08TACD2020

BETWEEN

Appellant

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against a refusal by the Respondent to grant split year residence relief to the Appellant in accordance with Section 822 of the Taxes Consolidation Act 1997 (TCA 1997) in respect of the tax years ended 31 December 2012 and 31 December 2013 respectively.

2. The appeal is determined without a hearing, by the agreement of the parties, in accordance with section 949U TCA 1997.

Background

3. The Appellant is a UK citizen who lived in Northern Ireland (hereafter NI) and commuted to the Republic of Ireland (hereafter ROI) from 20 August 2012 to 10 May 2013 to perform the duties of his employment with an Irish employer. From 11 May 2013 until 5 November 2013 the Appellant resided in the Republic of Ireland. Following that he left the State and returned to the UK.

4. The Appellant spent less than 183 days in the ROI in 2012. He was not otherwise tax resident nor was he ordinarily tax resident or domiciled in ROI in 2012. He elected to

be tax resident in ROI in 2012 on the basis of that he would spend greater than 183 days in Ireland in 2013.

5. The Appellant has sought to have the split-year residence rules under S.822 TCA 1997 applied to him for years 2012 and 2013 in relation to his Irish employment income. Were he to qualify for this relief, he would be entitled to full personal tax credits and PAYE tax credits for tax years 2012 and 2013. In addition, he would only be treated as Irish tax resident from his time of arrival in the State until his departure from the State.

6. The Respondent states that the Appellant is not tax resident in Ireland in 2012 and 2013 and therefore the application of the split year rules does not apply to him.

7. The Respondent is relying on the limited days spent in Ireland by the Appellant in 2011 under the "look back" rule in S. 819 TCA 1997, as the basis to challenge the Appellant's status as tax resident in ROI in 2012.

8. The letter of refusal in respect of split year residence relief stated that

> *"Appellant does not qualify for split year residence relief under the Double Tax Agreement Article 4 A and B".*

The Respondent is relying on the tie-breaker clause in the Ireland/UK Double Tax Agreement (hereafter the DTA) as the basis of its decision that the Appellant is not tax resident in Ireland in 2013.

Legislation

9. S. 819 and S. 822 are the relevant legislative sections for consideration herein. These are reproduced in Appendix 1.

10. Relevant extracts from the Ireland / UK Double Tax Treaty (UK DTA) are set out in Appendix 2.

Submissions by The Appellant

Year 2012

11. The Appellant contends he is tax resident in Ireland in 2012 by virtue of his election under S.819 TCA 1997 to be tax resident in that year.

12. The Appellant asserts that the Respondent is incorrectly relying on the days he spent in ROI in 2011 under the "look back" rule in S.819 TCA 1997, as the basis for its decision that he was not tax resident in Ireland in 2012.

13. The Appellant agrees with the Respondent's commentary in relation to the interpretation of the "look back" rule but contends that this is not the basis of his tax status in 2012, rather it is based on his election under S.819 TCA 1997 to be tax resident in ROI in that year.

14. The Appellant refutes the Respondent's position that the DTA overrides domestic legislation in the context of the correct interpretation of S. 822 TCA 1997.

15. The Appellant submits that tax residence as construed for the purpose of S.819 TCA 1997 is determined in accordance with Irish domestic tax legislation, in particular, for the purpose of interpretation of S. 822 TCA 1997.

Year 2013

16. The Appellant refers to s.819(1)(a) TCA 1997 which provides that an individual shall be tax resident in the State if the individual is present in the State for more than 183 days.

Years 2012 & 2013

17. The Appellant states that he was present in ROI for greater than 183 days in 2013 and hence was tax resident in ROI in that year. Hence, he submits that he is entitled to split year residence in 2013 on the basis of his factual residence in ROI in 2013 and on the basis of his decision to return to the UK in that year.

18. The Appellant asserts his entitlement to full personal and PAYE credits in 2012 and 2013 on the basis of his residence in ROI in those years and also on the basis that his only income in that year was Irish income.

19. The Appellant states that the purposes of DTAs is to establish "relieving" provisions from double taxation and therefore the Respondent is incorrect in invoking the provisions of the DTA where no relief is sought under the DTA.

20. The Appellant argues that the Respondent is not entitled to rely on eBrief 03/09 to override the unambiguous terms of s.819 (1)(a) TCA 1997.

Submissions by the Respondent

21. The Respondent agrees that the facts (in relation to the location of the Appellant) of the appeal are not in dispute.

Tax Year 2012

22. The Respondent contends that the Appellant is not tax resident in 2012. The Respondent is relying on the days the Appellant spent in ROI in 2011 under the "look back" rule in S.819 TCA 1997, as the basis for its decision that he was not tax resident in Ireland in 2012.

Tax Year 2013

23. The Respondent argues that the Appellant is dual resident in 2013 being both tax resident in ROI and NI. The Respondent submits that due to the dual residence status of the Appellant in 2013 it is necessary to consider the tie breaker clause in paragraph 4 of the DTA. The Respondent states that even though the Appellant is in the State for more than 183 days in 2013, the DTA does not confer residency status in the State but permits the State to tax the income of the taxpayer without affecting the residency of the taxpayer in the UK.

24. The Respondent argues that s. 826 TCA 1997 gives force of law to the DTA in the State and on this basis the Appellant's' interpretation of the DTA is too narrow. The Respondent emphasises that the preamble to the DTA states that it is a convention

'for the avoidance of double taxation and the prevention of fiscal evasion with respect of taxes on income and capital gains tax' and as such sets out the rules for residence and how income is to be taxed.

Tax Years 2012 & 2013

25. The Respondent states that the Appellant had a permanent home in the UK as he has maintained his personal and economic interests in the UK. The Respondent argues that due to the Appellant's retention of his home in the UK, he is not entitled to elect for residence in 2012, he is not tax resident in 2013 and he cannot apply for split year residence in either year.

26. The Respondent contends that the taxation of the Appellant's employment income is dealt with under Article 15 of the DTA which permits the State to tax the employment income of an individual who is in the State for over 183 days.

Findings and analysis

Tax Year 2012

Irish Residence

27. The Appellant has elected to be resident in 2012 under S.819 TCA 1997. This is not disputed by the Respondent. By virtue of the Appellant's valid election under S.819 TCA 1997 he is Irish resident for 2012.

Split year relief

28. The next question to decide is whether Split Year relief under S.822 TCA 1997 applies to tax year 2012. Below, underlined, are the conditions under S.822(1) that must be met in 2012 by the Appellant:

> *(a)(i) an individual who has not been resident in the State for the preceding year of assessment satisfies an authorised officer that the individual is in the State-*

(I) with the intention, and

(II) in such circumstances,

that the individual will be resident in the State for the following year of assessment, or

(ii) an individual who is resident in the State satisfies an authorised officer that the individual is leaving the State, other than for a temporary purpose-

(I) with the intention, and

(II) in such circumstances,

that the individual will not be resident in the State for the following year of assessment,

and

(b) the individual would but for this section be resident in the State for the relevant year,

subsection (2) shall apply in relation to the individual. (Emphasis added)

Based on the testimony of the Appellant, the Appellant meets condition (a)(i). Based on his election under S.819TCA 1997, the Appellant meets condition (b).
For this reason, the Appellant is entitled to split year relief under S.822 TCA 1997 in 2012.

Tax Year 2013

29. The Appellant has asserted that split year residence relief is an entitlement of the Appellant in respect of the 2013 tax year because: -

(a) The Appellant was resident in Ireland during 2013, based on the 183-day rule;
(b) The Appellant departed to live abroad in November 2013, other than for a temporary purpose; and,

> (c) The Appellant departed in circumstances where it was clear that he did not intend to be resident in the State in the following year.

30. I am satisfied on the evidence before me and find as a material fact that the Appellant was resident in Ireland in 2013 as he was present in the State for more than 183 days. The Respondent argues that the Appellant does not meet the statutory criteria necessary to avail of split year residence relief for 2013. I am satisfied that the Appellant meets the conditions in S.822TCA 1997 and is entitled to split year relief in 2013.

31. I am not persuaded by the Respondent's view that the provisions of a DTA can override domestic legislation other than in the context of circumstances of dual taxation. I am satisfied that in the first instance, as contended by the Appellant, it is necessary to interpret domestic legislation on a standalone basis; and then only in instances where it is clear that both the State and a DTA country both seek to impose tax on a taxpayer, that the DTA can then be relied on to alleviate such double taxation.

32. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on a balance of probabilities that the decision of the Respondent is incorrect.

33. In cases involving tax reliefs or exemption, it is incumbent on the taxpayer to demonstrate that it falls within the relief, see *Revenue Commissioners v Doorley* (1933) 1 IR750 and *McGarry v Revenue Commissioners* (2009) ITR 131.

34. In the High Court case of *Menolly Homes v Appeal Commisssioner and another* (2010) IEHC 49, at par.22 Charleton J. stated:

> '*The burden of proof in this appeals process is, as in all taxation appeals on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*'

35. Having considered the facts, the submissions of the parties and the relevant legislation, I determine that the Appellant has succeeded in discharging the burden of proof in relation to his entitlement to split year residence relief in 2012 and 2013.

Conclusion

36. For the reasons outlined above, I determine that: -

> the Appellant was resident in Ireland in 2012;
>
> he does meet the conditions in section 822 and is therefore eligible for split year residence relief in 2012;
>
> the Appellant was resident in Ireland in 2013. Because he left Ireland in 2013 with the intention and in such circumstances that he was not resident in Ireland in 2014 he does meet the conditions in section S.822 TCA 1997 and is therefore eligible for split year residence relief in 2013;

37. This determination deals solely with the Irish tax position of the Appellant. It does not address any UK tax liability which may arise in respect of the years under appeal. The Appellant may be allowed a credit against Irish tax for foreign tax paid, if any, under the terms of the Double Taxation Agreement between Ireland and the United Kingdom;

38. The appeal is determined in accordance with section 949AL TCA 1997.

PAUL CUMMINS

APPEAL COMMISSIONER

20 DECEMBER 2019

Appendix 1

Section 819(1)(a) TCA 1997 - Residence

(1) For the purposes of the Acts, an individual shall be resident in the State for a year of assessment if the individual is present in the State-

(a) at any one time or several times in the year of assessment for a period in the whole amounting to 183 days or more, or

(b) at any one time or several times-

(i) in the year of assessment, and

(ii) in the preceding year of assessment,

for a period (being a period comprising in the aggregate the number of days on which the individual is present in the State in the year of assessment and the number of days on which the individual was present in the State in the preceding year of assessment) in the aggregate amounting to 280 days or more.

(2) Notwithstanding subsection (1)(b), where for a year of assessment an individual is present in the State at any one time or several times for a period in the aggregate amounting to not more than 30 days –

(a) the individual shall not be resident in the State for the year of assessment, and

(b) no account shall be taken of the period for the purposes of the aggregate mentioned in subsection (1)(b).

(3)(a) Notwithstanding subsections (1) and (2), an individual-

(i) who is not resident in the State for a year of assessment, and

(ii) to whom paragraph (b) applies,

may at any time elect to be treated as resident in the State for that year and, where an individual so elects, the individual shall for the purposes of the Acts be deemed to be resident in the State for that year.

(b) This paragraph shall apply to an individual who satisfies an authorised officer that the individual is in the State-

(i) with the intention, and

(ii) in such circumstances,

that the individual will be resident in the State for the following year of assessment.

[(4) For the purposes of this section—

(a) as respects the year of assessment 2008 and previous years of assessment, an individual shall be deemed to be present in the State for a day if the individual is present in the State at the end of the day, and

(b) as respects the year of assessment 2009 and subsequent years of assessment, an individual shall be deemed to be present in the State for a day if the individual is present in the State at any time during that day.]

Section 822 TCA 1997 - Split Year Residence

(1) For the purposes of a charge to tax on any income, profits or gains from an employment, where during a year of assessment (in this section referred to as "the relevant year")-

(a)(i) an individual who has not been resident in the State for the preceding year of assessment satisfies an authorised officer that the individual is in the State-

(I) with the intention, and

(II) in such circumstances,

that the individual will be resident in the State for the following year of assessment, or

(ii) an individual who is resident in the State satisfies an authorised officer that the individual is leaving the State, other than for a temporary purpose-

(I) with the intention, and

(II) in such circumstances,

that the individual will not be resident in the State for the following year of assessment,

and

(b) the individual would but for this section be resident in the State for the relevant year,

subsection (2) shall apply in relation to the individual.

(2)(a) An individual to whom paragraphs (a)(i) and (b) of subsection (1) apply shall be deemed to be resident in the State for the relevant year only from the date of his or her arrival in the State.

(b) An individual to whom paragraphs (a)(ii) and (b) of subsection (1) apply shall be deemed to be resident in the State for the relevant year only up to and including the date of his or her leaving the State.

(3) Where by virtue of this section an individual is resident in the State for part of a year of assessment, the Acts shall apply as if-

(a) income arising during that part of the year or, in a case to which section 71(3) applies, amounts received in the State during that part of the year were income arising or amounts received for a year of assessment in which the individual is resident in the State, and

(b) income arising or, as the case may be, amounts received in the remaining part of the year were income arising or amounts received in a year of assessment in which the individual is not resident in the State.

Appendix 2

CONVENTION BETWEEN THE GOVERNMENT OF IRELAND AND THE GOVERNMENT OF THE UNITED KINGDOM 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 Kingdom;

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;

Have agreed as follows: —

ARTICLE 1

Personal scope

This Convention shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

Taxes covered

(1) The taxes which are the subject of this Convention are:

(a) in Ireland:

(i) the income tax;

(ii) the corporation profits tax;

(iii) the corporation tax; and

(iv) the capital gains tax;

(b) in the United Kingdom:

(i) the income tax;

(ii) the corporation tax;

(iii) the petroleum revenue tax; and

(iv) the capital gains tax.

(2) This Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes.

ARTICLE 3

General definitions

(1) In this Convention, unless the context otherwise requires:

(a) the term "Ireland" includes any area outside the territorial waters of Ireland which in accordance with international law has been or may hereafter be designated, under the laws of Ireland concerning the Continental Shelf, as an area within which the rights of Ireland with respect to the sea bed and sub-soil and their natural resources may be exercised;

(b) the term "United Kingdom" includes any area outside the territorial sea of the United Kingdom which in accordance with international law has been or may hereafter be designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the sea bed and sub-soil and their natural resources may be exercised;

(c) the term "nationals" means:

(i) in relation to Ireland, all citizens of Ireland and all legal persons, associations or other entities deriving their status as such from the laws in force in Ireland;

(ii) in relation to the United Kingdom, citizens of the United Kingdom and Colonies, British subjects under Section 2 of the British Nationality Act 1948 whose notices given under that Section have been acknowledged before the date of signature of this Convention, British subjects by virtue of Section 13

(1)or Section 16 of the British Nationality Act 1948 or Section 1 of the British Nationality Act 1965, and British protected persons within the meaning of the British Nationality Act 1948; and all legal persons, associations or other entities deriving their status as such from the law in force in the United Kingdom;

(d) the term "Irish tax" means tax imposed by Ireland being tax to which this Convention applies by virtue of the provisions of Article 2; the term "United Kingdom tax" means tax imposed by the United Kingdom being tax to which this Convention applies by virtue of the provisions of Article 2;

(e) the term "tax" means Irish tax or United Kingdom tax, as the context requires;

(f) the terms "a Contracting State" and "the other Contracting State" mean Ireland or the United Kingdom, as the context requires;

(g) the term "person" comprises an individual, a company and any other body of persons;

(h) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

(i) 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;

(j) the term "competent authority" means, in the case of Ireland, the Revenue Commissioners or their authorised representative, and in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorised representative.

(2) As regards the application of this Convention by a Contracting State any term not otherwise

defined shall, unless the context otherwise requires, have the meaning which it has under the laws

of that Contracting State relating to the taxes which are the subject of this Convention.

ARTICLE 4

Fiscal domicile

(1) For the purposes of this Convention, the term "resident of a Contracting State" means,

subject to the provisions of paragraphs (2) and (3) of this Article, any person who, under the

law of that State, is liable to taxation therein by reason of his domicile, residence, place of

management or any other criterion of a similar nature; the term does not include any

individual who is liable to tax in that Contracting State only if he derives income from

sources therein. The terms "resident of Ireland" and "resident of the United Kingdom" shall

be construed accordingly.

(2) Where by reason of the provisions of paragraph (1) of this Article an individual is a resident

of both Contracting States, then his status shall be determined in accordance with the

following rules:

(a) he shall be deemed to be a resident of the Contracting State in which he has a

permanent home available to him. If he has a permanent home available to him in

both Contracting States, he shall be deemed to be a resident of the Contracting

State with which his personal and economic relations are closer (centre of vital

interests);

(b) if the Contracting State in which he has his centre of vital interests cannot be

determined, or if he has not a permanent home available to him in either

Contracting State, he shall be deemed to be a resident of the Contracting State in

which he has a habitual abode;

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

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

(3) Where by reason of the provisions of paragraph (1) of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.