of the property in 2012, I have found for the reasons set out above, that the property remained available to him in 2012 albeit, he did not avail of it.

79. As regards the issue of the Appellant's intention, his evidence at hearing was that in 2012, he was giving Malta a try and that he would see how it went. In *O'Brien,* Judge Laffoy accepted that there was no intention on the part of Mr. O'Brien that the Irish property would be used or kept available for his permanent use. However, in this appeal, while the Appellant was no longer the beneficial owner of the property, the arrangements he put in place *via* the family trust, meant that the property was not alienated to such an extent or in such a manner that he could never again enter the property or never again stay there.

80. For the reasons set out above, including; the suitability of this property as a family home, the Appellant's attachment and personal link to the home, the use of the property as such by the Appellant, his wife and children in the decades that preceded 2012 and the fact that the property remained available to the Appellant throughout 2012, I find that the property was a '*permanent home available'* to the Appellant within the meaning of Article 4(2) of the Ireland/Malta DTA.

<u>Does the Appellant have a permanent home available to him in Malta?</u>

81. Applying Article 4(2) of the DTA together with the commentaries and authorities above, I find that the Appellant had a permanent home available in Malta on the following grounds;

Home

82. Vogel, on *Double Taxation Conventions*, 4th ed., p. 271, provides that *'It is immaterial whether or not the taxpayer has legal title to the place or whether it owns or rents the place'* and further *'In cases of doubt it has to be assessed whether the intensity of the taxpayer's use is of such quality that it has a place in the everyday life the taxpayer. For that purpose, the Taxpayer's personal attachment to the home can be taken into account.'*

83. Vogel also provides that the concept of '*home'* contains an element of personal link with the accommodation, meaning the containment of a taxpayer's personal belongings and effects and this was observed by Laffoy J. in the *O'Brien* case at page 810 of the reported judgment.

84. The OECD Model Convention Commentary on Article 4(2), paragraph 13 provides; *'.. the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which …. is necessarily of short duration…'*

85. The property in Malta was a large four-bedroom apartment occupying some 3,000 square feet. It was well furnished and suitable to the Appellant's requirements and his standard of living. While the Appellant and his wife used the Malta property as a base to holiday and travel from, they spent a considerable period of the year in Malta (approximately 123 days) and I am satisfied that the dwelling was available to the Appellant at all times continuously, in accordance with the OECD Model Convention commentary on Article 4(2).

86. While the property may not have constituted a '*home'* within the meaning of the DTA to begin with, I am satisfied that the Appellant's intention was to render it so and that over time, with the accumulation of personal effects, personalisation of furnishings, time spent and increasing attachment to the property, it became a home to the Appellant within the meaning of Article 4(2) of the DTA, in 2012.

Available

87. Vogel, on *Double Taxation Conventions*, 4th ed., p. 271, provides: ;*'As a factual matter, the home must be available to the taxpayer. When an individual does not own or possess a permanent home, this does not necessarily mean that he has no such home available to him. A taxpayer who has no legal title may still have a home – factually – at his disposal and use it accordingly.'*

88. There is no doubt that the Malta property was factually available to the Appellant, that it was at his disposal and that in 2012, he used it accordingly. I am satisfied therefore, that this home was available to the Appellant.

Permanent

89. Vogel, on *Double Taxation Conventions*, 4th ed., paragraph 87 provides; *'It is the permanence of the home, rather than its size or the nature of the taxpayer's ownership or tenancy, that reflects the individual's attachment to a particular State. Thus, the taxpayer must have arranged to retain it for his permanent use as opposed to staying at a particular place occasionally.'*

90. As the Appellant executed a tenancy in respect of this property in circumstances where there was no obstacle to the availability of the property, where the property was not uninhabitable and where the Appellant inhabited the property, I am satisfied that the taxpayer arranged to retain the property for his permanent use as opposed to staying occasionally in the property. On this basis, I am satisfied that the property was a *permanent home available* within the meaning of the DTA.

91. As I have determined that the Appellant had a permanent home available in both Ireland and in Malta in 2012, the next issue to be determined is whether the Appellant's centre of vital interests was located in Ireland or in Malta, in 2012.

<u>Location of the Appellant's centre of vital interests in 2012</u>

92. Article 4(2)(a) of the Ireland/Malta DTA provides;

'Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows;

(a) he shall be deemed to be a resident only of the State in which he has a personal home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);'

93. Vogel, 4th ed., paragraph 91, provides that there can only be one centre of vital interests and that it has to lie in either of the contracting States unless it is indeterminable.

Paragraph 97 provides: *'It should be noted that there is some degree of inertia with respect to a taxpayer's centre of vital interests. Thus, a person who establishes and maintains a home in one State but then sets up a second in the other State can be presumed to maintain his centre of vital interests in the first State unless the circumstances have changed so that the centre of vital interests have demonstrably changed.'*

94. Based on the factors to be taken into account in conducting a centre of vital interests analysis, I determine that Ireland was the Appellant's centre of vital interests in 2012. This determination is based on the fact that the greater part of the Appellant's personal and economic relations was situate in Ireland in 2012. Matters considered include the fact that the Appellant was born and raised in Ireland, his children were Irish, his wife was Irish, his businesses were Irish, he had a history of working and doing business in Ireland, his directorships were in Ireland. The family maintained club memberships in Ireland. He had friends, acquaintances and colleagues in Ireland and he had extended family in Ireland. He also retained health insurance in Ireland with VHI. He kept more personal belongings in his home in Ireland than in Malta. In addition, the Appellant's long-term family home where he lived since he was boy was situate in Ireland and the Appellant raised his own family in that home and resided there with his wife and children over many decades.

Conclusion on treaty residence

95. Based on the analysis set out above:

I. I determine that in 2012, the Appellant had a permanent home available to him in Ireland and in Malta in accordance with Article 4(2)(a) of the Ireland-Malta DTA. I determine that in 2012, the centre of vital interests of the Appellant was situate in Ireland.

II. As a result, I determine that section 784A TCA 1997 is applicable and that the Appellant is not entitled to a refund of PAYE withheld in the amount of €270,548. 21 in respect of his distribution from the ARF of €593,661, in 2012.

Application of the Ireland-Malta DTA to the ARF distribution

96. As I have determined that Ireland has primary taxing rights in respect of the distribution to the Appellant from the ARF in accordance with Article 4(2)(a) of the Ireland/Malta Double Tax Agreement, the requirement to consider the application of the DTA to the ARF distribution does not arise. However, for completeness, I have considered the application

of the DTA *as if* the Appellant had been treaty resident in Malta and in this regard my findings are as follows;

Capital

97. The Respondent submitted that the DTA does not cover the taxation of capital and the Respondent cited Article 2 of the DTA which provides that '*this Convention shall apply to taxes on income'.* Article 2 lists the Irish taxes to which the Convention applies as; income tax, corporation tax and capital gains tax. The Respondent also relied on the expert evidence of Mr. Y., which was that the DTA did not apply to capital. I accept this submission on behalf of the Respondent and find that the taxation of capital falls outside the scope of the Ireland-Malta DTA.

Article 18

Annuity

98. Article 18(1) of the DTA provides;

> *'Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid in consideration of past employment, or any annuity paid, to an individual who is a resident of a Contracting State, shall be taxable only in that State.'*

99. Article 18(3) of the DTA provides;

> *The term 'annuity' means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.'*

100. The Respondent submitted that an ARF payment can be differentiated from an annuity in two ways. Firstly, the beneficiary of an ARF has flexibility as to the amount of the draw down, unlike an annuity which is a fixed annual payment and secondly, an ARF is transferable on death to a spouse/next of kin, unlike an annuity which terminates on death. The Respondent stated that it was open to the Appellant on reaching retirement age and triggering his benefits, to purchase an annuity which would have come squarely within Article 18(1) of the DTA, but that he did not do so.

101. Based on the Article 8(3) set out above, it is clear that the payment of €593,661 from the ARF does not constitute an '*annuity'* within the meaning of Article 18 of the DTA.

Pensions

102. Article 18(1) also applies to '*pensions and other similar remuneration paid in consideration of past employment'.*

103. The payment from the ARF was not a pension paid in consideration of past employment. An ARF is a post retirement vehicle which contains a capital fund. An ARF can only arise post the receipt of retirement benefits. It is not possible for an individual or an employer to make direct contributions to an ARF. Contributions to an ARF must come from a pension and in the Appellant's case, the contributions arose from his commutation of pension in 2009 when the Appellant triggered his benefits on retirement under that pension scheme. A lump sum of approximately €10.6m arising under the pension scheme in 2009 was transferred to the ARF. As the ARF is not a pension, it follows that a drawdown from the ARF does not constitute *'pension[s] ..... paid in consideration of past employment*' within the meaning of Article 18 of the DTA.

104. On behalf of the Appellant, it was suggested that, as the Appellant had taken distributions from the ARF in 2012, 2013, 2014 and 2015, that these were periodically recurrent payments in the nature of a pension. I do not accept this submission. Annual withdrawals of capital sums from an ARF do not characterise such withdrawals as a pension with the DTA and do not equate to periodically recurrent payments from a pension scheme.

Other similar remuneration

105. In this appeal, the payment from the ARF was made approximately 3 years after the Appellant retired. It was not a lump sum from the Appellant's occupational pension scheme on the cessation of employment. It was a drawdown of capital funds from a post retirement vehicle after the point of retirement. The Appellant commuted €1.3m of his pension in January 2009, which he was fully entitled to do at that time under the terms of his pension scheme. The Appellant transferred the balance of €10.6m to the ARF. The withdrawal from the ARF did not constitute a commutation of a pension within the meaning of Article 18.

106. As I have made a finding that an ARF is not a pension, but a post retirement vehicle, I am satisfied that drawdowns from an ARF could not constitute a pension and do not constitute *'... other similar remuneration paid in consideration of past employment ...'* per article Article 18 of the DTA. While '*other similar remuneration...'* captures non-periodic payments such as single lump sum payments *in lieu* of periodic pension payments, the ARF drawdown did not constitute such a payment and does not fall within Article 18. In arriving at these conclusions, I have reviewed and considered the OECD Model

Convention commentary on Article 18 together with Vogel, on *Double Taxation Conventions*, 4th ed, fourth edition, commentary in relation to Article 18.

107. I note that Mr. X. in his evidence stated that in his opinion, the ARF distribution was '*other similar remuneration'* in accordance with Article 18. His views in this regard were based on his own particular definition of what a pension was. His words were; *'Obviously it depends on how you define pension but if we took pension to mean, you know, a high degree of certainty with regard to the income you get in every month, month in, month out, I would say then the ARF income is other similar remuneration'*. In fairness to Mr. X, he was not called to give evidence in a legal capacity and I attach negligible weight to his views on the meaning of '*other similar remuneration'* in Article 18 of the Treaty.

108. Section 794A(3)(a) TCA 1997 provides that distributions from an ARF *'shall … be treated as a payment …. of emoluments to which Schedule E applies and, accordingly, the provisions of Chapter 4 of Part 42 shall apply to any such distribution, …*' The Appellant contended that as the distribution is taxed in accordance with Schedule E, that it is income in nature (not capital), that it is pension income and that it is taxable under Article 18 of the DTA. The Respondent submitted that section 794A(3)(a), while subjecting the ARF distribution to income tax under Schedule E, does not convert its nature from capital to income. I accept the Respondent's submission in this regard. The drawdown from the ARF is *'treated as'* an emolument to which Schedule E applies pursuant to section 794A(3)(a). The application of 794A(3)(a) TCA 1997 does not convert the ARF distribution to income by virtue of its application.

109. In conclusion, the distribution of €593,661 from the ARF is not '*pensions and other similar remuneration paid in consideration of past employment' and* Article 18 of the DTA does not apply.

Article 21

110. As a default position in the event that Article 18(1) of the DTA was determined to be inapplicable in relation to the distribution, the Appellant contended that relief would be available in accordance with Article 21(1) of the DTA.

111. Article 21(1) is a catchall provision which provides; *'Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.'*

112. Article 21 provides a general rule for income not covered by other provisions of the treaty and allocates exclusive taxing rights to the State of residence. Therefore, where income falls to be dealt with under any other Articles of the treaty, Article 21 has no application. The DTA is not extended by the catchall provision that is Article 21. The DTA applies only to the taxes enumerated in Article 2. In arriving at these conclusions, I have reviewed and considered the OECD Model Convention commentary together with Vogel's 4th edition commentary, in relation to Article 21.

113. The amount of €593,661 was withdrawn from the ARF by the Appellant in 2012. When filing his Maltese tax return, the Appellant, in a schedule attached to the return, identified €35,470 (of the amount of €593,661 withdrawn from the ARF) as income. The income amount of €35,470 was stated by the Appellant to comprise; €34,424 in relation to dividends and €1,044 described as '*interest post*'. The Respondent submitted that it was anomalous that the distribution from the ARF was not recorded in its entirety in the Appellant's Maltese income tax return in circumstances where the Appellant contended that it came within '*pensions, annuities and similar payments'* in Article 18 or alternatively *'other income'* in Article 21.

114. On the basis of the information contained in the schedule to the Appellant's Maltese tax return, the appropriate Articles under the Ireland-Malta DTA in seeking treaty relief are; Article 10 (Dividends) in relation to the sum of €34,424 and Article 11 (Interest) in relation to the sum of €1,044.

115. As a consequence, while the Appellant would be entitled to seek the benefits of the treaty in respect of the dividend and interest income earned by him in the ARF in 2012 (on the hypothetical basis that he was treaty resident in Malta) there is no basis for claiming treaty relief in respect of the capital element of the ARF distribution. As a result, the assessment to tax under Schedule E stands, in respect of the capital element of the ARF distribution.

116. In conclusion, in the event that the Appellant were treaty resident in Malta under the Ireland-Malta DTA, I find that the assessment to income tax under section 784A of the Taxes Consolidation Act 1997 would stand in respect of the capital element of the ARF distribution.

Determination

I. I determine that in 2012, the Appellant had a permanent home available to him in Ireland and in Malta in accordance with Article 4(2)(a) of the Ireland-Malta DTA. I determine that in 2012, the centre of vital interests of the Appellant was situate in Ireland.

II. As a result, I determine that section 784A TCA 1997 is applicable and that the Appellant is not entitled to a refund of PAYE withheld in the amount of €270,548.21 in respect of his distribution from the ARF of €593,661 in 2012.

III. For completeness, I have considered the application of the DTA *as if* the Appellant had been treaty residence in Malta and for the reasons set out above, I determine that the distribution from the ARF does not come within Article 18 of the DTA and does not come within Article 21 of the DTA.

This Appeal is determined in accordance with Section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

July 2019

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.