176TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments in relation to the imposition of the domicile levy, for the tax years of assessment 2010 and 2011. On 29 May 2015, the Respondent raised assessments to the domicile levy in the sums of €200,000 and €200,000 respectively.

Background

2. The Appellant is a hotelier by trade and is the owner and operator of an Irish situate hotel. The Appellant is Irish tax resident and Irish domiciled. The Appellant incurred significant capital expenditure on the construction of the hotel and on plant and machinery in respect of the hotel. In 2010 and 2011 the hotel was loss making.

3. In addition to operating the hotel, the Appellant was in receipt of income from other sources. This income consisted of salary from numerous companies of which he was an indirect shareholder (Schedule E), dividend income (Schedule F), rental income (Case V) and interest income (Case III/IV).

4. As a result of having availed of Case I losses in respect of the hotel trade, the Appellant was in an income tax refund position for both 2010 and 2011 in the amount of €361,346 in respect of 2010 and €919,557 in respect of 2011.

5. The Respondent processed these refunds in 2013 but retained €200,000 in respect of 2010 and €200,000 in respect of 2011 on the basis that, in the Respondent's view, the Appellant was subject to the domicile levy in relation to those tax years of assessment.

6. Following an exchange of correspondence between the parties, the Appellant received notification of a Revenue audit on 29 August 2014. The audit commenced on 23 September 2014. On 29 May 2015, the Respondent raised notices of assessment in respect of the tax years of assessment 2010 and 2011, assessing the Appellant to the domicile levy in respect of those tax years in the sums of €200,000 and €200,000 respectively. The Appellant duly appealed.

Legislation

The legislation in force as set out in the Taxes Consolidation Act 1997, as amended ('TCA 1997') in respect of the tax years of assessment 2010 and 2011, relevant excerpts of which are set out below, is as follows;

- Part 18C TCA 1997 (ss. 531AA – 531AK) - Domicile Levy
- Part 18D TCA 1997 (ss. 531AL – 531AAF) - Universal Social Charge
- Section 3 TCA 1997 – Interpretation of Income Tax Acts
- Section 12 TCA 1997 - The charge to income tax
- Section 381 TCA 1997 – Right to repayment of tax by reference to losses

Submissions

World-wide income

7. The Appellant submitted that the Case I deduction claimed pursuant to section 381 TCA 1997, was a deduction in estimating income from all sources, and was not a deduction in computing total income and that as a result, the Appellant's world-wide income for 2010 and 2011 was nil and the Appellant was not a '*relevant individual'* for the purposes of the domicile levy.

8. The Respondent was of the view that a deduction pursuant to section 381 TCA 1997, was a deduction in computing total income and that as such, the deduction was excluded from the calculation of world-wide income in accordance with the express statutory wording of the definition of '*world-wide income*' contained in section 531AA TCA 1997.

Sub-section (a) of world-wide income

9. The Appellant submitted that because section 381 losses were not expressly prohibited by subsection (a) of the definition of '*world-wide income'*, they were allowable in computing world-wide income for the purposes of the domicile levy.

10. The Respondent submitted that the express statutory wording of the definition of '*world-wide income'* contained in section 531AA TCA 1997, precluded such a view.

The meaning of 'Income tax' for the purposes of the Domicile Levy

11. The Appellant submitted that the Appellant's liability to income tax in the State in respect of the tax year of assessment 2011, exceeded €200,000 on the basis that his liability to Universal Social Charge ('USC') should be regarded as '*liability to income tax'* for the purposes of the domicile levy.

12. The Respondent's position was that USC was a tax on income but was not '*income tax'* and that USC was not reckonable for the purposes of calculating '*liability to income tax'* for the purposes of section 531AA.

Miscellaneous

13. The Appellant, in written submissions, made a further submission to the effect that the Respondent did not operate a consistent approach in relation to the treatment of USC as income tax and that this was inequitable. QC for the Appellant did not seek to advance this ground at hearing. For completeness, I will state that had the submission been advanced I would have included in this determination, a paragraph in relation to the scope of the jurisdiction of an Appeal Commissioner (as discussed in a number of Irish cases namely; *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 *and the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577) which jurisdiction is confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. It does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings.

ANALYSIS

14. Part 18C of the TCA 1997 (section 531AA to section 531AK) contains provisions in respect of the domicile levy. The Appellant submitted that he was not within the

charge to the domicile levy for 2010 or 2011 as he was not a '*relevant individual*' as defined. A '*relevant individual*' for the purposes of the domicile levy is defined in section 531AA(1) by reference to the following criteria;

'relevant individual' in relation to a tax year, means an individual –

(a) Who is domiciled in, and is a citizen of, the State in the tax year
(b) Whose world-wide income for the tax year is more than €1,000,000
(c) Whose liability to income tax in the State for the tax year is less than €200,000, and
(d) The market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000;

15. The Appellant claimed he was not a '*relevant individual*' on the basis that his world-wide income was not more than €1,000,000 and, in respect of the tax year 2011, because his liability to income tax was not less than €200,000. Criteria contained in sub-sections (a) and (d) were not disputed.

World-wide income

16. The expression '*world-wide income'* is defined for the purposes of the domicile levy in section 531AA(1) as follows;

"world-wide income" in relation to an individual means the individual's income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts and as if any provision of those Acts providing for any income, profit or gains to be exempt from income tax or to be disregarded or not reckoned for the purposes of income tax or of those Acts were never enacted, and –

(a) Without regard to any deduction
(i) In respect of double rent allowance under section 324(2), 333(2), 345(3) or 354(3),
(ii) under section 372AP, in computing the amount of a surplus or deficiency in respect of rent from any premises.
(iii) under section 372AU, in computing the amount of a surplus or deficiency in respect of rent from any premises
(iv) under Section 847A, in respect of a relevant donation (within the meaning of that section)

(v) under section 848A, in respect of a relevant donation (within the meaning of that section)

and

(b) having regard to a deduction for …

(i)any payment to which section 1025 applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) relating to the marriage for the benefit of the other party to the marriage, unless section 1026 applies in respect of such payment,

(ii)a payment of a similar nature to a payment referred to in subparagraph (i) pursuant to a maintenance arrangement (within the meaning of section 1025) relating to the marriage for the benefit of the other party to the marriage which attracts substantially the same tax treatment as such a payment,

determined on the basis that the individual, if not otherwise resident in the State for the year, was resident in the State for the tax year;

17. In 2010 and 2011, the Appellant claimed relief for income tax purposes in respect of trade losses pursuant to section 381 TCA 1997. The Appellant submitted that he was not a '*relevant individual'* for the purposes of the domicile levy on the following basis;

- that the Case I deduction claimed pursuant to section 381, was a deduction in estimating income from all sources and not a deduction in computing total income and that as a result, his world-wide income for 2010 and 2011 was nil.
- that because section 381 TCA 1997 losses were not expressly prohibited by subsection (a) of the definition of '*world-wide income'*, they were allowable in computing world-wide income for the purposes of the domicile levy, and
- that the Appellant's liability to income tax in the State in respect of the tax year of assessment 2011, exceeded €200,000 on the basis that his liability to Universal Social Charge ('USC') should be regarded as '*liability to income tax'* for the purposes of the domicile levy.

18. The Respondent submitted that '*world-wide income*' for domicile levy purposes contained the aggregate of the Appellant's income from all sources *before* amounts

deductible in arriving at total income and amounts deductible from total income. Thus, the Respondent's position was that the individual's world-wide income for the purposes of the domicile levy was to be calculated without reference to loss relief pursuant to section 381 TCA 1997.

19. The Appellant submitted that the proper interpretation of '*world-wide income*' required a consideration of the totality of the Income Tax Acts in calculating world-wide income for the purposes of the domicile levy. In effect, the Appellant argued that the reference to the exclusion of items '*deductible in computing total income*' did not include Case I losses which the Appellant submitted were already deducted from the Appellant's various sources of income before items '*deductible in computing total income*' fell to be considered. Thus, the Appellant argued that a Case I deduction pursuant to section 381, was a deduction in estimating income from all sources, not a deduction in computing total income.

20. The Appellant, at paragraph 5.6 of his written submissions stated:

> *'Section 531AA TCA provides that no regard is to be had to amounts which are deductible from or are a deduction in computing total income. As the* [s.381 Case I] *deduction is from each separate class or source, it cannot therefore be regarded as being 'deductible in computing total income from all sources' as referred to in the definition of worldwide income.'*

21. It is necessary to be aware that the definition of world-wide income in section 531AA does not refer to the exclusion of items *'deductible in computing total income from all sources'.* There is a comma after '*total income*' which marks the end of that particular clause. The definition provides;

> *"world-wide income" in relation to an individual means the individual's income,* ***without regard to any amount deductible from or deductible in computing total income,*** *from all sources as estimated in accordance with the Tax Acts and as if any provision of those Acts providing for any income, profit or gains to be exempt from income tax or to be disregarded or not reckoned for the purposes of income tax or of those Acts were never enacted, and –*

22. The relevant clause is emboldened. It is clear that the deductions to be disregarded for the purposes of the calculation of world-wide income are amounts deductible from '*total income*' or deductible in computing '*total income*', not, as the Appellant submitted, amounts *'deductible in computing total income from all sources'.*

23. It is also important to note that '*world-wide income*' for the purposes of the definition '*in relation to an individual means the individual's income,: …., from all sources as estimated in accordance with the Tax Acts…'*

24. The Appellant argued that the Case I losses were to be treated as reducing income of each class and source to nil *before* taking into account amounts deductible in computing total income and this is a submission I consider below, not on the basis of paragraph 5.6 of the written submissions, but on the additional points contained in those submissions together with the detailed submissions made on the Appellant's behalf at the hearing of this appeal.

25. The Appellant stated that Case I losses were not a deduction in computing total income because a deduction in computing total income arises only after one has aggregated income from all sources. The Appellant contended that *'income ….. from all sources as estimated in accordance with the Tax Acts'* included a section 381 deduction and was not to be equated with gross income.

26. The statutory definition of world-wide income is by reference to the individual's income *'from all sources as estimated in accordance with the Tax Acts*.' The sources of income for the purposes of income tax are contained in section 12 TCA 1997 and in Schedules C to F listed in section 12 and contained in sections 17 to 20 of the TCA 1997, as amended. The Schedules listed in section 12 (and the Cases within the Schedules) set out the property, profits and gains to be charged to income tax. For the purposes of the domicile levy, all income, profits or gains arising by reference to each Schedule and Case are aggregated in arriving at the individual's income from all sources.

27. In order to avail of the deduction in the first instance, there must be income for the purposes of the Income Tax Acts, against which the loss may be deducted and such income comprises property, profits or gains set out in the Schedules and Cases listed in section 12 TCA 1997.

28. Section 381 TCA 1997, provides for relief for trading losses by allowing the offset of trading losses against income, resulting in a reduction of income tax which would otherwise be payable in respect of that income or, which results in the repayment of income tax paid in respect thereof. In this regard, section 381(1) provides;

'Subject to this section , where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by the person either solely or in partnership, that person shall be entitled on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by, the amount of the loss.'

29. Subsection (3) of the section provides how *'... the amount of income tax which would have been borne if income had been reduced by the amount of the loss'* should be computed. This is done '*on the basis of treating the loss as reducing'* income of the individual and if applicable, the individual's spouse as the case may be.

30. Where repayment has been made to a person in accordance with section 381, there is a statutory prohibition on double counting the loss and a direction that the loss is to be treated for tax purposes as a deduction in computing the person's total income. Section 381(5) provides;

'Where repayment has been made to a person for any year under this section –

(a) no portion of the loss which in the computation of the repayment was treated as reducing the person's income shall be taken into account in computing the amount of an assessment for any subsequent year, and
(b) so much of the loss as was required by subsection (3) to be treated as reducing income of a particular class or income from a particular source shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year.

31. Section 381(5)(b) TCA 1997, clearly provides that the loss offset '*<u>be regarded as a deduction</u> to be made from income of that class or from income from that source, as the case may be, <u>in computing the person's total income</u> for the year'.*

32. The calculation of '*world-wide income*' contained in section 531AA TCA 1997, provides that it is to be done '*... without regard to any amount deductible from <u>or deductible in computing total income</u>...*'

[emphasis added]

33. The resolution of the dispute between the parties under criterion (b) of the definition of *'relevant individual'* (namely, whether the taxpayer's world-wide income for the tax year exceeds €1,000,000) turns on the question of whether the section 381 losses constitute either a deduction in estimating income from all sources as contended by the Appellant or, a deduction in computing total income, as contended by the Respondent.

34. The Appellant's submission was that because a section 381 deduction is taken from each separate class or source of income, it cannot therefore be regarded as deductible in computing total income. The Appellant argued that the section 381 loss was not a deduction in computing total income but a deduction in estimating income from all sources. The Appellant's submission was that section 381 applied to reduce income from all sources to nil and that as a result, total income was nil and thus his world-wide income was nil.

35. However, in order to arrive at nil in respect of each of the Appellant's income sources, it is necessary to first deduct the section 381 loss. Loss relief pursuant to section 381 requires a claim to be made by the taxpayer, otherwise the loss relief will not be availed of. This is clear from the wording of section 381(1) which provides;

> *'(1) Subject to this section, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.'*

[emphasis added]

36. Thus, a claim made in respect of a section 381 loss, is a subsequent and separate step to the calculation of income from all sources. A taxpayer is not compelled to make a claim but if a claim is to be made, the taxpayer must opt to make the claim. The Case I loss is deducted from the income source(s), it does not form part of the source(s). The claim when made, is given by way of a repayment of income tax (or reduction of income source(s) as the case may be).

37. In addition, section 381(5)(b) provides that the loss utilised to reduce income of a particular class or source ' …*shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year'.*

38. Thus, loss relief arises after income from all sources has been calculated and before total income is ascertained.

39. This leads the analysis back to the definition of '*world-wide income'* which provides that the individual's income must be calculated *'without regard to any amount deductible from or deductible in computing total income…'* Thus, the provision requires that deductions taken in computing total income must be excluded from the calculation of *world-wide income* for the purposes of the domicile levy.

40. As section 381(5)(b) provides that the loss when deducted from an income source ' ..*shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year'*, it is difficult to see therefore how or why a deduction of the loss would *not* constitute a deduction in computing total income for the purposes of the calculation of world-wide income. The Appellant contended that it was because a section 381 loss is not a deduction in computing total income but a deduction in estimating income from all sources. I cannot accept this submission because a claim for section 381 loss relief is a claim which must be made by a taxpayer in the first instance and is a subsequent and separate step to calculating income from all sources.

41. Returning then to '*world-wide income'* for the purposes of the domicile levy, which must be computed *'…without regard to any amount deductible from or deductible in computing total income..*' in accordance with the definition thereof in section 531AA. As loss relief under section 381 must be the subject of a claim made by the taxpayer and as section 381 loss relief is, by virtue of subsection 5(b) of that section, specifically deductible in computing a person's total income, section 381 loss relief must be disregarded in calculating world-wide income for the purposes of the domicile levy in accordance with the clear statutory wording contained in the definition of '*world-wide income'* namely, on the basis that a deduction pursuant to section 381 clearly constitutes an '…*amount deductible from or deductible in computing total income*…' which is expressly excluded from the calculation of world-wide income for the purposes of the domicile levy.

42. Further, the latter half of the first paragraph of the definition of *world-wide income* provides that the income to be taken into account for the purposes of the domicile levy, is to be established; '*…as if any provision of those Acts providing for any income, profit or gains to be exempt from income tax or to be disregarded or not reckoned for the purposes of income tax or of those Acts were never enacted, …'.*

43. On the matter of statutory interpretation of taxation statutes, where a provision is obscure or ambiguous or, where on a literal interpretation it would be absurd or would fail to reflect the plain intention of the Oireachtas, recourse may be had to section 5 of the Interpretation Act 2005. However, on review and consideration of the relevant statutory definitions and having considered the submissions of the parties, I am satisfied that the words contained in in the definition of '*world-wide income'* in section 531AA are clear and unambiguous and in the circumstances, it is not necessary to have recourse to the Interpretation Act. It follows, in accordance with the common law rules, that the interpretative approach to be adopted is a literal one based on the established authorities including *inter alia*, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 and *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449.

44. Based on the clear and unambiguous statutory wording contained in the definition of '*world-wide income'*, I am unable to accept the submission of the Appellant that his income *'from all sources as estimated in accordance with the Tax Acts*…' amounts to nil on the basis that a section 381 loss is not a deduction in computing total income but a deduction in estimating income from all sources.

45. As a result, I find, in accordance with the ordinary and natural meaning of the words and expressions contained in the definition of '*world-wide income'* in section 531AA TCA 1997, that the individual's income from all sources is to be computed for the purposes of the domicile levy, '*without regard to any amount deductible from or deductible in computing total income'* as clearly set out in the definition contained in s.531AA. Thus '*world-wide income'* for the purposes of the domicile levy is to be calculated without regard to deductions pursuant to section 381 TCA 1997. It follows that the Appellant satisfies criterion (b) of the definition of *'relevant individual'* in section 531AA on the basis that the Appellant's world-wide income for each relevant tax year of assessment is in excess of €1,000,000.

Sub-section (a) of definition of 'world-wide income'

46. Further or in the alternative, the Appellant contended that because section 381 losses were not expressly prohibited by subsection (a) of the definition of *world-wide income*, they were allowable in calculating the individual's income '*from all sources*' for the purposes of ascertaining *world-wide income*.

47. However, it is clear from the definition of '*world-wide income*', that there is first a general statutory prohibition on computing income by taking into account amounts deductible from or deductible in computing total income as follows;

> *"world-wide income" in relation to an individual means the individual's income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts and as if any provision of those Acts providing for any income, profit or gains to be exempt from income tax or to be disregarded or not reckoned for the purposes of income tax or of those Acts were never enacted, and –*

[emphasis added]

48. This general prohibition is followed by: '.. *and as if any provision of those Acts providing for any income, profit or gains to be exempt from income tax or to be disregarded or not reckoned for the purposes of income tax or of those Acts were never enacted, and…'*

[emphasis added]

49. The general prohibition and the clause that follows is then followed by the word '*and*' which prohibits the inclusion of a series of specific deductions set out in subsections (a)(i) – (a)(v). The Appellant contended that because section 381 losses were not expressly prohibited by subsection (a) of the definition of *world-wide income*, they were allowable in calculating the individual's income '*from all sources*' for the purposes of ascertaining world-wide income.

50. I cannot accept this submission. Subsection (a), as is clear from the word '*and*' that precedes it, is an addition to the general statutory prohibition on amounts *'deductible from or deductible in computing total income'* in the preceding part of the definition of world-wide income. Such deductions are set out pursuant to their own statutory provisions *i.e.* section 381 TCA 1997. The absence of an express

reference to section 381 TCA 1997, in subsection (a) does not mean, as the Appellant contends, that a section 381 deduction may be taken in computing world-wide income for the purposes of the domicile levy.

The meaning of 'income tax' for the purposes of the domicile levy

51. In accordance with section 531AC TCA 1997, a relevant individual's liability to income tax for a tax year, is allowable as a credit against the domicile levy chargeable for that year.

52. The Appellant raised an additional submission in respect of the assessment regarding the tax year of assessment 2011, which was that the Appellant submitted that he was not a '*relevant individual*' for the purposes of the domicile levy because he did not meet criterion (c) of the definition contained in section 531AA in respect of 2011.

53. Section 531AA(1) provides;

> *'relevant individual' in relation to a tax year, means an individual –*
>
> *(a) …*
> *(b) Whose world-wide income for the tax year is more than €1,000,000*
> *(c) Whose liability to income tax in the State for the tax year is less than €200,000, and*
> *(d) …..*

54. Thus, the Appellant claimed he was not a '*relevant individual*' because his liability to income tax in respect of 2011 was *not* less than €200,000.

55. The Appellant submitted that he incurred significant liability in respect of taxes and levies in relation to his income in 2011 and that these liabilities should be regarded as liabilities to income tax for the purposes of calculating the domicile levy. In particular, the Appellant claimed that his liability to Universal Social Charge ('USC') should be regarded as '*liability to income tax*' for the purposes of the domicile levy and on that basis, his liability to income tax exceeded the threshold of €200,000 in respect of the tax year of assessment 2011.

56. For the purposes of the domicile levy, section 531AA defines the term '*liability to income tax'* as follows;

> *"liability to income tax", in relation to an individual and a tax year, means the amount of income tax due and payable by the individual for the tax year in accordance with the Tax Acts and in respect of which a final decision has been made;*

57. This provision refers to '*income tax ….. in accordance with the Tax Acts'*. It does not expressly refer to USC.

58. The charge to income tax is contained in section 12 TCA 1997, as follows;

> *'Income tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the sections enumerated below –*
>
> *Schedule C – section 17;*
>
> *Schedule D – section 18;*
>
> *Schedule E – section 19;*
>
> *Schedule F – section 20;*
>
> *and in accordance with the provisions of the Income Tax Acts applicable to those Schedules.'*

59. In accordance with section 12 TCA 1997, income tax, for the purpose of the Income Tax Acts is charged in respect of all property, profits or gains comprised in Schedules C, D, E and F (Sections 17-20 TCA 1997).

60. The charge to Universal Social Charge is contained in Part 18D TCA headed '*Universal Social Charge'* containing sections 531AL to 531AAF.

61. Section 531AM (charge to Universal Social Charge) provides;

> *'With effect from 1 January 2011, there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as "universal social charge" in respect of the income specified in paragraphs (a) and (b) of the Table to this subsection.'*

62. Paragraph (a) of the Table defines '*relevant emoluments*' and paragraph (b) defines '*relevant income*'. Relevant emoluments and relevant income together comprise '*aggregate income*'.

63. Further, the interpretation section (s. 531 AL) which precedes s.531AM provides; *"Universal Social Charge" has the meaning assigned to it by section 531AM.*

64. Section 531AX (Restriction on deduction) provides;

> *'(1) Universal Social Charge paid in respect of a tax year is in addition to, and does not reduce, any liability which an individual may have in respect of income tax or other taxes under the Tax Acts.*
>
> *(2) Excess tax credits or reliefs which are available to an individual may not be set against any charge to Universal Social Charge which is due and payable for a tax year'*

65. The Appellant's view of this provision was that the reference to '*income tax*' was a reference to section 12 TCA 1997 but that this reference did not define or restrict the extent of income tax at all times, in the absence of a specific statutory definition. The Appellant's position was that if USC is an income tax as the Appellant contended it was, then it was deductible against a domicile levy.

66. The Respondent submitted that section 531AX put beyond doubt that USC was a separate tax to income tax on the basis that the expression clearly and expressly provides that USC is in addition to and does not reduce any liability in respect of income tax.

67. The Appellant accepted that s.531AX identified USC as an additional tax however, the Appellant submitted that while USC may have a different title or description, this does not prevent it from being income tax. The Appellant submitted that the USC is a tax on income and a tax on income is '*income tax*'. The Respondent's position was that USC was a tax on income but was not '*income tax*' and that USC was not reckonable for the purposes of calculating '*liability to income tax*' for the purposes of section 531AA.

68. The Appellant cited and relied upon *London County Council v The Attorney General* [1901] AC 26 in support of his submission that income tax is a tax on income. In support of its submission, the Respondent cited the dicta of Lord Davy in *London County Council* as follows;

'But the question is, What do the words "income tax" mean in the language of the Legislature, and in this Act? I believe the expression is not used in either of the principal Acts of 1842 or 1853, but by the Short Titles Act, 1892, these statutes have received the title of "the Income Tax Acts" of 1842 and 1853

…

And, not to weary your Lordships, the words may be found in all the subsequent Acts (which have been passed almost yearly) as describing the tax which is levied under all the five schedules without distinction.'

69. The Appellant also relied on the 1911 case of *Bowles v the Attorney General* 5 TC 685. In that case, the UK legislature enacted an income tax called a 'supertax' payable on income over a certain level. The relevant UK statute referred to the supertax as *'an additional duty of income tax*.'

70. However, the supertax in *Bowles*, which was introduced in the early part of the 20th century, and the surtax with which it was later replaced, were each expressly defined as being additional charges to income tax in the relevant UK legislation, which was the Finance Act 1928. This is clear from the judgment of Parker J. at page 136 of the judgment where he stated;

'The super tax is in fact an income tax. It is referred to in the Act which imposes it as an additional duty of income tax. It is collected and recovered by means … of the ordinary income tax machinery. It is intended, like the ordinary income tax, to be a permanent tax, though imposed annually only. It is imposed and its collection regulated by sections contained in a part of the Act which is entitled "Income Tax" and is to be read with all existing enactments relating to income tax, including s.30 of the Customs and Inland Revenue Act 1890. Under these circumstances can there be any real doubt that it is a duty of income tax within the meaning of the 30th section of the last-mentioned Act? In my opinion there cannot.'

71. It is clear therefore that supertax was an additional charge to income tax. The differences between that and USC are significant.

72. The Respondent opened the case of *Lord Chetwode v IRC* [1977] All ER 638 and specifically, the dicta of Lord Wilberforce at page 641 of the report, where he stated:

> *'What is meant by 'income'? It is first to be noticed that this section forms part of the United Kingdom tax code – it was part of the Income Tax Act 1952 which dealt comprehensively with all aspects of income tax in the UK. Moreover it is concerned with individuals ordinarily resident in the UK and aims at taxing them: it would be a misconception to regard it as concerned with the taxation of companies resident abroad. This means that one should start with a disposition to interpret 'income' as that word is used in our tax legislation. It is notorious that there is not and never has been any definition of income in the UK tax code. What, as income, is chargeable with income tax is left to be determined according to particular heads of charge under the Schedules. I cannot do better in this context than to quote the words of Viscount Radcliffe in Inland Revenue Comrs v Frere:*
>
> *"One can start with some safe generalisations on this subject. Income that is assessed to tax is neither measured by expenditure nor is it the residual income that lies after expenditure of an income nature. It is not the savings of income. In principle it is gross income as reduced for the purposes of assessment by such deductions only as are actually specified in the tax code or are granted by way of reliefs, usually in the form of fixed sums or proportions. No doubt the assessment of profits under Schedule D has come to require a rather different approach, since in that case the basic figure for assessment is the balance between receipts and expenditure: but even there it is plain that the code is intended to keep a control over the forms of expenditure that can appear in the profit account."*

73. Taking into account the detailed submissions made on the question of the meaning of '*income tax'* including the case law, it must first be noted that tax is a creature of statute and that income tax is set out in the income tax code, starting with section 12 TCA which sets out the charge to income tax by reference to the schedular system. USC, introduced in 2011, by way of a stand-alone code in Part 18D TCA, is also a creature of statute. USC has its own tax base, its own rate and its own specific legislative provision to specifically apply to USC, the collection and recovery mechanisms contained in the TCA 1997, that apply to income tax.

74. The Respondent's position was that the correct interpretation of '*income tax'* was that it was the charge by reference to section 12 TCA 1997, in respect of all

property, profits or gains respectively, under the schedular system. The Appellant contended that USC was an income tax outside of the schedular system.

75. The Respondent also relied upon the fact that the legislation provides that the income tax machinery in existence for the assessment and collection of income tax will be applied to chargeable persons for the collection of the USC. Section 531AS(1) provides;

> *'Universal Social Charge payable for a tax year in respect of an individual's aggregate income for a tax year being an individual who is a chargeable person (within the meaning of [Part 41A]), shall be due and payable in all respects as if it were an amount of income tax due and payable by the chargeable person under the Income Tax Acts, but without regard to [section 1017 or 1031C].'*

[emphasis added]

76. The use of the expression *'as if it were an amount of income tax'* as contained in this provision, indicates that USC is not '*income tax'*. The provision provides that for the purposes of administration and collection, it will be treated *'as if it were …income tax'*.

77. The Respondent submitted that this provision would not have been necessary if USC were income tax, as there would be no need for a legislative provision to apply the mechanics of the administration and collection of income tax to USC. I accept this submission on behalf of the Respondent.

78. The Appellant, citing references to '*income tax'* in section 3 and section 12 TCA 1997 and a reference to '*Income Tax Acts'* in section 1 TCA 1997, contended that the expression '*income tax'* was not defined in Irish tax legislation and that it was necessary therefore to examine the ordinary meaning of the term '*income tax'* having recourse to various dictionary definitions of '*income tax'*.

79. For ease of reference, the statutory provisions cited and relied upon are as follows;

Section 1 TCA 1997 provides *inter alia*;

> *"the Income Tax Acts" means the enactments relating to income tax in this Act and in any other enactment*

Section 3 TCA 1997 provides *inter alia*;

> *'chargeable tax' in relation to an individual for a year of assessment, means the amount of income tax to which the individual is chargeable for that year of assessment under section 15 in respect of his or her total income for that year including, in the case of an individual assessed to tax in accordance with the provisions of section 1017, the total income, if any, of the individual's spouse'*
>
> *'income tax payable' in relation to an individual for a year of assessment, means the chargeable tax less the aggregate of the personal tax credits and general tax credits'*
>
> *"'tax' means income tax"*

Section 12 TCA provides *inter alia*:

> *'Income tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the sections enumerated below …… and in accordance with the provisions of the Income Tax Acts applicable to those Schedules.'*

80. The dictionary definitions cited and relied upon by the Appellant are as follows;

- The online Oxford English Dictionary defines 'income tax' as: *'compulsory contribution to State revenue, levied by the government on workers' income and business profits, or added to the cost of some goods, services and transactions'*
- The Collins Dictionary of the English Language defines 'income tax' as: '*personal tax levied on annual income'*
- The online Cambridge Dictionary defines 'income tax' as: *'A tax you have to pay on your income, usually higher for people with larger incomes'.*

81. The Appellant submitted that based on the dictionary definitions, the expression '*income tax'* should be construed to mean that '*income tax'* is a tax on income.

82. I cannot accept the Appellant's submission that the expression '*income tax'* should be construed to mean; *a tax on income*. Income tax is a creation of statute and is contained in the income tax code, starting with section 12 TCA 1997, which sets

out the charge to income tax by reference to the schedular system. A separate tax on income titled '*Universal Social Charge'* is defined in section 531AB TCA 1997, and contained in Part 18D TCA 1997. Both USC and income tax are taxes on income however, they are separate and distinct taxes. To have recourse to a dictionary definition of '*income tax*' is to travel outside of the statute in search of meaning, which is not necessitated in this appeal.

83. In this regard I refer to the dicta of Charleton J. in *Menolly Homes Limited v The Appeal Commissioners and the Revenue Commissioners* [2009] IEHC 49 at paragraph 12 as follows;

> *'Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modern concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection. How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation.'*

84. Further, I cannot accept the submission of the Appellant as regards his reliance on section 3 TCA 1997, in construing USC. USC is a creature of statute and is created by Part 18D TCA 1997. Section 531AL TCA 1997 provides that: "*Universal Social Charge*" has the meaning assigned to it by section 531AM TCA 1997. Therefore, it is not necessary to have recourse to section 3 TCA 1997 in this instance.

85. On the matter of statutory interpretation, I find no ambiguity in the wording of the definition of '*relevant individual'* contained in section 531AA TCA 1997 and thus the interpretative approach to be adopted is a literal one based on the established authorities set out above. It is not necessary to have recourse to section 5 of the Interpretation Act 2005.

86. The reference to '*liability to income tax'* in subsection (c) of '*relevant individual*' can only be a reference to income tax for the purposes of the Tax Acts. It cannot be

a reference to the term '*income tax'* as it is broadly understood by members of the public or spoken in every-day conversation. The context here is the statute, namely the Taxes Consolidation Act 1997, as amended. Income tax and USC are, like all taxes, creatures of statute.

87. USC is imposed and collected by means of its own statutory provisions, which provide for the declaration of liability, the quantification of liability through assessment and the recovery of tax by methods prescribed by statute. It is a new charge to tax on income. It is different to '*income tax'* as it is charged on a different measure of income, a different rate of income and it is charged on an individual basis only. In addition, the statutory provisions governing the collection, assessment and recovery of income tax and the statutory provisions governing the making of enquiries and the making of returns of income, required the enactment of specific statutory provisions (ss.531AS(1) and 531AAA TCA 1997) to apply those statutory provisions to USC. This was necessary because USC, although it was a tax on income, did not constitute '*income tax'* in accordance with the Tax Acts.

88. In conclusion therefore, Universal Social Charge, having its own Part, its own provisions and its own mechanisms, is its own tax and I am satisfied that Part 18D TCA creates a new taxation code for USC which is separate and distinct from the income tax code. Thus, I find that while USC is a tax on income, it is not *'income tax'* for the purposes of the Tax Acts and is not '*liability to income tax'* for the purposes of the definition of '*relevant individual'* in accordance with the domicile levy.

Determination

89. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments to tax are incorrect.

90. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

> *'The burden of proof in this appeal 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.'

91. The onus in this appeal rests on the Appellant and the question is whether the Appellant has shown that he is not liable to the domicile levy in respect of his world-wide income for the tax years 2010 and 2011.

92. The Appellant's case in relation to the tax year of assessment 2010, was that he was not liable to the domicile levy as his world-wide income in 2010was nil. In respect of 2011, the Appellant claimed that his world-wide income was nil and that his liability to income tax for the tax year 2011 was greater than €200,000.

93. For the reasons set out above, the Appellant, in respect of both tax years of assessment under appeal, has failed to discharge the onus of proof and is thereby unable to succeed in this appeal. As a result, I determine that the assessments dated 29 May 2015 totalling €400,000 in relation to the imposition of the domicile levy for the tax years of assessment 2010 and 2011, shall stand.

94. This appeal is hereby determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

4th day of August 2020

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.