AC Ref: 17TACD2019

NAMED REDACTED

AND

NAMED REDACTED

Appellants

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The issue in these appeals is whether the Appellants are entitled to group relief pursuant to Taxes Consolidation Act 2007 (TCA), section 411.

2. In this regard, the Respondent has refused the claims to group relief on the basis that **Name Redacted** LLC (LLC), a Delaware corporation under the Delaware Limited Liability Company Act, is not a company and in particular is not a company for Irish tax purposes. Furthermore, the Respondent submits that LLC is treated as transparent for US tax purposes and accordingly the default US tax treatment is to be treated as an entity disregarded from its owner. On this basis, the Respondent asserted that LLC is not resident in the US for tax purposes and has denied relief accordingly.

Issue

3. The parties to this appeal have therefore agreed that the following three issues are to be determined by the Tax Appeals Commission, namely:

   a) Is LLC, a limited liability company in the United States incorporated under the law of Delaware, a '*company*' for the purposes of TCA, section 411?

   b) If such an entity is to be regarded as a 'company', is it resident in the US for the purposes of tax?

c) What, if any, is the impact of anti-discrimination provision contained in Article 25 of the DTA?

Background

4. LLC was formed as a Delaware "corporation" on **Date Redacted**. On **Date Redacted**, it converted to a Delaware limited liability company, pursuant to a certificate of conversion. It is a Delaware "Limited Liability Company" under the Delaware Limited Liability Company Act.

5. LLC's registered office is at **Address Redacted**. The owners of LLC hold member interests in the LLC.

6. LLC's purpose is to directly, and through other entities including its subsidiaries, engage in securities trading and securities services activities and other additional related services.

7. LLC prepares a standalone income statement and balance sheet and prepares consolidated financial statements under US GAAP which includes the financial information of its wholly-owned subsidiaries. These financial statements are audited in the US, currently by **Auditor Redacted.**

8. LLC controls the capital of a number of companies. For the purpose of this appeal the relevant companies are **Name Redacted** ("SL"), **Name Redacted** ("GL") and **Name Redacted** (AL), all Irish resident companies.

9. Claims for group relief were made as follows:

   2010 – GL surrendered group relief of **€Million** to SL
   2011 – claim for GL to surrender group relief of **€Million** to SL
   2012 – claim for SL to surrender group relief of **€Million** to AL

10. The Respondent refused these claims as not being available under TCA, section 411. As such, Notices of Amended Assessment issued by the Respondent and were appealed by the Appellants.

Legislation

Taxes Consolidation Act

11. For corporation tax losses purposes, a group consists of a parent company and its 75% subsidiaries. Two companies are deemed to be members of a group of companies if one company is a 75% subsidiary of the other company, or both companies are 75% subsidiaries of a third company. TCA, section 4(1) defines a 'company' for the purposes of the Corporation Tax Acts as "*any body corporate".*

12. TCA, section 411 provides for the allowance of trading losses of a group member against the profits of other group members. However, for the purposes of this appeal there are two different regimes in place due to legislative change introduced by Finance Act 2012. Therefore, for the years 2010 and 2011, TCA section 411 did not provide for relief where the parent company was resident outside the EU and the EEA. The changes introduced by Finance Act 2012 amended TCA, section 411 to include companies who were resident in territories that had concluded a double tax treaty with the State.

13. TCA, section 411(1)(a) provides the following definitions in respect of the years 2010 and 2011:

""relevant Member State" means—

(i) a Member State of the European Communities, or
(ii) not being such a Member State, an EEA State which is a territory with the government of which arrangements having the force of law by virtue of section 826(1)]3 have been made."

""tax", in relation to a relevant Member State other than the State, means any tax imposed in the Member State which corresponds to corporation tax in the State;"

"2 companies shall be deemed to be members of a group of companies if one company is the 75 per cent subsidiary of the other company or both companies are 75 per cent subsidiaries of a third company."

14. Correspondingly, for accounting periods ending before 1 January 2012, TCA, section 411(1)(c) provided as follows:

(c) References in this section and in the following sections of this Chapter to a company shall apply only to a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State, and in determining for the purposes of this section and the following

sections of this Chapter whether one company is a 75 per cent subsidiary of another company, the other company shall be treated as not being the owner of –

(i) any share capital which it owns directly in a company if a profit on a sale of the shares would be treated as a trading receipt of its trade,

(ii) any share capital which it owns indirectly and which is owned directly by a company for which a profit on the sale of the shares would be a trading receipt, or

(iii) any share capital which it owns directly or indirectly in a company, not being a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State.

15. For accounting periods ending between 1 January 2012 and 31 December 2012, TCA section 411 was amended to include companies who were resident in territories that had concluded a double tax treaty with Ireland. TCA, section 411(1)(c) was also amended as follows:

"In determining for the purposes of this section and the following provisions of this Chapter whether one company is a 75 per cent subsidiary of another, the other company shall be treated as not being the owner of –

(i) any share capital which it owns directly in a company if a profit on the sale of the shares would be treated as a trading receipt of its trade,

(ii) any share capital which it owns indirectly and which is owned directly by a company for which a profit on a sale of the shares would be treated as a trading receipt,

(iii) any share capital which it owns directly in a company, not being a company –

(I) which by virtue of the law of a relevant territory, is resident for the purposes of tax in such a relevant territory, or

(II) the principal class of shares of which or, where the company is a 75 per cent subsidiary of another company, the principal class of shares of that other company, is substantially and regularly traded on a stock exchange in the State, on one or more than one recognised stock exchange in a relevant territory or territories or on such other stock exchange as may be approved of by the Minister for Finance for the purposes of Chapter 8A of Part 6.

16. A new paragraph (d) was also inserted into TCA, section 411(1) and states:

"References in this Chapter to a company which is a surrendering company or a claimant company shall apply only to a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State."

17. The definition of "relevant territory" was also inserted and defined as:

(i) a relevant Member State,

(ii) not being such a Member State, a territory with the government of which arrangements having the force of law by virtue of section 826(1) have been made, or

(iii) not being a territory referred to in subparagraph (i) or (ii), a territory with the government of which arrangements have been made which on completion of the procedures set out in section 826(1) will have the force of law;

18. TCA, section 411(2) provides relief for losses and provides that:

"Subject to subsection (2A), relief for –

(a) trading losses and other amounts eligible for relief from corporation tax, and

(b) trading losses incurred by non-resident companies and other amounts not otherwise eligible for relief from corporation tax,

may in accordance with this Chapter be surrendered by a company (in this Chapter referred to as the 'surrendering company') which is a member of a group of companies and, on the making of a claim by another company (in this Chapter referred to as the 'claimant company') which is a member of the same group, may be allowed to the claimant company by means of a relief from corporation tax (in this Chapter referred to as 'group relief')."

Double Taxation Treaty between Ireland and USA

19. The Appellants submitted that, under the non-discrimination provisions of the Ireland-US DTA, Article 25, there is an entitlement to group relief as if their common parent was an Irish-resident company. As such a consideration of the relevant provisions of that treaty is required.

20. The preamble to the treaty provides:

"Convention between the government of Ireland and government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains.

The Government of Ireland and the Government of the United States of America, desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains."

21. Article 3(1) provides the following definitions:

    a. *the term "person" includes an individual, an estate, a trust, a partnership, a company, and any other body of persons;*
    b. *the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;*
    c. *the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State*

22. Article 4 sets out the definition of "*resident of a Contracting State*" as;

    "any person who, under the laws of that State, is liable to tax therein, by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature."

23. Article 25 is entitled 'Non-discrimination'. The relevant paragraphs state:

    1. *"Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected to requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall also apply to persons who are not residents of one or both of the Contracting States. However, for the purposes of the tax of a Contracting State, a citizen of that Contracting State who is not a resident of that Contracting State and a citizen of the other Contracting State who is not a resident of the first-mentioned Contracting State are not in the same circumstances.*

    2. *……..*

    3. *……..*

4. *Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected."*

24. The Protocol to the DTA provides, *inter alia*, that:

"the following provisions shall form an integral part of the Convention:

1. *With reference to income, profit or gain derived by fiscally transparent persons. For the purposes of the Convention, where a resident of a Contracting State is entitled to income, profit or gain in respect of an interest in a person that derives income, profit or gain from the other Contracting State, any income, profit or gain so derived will be considered to be income, profit or gain of that resident to the extent it is treated as such for purposes of the taxation laws of the first-mentioned Contracting State."*

Evidence

Overview

25. The expert witness appearing on behalf of the Respondent, Professor Shay, prepared an Expert Report, reproduced below, which also formed the basis for the evidence adduced by the Appellant's experts, Mr Herring and Mr Bowers.

Professor Shay's Expert Report

"I. INTRODUCTION

A. Engagement and Assignment

1. The Office of the Revenue Commissioners (the "Revenue Commissioners") has requested my assistance in connection with a dispute between the Revenue Commissioners and a pair of Irish companies**, NAMES REDACTED** (collectively, the "Appellants"), understood to be resident in Ireland for purposes of the Taxes Consolidation Act 1997 ("TCA").

   a. The issue in dispute is whether the Appellants are entitled to group relief under Section 411 of the TCA and Article 25.4 of

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the Convention between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (the "DTA").

b. The point of difference between the parties is whether LLC, a U.S. limited liability company registered under the law of Delaware, satisfies the requirements of Section 411 TCA and Article 25.4 of the DTA to qualify the Appellants for Irish group relief.

2. The issues for which this report is relevant are:

    a. Whether for purposes of Section 411 TCA LLC should be considered to constitute "a body corporate;"

    b. Whether for purposes of Section 411 TCA LLC should be considered "resident for the purposes of tax" in the U.S.; and

    c. Whether LLC should be considered a "resident" of the U.S. under Article 4 of the DTA.

3. In connection with an analysis of whether LLC would be considered a "body corporate" for purposes of Section 411 TCA, the Revenue Commissioners have asked me the following questions regarding attributes of Delaware LLCs generally and LLC specifically:

    a. What are the requirements to form a Delaware LLC or to convert another form of legal entity to be an LLC?
    b. Does a Delaware LLC have legal personality?
    c. What is the significance of converting to an LLC as opposed to forming an LLC anew?
    d. Does LLC have a perpetual existence?
    e. What are the (non-tax) legal attributes of an interest in LLC?
    f. What is the legal structure for the management of LLC?
    g. How is LLC taxed under U.S. federal income tax law?

4. The Revenue Commissioners also have asked me whether LLC, a business entity the Appellants have stated is disregarded for U.S. Federal income tax purposes, would be considered "resident" of the U.S. for U.S. Federal income tax purposes.

5. Finally, the Revenue Commissioners have asked me whether LLC, a business entity the Appellants have stated is disregarded

for U.S. Federal income tax purposes, is a "resident" of the U.S. under the standards of Article 4 of the DTA.

…

E. Summary of Conclusions

16. As requested, I have described the specified attributes of Delaware LLCs and LLC. See Sections III.A & III.B, infra.

17. LLC, a disregarded entity for U.S. Federal income tax purposes, would not itself be considered a "resident" of the U.S. for U.S. Federal income tax purposes. See Section III.C, infra.

18. LLC, a disregarded entity for U.S. Federal income tax purposes, would not itself be considered a "resident" of the U.S. under the standards of Article 4 of the DTA. See Section III.D, infra.

II. FACTUAL BACKGROUND

19. **Name Redacted**, Inc. ("Inc"), a Delaware corporation, was formed on **Date Redacted**. **Date Redacted**, Inc. converted from a corporation to an LLC under the law of the State of Delaware, and became LLC.

20. Prior to its conversion in **Date Redacted**, INC. was an "S corporation," a corporation which has elected to be taxed on a pass-through basis under Subchapter S of Chapter 1 of the Internal Revenue Code. For U.S. Federal income tax purposes, a corporation that elects S corporation status generally is not taxed at the entity level, and in colloquial U.S. tax jargon is considered a pass-through entity.

21. INC. was owned directly by its four individual shareholders: **Shareholders Names Redacted**. Shares in a Subchapter S corporation only may be owned by individuals who are U.S. tax residents.

22. **Date Redacted**, the individual U.S. shareholders contributed all of their shares in INC. to **Name Redacted** Corp. ("Corp."), another Delaware corporation electing S corporation tax status, of which they were the sole shareholders.

23. That same day, Corp., as the sole shareholder of INC., filed a Certificate of Conversion and a Certificate of Formation under

Delaware Code, Title 6, § 18-214, thereby converting INC. into an LLC.

24. Also on **Date Redacted**, **Name Redacted** Partners, LLLP ("IHP") was formed as a Delaware limited liability limited partnership ("LLLP"). **Date Redacted**, Corp. transferred its entire interest in LLC to IHP in exchange for a 1% interest in IHP.

25. The remaining 99% of the interests in IHP were owned by five S corporations in varying percentages. Each of **Shareholders' Names Redacted**, was the sole shareholder of one of the five S corporations. In **Dates Redacted**, no ultimate shareholder owned, directly or indirectly, 75% or more of the interests in IHP.

....

III. DISCUSSION

A. Delaware (Non-Tax) Entity Legal Classification

<u>Legal Framework</u>

28. The Delaware Limited Liability Company Act controls the formation, governance, and membership rights and obligations of a limited liability company (an "LLC"). The powers and governance of the entity and the rights and obligations of membership may be modified by the limited liability agreement among the members of the LLC. The LLC agreement is among the members of the LLC and binds the LLC (whether or not the LLC executes the LLC agreement). LLC was not a signatory to its LLC agreement.

<u>What Are the Requirements to Form a Delaware LLC or to Convert Another Form of Legal Entity to Be an LLC?</u>

29. To form a Delaware LLC, one or more authorized persons must execute and file a certificate of formation. The LLC is formed when the initial certificate of formation is filed with the Secretary of State, if there has been substantial compliance with the statutory requirements for the certificate. To convert an existing entity to an LLC, one or more authorized persons must execute and file a certificate of conversion, and execute and file a certificate of formation. The process is complete when the initial certificates of formation and conversion are filed with the Secretary of State, just as in the case of forming an LLC.

30. LLC is a successor to INC., a Delaware corporation formed on **Date Redacted**, which converted into LLC by filing a Certificate of Conversion on **Date Redacted**. In compliance with the requirements for conversion under the Delaware Code, LLC filed a Certificate of Formation, just as would have been required if the entity were newly formed rather than converted. As a result, INC. became LLC upon the filing of the Certificates.

Does a Delaware LLC Have Legal Personality?

31. The Delaware LLC Act recognizes that an LLC is a separate legal entity and that its separate existence continues until the certificate of formation is cancelled. Accordingly, LLC has a legal existence separate from its sole owner, IHP.

What Is the Significance of Converting to an LLC as Opposed to Forming an LLC Anew?

32. From conversion onward, an entity that has been converted to an LLC is treated the same under Delaware (non-tax) business law as an LLC that was not formed via conversion. This is so regardless of the type of entity the LLC was before conversion. This means that LLC, following its conversion to an LLC, would be treated the same as a newly formed LLC, just as would a partnership, trust, or any other predecessor incorporated or unincorporated entity that had been converted to an LLC. The classification of the predecessor entity as a corporation, as opposed to a partnership, trust or any other form of entity is irrelevant to its post-conversion status as an LLC.

33. Upon its reformation as LLC, the assets, liabilities, rights, and duties of INC., rather than being considered transferred to the new LLC, were deemed under Delaware law to be vested in LLC as a continuation of the existence of INC.. Delaware did not consider this a "transfer," as the law of Delaware considered LLC to be merely a continuation of the existence of INC. rather than a separate entity.

Does LLC Have a Perpetual Existence?

34. The Delaware Code provides that an LLC shall continue to exist until cancellation of the LLC's certificate of formation. There are, however, several events upon which the law of Delaware provides for the dissolution of an LLC (and consequent cancellation of the certificate of formation). These circumstances of dissolution are (a) at a time specified in the LLC agreement, (b) upon the happening of events specified in the LLC agreement, (c) upon the vote or consent of members owning more than two-thirds (2/3) of the then-current interest, unless the LLC agreement provides otherwise, (d) at any time where there are no members, and (e) upon entry of a decree of judicial dissolution. An LLC may avoid dissolution notwithstanding having no members if the personal representative of the final member agrees to continue the LLC within 90 days or if the LLC agreement provides for the special admission of a member within 90 days to prevent dissolution.

35. The LLC Agreement provides for the dissolution of the LLC upon the first to occur of (a) a majority vote of the members, (b) the sale or disposition of all or substantially all of the LLC's assets, or (c) upon the occurrence of any other event that would cause dissolution under Delaware law. The agreement makes no provision to either bind the personal representative of the final member to continue the LLC or admit a special member to prevent dissolution under 6 Del. Code § 18-801(a)(4), and thus if no action is taken LLC will dissolve in the event it has no members.

36. The LLC Agreement provides for voluntary withdrawal of a member at will, and mandates that a member sell, and the LLC purchase for cash, its member interest upon the death or disability of such member's ultimate owner. Further, the LLC agreement bars members from transferring any part of their interest in the LLC, and ultimate owners from transferring any of their interest in the members, without the consent of the Management Committee. Because of this, if no action is taken, the life of LLC will necessarily end upon the death or disability of the last ultimate owner, after LLC makes the required purchase of the membership interest of the final member, under either (a) 6 Del. Code § 18-801(a)(4), due to the LLC having no members, or (b) LLC Agreement §10.01(b), due to the sale of all or substantially all of the remaining assets of the LLC in order to effect the purchase.

37. Accordingly, LLC cannot be said to have a perpetual existence.

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<u>What Are the (Non-Tax) Legal Attributes of an Interest in LLC?</u>

What rights do LLC members have in an LLC, and does an LLC issue share capital?

38. A person is admitted as a member of an LLC upon formation or, in the case of a converted entity, upon conversion. Accordingly, upon the formation by conversion of LLC, Corp. became its sole member and received a 100% membership interest in the newly converted LLC. This 100% membership interest was subsequently transferred to IHP, for which Corp. acted as the general partner.

39. An LLC does not issue share capital, and instead issues a limited liability company interest, which is sometimes called a membership interest. The Delaware statute defines "limited liability company interest" to be "a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets." An LLC's profits and losses are allocated among its members.

40. Under Delaware law, LLC members have an interest in the profits of the LLC as they arise, without regard to whether a distribution is made. Specifically, a member's interest consists of an allocable share of the profits and losses of the LLC and a right to receive distributions of the LLC's assets.

41. Distributions are allocated in accordance with the LLC agreement under Delaware law. Under the LLC Agreement, distributions are determined by the Management Committee. Distributions generally are allocated in accordance with the members' Percentage Interests as defined (if there is only one member, there is no allocation required). Accordingly, as a single member entity, all profits of LLC are allocated to the sole member (now IHP).

42. As with distributions from an LLC or a partnership, shareholders of a corporation have no statutory right to receive dividends. Instead, dividends are generally paid at the discretion of the directors. Nonetheless, there are differences between the statutory treatment of corporate dividends versus partnership and LLC distributions. For instance, members of closely held partnerships and LLCs may exercise a far greater degree of control over the management – and thus whether distributions are made – than corporate shareholders, whose control over directors' discretion is subject to limitations and formal prerequisites.

Do members of an LLC have any interest in the specific property of the LLC?

44. Under Delaware law, an LLC is the legal owner of its property and assets. A member of an LLC has no interest in specific property owned by the LLC. The LLC Agreement does not provide a member with any direct ownership interest in the assets of LLC.

Are LLC members liable for the LLC's liabilities?

45. Under Delaware law, members of an LLC are not personally liable for LLC debts, obligations, and liabilities solely by reason of being a member. Members are liable for their agreed-upon contributions. As an LLC, LLC, and not its members, is solely responsible for debts incurred as a result of carrying on its business. Under the LLC Agreement, a member may, but shall not be obligated to, make additional contributions with the approval of the Management Committee.

46. Members of an LLC are liable for returns of distributions made while the LLC is insolvent or which render the LLC insolvent. An LLC's liabilities are to be satisfied by its assets on winding up or dissolution. Upon dissolution of an LLC, a member who receives a distribution in violation of the priority given to creditors and knows of the violation will be liable to repay the amount of the distribution in violation.

What Is the Legal Structure for the Management of LLC?

47. The Delaware Limited Liability Company Act provides that management is vested in the members of an LLC in proportion to the members' then-current interest in the LLC's profits. However, the LLC agreement can provide for LLC management, in whole or part, by a manager.

48. The LLC Agreement vests management in a Management Committee. The Management Committee consists of representatives of four of the six S corporation partners of IHP (the sole member of LLC): **Shareholders' Names Redacted**. Under an amendment adopted in 2012, the sole member may designate a representative having a right to veto any or all decisions of the Management Committee.

B. U.S. Tax Entity Classification and Residence

49. The U.S. Internal Revenue Code of 1986, as amended (the “Code”), is the U.S. federal tax law. The Code defines the terms “partnership,” “partner,” and “corporation” in Section 7701(a) as follows:

> (**2) Partnership and partner** The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.
>
> **(3) Corporation**
>
> The term “corporation” includes associations, joint-stock companies, and insurance companies.

50. Under regulations promulgated under Code Section 7701, and having the force of law, a corporation formed under the law of any state is always a corporation for tax purposes. Any business entity created or organized in the United States that is not defined to automatically be a corporation, including a partnership or LLC, is an “eligible entity,” meaning it is classified as either a corporation or a partnership under a set of default rules, but it also is eligible to electively change its classification to the other classification.

51. Under the default rules, a business entity that is not a corporation and that has at least two members is a partnership for Federal income tax purposes. The default rules provide that a business entity that is not a corporation and has only one owner is, for Federal income tax purposes, disregarded as an entity separate from its owner, unless the sole owner is a bank (in which case it is automatically classified as a corporation).

<u>How Is LLC Taxed under U.S. Federal Income Tax Law?</u>

52. A domestic LLC with one member is treated as a disregarded entity under the so-called default rules of the classification regulations. Both a domestic partnership and a domestic LLC may affirmatively elect to be treated as a corporation for Federal income tax purposes. An eligible entity that elects corporate status (or that

does not elect out of corporate status if its default classification would be a corporation), would be subject to Federal tax on its worldwide taxable income if it is a domestic corporation. If such a corporation were a foreign corporation, it would be subject to Federal tax on its taxable income effectively connected with a U.S. trade or business and certain other U.S. source income not connected to a U.S. business.

53. Because LLC is a single member domestic LLC that has not elected to be treated as a corporation for Federal income tax purposes, it is treated under the default rules as disregarded for Federal income tax purposes. As a disregarded entity, LLC has no income tax filing obligations itself; rather, its income is taxed as the income of its sole member.

54. **Paragraph Redacted**

C. Residence of a Disregarded Entity under U.S. Tax Law

55. As may seem evident, it is an oxymoron to refer in a U.S. Federal income tax context to the U.S. tax residence of an entity that is disregarded for Federal income tax purposes. For U.S. Federal income tax purposes, a disregarded entity does not realize income nor is it subject to tax.

56. In an international context, the term "resident" generally refers to a person who may be taxed by a jurisdiction on all of his or her income, regardless of where or how earned, based on a sufficient degree of contact with the jurisdiction. The Code does not have a definition of "residence" for corporations or other business entities. The Code defines "domestic" and "foreign," but these definitions do not alone play the same role in U.S. Federal income tax as the term "residence" does in an international tax context. The principal significance of these definitions is for application of income source rules and entity classification rules.

57. The term "domestic" has no separate Federal income tax significance for an entity that is disregarded, whether the disregarded status is by default classification or by election. The default classification rules in the regulations differ for domestic and foreign eligible entities, but once an entity (whether domestic or foreign) is disregarded, whether the entity is domestic or foreign does not otherwise affect its treatment for tax purposes precisely because the entity is disregarded.

58. There is no meaningful respect in which it could be said that LLC (or any disregarded entity) is U.S. resident for U.S. Federal income tax purposes. It has no separate U.S. Federal income tax liability and is not considered the owner of income for U.S. Federal tax purposes.

D. Residence of a Disregarded Entity under Article 4 of the U.S.-Ireland DTA

Is LLC a Resident of the United States under the Standards of Article 4 of the DTA?

59. Article 4(1)(a) of the DTA defines "resident" as "any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature."

60. A U.S. domestic LLC that has not elected classification as a corporation would not be liable to tax in the U.S. if it is disregarded. Under the DTA, it therefore would not be a resident of the U.S. under the general rule of DTA Article 4(1).

IV. CONCLUSIONS

61. I described the specified attributes of Delaware LLCs and LLC in sections III.A & III.B, supra.

62. A disregarded entity like LLC is not "resident" of the U.S. for U.S. tax purposes. A disregarded entity has no independent significance for relevant U.S. income tax purposes. See Section III.C, supra.

63. A disregarded entity like LLC would not be considered "resident" of the U.S. under the standards of Article 4 of the DTA because it is disregarded for U.S. tax purposes and is not liable to tax. See Section III.D, supra.

I affirm my genuine belief in the opinions expressed in this report.

I reserve the right to update or modify this Report for additional information that may come to my attention, including information that was unavailable as of the date of this Report.

Executed this 3rd day of January, 2019 at Cambridge, Massachusetts.

Mr. Louis Hering expert witness for the Appellants

26. Mr. Hering gave evidence as to his educational background confirming his undergraduate work at Cornell University and UCLA. He also confirmed his clerkship in the Court of Chancery in Delaware and his admission to Bar associations in Delaware, New York and Washington D.C. He is currently a partner in the firm of Morris, Nichols, Arsht & Tunnell. He confirmed that the firm mainly practices in corporate litigation and structure, corporate transactions and alternative entity transactions. He confirmed he focusses on alternative entity transactions including Delaware limited liability companies, limited partnerships, business trusts and partnerships. He has been a partner with Morris Nichols for 25 years.

27. Mr. Hering confirmed he was a member and past chair of the Partnership and Limited Liability Company Committee of the Corporate Law Section of the Delaware State Bar Association. He stated that the Delaware Bar Association had various committees including the Corporate Law Committee of which he was a member for approximately 20 years. The Corporate Law Committee periodically reviews Delaware General Corporation Law to suggests amendments to that law and also to the LLC Act and Partnerships Acts.

28. Mr. Hering gave evidence that he was invited to be a member of the Corporate Law Committee. He stated that as a large firm of approximately 100 attorneys, Morris Nichols had a right to 2 seats on the Committee. He confirmed he was very familiar with the LLC statutes both from his practice and his work on the Corporate Law Committee. He confirmed that the work of the Corporate Law Committee involved an objective appraisal of the legislation, without regard to client considerations. He said that lobbying was not permissible.

29. In addition, Mr. Hering frequently gives speeches and writes articles on LLCs. He confirmed he reviewed the Appellant's constitutional documentation and also confirmed that he reviewed the Respondent's expert's report provided by Professor Shay. In this regard, Mr Herring gave the following evidence:

   a) there were approximately 930,000 Delaware LLCs in 2017 and that this number exceeded the number of corporations by 3 to 1. He confirmed that the existence of corporations preceded the existence of LLCs which came into being by virtue of legislation enacted in 1994. He clarified that both LLCs and corporations could be publicly traded but that there was preference for the LLC structure for vehicles when they go public.

b) He indicated that there had been a historical expectation that LLCS would become the predominate corporate vehicle but that this did not happen due to ongoing preference by public securities market for corporations. He indicated that LLCs were the vehicle of choice used by private equity firms due to the structural flexibility of LLCs in relation to management rules and corporate duties.

c) He confirmed that analogies could be drawn between corporations and LLCs and similar objectives could be met using either structure.

d) He confirmed that he had reviewed Professor's Shay's report and the constitutional documentation of the Appellants. He confirmed that he understood the requirement to give objective evidence.

e) He agreed that a Delaware LLC has separate legal personality as highlighted in Professor Shay's report and confirmed that he was *ad idem* with Professor Shay that the LLC could own property, and that it could sue and be sued.

f) He agreed that LLC was initially formed as an Incorporation and was subsequently converted to an LLC and once so converted the LLC compared in all material aspects to other Delaware LLCs. He confirmed that the conversion did have some consequences in carrying over the assets and liabilities of the Incorporation. He confirmed that the entity continued albeit in a different formation.

g) He disagreed with Professor Shay's analysis that the assets and liabilities of the Incorporation were deemed to be transferred to the LLC on conversion as the legislation expressly states that the assets and liabilities remain vested in the LLC.

h) He stated that analogies could be drawn between the certificate of formation of the Incorporation and the certificate of conversion of the LLC both of which give rise to summary filing requirements in the Secretary of State's office.

i) He disagreed with Professor Shay's position that an LLC did not have perpetual succession in the event of death or disability of all its members. He indicated this was a hypothetical scenario and that in the event of either such occurrence and with the consent of the management committee, a new member could be appointed. He gave the example that the changing of partners in a partnership did not affect the continuity of a partnership and likewise an LLC could continue despite a change in members.

j) He stressed the important distinction between termination which ends an entity's existence and dissolution which does not. He pointed out that an entity continued its existence as an LLC until its certificate of formation is cancelled. He confirmed

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that a key legislative reference informative as to the perpetual succession of an LLC was 18-801(a)(i) of the Delaware Code.

k) Under 18-801 of the Delaware Limited Liability Company Act an LLC can be dissolved on the earliest of the following:

  (i) A date stated in the operating agreement.
  (ii) When a certain set of events occur that have been specified in the operating agreement.
  (iii) When the members representing 2/3 of the ownership percentage vote or consent to dissolve the company.
  (iv) At any time there are no members. In such an event there is a period of 90 days, or such other period as specified in the operating agreement to appoint somebody else as a member.
  (v) The Delaware Court of Chancery may decree a dissolution of the LLC upon application by or for a member of manager.

l) He confirmed the fact that the dissolution of an LLC can occur on the first of 4 events does not end the company' existence rather it changes its status.

m) He pointed out that the default provision in Delaware law is that an LLC has perpetual existence unless the charter of the company provides for a more limited lifespan. He confirmed the default position applied to the LLC due to absence of more restrictive conditions in its charter. He stated the concept of perpetual existence for Delaware law purposes did not envisage that the LLC should in fact exist indefinitely, rather the possibility of indefinite existence was sufficient to constitute perpetual existence. He also confirmed that the interest of a deceased member could be dealt with under his/her will.

n) In relation to an LLC which was dissolved, he confirmed such dissolution could be revoked. He clarified that as a matter of Delaware law one could review the agreement to ascertain whether the LLC had perpetual succession. He opined that all corporations could die but this did not detract from the fact an entity had perpetual succession until termination.

o) In cross-examination in relation to perpetual succession, he agreed that if the last member of an LLC died, the company could be dissolved in the absence of affirmative action by the legal personal representative within 90 days of that member's death. He agreed that the LLC agreement would have to expressly provide for the admission of new members. He agreed that the LLC agreement in question in this appeal did not have a provision allowing for the admission of new members where no members were left and that hypothetically in the absence of such agreement and in the absence of agreement of the legal personal representative of the last surviving member, that the company could be dissolved and wound up. On re-examination he was unable to verify the identity of ultimate intestate successor of a deceased sole member of a US LLC.

p) During cross-examination, he did not agree that it was mandatory that the certificate of formation of an LLC be cancelled in the event of an unrevoked dissolution. He confirmed his understanding that the legislation intended that the company could not be terminated until after the dissolution and the winding up process had been completed. During further cross-examination he confirmed his agreement that generally in such circumstances the company was terminated but said there were instances where the LLC might not have its certificate of formation cancelled for a number of years following dissolution and winding up.

q) On re-examination, he confirmed that an LLC continues in existence until its certificate of cancellation is filed.

r) He gave evidence that there was a distinction between the economic interest of the member as opposed to managements rights. During cross-examination, he said that he had drawn an analogy between a management committee of an LLC and the board of directors of a company. He confirmed that the general understanding that fiduciary duties attached to the members of the management committee. He clarified that the current legislation was that fiduciary duties attached to committee members subject to modification by the LLC. He stated that the fiduciary duties attributable to directors of a corporation were not necessarily replicated in the management of an LLC, but that they could be carried over by express provision in the charter of the LLC, or, a court might so provide in the interest of public policy.

s) He confirmed that a member’s interest could be transferred but likewise there could be restrictions on the transferability of the member’s interest. He confirmed that the transferee of a member’s interest must be admitted as a member with the default rule requiring a unanimous decision of the members. He agreed that a member had no interest in the assets of an LLC and was not personally liable for the debts of the LLC. He confirmed that the debts of a corporation survived the conversion of the corporation to an LLC. He likened the member’s right to appoint a representative to the board to the right of a shareholder in a company to appoint directors. He agreed that both an Incorporation and an LLC could have a power of veto.

t) He stated that if someone running a company made a distribution in the knowledge it would make the company insolvent in a manner defrauding a creditor, there was no statutory provision in Delaware law that renders the person personally liable.

u) He agreed with Professor Shay that there was a difference between a profit allocation and a distribution and confirmed that until a distribution is made the member has no access to profits. He pointed out that the profit allocation was a tax driven concept while conceding he was not an expert in tax law. He confirmed that from a tax and accounting perspective profits were allocated to members as they arise as the entity does not recognise profits for itself. Notwithstanding an allocation of profit to a member, he said that the member might not actually receive anything, for example, if to do so would result in the insolvency of the company. He confirmed the profit post allocation but pre-distribution to members remained the asset of the LLC which a creditor could call on. He stated that the separate legal entity of the LLC was fully respected despite an allocation of profits. He confirmed that allocation had no meaning from a legal perspective.

v) He agreed that a decision to allocate profits was significant as the member in receipt of an allocation would have to pay tax on the profits, even in circumstances when the profits were never received. He agreed that the LLC was held by a partnership. He confirmed his understanding that the LLC did not pay tax as it had not checked the box and that as a result the partnership did not pay tax. He agreed that the partnership members being an 'S' corporation were also flow through entities for tax purposes and that tax was paid at the ultimate owner level.

Mr. Christopher Bowers - expert witness for the Appellants

30. Mr. Bowers gave evidence of his educational background confirming the completion of an undergraduate degree at Fordham University in New York City and his law degree at the University of Chicago. He stated that he was a member of the Bar of the District of Columbia, Maryland and also New York. He confirmed his membership of the US Tax Court and he said he currently worked at the firm Skadden, Arps, Slate, Meagher & Flom (Skadden). He stated that he had clerked on the Ninth Circuit Court of Appeals in the Western half of the US, at the appellate level and then clerked for the US Supreme Court, for Justice William H. Rehnquist.

31. He confirmed that thereafter he worked in tax specialising primarily in international tax and financial services. He said he was a partner in tax in KPMG's Washington national office and in a number of law firms and with Skadden for the last 5 years. Mr. Bowers said he worked with the IRS equivalent of the Tax Appeals Commission and also in front of courts on behalf of clients. He stated that he also provided consultancy advice in relation to restructuring transactions. He confirmed that has written numerous articles for tax journals and also teaches international tax but said he is currently taking a break from the University of Georgetown where he is adjunct professor. He stated that he is also adjunct professor at George Mason University of Law teaching corporate tax.

32. Mr. Bowers gave evidence as follows:

    a) He confirmed that under American tax code, there is no separate system of corporation tax in the US comparable to the system in Ireland. He referred to the relevant provision in the US tax code in relation to federal income tax defined as gross income minus deductions allowed. He confirmed that federal income tax currently applies at the rate of 21% to corporations. He confirmed that while the same tax applied to individuals and corporates, there were specific permissible deductions for corporations. He stated the term income tax could be read interchangeably throughout the code for individuals and corporates.

    b) He agreed with Professor Shay that an LLC is not a *per se* corporation. He confirmed that the default position is that the LLC is treated as a disregarded entity which does not have an exposure to tax in its own right. He confirmed that an LLC is a cognisable, juridical person under US law which did not equate with a trust. He also confirmed that the election to be treated as a corporation did not affect the classification of the entity as an LLC.

    c) He said that there were exceptions to the default rule where an otherwise disregarded entity is actually treated as a corporation including entities which convert from a corporation to an LLC. He also confirmed that any pre-conversion federal income tax liabilities remain with the converted entity. In such circumstances the entity is treated as a separate entity and is directly liable for tax. In cross-examination, he confirmed that where a disregarded entity had an exposure to US federal income tax in respect of outstanding tax liabilities carried over to an LLC on conversion from an Incorporation, the exposure for the LLC related to a different entity being the Incorporation.

d) On re-examination he was asked to comment on whether he considered that an entity which started life as an Incorporation and then converts to an LLC is the same entity (albeit in a different form) or whether there are 2 entities. He indicated that there was a divergence between the tax and legal position and while there were 2 entities for tax purposes it was outside his expertise to comment on how this would be interpreted from a Delaware state legislation perspective.

e) He cited further exceptions to the default position in the context of employment and excise duties in relation to which an entity was directly liable to tax notwithstanding its status as a disregarded entity.

f) He confirmed that employment taxes constituted federal income tax for US tax purposes but he pointed out that such taxes were specifically excluded from the DTA.

g) During cross-examination, he agreed that employment and excise taxes were provided for in a part of the US tax code which was distinct from the provisions dealing with federal income tax.

h) During cross-examination he also confirmed that employment taxes arose a consequence of having employees and that there was no requirement relating to a US residence or US place of incorporation. He confirmed that excise taxes arose as a consequence of trading in specific goods and that there was no requirement to have an establishment in the US.

i) In terms of structure, he stated that an LLC could have a sole member or several members. He explained that a *per se* corporation unlike an LLC did not have the ability to be disregarded for tax purposes. He confirmed that Irish public limited companies are automatically treated as corporations and hence are *per se* corporations for US tax purposes. He contrasted this to the position of Irish private companies which were classified as eligible entities having the ability to select whether to pay tax at corporate or member level. He stated that an Irish company could thus be treated for US tax purposes similarly to a US LLC.

j) He said that there is little distinction between a US Incorporation having a certificate of incorporation or a US LLC having a certificate of formation. He agreed that both entities are moved through the tax system in a similar manner and that if the entity is an LLC it is treated as an eligible entity and an election can be made to tick the box to be treated or classified as a corporation for tax purposes.

k) He gave evidence that IH partners was the single owner of LLC and as such a disregarded entity for US federal income tax purposes notwithstanding the partnership was held by S corporations which are flow through entities for tax purposes on an individual basis. He agreed with Professor Shay that the Code traces the taxing rights to the ultimate owners of the S corporations.

l) However, he disagreed with Professor Shay's statement to the effect that income did not arise to the LLC. He said that income did arise to the LLC as a separate juridical entity arising from its operational activities and as reflected in its accounts. He asserted that in a single member disregarded entity the issue of allocation did not arise as all income flowed through to the member. He agreed that the LLC did not account to the IRS in respect of its income. He also indicated that the LLC could be otherwise liable to tax in respect of excise duties, employment taxes, or, in respect of the pre-conversion liabilities of an Incorporation that had subsequently converted to an LLC.

m) He agreed with Professor Shay that there is no concept of residence for US corporation tax purposes, rather the rules identify the taxable person. He stated that a domestic entity was liable to tax on a worldwide basis. He contrasted this with a foreign entity which only had an exposure to US federal Income tax if it is operated as trade or business in the US and then only to the extent it has US business or source Income. He differentiated the definitions of domestic and foreign entities for US tax purposes from the concept of residence as generally understood for DTA purposes.

n) He referred to the commentary in Mr. Shay's report that defined residence for DTA purposes as including a person liable to tax therein *"by virtue of its domiciled residence, place of management, place of incorporation or other criterion of a similar nature*" and he agreed that an LLC was connected with the US by virtue of its formation was analogous to the process of incorporation. He agreed that if that DTA criterion of residence was the correct premise for defining residence, the LLC could fall within the DTA definition of residence.

o) He agreed that while there were divergent views as to the correct interpretation of the phrase "*liable to tax*", there was consensus that tax paid by the ultimate owners. Furthermore, the LLC has an exposure to employment taxes, excise duties and pre-conversion liabilities.

p) He stated that the Protocol to the DTA renders the question of the residence of the LLC redundant in that the Protocol gives guidance as to the taxation of fiscally transparent entities and provides a look through to the ultimate owners as to the availability of DTA relief.

q) In cross-examination he stated that it was his understanding that in relation to the request for certificates of residence in relation to an LLC which is a disregarded entity that is the owner who requests the certificate of residence. He confirmed that he had heard of the *TD Securities* case which established that in the context of the US/Canada double taxation agreement that it was the practice of the IRS to grant certificates of ownership to the owners of single owner LLC which was a disregarded entity, given that the entity is not a person and it is not liable to tax. He expressed some doubt as to the IRS position that an LLC which is a disregarded entity is not liable to tax and pointed out that IRS Chief Counsel position in this regard has not been endorsed by the courts. He pointed out that it would be a waste of IRS time to certify residence for LLCs where in fact a protocol to a DTA determines who can claim Treaty benefits.

r) He confirmed that both foreign and domestic corporations paid a franchise tax as a cost of doing business in Delaware.

Professor Stephen Shay - expert witness for the Respondent

33. Professor Shay provided an overview of his career. He confirmed he is a senior lecturer in law at Harvard Law School where he lectured in international tax. He confirmed that he joined the Law Faculty in 2011 and that he became a senior lecturer in 2015.

34. Professor Shay confirmed that he was acting as expert witness on the instruction of Ropes & Gray which is a large commercial law firm of which he previously acted as partner from 1987 to 2009 specialising in international taxation. He indicated that he currently provides consultancy service to Ropes & Gray.

35. Professor Shay stated that he retired from Ropes & Gray to join the Obama administration at high level in the US Treasury department. He confirmed that the duties of his position as deputy assistant secretary for international tax affairs were of a technical nature notwithstanding the nature of the position at political level. He confirmed the role involved negotiating DTAs and that his prior role as International Tax Counsel in the US treasury also involved negotiating DTAs. He stated that he was involved in the finalisation of negotiations in relation to the conclusion of the Ireland/US DTA.

36. Professor Shay stated he has a BA from Wesleyan and University in Connecticut law degree and that he has a law degree and M.B.A from Columbia University. He confirmed his publication of articles on international taxation and stated that he had testified numerous times before Congressional tax writing and investigatory committees. He confirmed that he had been retained as an expert in international tax by US and Canadian law firms and by the New Zealand Crown Counsel. He indicated that this was the first time advising the Respondent. He confirmed that his role was to provide independent assistance to the Appeal Commissioners by way of objective opinion on matters within his area of expertise.

37. Professor Shay gave evidence as follows:

a) He confirmed his report could be taken as part of his evidence in chief.

b) He recited the historical structural changes in the conversion of the Incorporation to the LLC. He agreed that there was common ground between the parties as to the entity classification of the LLC and the existence of a separate legal personality of the LLC distinct from its members. He agreed that the separate legal existence of the LLC continues until its certificate of formation is cancelled.

c) He said that he was of the view that there was a new entity subsequent to the conversion from the Incorporation to the LLC. He confirmed that there was a new entity for US tax purposes. During cross-examination he agreed that post conversion for Delaware state law purposes the LLC was a continuation of the converted Incorporation.

d) He confirmed the LLC did not have perpetual existence as it could be dissolved on ceasing to have any members and on the earliest occurrence of 4 different events. He said he considered the legislation was anomalous as on one hand it contemplated perpetual existence and on the other hand specified events which could result in dissolution of the company. On this basis he re-affirmed the position set out in his report that the LLC did not have perpetual succession.

e) In cross-examination, he agreed that as there was no lifespan specified in the LLC agreement the default position was that the LLC had perpetual existence and this was not affected by the specified events which could give rise to dissolution. He indicated that he focussed on the latter events as if the events occurred, they did not require an independent act by the LLC.

f) On re-examination he agreed with Mr. Hering that dissolution and winding up was a process.

g) He confirmed that an allocation of profits was not significant in the absence of a distribution and he agreed with Mr. Hering's evidence that in a single member entity the concept of allocation had very little relevance. He stated that an allocation of profits was tracked though the capital account of an LLC which was to be treated as a partnership.

h) He indicated in cross examination that he disagreed with Mr. Bowers that the LLC was liable to federal income tax and he stated he was of the view that any exposure to employment taxes, excise or franchise tax was not relevant to the question of relevance for DTA purposes. He confirmed that he was not swayed by Mr. Bower's argument as to an exposure to historic liabilities in the pre-conversion period. He reiterated the position that a disregarded entity could not be treated as a resident of a Contracting State for DTA purposes.

i) He confirmed a general familiarity with the characteristics and legal structure of an LLC but he indicated his specialism was tax.

j) During cross-examination, he agreed that an analogy could be drawn between a certificate of incorporation and a certificate of formation as both derive from statute. He confirmed that the concept of residence was alien to US law. He acknowledged that the concept of residence was familiar to international tax lawyers. He indicated that as a starting point in interpreting bi-lateral tax treaties, one looks at each country's tax law and that in the absence of a specific definition one applies the law of the country whose tax is being applied to define terms not otherwise defined. He accepted that in an international tax context the concepts of nexus and control were significant. He accepted that his report was directed to the US rules for the taxation of income of a person.

k) In cross-examination, he stated that if a person is a disregarded entity for US tax purposes it has no existence for US federal income tax purposes and does not have income. On further questioning, he accepted that the US tax code recognised the existence of the LLC but then treated it in a different way for tax purposes. He agreed that the profits of the LLC in question were taxed at member level depending on the circumstances of the member. He also agreed that in the particular circumstances the profits of the LLC were ultimately taxed on the level of the 5 owners who were resident in the US. He agreed that this was not a situation where tax was not paid.

l) During cross-examination, he agreed that the words "*liable to tax*" did not mean that the person had to pay the tax for example where loss relief was available. He referred to one of the footnotes in this report which provided OECD commentary to the effect that if the income flows from partnership under a country's law it is not considered a resident.

m) He agreed that the Vienna Convention was used to interpret treaties and the Convention made it clear treaties were to be interpreted in accordance with their objects and purpose, one of which was the avoidance of double taxation.

Submissions

Appellant

88. The Appellants made the following submissions:

i. TCA, section 4, sets out the definition of "*company*" for the purpose of the corporation tax acts and provides that "*except where the context otherwise provides" a "company" means any body corporate and includes a trustee savings bank within the meaning of the Trustee Savings Bank Act*.

ii. Throughout the Taxes Acts, the word "*company*" has different meanings, for example, in TCA, section 616 there is a definition of "*group of companies*" and what can constitute a group of companies, and the definition of "*company*" is restricted so that for the purposes of that section a company only applies to certain categories of entity.

iii. It was noted that TCA, section 411 does not define "*company*" and reliance is therefore made to TCA, section 4 to where *"company"* is defined, *inter alia*, as *"any body corporate"*. In this regard, the Appellants argued that in ordinary language a "*body corporate"* is different to a company. The ordinary use of the word "*company*" invokes a requirement that it be an entity registered under the Companies Act. However, this is not an accurate description as not every *'body corporate'* is a company. For example, an ICAV is a *'body corporate'* but it is not a company.

Characteristics of LLC

iv. LLC is, a separate legal entity formed pursuant to Delaware law. It was originally formed as a Delaware corporation pursuant to Certificate of Incorporation dated 2nd December 1999 and converted to a Limited Liability Company on 2nd April 2007. It has foundation documents governing its operation namely the Limited Liability Company Agreement and governed by Delaware law. The registration document is authenticated by the Secretary of State of Delaware and states that the Secretary of State certifies that LLC was formed under the State laws as a limited liability company. The Secretary of State's stamp is marked "Division of Corporations".

v. LLC has a registered address in the State of Delaware with an unlimited life and if it were to be dissolved it would have to be in accordance with the provisions of its Limited Liability Company Agreement and in accordance with Delaware law. Distributions are made from LLC at the discretion of LLC's management committee.

vi. LLC is treated as transparent for US tax purposes as it did not "*check the box*" to be treated as a corporation for US tax purposes. It is a single member LLC and accordingly the default US tax law, it is to be treated as an entity disregarded from its owner. Further, LLC is treated as a "person" for US tax purposes and has a US tax number.

Perpetual succession

vii. No distinction could be drawn between an Irish company and an LLC. In the event that all members of an Irish company die without appointing a successor, no filing can be made in the Companies Office and it will be struck off. As such there can be no distinction between an Irish company and an LLC.

viii. Under section 725 of the Companies Act 2014, the Registrar may strike a company off the register where, *inter alia,* there is a failure to file an annual return or where the Registrar has reasonable cause to believe that no liquidator is acting. However, section 738(3) of the Companies Act 2014 provides that after an application to court and an order made "*the company shall be deemed to have continued in existence as if it had not been struck off the register upon the Registrar receiving a certified copy of the order under subsection (1) within 28 days after the date of its perfection.*"

ix. Therefore, it is possible that in an Irish situation, a company can be struck off but can be restored. Of significance, the evidence from Mr. Hering was that an LLC can be dissolved and unless and until the certificate of termination is cancelled, dissolution can be revoked. As such the Appellants argued that there is no difference in any real sense with the issue of perpetual succession with regard to a company and an LLC.

x. The Appellants disagreed with the Respondent's submission to the extent that an LLC, as a corporate body, has to comply with all of the *indicia* as set out in Courtney Irish company law. To suggest that a body corporate must mirror precisely an Irish company is incorrect as there are body corporates in Ireland that are not companies, for example, an ICAV.

xi. A body corporate has to satisfy the general criteria specifically separate legal personality and can sue and be sued. The most important feature of a body corporate is that it possesses separate legal corporate personality, as opposed to the individual members who stand behind it.

xii. The Appellants disagreed with the academic commentary in the British Tax Review provided by Mr Montagu, considered below, to the extent to which it failed to take into account the fact that dissolution is not the end of an LLC. On the contrary, it was argued that an LLC has to file certificate of termination, a situation which is almost identical to the position in Ireland.

Application of Irish Law to these Characteristics – Memec/Harris v Quigley

xiii. There is an established line of authority following the rationale in the case of *Memec v IRC* 1998 STC 754 which governs how Irish Revenue should treat a body with the characteristics that LLC has. Furthermore, in *Quigley (Inspector of Taxes) v Harris* [2008] ITR 153, Miss Justice Laffoy in the High Court expressly considered the *Memec* case and *Dreyfus v IRC* 1929 14 TC 560 in giving a detailed review of the approach to be adopted when looking at foreign structures for Irish tax purposes.

xiv. In *Harris*, the treatment under Irish tax law of Mr Harris as member of a Cook Island partnership was considered. In the context of determining whether a partner in a foreign limited partnership was a "limited partner" within the meaning of Irish legislation, TCA, section 1013(1)(d), the Court said that a two stage process had to be adopted. The first stage was to determine the characteristics, rights and obligations of a taxpayer by reference to the law of the foreign jurisdiction and the second stage required a determination of whether, applying Irish law, the characteristics, rights and obligations of the taxpayer match the characteristics, rights and obligations of a general partner within the meaning of TCA, section 1013.

xv. By adopting this approach, one must look to US law to determine the characteristics, rights and obligations of LLC and as a matter under Delaware law, LLC is undoubtedly a body corporate. The second stage is to determine whether an organisation with the same characteristics existed in this jurisdiction would it be a body corporate if so then it would also be a "*company*" within the meaning of the Tax Acts.

xvi. While there is no definition of "*body corporate*" in the legislation there are a number of commentaries, which are of some assistance. The phrase "*body corporate*" is defined in 'A Dictionary of Irish Law' as follows:

> *"A succession or collection of persons having in the estimation of the law an existence and rights and duties distinct from the individual person to form it from time to time, e.g. a company registered under the Companies Acts, a local authority, a body established by charter."*

xvii. Michael Feeney in Corporation Tax defines "*body corporate*" as follows:

"A body corporate is, broadly, any body of persons having an identity conferred on it by law and separate from the identities of the members comprising it."

xviii. Thomas Courtney in Law of Private Companies states:

"A corporation or corporate body as such constitutes a legal person with a legal identity separate and distinct from that of its individual members or shareholders."

xix. Courtney goes on to make the point that it is through the process of incorporation by registration that a registered company acquires its corporate personality and as such constitutes a legal person separate and distinct from that of its individual members.

xx. Halsbury's Laws of England states as follows:

"the word 'company' imports an association of a number of individuals formed for some common purpose. Such an association may be either incorporated (that is, a body corporate with perpetual succession) or unincorporated. An incorporated company is a legal person separate and distinct from the individual members of the company, whereas an unincorporated company has no such separate existence and is not in law an entity distinguishable from its members."

xxi. The rationale of the *Memec, Dreyfus and Harris* cases is a respect for other nations' organisational structures known as the "*Comity of Nations*". In the *Harris* case, Miss Justice Laffoy found that having examined the characteristics of the partnership and based on the *Memec* and Comity of Nations principle the Courts in Ireland would 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 was established. The High Court expressly referred to the *Dreyfus* case and determined that having established the characteristics in accordance with the law of the partnership country, the second stage is to determine whether applying Irish law, the characteristics, rights and obligations of a taxpayer *qua* partner match the characteristics, rights and obligations of the particular piece of legislation which she was considering.

xxii. Recourse was thereafter made to a UK case of *Revenue and Customs Commissioners v Anson* [2015] UK SC 44 where the tax treatment of income from a US LLC in the hands of an individual, Mr Anson, was considered. In *Anson* the UK courts confirmed that a Delaware LLC could be treated as a partnership for UK tax purposes. Prior to that decision HMRC had taken the view that a US LLC was an opaque body corporate and therefore any income received by a UK resident of an LLC would be taxed as a distribution. It is relevant to note that the issue before the Court in Anson was whether the LLC could be treated as transparent rather than "entity classification". In the Supreme Court, Lord Reed supported the First Tier Tribunal's original decision concluding that the fundamental factor in that particular case was that Mr Anson was entitled to a share of the profits of the LLC "*as they arose*". The Supreme Court, therefore, concluded that he was entitled to relief under the Treaty on the basis that the income on which he had paid US tax was the same as the income on which he was liable to pay UK income tax. This case marked a departure from the long-established HMRC practice wherein LLCs were treated as being fiscally opaque and treated as an overseas company.

xxiii. Furthermore, in September 2015 the UK published a Brief (Revenue and Customs Brief 15 (2015) published 25 September 2015) dealing with *Anson* case in which it was stated that *Anson* was specific to its own facts and that the HMRC would continue to consider whether a company was opaque or transparent depending on a number of characteristics. Therefore, HMRC would seem to be adopting the position that if a US LLC has been treated as a company within a group structure it would continue so to do.

xxiv. In the Canadian case of *TD Securities (USA) LLC v HMQ* 12 ILTR 783/2010 TCC 186. The Tax Court Canada noted that an LLC was a company recognised as a distinct legal entity separate from its members under Delaware and US law.

xxv. The *Dreyfus* case was concerned with a French organisational structure namely a "*societe en nom collectif*" ("SNC") and was found not to be a partnership for UK tax purposes. The conclusion turned on the fact that a SNC had a separate legal personality under French general law.

xxvi. In that case, Lord Hanworth M.R. stated:

> *"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 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."*

xxvii. The Court of Appeal in upholding the decision that the French SNC was not a partnership placed emphasis on the following:

a) An SNC does not owe its existence to the agreement of the parties, but to a written document deposited with a Register, published in an official journal and effective only on completion of these formalities.
b) It has a legal personality, separate from the individuals to which it is composed.
c) The SNC alone owns the business assets, while the associates have no ownership interest in them.
d) There is no mutual agency between the associates: they may act as agents for the SNC if so appointed, but this does not mean they act as agents for each other.
e) The SNC alone has an interest in the profits, which it then decides how to distribute.

xxviii. The *Memec* case involved a German silent partnership and as in the *Dreyfus* case Walker, J. approved of the two-stage process.

xxix. It was submitted therefore, that looking at LLC one must ask the following to ascertain whether it has the characteristics of a body corporate for Irish tax purposes:

a) is the entity's existence created by virtue of a statute or charter and the formal granting of a certificate of incorporation or registration?
b) does the entity have a legal existence separate from that of the persons who have an interest in it?
c) will the entity continue to exist notwithstanding that any or all of its members or shareholders cease to exist?
d) is there a mutual agency between the members? For a body corporate there should not be.
e) does the entity alone own the business assets?
f) is the entity the person with the interest in the profits, which it may then decide to distribute?
g) a third party will contract with the entity itself rather than with the individual members.

xxx. These tests are not dissimilar from the test that the UK applies as to whether it will treat an organisation as an opaque or "look-through" body. Therefore having regard to the characteristics, rights and obligations of LLC one must conclude that it is a body corporate and therefore a “company” within the meaning of the TCA.

xxxi. It was also noted that such an analysis is consistent with Respondent’s own stated position on LLCs. The Respondent’s approach in this case, in denying group relief, was wholly at odds with its stated position regarding withholding tax. In its Briefing 55 regarding withholding tax it was submitted that it is clear that Revenue's reading

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of that legislation is that it is not the intention of the legislation to exclude US companies when confirming that:

> *"An LLC has corporate form and personality but is categorised as a partnership under the internal revenue code of the USA. As such the LLC is not separately taxed but is treated as a transparent or "look-through" entity for US tax purposes and its income is taken to flow through to its members who are taxed according to US principles as though they received the money directly. Therefore on a strict interpretation of the legislation an exemption from withholding tax cannot be granted where the interest is paid to a US resident through a US LLC. In recognition of the difficulties arising from the use of US LLCs Revenue are prepared to "look through" the US LLC to the ultimate recipients of the interest subject to the following conditions ……"*

xxxii. In addition, it was noted that in 2012 Revenue issued guidance on interest payments made via US LLCs in the context of TCA, section 110 which was based on the same principle stating; -

> *"Where payments are made via a US Limited liability company to investors who are not US resident, the non- US investors may not be subject to US tax on the income and gains of the US limited liability company. In such cases, the interest or other distribution will be considered to be subject to tax to the extent that it is immediately paid on to residents of EU or other tax treaty partner countries who are subject to tax on the onward payments in those countries…."*

TCA, Section 411

xxxiii. It was submitted that the Appellants were entitled to rely on the double taxation agreement, specifically the anti-discrimination provision and indeed the UK Court of Appeal case, *FCE Bank plc v Revenue and Customs Commissioners* [2013] STC 14. It was therefore necessary to undertake a comparison with what would have been the situation had the legislation been drafted so as to allow for a US company to get group relief.

xxxiv. TCA, section 411(1)(a) defined a *"relevant Member State"* as members of the EU and EEA States with whom a tax treaty has been made. That subsection also defines "*tax*" as:

> *"in relation to a relevant Member State other than the State, means any tax imposed in the Member State which corresponds to corporation tax in the State."*

xxxv. It was argued that the tax imposed in the US corresponds to corporation tax as the US tax code does not distinguish between income tax and corporation tax but merely imposes federal income tax. Furthermore, the definition of "tax" contained within TCA, section 411(1)(a) does not specify the person who has to pay the tax. As such, there should be a territorial grasp of tax in the US and it has to correspond to corporation tax and therefore federal income tax by its very nature corresponds to Irish corporation tax.

xxxvi. In this context it was also necessary to consider TCA, section 411(1)(c) which stated:

> *"References in this section and in the following sections of this chapter to a company shall apply only to a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State"*

xxxvii. In response to the Respondent's position that LLC could not be considered resident for US purposes because it is a disregarded entity, the Appellants argued that LLC came within the US tax code and federal income tax is paid in respect of the profits albeit at member level. As such the US tax code gives a choice. It permits either that the LLC can pay the tax or the members can pay the tax. The tax paid in the US could have only been federal income tax.

xxxviii. Reference was made to the fact that as a result of the *FCE Bank* case, TCA, section 411 was amended in 2012 to ensure that corresponding discrimination was not contained in the Irish group relief provisions. As such the following definition of "*relevant territory*" was included into TCA, section 411(1)(a): -

> *(i) a relevant Member State,*
> *(ii) not being such a Member State, a territory with the government of which arrangements having the force of law by virtue of section 826 (1) have been made, or*
> *(iii) not being a territory referred to in subparagraph (i) or (ii), a territory with the government of which arrangements have been made which on completion of the procedures set out in section 826(1) will have the force of law;*

xxxix. It was noted that the US falls within the (iii) being a territory with which there is a double taxation agreement in place. It was therefore submitted that the requirement to have tax that corresponds to corporation tax is in respect of a relevant Member State.

xl. Furthermore TCA, section 411 (1)(a) also states:

"2 companies shall be deemed to be members of a group of companies if one company is the 75% subsidiary of the other company or both companies are 75% of the subsidiaries of a third company"

xli. In this appeal, all the companies are 100 % subsidiaries and no issue was taken by the Respondent regarding the share capital or the ownership provisions in TCA, section 411. Both the surrendering company and the claimant company are Irish resident while the parent company is non-resident.

xlii. The dispute with the Respondent was firstly that LLC is not a company. Furthermore, even if LLC was found to be a company, the Respondent argued that it would not be entitled to claim group relief under section 411 as it is:

- fiscally transparent in the US,
- not subject to a tax in the US equivalent to Irish corporation tax, and
- not resident in the US for the purpose of a tax equivalent to corporation tax.

xliii. The dispute with the Respondent was firstly that LLC is not a company. Furthermore, even if LLC was found to be a company, the Respondent argued that it would not be entitled to claim.

xliv. When interpreting TCA, section 411, the rules of statutory interpretation to be applied have been set down by the Courts through a number of cases. In *Inspector of Taxes v Kieran* [1981] IR 117, Henchy, J. set out three principles of construction. These may be summarised as follows: -

a) Words are to be construed as having a particular meaning if the Act is passed with reference to that particular trade business or transaction, though it may differ from the common ordinary meaning of the words. Otherwise the words should be given the meaning which an ordinary member of the public would intended to have when ordinarily using them.

b) Where a word or expression is used in the statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language.

c) Where a word which requires to be given its natural and ordinary meaning is a simple word which has widespread and unambiguous currency, the Judge construing it draw primarily on his own experience of its use.

xlv. The Supreme Court further clarified the approach to statutory interpretation in the case of anti-avoidance provisions in *Revenue Commissioners -v- O'Flynn Construction Company Limited John O'Flynn and Michael O'Flynn* [2011] IESC 47 where the Supreme Court adopted a purposive approach and rejected a purely literal one. It was noted the very particular context of TCA, section 86, now section 811, requires by its very own words that such a purposive approach be taken. In delivering the majority Judgment of the Supreme Court Mr. Justice O'Donnell stated at paragraph 69:-

> *"The suggestion that the principles in McGrath preclude a 'purposive approach' is also perplexing. In the first place the express words of s 86 require the Commissioners to have regard to the "purposes for which it [the relief] was provided". Furthermore, the decision in McGrath itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay, C. J. re-stated the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the Courts in cases of doubt or ambiguity to resort to a "consideration of the purpose and intention of the legislature" at page 276. Indeed if McGrath stands for any principle in statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters. As Lord Steyn observed in the Northern Ireland case of IRC -v- McGuckian [1997] 1 WLR 991, there has been a tendency to treat tax law, almost uniquely in the civil law as continuing to be the subject of a strict literalist interpretation.*
>
> *'During the last 30 years there has been a shift away from the literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminster Doctrine [1936] AC 1, 19 tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute .... tax law was by and large left behind as some island of literal interpretation.'"*

xlvi. By applying a literal interpretation, the Respondent's argument was flawed as there is no federal "corporation" tax in the US but rather federal income tax that applies to both individuals and corporations. However, on a literal reading of TCA, section 411 it is clear that in setting out the requirement to be subject to a tax that corresponds with corporation tax, that is only relevant to those falling within definition of "Member State" category of "*relevant territory*". The legislation states "tax" "in relation to a relevant Member State means "*any tax imposed in the*

Member State which corresponds to corporation tax in the State". It does not apply to a parent company whose "relevant territory" category is non Member State.

xlvii. Therefore the provisions of TCA, section 411 apply and there can be no disapplication, as contended for by the Respondent, based on the argument that LLC has no liability to a tax corresponding to corporation tax in the US.

Double Taxation Agreement – Resident for Tax Purposes/Liability to Tax Meaning

xlviii. The double taxation agreement between Ireland and the USA pursuant to Article 3(1)(a) provides that "*person*" includes a company. Article 3(1)(b) defines the term "*company*" as any *body corporate* or any entity which is treated as a body corporate for tax purposes. It is clear therefore that if you are a body corporate you are a company but you may also be a company if you are treated as a body corporate for tax purposes. LLC is in fact a body corporate and therefore is a "c*ompany*" within Article 3 without any further reference to its tax treatment required.4.1

xlix. It was noted that under Article 4 the definition of "*resident of a Contracting State*" refers to:

> "*any person who, under the laws of that State, is liable to tax therein, by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature*.

l. As such LLC, as a body corporate, is liable to tax in the US if it falls within Article 4 and is entitled to the benefit of the double taxation treaty. Therefore, as LLC is a single member LLC, the default tax treatment is to be treated as an entity disregarded from its owner.

li. Some tax treaties use the words "*subject to tax*" rather than "*liable to tax*". In the case of *Paul Weiser v HMRC* [2012]UK FTT 501 (TC) Decision of 3 August 2012, the UK tax tribunal considered provisions in the UK/Israel Double Taxation Agreement which provided that a UK source pension would not be subject to UK tax where they were received by a resident of Israel who was "*subject to*" Israeli tax in respect thereof. However, under Israeli tax rules, UK pension income was excluded from tax in Israel during the first 10 years of residence. There was in effect an exemption. HMRC therefore argued that because the pension income was exempt from tax in Israel it could not be said to be "*subject to tax*". The taxpayer argued that he was within the charge to tax in Israel by virtue of living there and even though Israel did not levy tax on his UK pension income because of the exemption he was still within the terms of the Double Taxation Agreement.

lii. The case centred around the meaning of the phrase "*subject to tax*" and the difference in international tax treaties between this phrase and the phrase "*liable to tax*" as found in Article 4 of the Ireland/US DTA. HMRC presented various examples of case law from other countries and academic articles that examine the distinctions between the two phrases. The tribunal noted that while such authorities were not determinative, they were relevant. The argument made by HMRC in that case was that the distinction between the two phrases was that the expression "*liable to tax*" required only an abstract liability to tax (that is a person who is within the scope of tax generally irrespective of whether the country actually exercises the right to tax) and that this had a broader meaning than the phrase "*subject to tax*" which required that there was tax actually paid or levied on the income.

liii. In the First Tier Tribunal decision of Judge Berner held that the purpose of the UK/Israel Double Taxation Agreement was to prevent double taxation and fiscal evasion not to enable double non-taxation of particular income. He said that a distinction had to be drawn between "*subject to tax*" and "*liable to tax*". He found that the particular article required that the individual should not only be resident of Israel but also be subject to tax in respect of the relevant income. The provision was not concerned with the status of the individual but with the chargeability to tax of the specific income. Income, which was exempt from taxation, could not during the currency of that exemption be income in respect of which an individual could be said to be subject to tax.

liv. Judge Berner expressly approved of the principles of Lady Arden in *Bayfine* [2011] STC 717 wherein she stated that the words in the preamble to the US/UK treaty made it clear that the primary purpose of the treaty was to eliminate double taxation and prevent the avoidance of taxation. She said that in seeking a purposive interpretation both principles had to be borne in mind, and in her view it meant that the Treaty should be interpreted to avoid the grant of double relief as well as to confer relief against double taxation.

lv. Judge Berner noted that the distinction between "*liable to tax*" and "*subject to tax*" had been the topic of some debate within the international tax community. Having analysed the relevant academic journals and the case law of foreign jurisdictions such as Canada, Judge Berner came to the view that there was an international consensus that there was a contrast between "*liable to tax*" which refers to an abstract liability to tax and the expression "*subject to tax*" which may require an effective liability to tax on a person's income. He relied on the OECD Model Convention and Commentary and said:

> "*This follows from the distinction which must in my view be drawn between the use, in double tax treaties, of the expressions "liable to tax" and "subject to tax" and also by the requirement, under Article XI (2), that the individual*

concerned should not only be a resident of Israel (that is, a resident in Israel for the purpose of Israel tax) but should be subject to tax in respect of the relevant income. The reference to that income in this context clearly distinguishes this provision from one which requires that the individual fall within the scope of the state's taxation generally. This provision is not concerned with the status of the individual, but with the chargeability to tax of the specific income. Income which is exempted from taxation cannot during the currency of that exemption be income in respect of which an individual can be said to be subject to tax."

lvi. In *Kinsella v Revenue Commissioner* [2011] 2IR 417, Mr Justice Kelly in the High Court took the same approach and expressly found that reliance can be had to Commentary on the Model Convention. Kelly J. opined thus:

"Principles of interpretation

41. This State acceded to the Vienna Convention on the Law of Treaties with effect from the 6th September, 2006. Even before that event it is clear from the decision of Barrington J in McGimpsey v Ireland [1988] IR 567 that in interpreting an international treaty the court ought to have regard to the general principles of international law and in particular the rules of interpretation of such treaties as set out in articles 31 and 32 of the Vienna Convention.

The Vienna Convention

42. Article 31 of this Convention provides as follows:-

Article 31: General rule of interpretation.

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

    (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

    (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

> 3. *There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> 4. *A special meaning shall be given to a term if it is established that the parties so intended."*

lvii. As such, under the principles of interpretation of a double taxation agreement, there is a wider ability to interpret as there is a requirement to give a purposive approach to an international treaty.

lviii. Therefore, the Respondent was wrong to rely on the strict approach to statutory interpretation as advocated in *Droog* as that case was considered in context of Irish general anti-avoidance legislation. However, and notwithstanding the Respondent's reliance on *Droog*, in *O'Flynn Construction*, there is a requirement to interpret words literally but in context by looking at the Act as a whole and looking at the purpose to be obtained from reading the Act.

Protocol

lix. As such the Protocol to the Ire/US DTA references fiscally transparent entities and this is directed at any resident of a Contracting State who is entitled to income derived through an entity that is treated as fiscally transparent. The Protocol provides that an item of income derived by such a fiscally transparent entity will be considered to be derived by a resident of a Contracting State if the resident is treated under the taxation laws of the State where he is resident. The Protocol applies to the attribution of income, profit or gain and, it was submitted, does not alter the applicability of the DTA to a body corporate such as LLC.

lx. Therefore LLC comes within the term '*liable to tax*' as internationally understood. Whether it in fact suffers tax because of the way it exercises an option on how it is taxed does not change that. It is, by virtue of its being a body corporate, within the scope of tax in the US and as such it is within the DTA and entitled to rely on the anti-discrimination Article.

lxi. There is case law to support the application of the DTA to LLCs such as LLC. In *TD Securities (USA) LLC v HMQ,* the taxpayer was a Delaware LLC treated as fiscally transparent in the US having a branch in Canada. It sought to avail of the Canada/US Double Tax Agreement. Its income was fully taxed in the US but at the member level rather than at the level of the LLC, which was fiscally transparent. The Judge stated:

> *"Given the context of the Canadian/US tax regimes and the text of the Canada/US Treaty*
>
> *(i) TD LLC must be considered to be a resident of the US for purposes of the US Treaty otherwise the Treaty could not apply.*
>
> *(ii) TD LLC must be considered to be liable to tax in the US by virtue of all of its income being fully and comprehensively taxed under the US code albeit at the member level and"*

lxii. The definition of "*person", "company*" and "*residence*" in the US/Canada DTA are the same as found in the Ire/US DTA. In this regard, LLC is registered and has a tax number and could have opted to be taxed on the basis of the corporation rather than as a partnership. In order to make such an election or option it manifestly is resident for tax purposes and by "ticking the box" decides which way it is to be taxed.

Application of Article 25 and the FCE Bank Case

lxiii. Article 25 of the double taxation agreement between Ireland the United States containing the provisions on non-discrimination and provides:

> *1. "Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected to requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall also apply to persons who are not residents of one or both of the Contracting States. However, for the purposes of the tax of a Contracting State, a citizen of that Contracting State who is not a resident of that Contracting State and a citizen of the other Contracting State who is not a resident of the first-mentioned Contracting State are not in the same circumstances.*
>
> *2. ……..*
> *3. ……..*

4. *Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected."*

lxiv. It was observed that "*Enterprise*" is defined in Article 3 (1) (c) as "*an enterprise carried on by a resident of a Contracting State"*. Therefore, in applying this section to a group with a US parent (or other US companies in the group) one must treat the US enterprise as if it were Irish resident in that no more burdensome requirement may be placed on it than would be placed on it if it were Irish resident.

lxv. In relation to the discrimination provision contained in Article 25(4), the Appellant disagreed with the Respondent's reliance on the reasoning of Lord Hoffmann in the *Boake Allen* case, as Lord Hoffmann ultimately was dealing with a Section 247 group election, not group relief. Fortification for the Appellants was the observation of Lord Justice Rimer where he says in *FCE Bank* at paragraph 32:

> *"I do not interpret Lord Hoffman's intermediate holding company example as amounting to a general proposition intended to be of potentially wide application that there can be no discrimination on the ground of the foreign residence of the corporate owner of the taxpayer company, if it is open to the group company so to restructure themselves so as to achieve the removal of a tax disadvantage which, but for such restructuring, would otherwise be suffered. Lord Hoffmann did not purport to make any such general point and ought not to be read as having so intended so to do."*

lxvi. Reference was also made to the Respondent's acquiescence to the position that if I was satisfied that LLC was a body corporate, together with being satisfied that LLC fell within the definition of residence of a Contracting State within Article 4 of the DTA, that the law as set out in *FCE Bank* would apply. As such the Appellants accepted that it had an onus to prove, which it was submitted that had been achieved through evidence and submissions that LLC is firstly a body corporate and secondly, that it is resident of a Contracting State.

lxvii. Furthermore Article 25 of the DTA can be triggered by being resident of the Contracting State, the LLC, or alternatively by the five individual ultimate owners who are residents of a Contracting State.

lxviii. While there was no dispute between the parties that in relation to the years 2010 and 2011 when there is no reference to DTA countries in TCA, section 411, that LLC must be treated in the same way as an Irish company. As such there is a requirement to satisfy the definition of company, in section 411(1)(c) which read:

> *"Reference in this section to the following section in this chapter to a company shall apply only to a company which by virtue of the law of a relevant Member State, is resident for the purpose of tax in such Member State."*

lxix. Therefore, any tax imposed in the Member State and under the principles set out in *FCE Bank*, the US, corresponds to corporation tax. However, that provision does not specify on whom the tax should be imposed. The tax is imposed in the Member State and it is a matter of choice for the LLC whether it is going to be imposed on the LLC, or the individual owners. But as the tax is imposed in the Member State and all that it requires is that it is imposed in the Member State.

lxx. Therefore, the purpose of that provision is to ensure that tax is paid in the Member State. It would not apply if the individual owners were resident, for example, in the Caymans. The provision mandates that tax is paid, in this instance, the US. Furthermore, Federal income tax is the only tax that could correspond to corporation tax.

FCE Bank Case

lxxi. The Appellant relied on the Court of Appeal decision *FCE Bank*. In that case FCE and FMCL were companies resident in the United Kingdom. They were both owned and controlled by FMC, a company resident in the USA. FMCL made trading losses during the relevant accounting period and claimed an entitlement to surrender a portion of them to FCE. FCE claimed group relief and HMRC refused the claim because of the status of the parent company as a non-UK resident. Reliance was placed on the DTA between the United States and the United Kingdom and in particular Article 24, the non-discrimination provision.

lxxii. At the First-tier tribunal and the upper tribunal, HMRC were unsuccessful. HMRC relied on the *NEC Semi-Conductors Limited -v- Revenue & Customs Commissioners* [2007] STC 1265. It was argued that although the group relief provisions did discriminate against FCE and FMCL that such discrimination was not solely due to the foreign ownership or control of FCE. The reasoning and argument of HMRC was that as it would have been open to the group to interpose an intermediate UK holding company between the foreign owner/controller and the UK resident subsidiary with the result that the holding company and subsidiary company could have made a group income election but with the ultimate ownership or control remaining in the foreign company there was no breach of any discrimination. This was based on an example given by Lord Hoffman in the *NEC Semi-Conductors* case.

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Counsel on behalf of the HMRC in *FCE* accepted that but for the reasoning of Lord Hoffman in *NEC Semi –Conductors* there would have been nothing to argue about to defeat the claim being made by FCE. It was pointed out by the Court of Appeal that the dispute being considered in the *NEC* case was not about a group relief claim rather it was about an election under Section 247 of the UK Taxes Act.

lxxiii. The Court of Appeal in *FCE Bank* noted that there was obviously discrimination for FCE compared with the treatment that FCE would have enjoyed if FMC had been a UK resident company. That being so, the Court said what remained to be done was to identify the ground of such discrimination. The Court found that there was no ground other than the fact that FMC was a US resident rather than a UK resident and that the analysis of Lord Hoffman's decision did not change that. The Court of Appeal (Lord Rimer) was strongly of the view that Lord Hoffman's decision and example was specific to section 247 which was fundamentally different to group relief and that he was not establishing a more general test.

Application of FCE in context of LLC and ***Name Redacted*** *GL and* ***Name Redacted*** *AL:*

lxxiv. The question identified in the *FCE* Bank case is - what is the ground for the discrimination? If that ground is the residence of the controller/owner of **Name Redacted** GL and **Name Redacted** AL then it will be in breach of the Article 25. Here the parent company is US and non-Irish resident and the domestic Irish grouping provisions and surrender of losses would have been available had the parent been Irish. This, the Appellant asserted clearly showed that the ground for this treatment is residency and as such it was a discriminatory treatment prohibited under Article 25.

lxxv. Furthermore, it was argued that in the case of an Irish parent and subsidiary companies such Irish parent could be checked (transparent/" ticked the box") for US tax purposes and if it were it would not be denied group relief in Ireland. It is entirely possible that an Irish company could be so "checked" for US tax purposes and still gain group relief in Ireland. Yet in the case of LLC such group relief is being denied. This is discrimination in like manner as found in the FCE case.

lxxvi. The Appellants also argued that LLC fell within the definition of "*National*" found in Article 3(1)(i) which provides:

> *"the term "national" in relation to a Contracting State, means any citizen of that State and any legal person, association, or other entity deriving its status as such from the laws in force in that State."*

lxxvii. As such of that wide definition, an LLC as a corporation registered under Delaware laws and deriving its status therefrom is within the definition. There is no limiting reference to tax liability or tax status. Therefore Article 25(1) of the DTA expressly provides that nationals shall not be subjected to any more burdensome requirements regarding taxation and connected requirements than nationals of the other contracting state.

lxxviii. It was therefore submitted that:

a) LLC is a company for Irish tax purposes

b) The Irish entities under LLC are entitled to group relief for the years 2010, 2011 and 2012 and following years under TCA, section 411

c) LLC and its subsidiaries can claim group relief by virtue of the application of the non-discrimination Article 25 of the DTA between Ireland and the US and by relying on the *FCE Bank*.

Respondent

The LLC is not a 'company'

89. The Respondent made the following submissions:

i. There is a requirement under TCA, section 411 that every member of a group be a 'company' i.e. a 'body corporate'. In the present case, this requirement must be met by the parent entity i.e. the LLC, notwithstanding that the Appellants' claim is grounded on the DTA.

ii. It was accepted that LLC is an entity capable of bearing rights and being subject to duties, just as if it were a natural person and its personality is distinct from those of all the persons who are at any time members of the incorporation. It was also acknowledged that it did not have to be a company under the Companies Acts, and indeed cannot be such a company.

iii. The Respondent also accepted the *Memec* principles and the authority in *Quigley v. Harris* and the nature of the exercise that I have to undertake. However, in deciding whether something is a body corporate under Irish law, it is necessary to examine whether it has all the characteristics of a body corporate under Irish law, including perpetual succession.

iv. It was accepted that a company or body corporate cannot exist forever to the extent that a company can be wound up, and in fact the life of many companies and body corporates will, in fact, come to an end. The Respondent argued that the significance of perpetual succession had to do with the consequences of the members ceasing to exist and whether that triggers the termination of the body corporate or the entity.

v. In Courtney, *the Law of Companies*, 4th edition, perpetual succession is considered at page 249:

> *"As the authors of Gower's Principles of Modern Company Law have observed: One of the principal advantages of an artificial person is that it is not susceptible to the thousand natural shocks that the flesh is heir to. Since a company only ceases to exist as a legal person upon the occurrence of one of the dissolving events referred to earlier, its existence remains unaffected by the insanity, bankruptcy or other incapacities of any or all of its members. Likewise, where all the members of the company die, the company will survive."*

vi. However, based on the evidence adduced, particularly that of Professor Shay, LLC did not have perpetual succession. Furthermore, in response to the *Anson* case, a Mr Gerald Montagu published an article in the British Tax Review 2016 entitled '*Can a Delaware LLC be a body corporate for UK tax purposes*?', in which it was considered whether an LLC, such as a Delaware LLC, can constitute a body corporate under UK law. In this context, under Irish law, the same test applies. In relation to perpetual succession Mr Montagu made the following conclusion at page 14:

> *"Stepping back beyond speculation as to the actual terms of the LLC agreement in Anson, the review of the Delaware LLC Statute undertaken above leads to the following two propositions:*
>
> - *Where an LLC agreement for an LLC organised under Delaware law is silent with respect to what happens on the termination of the membership of an LLC's last remaining member and, by virtue of Section 18 801(a)(4) of the Delaware Statute, the termination of the membership of that last remaining member triggers an LLC's dissolution, then an LLC ought not to be regarded as a body corporate.*
>
> - *Where appropriate provision is made in an LLC agreement, for example the continuation requirement and the termination requirements are satisfied and Section 18 801(a)(4) A or B of the Delaware LLC Statute are appropriately engaged, the question arises as to whether the LLC agreement, being in that form, makes a difference and whether that difference could be sufficient to confer body corporate status. The answer to both those questions, as it has hoped has been shown above, tends very definitely towards a yes."*

vii. On this basis it was argued that the terms of the LLC agreement in this particular case are not such as to constitute a body corporate due to the absence of perpetual succession. Therefore the LLC is not a 'company' for the purposes of TCA, section 411.

The LLC's 'residence'

viii. The second major issue between the parties was whether the LLC is a resident of a contracting state within Article 4(1) of the DTA. That Article defines a resident of a contracting state as:

> *"A person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature."*

ix. This definition, requires that the person be liable to tax and for there to be a causal connection between that liability to tax and one of these connecting factors such as domicile, resident, place of management, place of incorporation or other criterion of a similar nature. Therefore, if LLC is liable to tax in the US, it must come within this definition and be liable to tax there by reason of its place of establishment or one of the other criteria listed in the definition.

x. The Respondent accepted the general principle as established by *Weiser,* a case opened by the Appellants, and other case law that there is a difference in meaning between the phase '*liable to tax'* and the phrase '*subject to tax'* however disagreed with the Appellants' submission that LLC is a person liable to tax but not subject to tax by virtue of special provisions of the State of its residence which in this case would be the special provisions of the US. The special US tax provisions which refer to the LLC are special provisions to do with entity classification. They are provisions which are treasury regulations dealing with business entities. Therefore, while LLC is an entity recognised for Federal tax purposes, it is an entity with a single owner that may be disregarded as an entity separate from its owner, however notwithstanding that it is referred to in the US tax code for the purposes of entity classification and in particular for classification as a disregarded entity, it is not sufficient to make it liable to tax.

xi. The position of an LLC was contrasted with charities or pension funds which are entities that are commonly dealt with specifically in a double tax treaty and which very often have exemptions under national law. The difference is that those are typically entities which are prima facie liable to tax under the national system. Therefore charities, for example, are prima facie liable to tax under the Irish system, but which enjoy the benefit of a special exemption. Either all the activities of a particular kind of body are exempt or particular types of income are exempt which is how the Irish system deals with charities, for example.

xii. The Respondent argued that LLC did not even have an abstract liability to tax on its worldwide income because of the fact that it has not checked the box and made an election to be treated as a corporation.

xiii. The Respondent noted the Appellant's argument that LLC pays employment taxes, certain excise taxes and franchise tax of $300 a year, a tax to enable it to carry on business in the State of Delaware are irrelevant as they are not taxes within the scope of the Treaty but more importantly none of them is a tax which, to which an entity is liable because any of the connecting factors referred to in Article 4.1 of the DTA. As such, employment taxes are a consequence of having employees and nothing to do with place of incorporation or place of establishment or tax residency.

xiv. Excise taxes relate to buying or dealing in or using certain goods and have nothing to do with any of the Treaty factors. The franchise tax is a nominal amount and represents a state's charge to carry on, to be registered to carry on business in the State of Delaware. It is not a connecting factor within Article 4.1 of the DTA.

xv. Article 4 of OECD Commentary is relevant where it states:

> *"8. Paragraph 1 provides a definition of the expression "resident of a contracting state" for the purposes of the Convention. The definition refers to the concept of residence adopted in the domestic laws (see Preliminary remarks). As criteria for the taxation of the resident the definition mentions domicile, residence, place of management or any other criterion of a similar nature.*
>
> *8.1 In accordance with the provision of the second sentence of paragraph 1, a person is not to be considered a resident of a contracting state in the sense of the Convention if although not domiciled in that state he is considered to be a resident according to the domestic laws but is subject only to a taxation limited to the income from sources in that state or to capital situated in that state.*
>
> *…*
>
> *8.6 Paragraph 1 refers to persons who are liable to tax in a contracting state under its law by reason of various criteria. In many states a person who is considered liable to comprehensive transaction even if the contracting state does not in fact impose tax. For example, pension funds, charities and other organisation may be exempted*

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from tax, but they are exempt only if they meet all the requirements for exemption specified in the tax laws. They are thus subject to the tax laws of the contracting state. Furthermore, if they do not meet the standard specified they also required to pay tax.

8.7 …

8.8 Where a state disregards a partnership for tax purposes and treats it as fiscally transparent, taxing the partners on their share of the partnership income, the partnership itself is not liable to tax and may not therefore be considered to be a resident of that state. In such a case, since the income of the partnership "flows through" to the partners under the domestic law of that state, the partners are the persons who are liable to tax on that income and are thus the appropriate persons to claim the benefits of the conventions concluded by the States of which they are residents."

xvi. Bodies like pension funds, charities and other organisations that enjoy a specific exemption from tax and that must meet the requirements or the standards set out in the provisions which create those exemptions and LLC which does not have to rely on a special exemption. There is a difference between being exempt under a particular provision and being just disregarded so that you are fiscally transparent is the key distinction here.

xvii. Therefore, by analogy if paragraph 8.8 of OECD Commentary applied to an LLC then the persons who are entitled to claim any benefits as residents are the US individuals but not the LLC itself being a non-resident entity.

xviii. Reliance was thereafter placed on the Protocol to the DTA where at paragraph 1 it states:

> *"With reference to income, profit or gain derived by fiscally transparent persons. For the purposes of the Convention, where a resident of a contracting state is entitled to income, profit or gain in respect of an interest in a person that derives income, profit or gain from the other contracting state, any income, profit or gain so derived will be considered to be income, profit or gain of that resident to the extent it is treated as such for purposes of the taxation laws of the first mentioned contracting state."*

xix. Therefore for the purposes of the Convention where residents of a contracting state, the ultimate owners who are residents of the US, are entitled to income, profit or gain in respect of an interest in a person, being the LLC, that derives income, profit or gain from the other contracting state being Ireland, any income, profit or gain so derived would be considered to be income, profit or gain of that resident and that would be one of the five individuals. To the extent that it is treated as such for the purposes of the taxation laws of the first mentioned contracting state, the US. Essentially that means that the individuals can obtain the benefit of the DTA in relation to income that they derive from the LLC which in turn derives income, profit or gain from Ireland. Therefore it is a way of passing on to the ultimate owners, the treaty benefits in relation to double taxation which might otherwise be lost if Ireland regarded the LLC as opaque and the US regarded as fiscally transparent.

xx. Thereafter the Respondent sought to distinguish *TD Securities (USA) LLC v Her Majesty the Queen* 12 ITLR 783, a case cited as an authority that the members of a fiscally transparent LLC could nonetheless be treated as resident for the purposes of the Canada US Treaty, on the basis that the profits were taxed in the hands of the member which was a corporate member. The significance thereof was that if there was any kind of universal rule and if it was a rule that was likely to be followed by an Irish court, that would have implications for the Respondent because that would mean that taxation of the LLC profits in the hands of the ultimate owners, three layers up in terms of the structure in this case, would be sufficient to make this LLC a resident for treaty purposes.

xxi. The Respondent proceeded to distinguish *TD Securities* on the following 3 grounds:

a) The current appeal is concerned with possible discrimination and not double taxation;
b) if an issue similar to situation arose in *TD Securities*, it would be dealt with under the Protocol; and
c) it is unlikely that the particular approach by the Canadian court would be followed by an Irish court.

xxii. Reliance was thereafter placed on the following paragraphs of the *TD securities* decision:

50. "*The Vienna Convention on the Law of Treaties provides that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose. It also authorizes regard to subsequent practice in the application of the Treaty in certain circumstances and for certain purposes, as well as the use of other supplementary means of interpretation when the interpretation of the Treaty otherwise leads to a result which is manifestly absurd or unreasonable.*

51. *It is fair to say that in this case there is a tension between the ordinary meaning of the terms used in the Treaty and its object and purpose. This is a case where it prima facie appears that a strict application of the terms used to define resident of a contracting state leads to an unreasonable result and thus, regard to*

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supplementary means of interpretation is an appropriate part of the required analysis. The prima facie unreasonableness is demonstrated by, amongst other things, the fact that a strict application of the text would conflict with how both countries have interpreted and applied the Treaty to government entities, not for profit organizations, pension funds and, as described below, partnerships which are themselves also fiscally transparent flow through entities."

xxiii. Therefore, in the application of the Vienna Convention, there is a requirement to interpret the Treaty in good faith and in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Having cited the Vienna Convention the Judge then goes on to say that there is a tension between the ordinary means of the terms which is one of the interpretive standards and the object and purpose which is another standard. The court proceeded to disregard the ordinary meaning of the terms and relied exclusively on the object and purpose. The Respondent argued that an Irish court would not adopt such an approach and would have more respect for the actual strict meaning of the terms used in the treaty than the Court did in *TD Securities*.

xxiv. Furthermore, at paragraph 52 the court cites a number of Canadian cases including the *Crown Forest Industries* case at 52 which discussed what was meant by liable to tax. In that case he cites at 53, the Courts approach to interpreting a treaty as follows:

> *"The Court began from the premise that: "In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties." The Court went on to quote approvingly from Addy J. in JN Gladden Estates v R [1985] 1 CTC 163 at 166–167, 85 DTC 5188 at 5191, wherein he wrote:*

Gladden Estate wherein he wrote:

> *"Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the Treaty might be defeated or frustrated insofar as the particular item under consideration is concerned."*

xxv. Then in the next paragraph he says:

> *"Both the Vienna Convention and the Supreme Court of Canada in Crown Forest confirm that literalism has no role to play in the interpretation of treaties. Coblentz v Canada* [1997] 1 FC 368 at 377.

xxvi. The Respondent did not accept that literalism has no role to play in the interpretation of a treaty. It was argued that the Vienna Convention refers the Courts to the ordinary meaning to be given to the terms of the treaty and that one cannot move away completely from a literal approach. Whatever about looking at object and purpose, the ordinary meaning of the terms must be kept in mind. It was noted that at paragraph 51 of the *TD Securities* judgment that the ordinary meaning of the term "*resident*" would not support the interpretation that that was applied. It was also noted in that judgment reference was made to various other authorities such as the OECD Model Treaty, an OECD Partnership Report and other materials in relation to the wider practice of the two contracting states in relation to fiscally transparent entities including partnerships. Based on such material and in the adherence to the object and purpose of the treaty in the avoidance of double taxation, that the Court arrived at a wider definition of resident than would be permitted if one just looked at the ordinary meaning of the treaty terms. The Respondent argued that the Canadian courts even in interpreting domestic legislation have a more liberal and less literal approach than the Irish courts as stated at paragraph 57:

> *"In Canada Trustco Mortgage Co v Canada, 2005 SCC 54 at [12], 8 ITLR 276 at [12], the Supreme Court of Canada emphasized that '[t]he provisions of the Income Tax Act must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently.' This court sees no reason why the objectives of consistency, predictability and fairness should be any less in the case of the interpretation and application of international tax conventions forming part of applicable Canadian income tax law."*

xxvii. The principle of consistency, predictability and fairness, unobjectionable as it may be in itself, is not a basic interpretive principle under Irish law.

xxviii. In *Revenue Commissioners v Droog*, [2016] IESC 55, the Irish Supreme Court dealt with an argument that the legislation should be interpreted in the light of the anomalies where Judge Clarke says at 6.1:

> *"In substance, counsel for Revenue submitted that the Court should have regard to what were argued to be the anomalies which would flow from the Court adopting the interpretation which found favour both before the Appeal Commissioner and the High Court. That interpretation, it was argued, would have the effect of imposing, in practice, a four year time limit on the operation of Section 811 in the case of self assessed persons in relation to income tax, corporation tax and capital gains tax only and would have no application to persons or bodies who are either within the PAYE system or had*

liabilities in respect of other taxes such as value added tax or capital acquisitions tax.

There is no doubt but that the argument in question is correct so far as it goes. However, it must also be taken into account that the application of the time limit contained in particular in Section 955 has been chosen by the Oireachtas to apply to the cases governed by Part 41 without including an identical or similar provision in respect of those taxes and persons who do not come within the ambit of Part 41. The Oireachtas has doubtless chosen to make such a distinction between certain taxes and certain tax payers for good reason."

xxix. There is a presumption that where there is an alleged anomaly or perhaps not an anomaly but it is a result which has been intended by the Oireachtas and the Court is not to go behind the actual legislation. While it was accepted that there is a somewhat different principle applicable to the interpretation of a tax treaty, there does not appear to be any case in which the Irish courts have taken an approach to the interpretation of a treaty which would depart so much from the wording of the treaty itself as the Canadian tax court did in this particular case.

xxx. Furthermore, the facts and the issue in *TD Securities* are very different to those in this appeal and it was argued that the approach of the Canadian Court is not one that is likely to be replicated in Ireland. Furthermore, the Canadian Court specifically mentioned that it was making the decision to ensure that the taxpayer got the benefit of the subsequent protocol and it did that *de facto* by altering and by expanding the definition of resident. It was not said that it would not consider that definition to be expanded in all cases and in all circumstances and for all LLCs.

Discrimination

xxxi. In response to the Appellants' reliance on the anti-discrimination Article in the DTA, the Respondent relied on Article 25.4 of the DTA which states:

"Enterprises of a contracting state, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other contracting state, shall not be subjected in the first mentioned state to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first mentioned State are or may be subjected."

xxxii. The Respondent submitted that the Appellants are enterprises of a contracting state, Ireland which are wholly or partly owned or controlled, directly or indirectly by the LLC, which the Respondent asserted was not a resident of Ireland. In this context the Respondent argued that the Irish companies are not subjected in Ireland to any taxation or requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises in Ireland, are or may be subjected.

xxxiii. In support of that argument the Respondent proceeded to elaborate on *FCE Bank* a case previously opened by the Appellants. Paragraph 4 of that judgment states:

"HMRC and FCE agree that:

(i) FCE and FMCL were relevant enterprises of contracting state, the UK, and so capable of benefiting from the protection of Article 24(5). They are objects of Article 24(5).

(ii) The relevant hypothetical comparator consists of UK resident companies carrying on the same business and in the same fiscal position as FCE and FMCL, but owned or controlled by UK resident company to the same extent as FCE and FMCL were owned by FMC."

xxxiv. The importance of the relevant hypothetical comparator and a relevant hypothetical comparator in this appeal would involve substituting Irish for UK. The relevant hypothetical comparator in this appeal are Irish resident companies carrying on the same business and in the same fiscal position as the companies here, the surrendering companies, but owned or controlled by a US resident company to the same extent as the Irish companies, the claimant and surrendering companies were owned by the American company. Therefore, what the Court understood to be meant by similar companies was similar enterprises. As such, the Irish companies in this appeal have to establish that they are other similar enterprises and they are owned by a US company.

xxxv. The Court of Appeal referred extensively to *the Boake Allen Ltd v Revenue and Customs Commissioners* [2007] UKHL 25, [2007] 3 All ER 605, [2007] 1 WLR 1386 which dealt with whether there was a right of election, a right of group election between a US company and a foreign parent. At paragraph 17 Rimer LJ observed:

14. The reasoning of the judge and the Court of Appeal was that article 24(5) of the US DTC (for ex-ample) requires one to compare the positions of the UK-resident subsidiary of a US parent and the UK-resident subsidiary of a UK parent. If the latter can elect under section 247 and the former cannot, that is discrimination contrary to article 24(5). It is irrelevant that an election would transfer liability for ACT to the UK parent but not to the US parent. The DTC is concerned with the taxation of enterprises in the UK *and not with the tax position of their foreign-resident shareholders. The authoritative commentary on the equivalent article of the OECD Model Convention with Respect to Taxes on Income and on Capital 1963 says that its object is 'to ensure equal treatment for taxpayers residing in the same state, and not to subject foreign capital, in the hands of the partners or shareholders, to identical treatment to that applied to domestic capital.'*

15. I respectfully think that this particular observation does not take the matter much further forward because it is directed to a different point. It draws attention to the limited application of the non-discrimination article, which provides only for treatment of resident tax payers and does not pre-vent a state from discriminating in its treatment of the income of foreign shareholders; for example, by imposing a withholding tax. It does not say that parentage cannot be a relevant characteristic of a resident tax payer."

xxxvi. The test of whether these are other similar or akin to other similar enterprises of Ireland, parentage is a relevant consideration. In this regard, at paragraph 16, Lord Hoffmann said:

> *"The question as it seems to me is whether Section 247 discriminates against the United Kingdom on the ground that its capital is wholly or partly owned or controlled, directly or indirectly, by residents in the United States or Japan or some other foreign state. In relation to Article 24(1) of the OECD Model Convention which prohibits discrimination between residents on grounds of nationality, the commentary says that the underlying question is whether two residents are being treated differently solely by reason of having a different nationality. It does not repeat this observation in relation to Article 24(5), but the principle must be the same. Does Section 247 discriminate on the grounds that the capital of the subsidiary is controlled by a non resident company?"*

xxxvii. It was not enough for there to be discrimination, the ground of discrimination must be the non residence of the non resident parent. While accepting the judgment in the *FCE Bank* case is relevant and indeed was responsible for the legislation change in 2012 and again in 2013 in this jurisdiction, it was not accepted that the Appellants' submission is on all fours with *FCE Bank*. The grounds of discrimination, if any is not that the capital is owned or controlled indirectly by a US company, it has to do with the nature of that parent entity to the extent that it is not a *body corporate,* it is not resident in the US and that it is a fiscally transparent entity.

xxxviii. The following paragraphs of the OECD commentary on Article 24.5 where relevant where it states:

76. "The various provisions of Article 24 prevent differences in tax treatment that are solely based on certain specific grounds, e.g. nationality in the case of paragraph 1. Thus, for these paragraphs to apply, other relevant aspects must be the same. The various provisions of Article 24 use different wording to achieve that result, e.g. 'in the same circumstances' in paragraphs 1 and 2, 'carrying on the same activities' in paragraph 3, 'similar enterprises' in paragraph 5. Also, whilst the article seeks to eliminate distinctions that are solely based on certain grounds, it is not intended to provide foreign nationals and non residents enterprises of other states or domestic enterprises owned or controlled by non residents with a tax treatment that is better than that of nationals, residents or domestic enterprises owned or controlled by residents.

77. Since the paragraph relates only to the taxation of resident enterprises and not to that of the persons owning or controlling their capital, it follows that it cannot be interpreted to extend the benefit of rules that take account of the relationship between a resident enterprise and other resident enterprises, (e.g. rules that allow or consolidation, transfer of losses or tax free transfer of property between companies under common ownership.)"

xxxix. The object here is to ensure that the Irish resident taxpayers in this case obtain equal treatment to other Irish resident taxpayers; in other words, Irish resident taxpayers which are controlled by an Irish resident company, but only if they are similar enterprises, and essentially that means in the same circumstances.

xl. It would not be a ground for a claim for the Irish subsidiary to transfer losses to a US parent rather than that it is intended to restrict the transfer of losses between Irish resident companies. Therefore, on the basis of Article 25, paragraph 4, the Appellants are not similar enterprises to enterprises in an Irish resident group because the entity that owns them is not a body corporate and is not liable to tax in the US on the basis of a residence type test and therefore is not a resident within Article 4.

xli. The Respondent also noted the alternative basis then for the Appellants' claim is Article 25, paragraph 1, that deals with discrimination on grounds of nationality and provides:

> "*Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected."*

xlii. LLC is not subjected in Ireland to any taxation, and neither is it subjected to any requirement connected with taxation. It is the claimant and the surrendering companies which are subject to requirements in connection with group relief. It is necessary to have incurred the losses and thereafter make a claim for the losses. It has to be shown that the Appellants are Irish resident, or resident, at any rate, in a Member State as defined in TCA, section 411. Those companies have to a satisfy the statutory requirements. There are no statutory requirements to which LLC is subjected.

xliii. Furthermore Article 25(4) requires a hypothetical comparison which must be an Irish national in the same circumstances. That requires positing an Irish national which is an LLC, which is not possible under Irish law as it is not possible for an Irish LLC to be formed, but as a hypothetical Irish LLC. Therefore assuming that it was possible and under the same circumstances as if it was managed in the US, carrying on its business in the US with Irish subsidiaries and fiscally transparent and was headed up by an Irish established LLC, if such an entity could exist, it would not qualify for group relief either, so there is no discrimination here because the hypothetical comparator would be treated in exactly the same way as the actual LLC, which is a US national.

xliv. In support, the OECD Commentary on 24 it states at paragraph 7:

> *"The expression 'in the same circumstances' refers to taxpayers, individuals, legal persons, partnerships and associations placed from the point of view of the application of the ordinary taxation laws and regulations in substantially similar circumstances both in law and in fact. The expression 'in particular with regard to residence' makes clear that the residence of the taxpayer is one of the factors that are relevant in determining whether taxpayers are placed in similar circumstances. The expression 'in the same circumstances' would be sufficient by itself to establish that a taxpayer who is a resident of a Contracting State and one who is not a resident of that State are not in the same circumstances."*

xlv. As such a taxpayer who is a resident of the US is not in the same circumstances as one who is not a US resident for the purposes of this paragraph. Furthermore, the commentary at paragraph 9 states:

> *"The expression 'in the same circumstances' can in some cases refer to a person's tax situation."*

xlvi. Therefore, in assessing whether there is discrimination on the grounds of nationality and whether the LLC is in the same circumstances as an Irish national, would be, 'the same circumstances' may include the fiscal transparency of the LLC.

xlvii. Therefore, in context of the application of group relief pursuant to TCA, section 411 as it applied for the years 2010 and 2011, the Appellants had to comply with the definition contained in TCA, section 411(1)(c)

> *"References in this section and in the following sections of this chapter to a company shall apply only to a company which, by virtue of the law of a relevant Member State is resident for the purposes of tax in such a Member State."*

xlviii. The definition of 'tax in relation to a relevant Member State other than the State' is set out in TCA, section 411(1)(a) as:

> "*any tax imposed on the Member State which corresponds to corporation tax in the State."*

xlix. It was not accepted that LLC was resident in the US for the purposes of a tax imposed in the US or on the grounds that even though the LLC was not subject to tax and paying tax, but on the basis that if it is liable to tax is for treaty purposes, can in some way described is that it is also subject to the imposition of tax for the purposes of TCA, section 411 and that that tax is a tax which corresponds to corporation tax in the State.

l. Secondly it was not accepted that tax was imposed on the members, the individuals who are the ultimate owners of LLC was US Federal income tax and the argument was that US Federal income tax paid by an individual corresponds to Irish corporation tax because a US corporation which pays income tax in the US, also pays Federal income tax on its profits.

li. Furthermore, the tax paid by the individuals does not allow the company to claim the benefit of Article 25(4) of the DTA, as this would require an acknowledgement that the relevant resident individuals, can form a group for Irish corporation tax purposes. So, the common control and ownership has to be established by reference to the LLC, which is the entity, and not by reference to the individuals.

lii. Finally, the tax status of the LLC as depicted in its the consolidated accounts in respect of the year to 31st December 2011 under "Note M" headed "Income Taxes" stated:

> "*No provision for federal income taxes has been made because the parent" that's the LLC "has elected to be treated as a partnership for Federal tax purposes and therefore is not subject to federal income taxes. Certain of the Parent's subsidiaries are subject to corporate tax at the prevailing corporate*

tax rate in the respective jurisdiction. Such foreign tax amounts aggregating approximately 24,224 dollars are included in other expenses in the consolidate statement of income and comprehensive income. The Parent's income or loss is reportable by its member on its tax returns. The parent is not subject to state or local income taxes."

ANALYSIS

Issue

92. The entitlement to surrender losses between members of the same group is governed by TCA, section 411. Two companies are deemed to be members of a group of companies if one company is a 75% subsidiary of the other company, or both companies are 75% subsidiaries of a third company where all such companies are:

(i) in a Member State of the European Communities, or
(ii) in an EEA State which is a territory with which the State has a tax treaty, or
(iii) in respect of accounting periods ending after 1st January 2012, are in a territory with which a tax treaty with the State is in force.

93. In this context, the issues to be determined in this appeal are:

a) Is LLC, a limited liability company in the United States incorporated under the law of Delaware, a company as defined by TCA section 4 to include *inter alia*, '*any body corporat*e' for the purposes of claiming the group relief pursuant to TCA, section 411?

b) If such an entity is to be regarded as a company, is it resident in the US for the purposes of tax?

c) What, if any, is the impact of anti-discrimination provision contained in Article 25 of the DTA?

Body corporate

94. There is no corresponding structure in this jurisdiction directly equivalent to a Delaware LLC. However, based on evidence adduced it would appear that an LLC is a hybrid entity with some of the characteristics of an Irish company and some of the characteristics of a transparent entity such as a partnership. Its corporate characteristics include separate legal entity, distinguishable from its members, ability to own property, and sue and be sued in its own right. However, the Respondent argued that perpetual succession, an

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essential characteristic of a body corporate, was lacking in an LLC and that constituted a fundamental difference between the parties.

95. The Respondent also acknowledged that the meaning of perpetual succession does not imply that a company or body corporate goes on forever as the life of most companies and body corporates will come to an end. However, it was argued that the concept of perpetual succession had to do with the consequences of the members ceasing to exist and whether that triggers the termination of the alleged body corporate or entity.

96. Both parties agreed that the powers and governance of a Delaware LLC and the rights and obligations of membership may be modified by the LLC operating agreement drafted and agreed by the members of that LLC.

97. Professor Shay, on behalf of the Respondent, was of the opinion that unless the LLC operating agreement makes certain provisions or actions are affirmatively taken, if a point is reached when there are no members then under the Delaware Code, 18-801(a)(4) dissolution is triggered.

98. In this regard, Professor Shay was of the view that if no time is specified in the operational agreement, the other conditions specified in that subsection if satisfied provide for the dissolution. Therefore, to state that an LLC has perpetual existence while having five other conditions in which it will not continue struck Professor Shay as anomalous to the concept of perpetual existence.

99. Mr Hering, on behalf on the Appellants, disagreed with that assertion and his evidence was that if there is no time specified in the operating agreement, as a matter of Delaware law, an LLC would have perpetual existence. However even if a sole member of an LLC died without the appointment of a personal representative, the LLC dissolves but it does not cease to exist as it would have to be wound up and its assets and liabilities realised. Furthermore, and notwithstanding the failure to appoint a personal representative within a period of 90 days from the date of the last member, dissolution may still be revoked and personal representatives can be appointed to continue the LLC under the revocation of dissolution provisions as set out in the Delaware Code, 18-806.

100. Similarly, from an Irish context, the death of the members of a company can give rise to situations where no filings are made in the Companies Office resulting in the company being struck off the register pursuant to section 725 of the Companies Act 2014. However, under section 738(3) of that Act, after an application to court and an order made "*the company shall be deemed to have continued in existence as if it had not been struck off the register upon the Registrar receiving a certified copy of the order under subsection (1) within 28 days after the date of its perfection.*" As such, there does not appear to be an ostensible distinction between an Irish company and an LLC.

101.Mr Hering's evidence was that in some legal regimes, dissolution is the end but under the Delaware Code, dissolution is just a change in status and the LLC continues to be an entity, that owns the assets and remains subject to liabilities, and that can go on for years before the winding up is complete.

102.Furthermore, and as noted by Mr Hering, there is a distinction between dissolution and termination. It was noted that dissolution is a stage in the entity's life, but it is not the end of that life as an LLC. An LLC, as a separate legal entity, does not cease to exist until the certificate of formation is cancelled pursuant to the Delaware Code 18-201(b).

103.It is therefore significant that Professor Shay's evidence made no significant reference to the revocation provisions that would permit an LLC to continue in existence. Furthermore, Professor Shay did not consider the existence of the entity during the course of winding up which Mr Hering confirmed could take years to complete.

104.Furthermore, Professor Shay, through his own admission, confirmed that his knowledge of the Delaware Limited Liability Company Act is with reference to his expertise on taxation and international taxation. Mr Hering, in comparison is fully immersed in Delaware corporate law and not only practices exclusively in that area and was actively involved in assisting the State of Delaware in monitoring the efficacy of that law and where necessary advised on the appropriateness of amending legislation thereby making the law fit for purpose. Therefore, in light of Mr. Hering expertise, evidence and forthright views that in the absence of a specified condition contained in the operating agreement providing for dissolution and winding up, the only conclusion that I can reach is that under Delaware Law an LLC enjoys perpetual succession.

105.Therefore, and a matter acknowledged by both parties to this appeal, in light of the fact that both a company and LLC can cease to exist, I consider that the more appropriate test is to determine whether the entity is capable of perpetual succession. Perpetual succession refers to continuous succession and represents a principle characteristic of such entities. Therefore, a company's life is not determined by the longevity of its members. If a member dies, or hypothetically, all the members die, their interests can be transferred to new people. Correspondingly an LLC is also capable of enjoying the same characteristics.

106.Furthermore, in the commentary provided by Orange Tax Guide 2016/2017, under the heading Part 1 – group relief and reconstruction and acquisitions relief for Stamp Duty Land Tax, states:

> *"a relief from SDLT for acquisitions of property by companies where the vendor and purchaser are members of the same group as at the effective date of the transaction. Sub-para (2) defines "company" as a "body corporate". This is a departure from the definition of "company in section 100 where it is provided that, save as expressly*

otherwise provided, "company" means any body corporate or unincorporated association but does not include a partnership. Schedule 7 is thus one of the places where it is expressly otherwise provided. <u>There is no statutory definition of body corporate; but it is generally assumed that the minimum requirements are that the body have a legal personality and be capable of perpetual succession</u>. For stamp duty the Commissioners have stated that "body corporate" includes companies with limited or unlimited liability, companies limited by guarantee, charter companies and bodies created by statute. The also indicated that relief may be available where a local authority, being a body corporate, is a party to a document and the other party has a share capital which is beneficially owned by the authority: Stamp Taxes Manual 6.123, and this definition appears to have been adopted for SDLT purpose: SDLTM 23014." [Emphasis added]

107. In this regard, while an LLC and an Irish company can cease to exist, both entities enjoy the possibility of perpetual succession by the introduction of new members thereby preserving the life of those entities. As such, I am of the view that LLC is a '*body corporate'* and therefore a company for the purposes of TCA, sections 4 and 411.

Resident for the purposes of Tax in the US

108. In light of the Respondent's acknowledgment that if I was satisfied that LLC was a body corporate, together with being satisfied that LLC was a resident of a Contracting State within the meaning of Article 4 of the DTA, that the law as set out in *FCE Bank* would apply. Implicit in that acknowledgement is the recognition that TCA, section 411, prior to the Finance Act 2012 amendment, discriminated against companies resident outside of the EU and EEA but resident in jurisdictions having concluded a double tax agreement with the State.

109. As such, the issue of whether LLC is resident in the US for the purposes of tax must be considered.

110. In this regard, TCA, section 411(1)(a) defines "tax" as:

"in relation to a relevant Member State other than the State, means any tax imposed in the Member State which corresponds to corporation tax in the State."

111. Article 4 of the DTA sets out the definition of "resident of a Contracting State" as;

"any person who, under the laws of that State, is liable to tax therein, by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature."

112. Therefore, in considering whether LLC was resident in the US for the years under appeal, recourse must be made to the evidence of the expert witnesses who appeared on behalf of the Respondent and the Appellants.

113. Professor Shay, on behalf of the Respondent, was of the opinion that it was an oxymoron to refer in a U.S. Federal income tax context to the U.S. tax residence of an entity that is disregarded for Federal income tax purposes. For U.S. Federal income tax purposes, a disregarded entity does not realise income nor is it subject to tax. He therefore formed the view that in no meaningful way could it be said that LLC or any disregarded entity is U.S. resident for U.S. Federal income tax purposes and that such entities have no separate U.S. Federal income tax liabilities and are not considered the owner of income for U.S. Federal tax purposes.

114. Professor Shay referred to the definition of 'resident' as contained in Article 4(1)(a) of the DTA as "*any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature.*" Therefore a U.S. domestic LLC that had not elected classification as a corporation would not be liable to tax in the U.S. if it is disregarded and as a consequence would not be a resident of the U.S. under the general rule of DTA Article 4(1). Furthermore, an LLC, as a disregarded entity, has no independent significance for relevant U.S. income tax purposes. In this regard, Professor Shay concluded that LLC would not be considered "*resident*" of the U.S. under the standards of Article 4 of the DTA because it is disregarded for U.S. tax purposes and is not liable to tax that would be the analogue to the Irish corporate tax.

115. Mr Bowers, on behalf of the Appellants, acknowledged that LLC does not account to the US authorities for the tax on its operational profits. He also agreed that the US Tax Code does not have a definition of 'residence' for corporations or other business entities. Instead, the Code sets out the procedure for taxing the entity depending on the structure employed.

116. However, Mr Bowers disagreed with Professor Shay's assertion that there is no meaningful respect in which it could be said that LLC is a US resident for US Federal income tax purposes. Mr Bowers said that the concept of residence is not contained in the US tax code. Rather the tax code classifies income to flow either to corporations or to individuals. As such, an LLC is connected to the US by virtue of its formation. Therefore, if that was all that was required to be a resident, then LLC would fall within that definition of resident.

117. Mr Bowers was also of the view that in interpreting or applying the DTA, it is not necessary to consider the issue of residence. Therefore in considering what the term "*liable to tax*" means in the context of an LLC, Mr Bowers posed the question as to whether you attempt to place significance on the fact that the LLC did not pay any tax

but the individual owners did and therefore the LLC is not liable to tax and as a consequence not resident, or do you take another level of generality and look at where the income flows through to determine residence?

118. It was Mr Bower's view that the DTA Protocol does not consider the issue of residence but rather considers situations where the US LLC is fiscally transparent and attributes the income to the owner. Therefore, the issue of residency or liable to tax puts the question to the side about whether the fiscally transparent entity is a resident or not. Mr Bower's stated that reliance must therefore be placed on the DTA Protocol to establish the owner of the income and to whom the income flows and on to those responsible for reporting the tax in the US.

119. Mr Bowers during cross examination was asked how he would apply Article 4 of the DTA in determining whether LLC was resident in the US and therefore liable to tax in that jurisdiction. He explained that in the absence of a definition of residence in the US Code, he would simply restate the US tax rules and try to create a definition of residence. Therefore, he advocated a process that would follow the income all the way up to the five individual owners that are subject to US tax as those five individuals are the ones who can claim the treaty benefits because those are ultimately the parties who can include the income on their tax returns.

120. Mr. Bowers expressed doubt on the position of the IRS in adopting the view that an LLC, as a disregarded entity, is not liable to tax and pointed out that IRS Chief Counsel position as articulated in the Canadian tax case, *TD Securities*, had not been endorsed by the courts. However, he pointed out that it would be a waste of the IRS' resources to certify residence for LLCs where in fact a protocol to a DTA determines who can claim treaty benefits.

121. Therefore, in the consideration of the expert evidence, it is relevant that Professor Shay was most definitive in his assertion that LLC was not resident in the US for tax purposes for the years under appeal whereas Mr Bowers did not make any corresponding assertions. Instead Mr Bowers highlighted the practical difficulties in the attempts to classify LLC as resident in the US as the US tax code did not address residency issues to the extent that such a concept does not exist under US tax law. As such, Mr Bowers highlighted the significance of the DTA Protocol which deals with transparent entities and the entitlement of individuals who derive income from flow through entities and their entitlement to treaty benefits.

122. Therefore, based on the evidence adduced, I can only rely on the definitive opinion of Professor Shay in concluding that in the application of Article 4 of the DTA, LLC was not liable to tax is the US in respect of the years under appeal. My conclusion is formed notwithstanding the pragmatic approach suggested by Mr Bowers that in determining residence one should follow the income all the way up to the five individuals that are

subject to US tax as those five individuals are the ones who can claim the treaty benefits because those are ultimately the parties who can include the income on their tax returns and under the laws of US and are liable to tax thereon.

123. As such, based on a literal interpretation of Article 4 of the DTA and Professor Shay's evidence, I can only conclude that LLC was not resident in the US and therefore not liable to tax in that jurisdiction in the years under appeal. However, this conclusion is not determinative of the matter, as I am required to consider the legal basis for the interpretation and application of an international agreement.

Interpretation of a Tax Treaty

124. In *O'Brien v Quigley (Inspector of Taxes*) [2013] IEHC 398, Laffoy J. considered the principles of interpretation of a double taxation agreement and opined thus:

> *(6) The relevant principles of interpretation applicable to the construction and application of a Double Taxation Convention, such as the Convention, were considered by the High Court (Kelly J) in Kinsella v Revenue Commissioners [2007] IEHC 250, 10 ITLR 63, [2011] 2 IR 417, where, in the context of the application of a Double Taxation Convention with Italy dating from 1971 and incorporated into Irish law in 1973, it was stated (at para 41):*
>
>> *"This State acceded to the Vienna Convention on the Law of Treaties with effect from 6 September 2006. Even before that event it is clear from the decision of Barrington J in McGimpsey v Ireland [1988] IR 567 that in interpreting an international treaty the court ought to have regard to the general principles of international law and in particular the rules of interpretation of such treaties as set out in Articles 31 and 32 of the Vienna Convention."*
>
> *(7) The decision in McGimpsey v Ireland concerned a constitutional challenge to the Anglo-Irish Agreement of 15 November 1985. In that case, it was held by the High Court that an international treaty must be interpreted having regard to international law and such interpretation should not be coloured by reference to the Constitution. In his judgment, Barrington J stated (at p 582):*
>
>> *"An international treaty has only one meaning and that is its meaning in international law. Its interpretation cannot be coloured by reference to the Constitution. The approach to the interpretation of post constitutional statutes laid down in East Donegal Co-Operative Society v The Attorney General [1970] IR 317 can have no application to the interpretation of a treaty. For guidance on this subject one must look to the general principles of international law and in particular to the rules of interpretation set out in article 31 of the Vienna*

Convention on the Law of Treaties. Ireland, admittedly, is not a party to that convention, but article 31 is acknowledged to have codified the relevant principles of interpretation."

(8) *Article 31 of the Vienna Convention is headed "General rule of interpretation". Paragraph 1 of art 31 provides "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Paragraph 2 elaborates on what the context for the purpose of the interpretation of a treaty shall comprise and para 3 sets out what shall be taken into account together with context, neither of which paragraphs is of any particular relevance for present purposes. Paragraph 4 provides that a special meaning shall be given to a term if it is established that the parties so intended.*

(9) *Article 32 of the Vienna Convention, which is headed "Supplementary means of interpretation" provides:*

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

(10) *In Kinsella v Revenue Commissioners, 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."

That passage, in my view, clearly sets out the proper approach to be adopted in interpreting and applying a Double Taxation Convention."

TAX APPEALS COMMISSION

125. As such, in accordance with settled law, I am required to interpret the DTA "*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.*"

TD Securities

126. In the interpretation of an international treaty, *TD Securities* is of assistance. That case concerned a US limited liability company registered in Delaware and wholly owned by another US company conducting business in Canada. While the issue in *TD Securities* concerned whether a US limited liability company, TD LLC, was entitled to be treated as a resident of the US for treaty purposes and therefore entitled to claim the reduced branch profits tax rate of 5% instead of the 25% rate applied on its branch income, the case is significant to the extent to which it considered whether an LLC, as a disregarded entity in the US, was liable to tax in the US for the purposes of availing of treaty benefits.

127. In the US, the taxpayer had elected to be treated as a flow-through or disregarded entity, where the income was taxed in the hands of its owner. If such an entity had several owners they were treated as a partnership. The taxpayer claimed the benefit of the Canada-US double taxation agreement on the basis that it was a resident of the US. The definition of 'resident' of a state in that agreement required the entity be liable to taxation in that state. The Canada Revenue Agency took the position that as the taxpayer did not itself pay tax in the US it was not resident there and not entitled to the benefit of the double taxation agreement. However, the Tax Court of Canada (Tax Court) held that the US LLC had to be considered liable to tax in the US by virtue of all its income being fully taxed under the US Tax Code, albeit at the member level, *inter alia*, by analogy with the treatment of a partnership. It was hence a resident of the US for the purposes of the Canada-US double taxation agreement.

128. In considering whether the treaty benefit should apply, the Tax Court relied on the Vienna Convention on the Law of Treaties and the requirement to interpret a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose in attempting to resolve "*the tension between the ordinary meaning of the terms used in the treaty and its object and purpose*" as identified at paragraph 51 of the *TD Securities* decision. The Tax Court highlighted that a strict application of the terms used to define resident of a contracting state lead to an unreasonable result and thus a supplementary means of interpretation was an appropriate part of the required analysis. Furthermore, the Tax Court considered that the unreasonable result was demonstrated by the fact that a strict application of the text would conflict with how both the US and Canada had interpreted and applied the treaty to government entities, not-for-profit organisations, pension funds and partnerships as fiscally transparent flow-through entities.

129.The Tax Court thereafter referred to *Crown Forest Industries Ltd v Canada [1995] 2 SCR 802, 125 DLR (4th) 485,* where the Supreme Court of Canada had occasion to consider the appropriate interpretation to be given to the phrase *'resident of a Contracting State'* in art IV of the US treaty and, in particular, what it meant to be *'liable to tax'* in the US by reason of the enumerated criteria. In that case, the premise was made that in interpreting a treaty, the paramount goal is to find the meaning of the words in question. The Tax Court, in considering the reasoning of the Supreme Court in *Crown Forest*, said at paragraph 53:

> *"the language used and the intentions of the parties. The court went on to quote approvingly from Addy J in JN Gladden Estates v R [1985] 1 CTC 163 at 166–167, 85 DTC 5188 at 5191, wherein he wrote:*
>
> > *'Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned.'"*

130.The Tax Court in acknowledging that both the Vienna Convention and the Supreme Court of Canada in *Crown Forest* confirmed that literalism has no role to play in the interpretation of treaties. Furthermore, in ascertaining the purposes of a treaty article, a court may refer to extrinsic materials which form part of the legal context, including model conventions and official commentaries thereon.

131.It was noted that the preamble to the US treaty sets out its purposes of reducing or eliminating double taxation of income earned by a resident of one country from sources in the other country, and of preventing tax avoidance or evasion. However, it was also observed that in *Crown Forest* that the purpose of the treaty also included the promotion of international trade between two countries and the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems.

132.The Tax Court thereafter found at paragraph 58 that:

> *"the meaning of the phrases resident of a contracting state and liable to tax by reason of the enumerated criteria, the Supreme Court of Canada in Crown Forest clearly concluded that the definition sought to describe those who are subject to as comprehensive a tax liability as is imposed by a state, which in the US as in Canada is taxation on worldwide income. The court was not faced in Crown Forest with circumstances where one person's worldwide income was subject to tax in the hands of another related entity resident in the same jurisdiction by virtue of specific US domestic taxing rules. It is none the less a strong confirmation that the intended*

purpose and scope of arts I and IV of the US treaty were that the treaty apply to those bearing full tax liability in either of the contracting states based upon the nature and extent of their connections with that country."

133. Reference thereafter was made to the Working Group of the Committee on Fiscal Affairs which authored an OECD Partnership Report on the application of the OECD Model Treaty to partnerships, trusts and other non-corporate entities. At paragraph 65 the Tax Court determined that while:

"the OECD Partnership Report focuses on partnerships, the report opens with an acknowledgment that many of the principles discussed therein may also apply with respect to other non-corporate entities. The court was not made aware of any OECD developments regarding other non-corporate entities. The court agrees that many of the same principles and considerations also apply to a determination of whether the income of an LLC is entitled to treaty benefits."

134. Thereafter the following passage of that Report was cited at Paragraph 69:

"Where the partnership as such does not qualify as a resident under the principles developed in the preceding section, the Committee agrees that the partners should be entitled to the benefits provided by the Conventions entered into by the countries of which they are residents to the extent that they are liable to tax on their share of the partnership income in those countries."

135. After considering the OECD material, the Tax Court made the following observations:

(75) From these OECD materials it seems clear that the OECD wants to be able to maintain that a partnership that is treated as a flow-through in its country of establishment will not be considered liable to tax therein for purposes of the OECD Model Treaty. However, the OECD makes it equally clear that, the OECD Model Treaty is intended to, and should be interpreted and applied in a manner that none the less extends the benefits of the Convention to the income of such a partnership notwithstanding that it is not, strictly speaking, a resident of its home country. In the case of partnerships this is to be done at the partner level notwithstanding that the partnership is not liable to tax in its home country and its partners are not considered to have earned the income in the source country.

(76) While these two conclusions—that a partnership is not liable to tax in its home country if it is treated as fiscally transparent and that its income from a source country that does not regard it as fiscally transparent should none the less get the benefit of the tax convention—are developed in the context of fiscally transparent entities that are partnerships, this court sees no reason that the conclusions should be any different in the case of a fiscally transparent US LLC.

(77) *Clearly these conclusions and the reasoning in the OECD Model Treaty and commentaries reflect the intention of the OECD member countries, including Canada and the US, with respect to treaties based upon the OECD Model Treaty, such as the US treaty. Further, given the absence of reservations or observations thereon by Canada and the US, the court accepts that these reflect the intentions of Canada and the US with respect to the US treaty specifically and how its objects and purposes are to be achieved."*

136. Thereafter the Tax Court made reference to the US material that was before it which confirmed that the approach of the US authorities to the interpretation and application of tax treaties to fiscally transparent entities was consistent with the OECD look-through approach and in particular the Technical Assistance document dated 15 March 2000 issued by the Chief Counsel of the US Treasury in which it stated at paragraph 90 that:

"because a single-owner LLC that is disregarded as an entity separate from its owner is not a "person", nor is it "liable to tax", the [IRS] may not certify that the LLC is a resident of the United States. However, the [IRS] may certify that the single-owner of the LLC is a resident of the United States, which should suffice to establish that income derived by the LLC in the treaty country is being derived by a resident of the United States and is entitled to treaty benefits."

137. The Tax Court also noted that the US competent authority had also determined under the mutual agreement procedures with several of its other treaty partners that the income of LLCs will be extended to treaty benefits at the member level on a look-through basis. The practice adopted by the United Kingdom revenue authority was also referenced for the purposes of confirming that this approach to US LLCs in its Double Taxation Relief Manual prior to being 'formalised' by amendments to the US-UK Treaty.

138. At paragraph 101, the Tax Court determined:

The OECD Commentaries on this issue are clear from a substantive point of view but appear to be walking a fine semantic line. On more than one occasion they state in a principled fashion that the fiscally transparent entity is not liable to tax. However, each time they go on to conclude in a pragmatic fashion that, interpreted and applied correctly having regard to the treaty's intended object and purpose, treaty benefits should apply to the income of the entity based on the member's entitlement. The Commentaries then go on to say that the relief can none the less be delivered at the entity level. The OECD Commentary may have a good reason for not wanting to conclude one way or the other on whether the treaty so applies because the entity is resident for treaty purposes or because the income is that of the member for treaty purposes. Given the vastly different legal and tax regimes represented by the OECD, this court cannot guess what the motivating reasons for this diplomatic ambiguity *are and no representative of Canada testified at this trial. However, this court finds it easier to discern how Canada and the US can be presumed to have the US treaty so apply given that they subsequently addressed the issue in the Fifth Protocol Amendments and the Technical Explanation thereto. While Canada and the US try to walk both lines—in the treaty text not treating the entity as a resident because it is not liable to tax yet acknowledging their intention of applying the text as if the LLC was a resident—, having forced this matter to court, Canada can perhaps no longer leave it ambiguous. Since this court has to decide whether TD LLC is a resident of the United States and liable to tax therein by reason of one of the enumerated or similar grounds, it concludes that it is. The court concludes that implicit in the clear intention of the OECD countries, including Canada and the US, that treaty benefits be enjoyed by TD LLC in the present circumstances, and given the context of the Canadian and US tax regimes and the text of the US treaty:*

(i) TD LLC must be considered to be a resident of the US for purposes of the US treaty otherwise the treaty could not apply;

(ii) TD LLC must be considered to be liable to tax in the US by virtue of all of its income being fully and comprehensively taxed under the US Code albeit at the member level; and

(iii) the income of TD LLC must be considered to be subject to full and comprehensive taxation under the US Code by reason of a criterion similar in nature to the enumerated grounds in art IV, namely the place of incorporation of its member which is the very reason that TD LLC's income is subject to full taxation in the US.

139. As such, the Canadian Tax Court determined that the US LLC had to be considered liable to tax in the US by virtue of all its income being fully taxed under the US Tax Code, albeit at the member level and by analogy with the treatment of a partnership. It was therefore a resident of the US for the purposes of the Canada-US double taxation agreement.

Purposive Interpretation - Is LLC liable to tax in the US?

140. The preamble to the DTA provides:

"Convention between the government of Ireland and government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains."

141. As observed by the Canadian Supreme Court in *Crown Forest* to which reference was made by the Canadian Tax Court in *TD Securities,* the purpose of the double taxation agreement also includes the promotion of international trade between the two

countries and the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems.

142. Therefore, while the evidence of Professor Shay and the clear wording of the treaty determines that LLC is not resident in the US, the international and domestic jurisprudence on the interpretation of international agreements clearly endorses an approach that attempts to facilitate an understanding of the purpose of the DTA.

143. Difficulties were highlighted by Mr Bowers in noting the DTA Protocol, while attempting to facilitate the allocation of treaty benefits to bespoke US taxing arrangements, does not contain the necessary provisions to deem an LLC to be liable to tax in the US. Instead Mr Bowers noted that the DTA Protocol deems the income to flow through to the individual members for the purposes of procuring treaty benefits.

144. It is noteworthy that in the Respondent's tax publication, Tax Briefing 55, it was acknowledged the practical difficulties in denying the exemption from withholding tax where the interest is paid to a US resident through a US LLC when stating that in *"recognition of the difficulties arising from the use of US LLCs, Revenue are prepared to "look through" the US LLC to the ultimate recipients of the interest"*

145. Furthermore, the Respondent also referred in its 2012 guidance note to a similar arrangement relating to interest payments made to US LLCs in the application of TCA, section 110, securitisation, when stating:

> *"Where payments are made via a US Limited liability company to investors who are not US resident, the non- US investors may not be subject to US tax on the income and gains of the US limited liability company. In such cases, the interest or other distribution will be considered to be subject to tax to the extent that it is immediately paid on to residents of EU or other tax treaty partner countries who are subject to tax on the onward payments in those countries…."*

146. While it is clear that the Respondent has adopted a pragmatic approach to the tax treatment of income derived by US LLC's in certain instances, such policies do not give me the authority to automatically adopt a similar approach in the absence of legal justification.

147. As confirmed by Mr Hering, LLC's are now the most predominant entity in Delaware outnumbering corporations by a factor of 3 to 1. His evidence was that in 2017 there were 930,000 LLC's registered in Delaware and estimated that in 2019 there could be over 1 million such entities. To this extent, I have considered that the application of a purposive approach, as espoused by the Irish Superior Courts, to the interpretation of the DTA is not only to avoid double taxation, prevent the evasion of tax and encourage

trade but also to mitigate the administrative complexities arising from having to comply with two uncoordinated taxation systems.

148. As such, while economic policy does not fall within the jurisdiction of the Tax Appeals Commission, I have concluded that to deny the Appellant's claim for group relief pursuant to TCA, section 411 would fail to mitigate the administrative complexities of the US and Irish domestic tax policies and therefore contrary to a purposive interpretation of the DTA.

149. Therefore and notwithstanding that on a literal interpretation of the DTA, and the fact that LLC is not in itself liable to tax in the US, I consider that the technical nuances of the Irish group relief provisions and the apparent disconnect between the US tax code and the DTA, that on a purposive interpretation of an international treaty and in line with the decision of the Canadian Tax Court in *TD Securities*, that LLC should be considered to be and as a consequence is liable to tax in the US *"which corresponds to corporation tax in the State"* by virtue of all of its income is fully and comprehensively taxed to Federal Income Tax under the US Tax Code albeit at the member level. Therefore, and in addition to the above, in light of my determination that LLC is a *body corporate*, the Appellants are entitled to avail of group relief pursuant to TCA, section 411.

Non-Discrimination

150. The Respondent acknowledged that if LLC was a US resident company, it would have allowed the relief. Therefore, in light of that acknowledgement and my conclusion that LLC is a *body corporate*, liable to tax in the US and as such is considered to resident in the US for treaty purposes, there is no requirement to consider the Non-Discrimination provision contained in Article 25 of the DTA.

Conclusion

151. On the basis of the evidence of Mr Hering and the extent to which a US LLC is capable of perpetual succession, I consider that LLC is a '*body corporate*' and therefore a company for the purposes of TCA, sections 4 and 411.

152. I have also found that in line with a purposive interpretation of the DTA and similar to the finding of the Canadian Tax Court in *TD Securities*, that LLC, as a '*body corporate*', must be considered to be and as a consequence is liable to tax in the US "*which corresponds to corporation tax in the State"* by virtue of all of its income is fully and comprehensively taxed under the US Code albeit at the member level.

153. Therefore, in light of the above, I have determined that the Appellants are entitled to avail of group relief pursuant to TCA, section 411 in accordance with the years and amounts specified at paragraph 9 of this determination. The assessments shall be amended accordingly.

154. This appeal is therefore determined in accordance with TCA, section 949AK.

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Conor Kennedy
Appeal Commissioner
12th April 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.

While the Respondent is challenging the finding that LLC is a 'company' within the meaning of TCA, section 411, it is not seeking to appeal the determination that LLC is a 'body corporate'.