114TACD2021

BETWEEN/

[redacted]

[redacted]

Appellants

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction & Background

1. The within appeals centre on whether or not the Appellants, [redacted] (Appellant 1) and [redacted] (Appellant 2), both Irish incorporated and tax resident companies, are liable to dividend withholding tax ("DWT") on gross distributions paid to certain non-resident shareholders.

There are seven appeals before the Tax Appeals Commission ("TAC") viz, [redacted] which have been consolidated under TAC ref [redacted].

2. Appeal Refs. [redacted], and [redacted] arise from gross distributions (dividends) paid to [redacted] (Shareholder A), a shareholder of Appellant 1.

Distribution Date	Amount of Distribution
27 March 2017	€1,403,607.40
31 May 2017	€160,000
24 October 2017	€150,000
17 January 2018	€80,000
1 February 2018	€75,000
30 November 2018	€1,994,375
23 December 2019	€ 80,000
03 June 2020	€ 1,125,000

3. Appeal Ref. [redacted] arise from gross distributions (dividends) paid to [redacted] (Shareholder B), a shareholder of Appellant 2 for the periods detailed below.

Distribution Date	Amount of Distribution
27 March 2017	€187,500
17 January 2018	€ 25,000
19 December 2018	€368,250

23 December 2019	€112,500

4. DWT was not operated by either Appellant 1 or Appellant 2 ("Appellants") on any of the distributions.

5. Appellant 1 has been assessed to DWT in the total amount of € 1,069,846.48 on the distributions as follows:-

Tax	Distribution Date	DWT Payable	Date of Assessment
DWT	27 March 2017	€280,721.48	2 July 2018
DWT	31 May 2017	€32,000	2 July 2018
DWT	24 October 2017	€30,000	2 July 2018
DWT	17 January 2018	€16,000	2 July 2018
DWT	1 February 2018	€15,000	2 July 2018
DWT	30 November 2018	€398,875	21 January 2019
DWT	23 December 2019	€16,000	28 February 2020
DWT	03 June 2020	€ 281,250	15 July 2020

6. Appellant 2 has been assessed to DWT in the total amount of €138,650 on the distributions as follows:-

Tax	Distribution Date	DWT Payable	Date of Assessment
DWT	27 March 2017	€37,500	5 December 2018
DWT	17 January 2018	€5,000	5 December 2018

DWT	19 December 2018	€73,650	12 February 2019
DWT	23 December 2019	€22,500	28 February 2020

7. A double taxation convention ("DTC") entitled the *'Convention between Ireland and the United Arab Emirates for the avoidance of* double *taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains'* was concluded on 1 July 2010 between Ireland and the United Arab Emirates ("UAE") as contracting states thereto.

8. A Protocol to the convention entitled *'Protocol to the Convention between Ireland and the United Arab Emirates for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains'* was also concluded on 1 July 2010 and forms part of the agreement.

9. In UAE, income tax is currently not levied on natural persons irrespective of nationality.

10. Declarations, in the prescribed form, and other information, as set out in paragraph 8 Schedule 2 A TCA 97, together with valid certificates of shareholders A and B tax residence in the UAE, issued by the relevant UAE authority, were obtained by the Appellants for years 2017 and 2018. Copies of these declarations and information together with copies of UAE tax residency, certified by the relevant UAE authority, were attached to the Appellants initial submission to the Tax Appeal Commission.

11. This appeal was heard over 2 days by remote oral hearing on [redacted] 2021.

12. The following table sets out the contents of this determination.

PAGE	**CONTENTS**
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Legislation

Statutory provisions being relied on:

section 20 TCA 1997

section 172 TCA 1997

section 172A TCS 1997

section 172B (4) TCA 1997

section 172D TCA 1997

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<u>Legislation</u>

13. Section 20 TCA 1997 is the charging section for distributions. It provides for a charge on distributions under Schedule F as follows:

> *"20 (1) The Schedule referred to as Schedule F is as follows:*
>
> *SCHEDULE F*
>
> 1. *In this Schedule, "distribution" has the meaning assigned to it by Chapter 2 of Part 6 ……..*
> 2. *Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient."*

14. Provision for special exclusion is provided for in section Chapter 8A – Dividend Withholding Tax. Section 172A is the interpretation section, and a number of interpretations are set out therein as follows:

> "*non-liable person" in relation to a relevant distribution means the person beneficially entitled to the relevant distribution, being an excluded person or a qualifying non-resident person.*

"qualifying non-resident person" in relation to a relevant distribution has the meaning assigned to it by section 172D (3).

"dividend withholding tax" in relation to a relevant distribution means a sum representing income tax on the amount of the relevant distribution at the standard rate in force at the time the relevant distribution is made.

"relevant person" – in relation to a relevant distribution means

> *where the relevant distribution is made by a company directly to the person beneficially entitled to the distribution, the company making the relevant distribution ………*

"relevant territory" means

> *a Member State of the European Communities other than the State, 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*
>
> *not being a territory referred to in sub-paragraph (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) would have the force of law.*
>
> *"tax", in relation to a relevant territory, means any tax imposed in that territory which corresponds to income tax or corporation tax in the State."*

15. Section 172 B (4) provides:

"A company resident in the State shall treat every relevant distribution to be made by it on or after the 6th day of April 1999, to a specified person as a distribution to which this section applies, but, where the company has satisfied itself that a relevant distribution to be made by it to a specified person is not, by virtue of the following provisions of this Chapter, a distribution to which this section applies, subject to those provisions, be entitled to so treat the relevant distribution to be made by it to the specified person until such time as it is in possession of information which can reasonably be taken to indicate that a relevant distribution to be made to the specified person is or may be a relevant distribution to which this section applies."

TAX APPEALS COMMISSION

16. Section 172D TCA 1997 provides that dividend withholding tax is not to apply where a company resident in the State makes a relevant distribution to a qualifying non-resident person. Section 20 TCA 1997 charges income tax under Schedule F on all dividends and other distributions of every company resident in the State unless they are specially excluded.

17. Section 172D TCA 1997 provides:

"(2)Section 172B shall not apply where, on or after the 6th day of April, 2000,

a company resident in the State makes a relevant distribution to a qualifying non-resident person.

(3) For the purposes of this Chapter, a person shall be a qualifying non-resident person in relation to a relevant distribution if the person is beneficially entitled to the relevant distribution and is—

a. a person, not being a company, who—

(i) is neither resident nor ordinarily resident in the State,

(ii) is, by virtue of the law of a relevant territory, resident for the purposes of tax in the relevant territory, and

(iii) has made a declaration to the relevant person in relation to the relevant distribution in accordance with paragraph 8 of Schedule 2A and in relation to which declaration the certificate referred to in sub-paragraph (f) of that paragraph is a current certificate (within the meaning of paragraph 2 of that Schedule) at the time of the making of the relevant distribution."

18. Paragraph 8 of Schedule 2A TCA 1997 provides:-

"The declaration referred to in section 172 D(3)(a)(iii) shall be a declaration in writing to the relevant person in relation to the relevant distributions which
(a)Is made by the person (in this paragraph referred to as 'the declarer') beneficially entitled to the relevant distributions in respect of which the declaration is made,
(b)Is signed by the declarer
(c)is made in such form as may be prescribed or authorised by the Revenue Commissioners

(d)declares that, at the time when the declaration is made, the person beneficially entitled to the relevant distributions is a qualifying non-resident person,

(e) contains the name and address of that person

(f)is accompanied by a certificate given by the tax authority of the relevant territory in which the person is, by virtue of the law of that territory, resident for the purposes of tax certifying that person is so resident in that territory

(g)….

(h) contains an undertaking by the declarer that, if the person mentioned in subparagraph (d) ceases to be a qualified non resident person, the declarer will, by notice in writing, advise the relevant person in relation to the relevant distributions accordingly, and

(i) contains such other information as the Revenue Commissioners may reasonably require for the purposes of Chapter A of Part 6."

19. Double Taxation Relief (Taxes on Income and Capital Gains) (United Arab Emirates) Order 2011 (S.I. 20/2011) ("DTC")

The purpose of the Convention between Ireland and the UAE is stated to *be "the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains".*

Article 5(1) DTC provides:-

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

Article 11(1) DTC provides:-

"Dividends paid by a company which is resident of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State, provided such resident is the beneficial owner of the dividends."

Article 2(iv) of the Protocol provides:-

> *"Notwithstanding the provisions of paragraph 1 of Article 5:*
>
> *i) it is the following persons that shall be regarded as a resident of the United Arab Emirates and accordingly entitled to claim the benefits provided by this Convention:*
>
> *(i) an individual who is a national of the United Arab Emirates and who is present in the United Arab Emirates for a period or periods totalling in the aggregate at least 183 days in the fiscal year concerned;*
>
> *…*
>
> *(iv) any person if that person shall pay income tax or corporate tax in the United Arab Emirates on income, by reason of domicile, residence, place of management or other criterion of a similar nature, where that person is in receipt of income;*
>
> *… ."*

EU Law

Treaty for the Functioning of the European Union [Article 18]
Treaty for the Functioning of the European Union [Articles 63 - 66]
Council Directive 88/361/EC
Charter of Fundamental Rights of the European Union

CASE LAW RELIED UPON BY THE APPELLANT

Irish Authorities

An Blascaod Mor Teoranta – v – Minister for Arts, Heritage, Gaeltacht and the Islands [2000] ILRM 401.
Terrance Keogh – v – Criminal Asset Bureau, Revenue Commissioners and the Collector General [2004] IESC 32.
In Re Article 26 – v – Health Amendment (No. 2) Bill – Conveyancing and Property Law Journal 2005 10(3) 67.
Kinsella – v – Revenue Commissioners [2011] 2 IR 417
O'Brian – v – Quigley [2013] IR 790.

European Union Authorities

Minister of Justice and Equality, Commissioner of An Garda Siochana – v – Workplace Relations Commission –Case C-378/17
Margaretha Bouanich – v – Skatteverkett – Case C-265/04
Marks and Spencer Plc – v – David Halsey (HMRC)
Skatteverket – v – A – Case C-101_05
Finanzamt Koln-Alstadt – v – Roland Schumacker – Case C-279/93
Denkavit Internationaal BV, Denkavit France SARL – v – Ministre de L'Econimie – Case C-170_05
European Commission – v – France – Case C-270/83
College Pension Plan of British Columbia – v – Finanzamt Munchen Abteilung III – Case – C-641/17
SE, Regeringsrätten 2 Oct. 1996 – Case RÅ 1996 ref 84 (6301-1994) (Sweden) International Jet Management C-628/11

Indian Authorities

Assistant Director of Income Tax v Green Emirate Shipping and Travels [2006] 286, I.T.R. 60 (A.T.)
Union of India and Anr v Azadi Bachao Andolan And Anr [2003]
UAE and India Double Taxation Agreement

Additional Authorities

Convention between Ireland and the United Arab Emirates for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains – dated 1 July 2010 [Article 5 Paragraph 1]
Protocol to the Convention between Ireland and the United Arab Emirates for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains – dated 1 July 2010 [Paragraph 2]
UN Model Double Taxation Convention [pages 9 to 11]
The OECD Model commentary [Article 4(1)]

Joanna Wheeler: United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries [page 66]
Klaus Vogel: Vogel, K on Double Taxation Conventions, 3rd Edition Kluwer Law International 1997, page 229, paragraph 24a [As referenced in Joanna Wheeler's The Missing Keystone of Income Tax page 10, paragraph 2]
David G. Duff: Responses to Tax Treaty Shopping: A Comparative Evaluation
Klaus Vogel on Double Taxation Conventions (4th Edition) – page 246, paragraph 26

CASELAW RELIED UPON BY THE RESPONDENT

Irish Authorities

Cape Brandy Syndicate – v – Inland Revenue Commissioners [1921] 1 K.B. 64, at 71
Revenue Commissioners – v – Doorley [1933] IR 750, at 765
Inspector of Taxes – v – Kieran [1981] IR 117
McGrath – v – McDermott [1988] IR 258
Texaco (Ireland) Ltd – v – Murphy [1991] 2 IR 449
Saatchi & Saatchi Advertising Ltd – v – McGarry [1998] 2 IR 562
Menolly Holmes Ltd – v – Appeal Commissioners [2010] IEHC 49
Kinsella – v – Revenue Commissioners [2011] 2IR 417
O'Brien – v – Quigley [2013] IR 790
Bookfinders – v – Revenue Commissioners [2020] IESC 50
TAC Ref *17TACD2019*

European Union Authorities
Case C-176/15 Guy Ruskin, Genevieve Timmermans – v – Etat Belge

Authorities from the Courts of England and Wales
Hurley – v – Taylor [1998] All ER (D) 490
Eagerpath Limited – v – Edwards [2000] All ER (D) 2276

MATERIAL FINDINGS OF FACT

20. Based on the credible sworn testimony of Shareholder A and B together with the expert witness, [redacted], supplied by the Appellant and expert witness, [redacted] supplied by the Respondent, given at the remote hearing held on [redacted] 2021, coupled with the documents and submissions presented before me by both the Appellant and the Respondent, I have established the following material findings of fact.

21. Both Shareholder A and B are neither resident nor ordinarily resident in Ireland for tax purposes for 2017 – 2020. All their shareholdings in Appellant 1 and Appellant 2 respectively, predate their move from Ireland to the UAE some years ago.

22. Both Shareholder A and B are residents of the UAE for the years 2017-2020

23. The UAE does not levy tax on income or gains on individuals.

24. Both Shareholder A and B were issued with tax certificates by the UAE Ministry of Finance for the years 2017 and 2018.

25. Shareholder A and B have applied for a UAE tax certificate for years 2019 and 2020 but to date no such certificate has been issued to them.

26. **SUBMISSIONS – Appellant**

Extracts from Appellant's Ancillary Memorandum re Double Tax Treaties

> "Article 5 Paragraph 1, of the Convention between Ireland and the United Arab Emirates states:-
>
> For the purpose of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion

of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.

In the protocol to the Convention, it states at (2): “With respect to Article 5: Notwithstanding the provisions of paragraph 1 of Article 5”.

The correct interpretation of “Notwithstanding the provisions of paragraph 1 of Article 5”, is that any provisions following the word “Notwithstanding” is an extension to paragraph 1 of Article 5. Therefore, when an individual falls within paragraph 1 of Article 5, their eligibility to be considered UAE resident should not be influenced by paragraph 2 of the Protocol. The Protocol directs that irrespective of Article 5 (1) certain persons must be regarded as a resident of the UAE. However, this does not mean that persons listed in paragraph 2 of the Protocol cannot come within Article 5 (1). Similarly it does not mean that persons not listed in paragraph 2 of the Protocol cannot come within Article 5 (1). Again this is a reflection that paragraph 2 of the Protocol is an extension of Article 5 (1) as it does not in itself limit the persons who would be regarded as being resident in UAE under the said Article 5 (1).

The “liable to tax requirement” in paragraph 1 of Article 5, follows Article 4 of the United Nations Model Convention and the OECD Model Convention. The factors listed are domicile, residence, place of management but also “any other criterion of a similar nature”.

The liable to tax requirement is intended to test the personal connection between a person claiming treaty benefits and the contracting State in which that person claims residence.

The second issue in Article 5 relates to the extent of the liability to tax that is required. The UN and OECD commentary [Article 4(1)] states that this requirement refers to a comprehensive, or full, liability to tax and it is usually interpreted as referring to a liability to tax in respect of worldwide income.

Article 5 of the Convention excludes from the definition persons who are liable to tax only on income from a source in the UAE or Ireland.

The reference to "liable to tax" in the Convention does not mean that the person must be actually paying tax in the UAE.

The interpretation of "liable to tax" has been considered by leading international experts.

A leading International Expert on Double Tax Agreements, Joanna Wheeler, in "United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries" (United Nations, ITC, 2013) [Chapter 2 'Persons Qualifying For Treaty Benefits' states page 66]

> *"If the residence definition is interpreted as demanding liability to tax on worldwide income, it would simply not be possible for a person taxable on a territorial basis to qualify as a resident for treaty purposes, even if the person had a very substantial personal connection with that State. Most experts therefore agree that, in the case of persons subject to a territorial system, the residence definition does not make this demand, but refers rather to liability to the full extent of the country's income tax system".*

Klaus Vogel in [Vogel, K on Double Taxation Conventions, 3rd Edition Kluwer Law International 1997, page 229, paragraph 24a] is of the view that bearing a general liability to tax is an indication of the residence issue rather than the crux of it, and that a person who has "that personal attachment to [a state] ... which *might* result in him becoming subject to full tax liability" should be regarded as resident in that state for treaty purposes.

In addition on page 246, paragraph 26, of Klaus Vogel on Double Taxation Conventions (4th Edition), it states:

> "*In our view, tax exempt entities may be liable to tax in the sense of article 4(1) OECD and UN MC. The wording requires that the person*

must be 'liable to tax' rather than 'subject to tax', where the first expression is commonly used to refer to potential and the later to actual taxation. A systematic argument also confirms that view: Tax Treaties prevent both 'current' and 'potential' double taxation. Once a treaty is allocated the exclusive right to tax specific income or capital to one contracting State, that State keeps the right whether exercise or not, dual tax ability of the income or capital is not necessary for residents to be entitled to treaty benefits. Instead, the OECD and UN MC, established two conditions (i) Residence based on some sort of comprehensive tax liability and (ii) the attribution of items of income to the person claiming the benefit. The fact that such interpretation could lead to double non taxation is acceptable because it is a conscience decision of the contracting States whether or not they enter into a tax treaty that leaves open the possibility of double non-taxation."…

Consideration of "liable to tax", has also been the subject of International Case Law.

The Indian Income Tax Appellate Tribunal (ITAT), and the Supreme Court of India have considered the phrase "liable to tax".

In Assistant Director of Income Tax v Green Emirate Shipping and Travels [2006] 286, I.T.R. 60 (A.T.), the ITAT held that Treaty Benefits under India – UAE Treaty (which are identical to Article 5 Paragraph 1 of the Ireland – UAE Convention), do not depend on actual taxation in the UAE to the extent that the Treaty vests an exclusive right on the UAE to levy tax under specific circumstances, whether this right is exercised or not.

The question before the Tribunal, was whether a person who had a strong personal connection with the UAE could be "liable to tax" in the UAE for Treaty purposes even though the UAE did not impose a tax on income. The argument for accepting that this situation creates liable to tax, for treaty purposes, was that, if the UAE did introduce an Income Tax, the person would most probably fall within its scope.

The payment of tax is not a prerequisite to claiming Treaty benefits. A Tax Treaty not only prevents 'current' but also 'potential' double taxation.

Therefore, irrespective of whether or not the UAE actually imposes taxes on individuals, once the right to tax UAE residents in specified circumstances vests only with the Government of the UAE, that right, whether exercised or not, continues to remain the exclusive right of the Government of the UAE.

In an EU case, *SE, Regeringsrätten 2 Oct. 1996, RÅ 1996 ref 84 (6301-1994),* a Swedish company held a 100% share in a Luxembourg fund. Under Luxembourg law, the fund was exempt from corporate tax and any other tax covered by the Luxembourg–Sweden double tax treaty convention (DTC). When the fund distributed profits to the parent company in Sweden, the question was whether (that) DTC was applicable.

In particular, was the fund resident in terms of Art. 4(1) of the Luxembourg–Sweden DTC and were the dividend payments therefore covered by Art. 10 of the treaty The Swedish Supreme Administrative Court held that the DTC was applicable to the situation at hand. The Court interpreted the phrase "liable to tax", which is a prerequisite for being resident in terms of Art. 4(1), as a requirement of formally being subject to unlimited tax liability. It was not necessary that the person actually has paid tax. Consequently, when the profits of the funds were distributed as dividends, the domestic exemption provisions and Art. 22(2)(b) of the Luxembourg–Sweden DTC applied, and the result was double non-taxation.

<u>UAE Treaty Network</u>

The United Arab Emirates has 115 Double Tax Agreements (Ireland has 74, with 73 in operation at present). The UAE is a country currently with zero income tax, capital gains tax, gift or inheritance tax.

The Tax Treaty between New Zealand and the United Arab Emirates that was signed in 2003 and entered into force in 2004, gives a very useful insight into the structure and rationale of double tax treaties with the UAE.

Prior to ratification, the New Zealand House of Representatives Finance and Expenditure Committee examined the Treaty in great detail. Here are a few of the findings in its report:-

- The Treaty is unusual because the UAE does not have a general income tax system, but the UAE has indicated that it may introduce one at some stage in the future.
- The main rationale for the Treaty is to facilitate investment from the UAE into New Zealand.
- UAE investors will seek to receive the same after tax rate of return from New Zealand as they can earn elsewhere, including from countries that impose no tax on their investments.
- The UAE private sector is understood to have about US$600 billion available for investment.
- The UAE emphasised that a Treaty was a basic prerequisite for investment from the UAE due to UAE investors' sensitivity to New Zealand tax.
- The main advantage for New Zealand is that the Treaty opens up significant opportunities for foreign investment into New Zealand from the UAE.
- The ability to exchange information with the UAE will be an advantage for New Zealand, as this will assist in the detection and prevention of tax avoidance and evasion.
- UAE investment in New Zealand is likely to be negligible in the absence of a Treaty.

Given countries are aware that the UAE does not currently impose income tax, the New Zealand Committee gives a very useful insight into the object and purpose of a Treaty with the UAE.

Conclusion

- Shareholder B and Shareholder A are resident of the UAE for the purposes of the Convention between Ireland and the United Arab Emirates.

- The “liable to tax requirement” in paragraph 1 in Article 5 of the Convention is intended to test the personal/physical connection between Shareholder B and Shareholder A and the UAE, where both individuals are resident. Vogel in Double Tax Treaties and Their Interpretation (page 52) confirmed the residency test in Article 5 is intended to test a physical connection with the particular Contracting State. Both Shareholder B and Shareholder A have this physical connection with the UAE.

- The Convention reference to “liable to tax” in Article 5 (1) does not mean that Shareholder B and Shareholder A must be actually paying tax in the UAE.

- The Protocol in the Treaty at paragraph 2 states with respect to Article 5 “*notwithstanding the provisions of Paragraph 1 of Article 5*”. This should be interpreted as an expansion to Article 5. It seeks to include rather than exclude persons who shall be regarded as a resident of the UAE.

- Our interpretation regarding “liable to tax” and the allocation of taxing rights is agreed and supported by leading experts on Double Tax Agreements – Klaus Vogel, Joanna Wheeler, Robert Couzin and David G. Duff.

- *In Green Emirate Shipping & Travels Limited v Assistant Director of Income Tax*, based on guidance from the Indian Supreme Court, held in considering identical wording to Article 5 (1) in the Ireland – UAE Convention, that Treaty benefits do not depend on actual levying/imposition of taxation in the UAE to the extent that the Treaty vests an exclusive right on the UAE to levy tax under specific circumstances, whether this right is exercised or not. A person who had a strong personal/physical connection with the UAE could be “liable to tax” in the UAE for Treaty purposes even though the UAE did not impose a tax on the income. Tax Treaties prevent both ‘current’ and ‘potential’ double taxation.

- The UAE has 115 Double Tax Agreements, including Ireland. In negotiating a Treaty, Ireland and other countries are aware of the fact that the UAE does not currently impose income tax. However, treaties are concluded in light of object and purpose. The New Zealand illustration gives a very interesting insight into the rationale.

- Shareholder B and Shareholder A are resident of the UAE within Article 5. Article 11 provides that dividends paid by Irish companies to UAE residents shall be taxable only in the UAE.

- Therefore, having considered the above, the tax assessments raised by Revenue should be vacated.

Extracts from Appellants Supplemental Submission re DWT, EC law and Discrimination.

"Administrative Provisions

Dividend Witholding Tax "DWT", introduced in 1999, is an administrative regime facilitating the collection of tax imposed on dividends under the relevant charging provision in TCA 97.

While it is the Appellant's position as set out below under the heading "Prescribed Form " that there was compliance with these provisions , it is a well- established principle that such provisions cannot impose, alter or increase the tax imposed under the relevant charging provision . See *Birmingham -v- Forrestal Land Timber and Railway Ltd XV TC pages 204 and 641; Brunson -v - Stamp Duty Commissioner (1913) - 1913 AC 747, 760 - FC* and the Leading UK Tax publication Simons states:

> *"In applying the taxing Acts it is necessary to bear in mind that a machinery section is intended to provides for the assessment or collection of the tax, and not to increase or vary it". (Ref A 2.112 The Anatomy of a taxing Act - Charging and Machinery Sections)*

Therefore such administrative / machinery provisions cannot apply where there is no tax imposed on the dividends including on foot of a provision in a double tax treaty such as Article 11 of the Ireland - UAE double tax treaty. A double treaty forms part of Irish tax law and where relevant override normal Irish domestic tax law eg Article 11 of the Ireland - UAE treaty.

EC Law

There are four fundamental freedoms in EC law .The central tenets of these freedoms is a level playing field (non-discrimination) and that there is no direct or indirect hindrance, potential hindrance or potential disincentive to make less attractive the exercise of these freedoms. One of these freedoms is the free movement of capital - Article 63 TFEU These freedoms have very broad tentacles as highlighted by the decision of the European Court of Justice in *Marks and Spencer -v - Halsey C 446/03* and which is referred to in the original submission.

The fundamental free movement of capital principle applies not only to the movement of capital within Member States but also between Member States and third countries. In other words such movements constitutes the exercise of this fundamental freedom in EC law. The prohibition on restrictions on movement of capital is extended beyond the EU and covers movements of capital between Member States and third countries. The ECJ has confirmed that the prohibition on free movement of capital as it relates to third countries is to be interpreted in the same manner as for movements of capital between Member States. That follows from the fact that the position in respect of third countries is expressed in identical terms to the movement of capital between Member States *Skatteverket -v- A C 101/05 paragraph 31.*

Derogations from this fundamental principle in EC law must be construed narrowly see *Anneliese Lens C 315/02.* Certainly discrimination, in comparable circumstances, on grounds of race or ethnic origin would not come within such an exception - a clear manifestation of arbitrary discrimination.

The cases of *Bouanich -v- Skatteverket C 265/04 and British Columbia Pension Plan a 641/17* involved the payment of dividends by a company in a Member State to a shareholder resident in a third country and came within the ambit of the fundamental principle of the free movement of capital in EC law .

EC Law and a Double Tax Treaty

The New Zealand parliamentary report (referred to elsewhere) re the New Zealand -UAE double tax treaty highlights that facilitating the movement of capital between the contracting states is one of the key factor behind a double tax treaty particularly in the case of a double tax treaty with the UAE.

It is fundamental that the EU law rights take precedence over the provisions of any double tax treaty *EC - v- France C 270/83* - paragraph 26.

The terms of a double tax treaty cannot be such as to constitute a restriction on one of the freedoms of movement in EC law *Luxembourg v Lakebrink C 182//06; Deutschland Shell GmbH C C 239/06 ; Bouanich -v- Skatteverket C 265/04* . The allocation of power to tax under the treaty must be consistent with the Treaty freedoms which are unconditional *Denkavit Internationaal C 175/05; Finanzamt Koln - Altstadt C 279/93*. Here the allocation of power to tax dividends in this country under the Ireland - UAE double tax treaty must be consistent with the free movement of capital in EC law.

A person can show discrimination (lack of level playing field) by a Member State if he cannot rely on the terms of a double tax treaty where another person in a comparable situation can rely on the terms of the treaty *Campagnie de Saint - Gobain case C - 307/ 97* - a case which considered the different tax treatment of dividends received in German tax law. This is the nub of the Respondent's contention namely (irrespective as to the size of their shareholdings) an individual who is an UAE national can avail of the benefits of the treaty whereas non UAE national individuals who are shareholders in comparable circumstances cannot do so.

The case of *British Columbia Pension Plan C 641/17* centred on Article 63 TFEU as well as the double tax treaty between Germany and Canada (a third country) . The ECJ held that the German tax treatment of dividends paid by a German company to this and other non-German pension funds should , having regard to the free movement of capital, be identical to the income tax or corporate tax treatment were the said dividends received by a similar German pension fund .This is clear authority for the conclusion that having regard to this fundamental freedom of movement in EC law the Irish tax treatment of dividends under the Ireland- UAE double tax treaty should be identical for all individuals in comparable situations .The ECJ in this case also set out a detailed analysis of Articles 63 - 65 TFEU.

Discrimination on Basis of Nationality /Race/Ethnic/Origin

Discrimination on the grounds of nationality is prohibited under 18 TFEU. This Article replicates to some extent Articles 20 and 21 of the Charter of Fundamental Rights of the European Union which also forms part of EC law and indeed equality is a key cornerstone in wider EC law. Article 20 states:

"Everyone is equal before the law."

Article 21. 1 of this Charter states:

"Any discrimination based on any ground such as sex, race, colour ethnic or social origin - ———- shall be prohibited"

This Charter is also in effect a replication of the European Convention of Human Rights (ECHR) into wider EC law. For example Article 14 of the ECHR prohibits discrimination on any grounds such as:

"sex, race colour ---------national or social origin ----"

The ECHR separately forms part of Irish law on foot of The European Convention of Human Rights Act 2003. Attention is drawn in particular to the obligation imposed on public bodies (eg. Revenue, Tribunal etc.) in section 3 of the said Act - in itself a reflection that this Act in essence sets out obligations and remedies. On this basis alone this raises the issue of an obligation on such bodies not to take actions such as implementing / applying (if applicable) such discrimination.

Towards this end it is well established that the tentacles of the ECHR can apply to areas of taxation. For example tax penalties and publication cannot apply to death cases. This is on the basis that under the ECHR tax misdemeanours are classified as criminal in nature. Therefore such actions such as seeking the imposition of penalties or publication (re a person who is not in a position to defend himself or herself) cannot be taken by Revenue as it would not be compatible with the ECHR

The above brings into sharp focus that discrimination on the basis of race or ethnic origin has the same and identical standing as discrimination on the basis of gender/sex. In other words the Respondent's contention is akin to claiming that on foot of an international treaty which forms part of Irish law its benefits, in the case of individuals can apply only those whose gender/sex is male ie an individual who is female cannot avail of its benefits.

In An Blascaod Mor Teo [2000] 1 I.L.R.M. 401, a case where the Supreme Court upheld a High Court judgement of *Budd J [19978 IEHC 38* who held that where Irish law discriminated between classes of persons, based substantially on pedigree /ethnic, origin such laws were contrary to Article 40.1 and 40.3 of the Constitution. The Irish Constitution, in this regard, mirrors the ECHR in that such discrimination is contrary to Irish law see *Tottenham Conveyancing & Property Law Journal (2005) 10(1) C.P.L.J. 1.*

Article 18 In Conjunction with Other Factors

The European Court of Justice in the *International Jet Management case C 628/11* is authority for the proposition that not only does Article 18 stand on its own two feet in securing protection under EC law but can only be taken into account with other factors which achieves the same result.

Supremacy of EC Law

There is the ECJ decision in the *Irish Workplace Relations Commission C 378/17* case which states clearly and unambiguously that Tribunals must disapply Irish law where it is not compatible with EC law - EC law being supreme. The position here is that the Respondent is claiming that Irish law which, if correct, leads to a situation where the said Irish law is not compatible with EC law.

Prescribed Form

Finally there is the position where the Appellant in good faith applied for tax residency certificates in the UAE using the prescribed Revenue forms as set out in the DWT legislation – forms which did not state or draw attention to an alleged exception in the case of individuals who are not UAE nationals. The significance of such failures in the case of a taxpayers rights was highlighted by the Supreme Court decision in *Keogh –v- CAB, Revenue Commissioners and Attorney General. [2004] IESC 32.*

These forms include a section which can only be completed by the relevant authority in the double tax country - in this case the UAE. The UAE authority completed these forms including the granting to the recipients of the dividends a UAE tax number for the purposes of the double tax treaty .Therefore it is the Appellants position that they have complied technically with the DWT provisions not least from the viewpoint that there is an international treaty factor here and , therefore, one must look behind the purpose of these forms - namely evidence of being resident in a double tax treaty country for the purposes of the treaty as certified by the relevant authority in the particular double tax treaty country (ie the other contracting party/state) and therefore the non-application of DWT on foot of this certification…

Ireland- UAE Double tax treaty entered into in 2010

This is a supplemental submission to the initial submission made to the Tax Appeal Commissioner on behalf of the Appellant. It sets out in detail reasons, including citing supporting case law, why the benefits of the Ireland –UAE treaty apply to individuals who are non-UAE nationals, fiscally resident in the UAE. It elaborates on the initial submission made on behalf of the Appellant that taxation in the UAE was not a pre-requisite for such individuals availing of the benefits of this double tax treaty…

Attached is a copy of the *Green Emirate Shipping case* .This is an Indian tax tribunal case which considered the tax residency Article in the original India -UAE double tax treaty entered into in 1997. It was the exact same wording as in Article 5 (1) of the Ireland-UAE double tax treaty - the OECD recommended non-discriminatory wording namely:

> *"For the purposes of the Convention , the term "resident of a Contracting State means any person who, under the laws of that state , is liable to tax therein by reason of domicile , residence , place of management or any other criterion of a similar nature , and also includes that State and any political subdivision or local authority thereof . The term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State".*

One key point in that case is that a double tax treaty prevents not only current but also future potential double taxation where the contracting state retains the right to levy taxation should it choose to do so in the future. Consequently, it held that the benefits of the India - UAE treaty applied to a resident in the UAE notwithstanding that the UAE had chosen not to levy income tax. This right on the part of the UAE is reflected in a number of Articles in the Ireland - UAE double tax treaty including Articles 7 , 8 and 11 (in Article 11 the UAE has the right to tax dividends if it chooses to do so)

The Indian Tax Tribunal based its decision on the reasoning adopted and guidance provided by the Indian Supreme Court in the *Azadi Bahao Andolan* case - copy of which is also attached. The Indian Supreme Court, in that case, set out the background , philosophy and practical reasons (including consideration of the Vienna Convention , commentaries such as Vogel , OECD guidelines etc) behind double tax treaties - parts of which were recited in the

Green Emirate Shipping case (note paragraph 8 in particular) It is also noticeable that the Indian Supreme Court cited a number of Canadian cases including the Federal Court of Canada decision in the *Gladden* case - citing say the abolition of CGT in one contracting state does not mean that the resident of that state cannot get the benefit of the treaty in the other contracting state.

The position is summed up by the following extract in paragraph 8 of the *Green Emirate Shipping* case:

> *"It is thus clear that taxability in one country is not sine qua non for availing relief under the treaty from taxability in the other country. All that is necessary for this purpose is that the person should be liable to tax in the contracting state by reason of domicile, residence place of management, place of incorporation or any other criterion of a similar nature which essentially refers to the fiscal domicile of such a person. In other word, if fiscal domicile of a person is in a contracting state, irrespective of whether or not that person is actually liable to pay tax in that country, he is to be treated as resident of that contracting state. The expression liable to tax is not to be read in isolation but in conjunction with the words immediately following it i.e., "by reason of domicile, residence place of management, place of incorporation or any other criterion of a similar nature"*

Article 5 (1) in the Ireland-UAE treaty does not state "*subject to paragraph 2 of the protocol which forms part of this treaty*". All that paragraph 2 of the protocol states is that notwithstanding the general rule in Article 5 (1) it sets out a list of persons who must be regarded as being tax resident for the purposes of the treaty in the UAE. The word "*notwithstanding*" has the direct opposite meaning to "*subject to*". In other words, there is an obligation to regard certain persons as being resident in the UAE for the purposes of the treaty and entitled to the benefits under it. Indeed, any contrary interpretation would be that even if income tax was levied in the UAE, the protocol would override the general rule set out in Article 5 (1). This would be on the basis that only the persons set out in the protocol can be regarded as being resident in the UAE for the purposes of the treaty and entitled to the benefits under it - a manifestly absurd or unreasonable result.

These cases also highlight the key point that the phrase "*liable to tax*" is different to an obligation to pay tax - indeed a fundamental difference in tax law.

In short the above confirms that the client who is fiscally resident in the UAE is entitled, on foot of Article 5 (1); to the benefits of the Ireland-UAE double tax treaty.

The Indian and Canadian cases highlight the point that in relation to an international double tax treaty, a liberal approach should be given to its interpretation. Indeed, this is also reflected in a number of decisions in this country. In *Kinsella -v- Revenue Commissioners [2007] ITR 151* the Revenue claimed that the Ireland- Italy double tax treaty , entered into in 1971 and entered into Irish law in 1973 (prior to the introduction of CGT in this country) did not cover CGT - a contention which was rejected by the High Court. The High Court in the Kinsella case referred in detail to the principles of interpretation of a double tax treaty - principles which were also referred to in detail by Laffoy J in *Denis O'Brien -v- John Quigley [2013 IEHC 398]*. In paragraph 41 of the Kinsella case which is also cited by Laffoy J in paragraph 6 of the O 'Brien case Kelly J states:

> *"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 Mc Gimpsey 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."*

In paragraph 44 of the Kinsella case which again is also referred to by Laffoy J in paragraph 10 of the O'Brien case, Kelly J states:

> *"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, on the appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon"*

Laffoy J goes on to state in the O'Brien case:

> "*That passage in my view clearly set out the proper approach to be adopted in interpreting and applying a Double Taxation Convention. It was the approach adopted by the Appeal Commissioner on the Appellants appeal.*
>
> *In the Case Stated (at para. 13) the Appeal Commissioner stated:*
>
> *In reaching my determination, I was satisfied that Barrington J , in McGimsey v Ireland --- general principles of interpretation of international law , and in particular the rules of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties should be approached. Article 31 takes a purposive approach to the interpretation of legislation which is different to the approach generally followed in interpreting taxing statutes; it is this purposive approach that I have applied in relation to this hearing."*

The Revenue's position is that in the case of an individual it is only an UAE national resident in the UAE who can avail of the benefits of the Ireland - UAE treaty i.e. discrimination on the basis of race or ethnic origin. Apart altogether from the above, such direct or indirect discrimination, in a comparable situation, brings into play compatibility with other legal obligations including wider EC law - indeed a somewhat surprising position being taken by a State body that such discrimination forms part of Irish law given this country's pro-active approach against such discrimination and indeed the general worldwide view that this type of discrimination should have no place in the modern world.

Attached to this part of the Supplemental submission is an ancillary memorandum (titled “*Ancillary Memorandum RE Double Tax Treaties*”) which refers to commentaries by leading authorities in the double tax treaty field, including commentaries as to the meaning of “liable to tax “in the residency Article of a double tax treaty – indeed some of which were referred to in the Indian and Irish case law set out above. It also sets out a New Zealand parliamentary committee conclusions as to why a country would enter into a double tax treaty with the UAE given that no tax is levied in the UAE.

The conclusions of the New Zealand parliamentary committee highlight that one of the key reasons why countries enter into double tax agreements with the UAE is to facilitate movement of investment/capital. This in itself highlights why the fundamental freedom of movement of capital in EC law also comes into play in this case which is dealt with in some considerable detail later.

27. SUBMISSIONS - THE RESPONDENT

Extracts from Respondent’s outline of arguments:

“IV. The Certificate entitled ‘TAX Resident Certificate: Individual’

The Certificate provided to Shareholder A by the Ministry of Finance in the UAE is entitled ‘TAX Residence Certificate: Individual’. It declares, under section B thereof, as follows:

> *“The Ministry of Finance of the United Arab Emirates hereby certifies that the above mentioned individual has met all requirements and*

conditions, therefore and Pursuant to the Agreement between the Government of the United Arab Emirates and the Government of the Ireland for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital signed on 01/July/2010, Shareholder A is a resident in the United Arab Emirates.

This certificate is valid from 01/January/2017 to 31/December 2017"

Under section B, the certificate is signed by Kalid Ali Al-Bustani, who is described thereon as being: "*Assistant Undersecretary for International Financial Relations*".

Section A of the certificate is entitled 'Applicant Information'. This section thereof refers to "*Shareholder A*" as being an Irish national, and it then states her Irish passport number and her 'Resident Visa Number' for UAE.

V. Burden of Proof in a Tax Appeal

As a matter of law, the burden of proof at a tax appeal is on a taxpayer; *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49; see paras. 20, 22, and 23). The decision in *Menolly* is consistent with authorities in England & Wales, such as, *Hurley v. Taylor,* [1999] STC 1, which is authority for the proposition that, on appeal of an "*in-time*" assessment, the burden of proof rests with the taxpayer. In *Eagerpath Limited v Edwards*, [2001] STC 26, 73, TC 427, the Court of Appeal held:

"*On appeal to the commissioners the burden of proof is on the Appellant taxpayer, because the taxpayer can be expected to know all about his own financial affairs, whereas the inspector may have little or no knowledge about them apart from the taxpayer's return."*

… The onus of proof is on the Appellants to prove facts on which they / it relies in support of the consolidated appeals and that, on applicable legal principles, that Shareholder A qualifies for the exemption provided for in section 172D TCA 1997 thereby entitling the Appellant make gross dividend payments to her.

VI Principles of Statutory Interpretation

It is well established that liability for tax must be clearly imposed and that the provisions of tax statutes are strictly construed. In *Inspector of Taxes -v- Kieran* [1981] IR 117, Henchy, J. set out three principles of construction. These may be summarised as follows:-

- 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 it.
- 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.
- Where in 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 should draw primarily on his own experience of its use.

In *McGrath -v- McDermott* [1988] IR 258, the Supreme Court reaffirmed the principles of statutory construction applicable to Finance Acts as follows:

> *"It is clear that successful tax avoidance schemes can result in unfair burdens on other taxpayers and that unfairness is something against which courts naturally lean. The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the*

legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from the express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective ...

In the course of the submissions such a necessity was denied but instead it was contended that the real, as distinct from what is described as the artificial, nature of the transactions should be looked at by the Court, and that if they were, the section could not apply to them.

I must reject this contention. Having regard to the finding in the case stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.

In those circumstances, for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers." (page 276)

In *Texaco (Ireland) Ltd -v- Murphy* [1991] 2 IR 449 McCarthy, J. (with whom Finlay C. J. and Hederman, J. agreed) stated that:

"[I]t is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly imposes the obligation."

In this context, he adopted the following observations in the judgment of Rowlatt J. in *Cape Brandy Syndicate -v- Inland Revenue Commissioners*: [1921] 1 K.B. 64, at 71.

> *". . . in a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

McCarthy, J. also referred to the following passages from the judgment of Kennedy, C. J. in *Revenue Commissioners -v- Doorley:* [1933] IR 750, at 765

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

> *Act as interpreted by the established canons of construction so far as applicable."*

The principles stated in *Cape Brandy Syndicate and Doorley* were also reaffirmed by the Supreme Court in *Saatchi & Saatchi Advertising Ltd -v- McGarry* [1998] 2 IR 562.

Section 172D TCA 1997 is a relieving provision and not a charging provision Therefore, it is for the Appellant to establish that it (and in this case that means Shareholder A) is clearly within the ambit of the relief. The burden of proof falls squarely on the Appellant 1 in this regard.

<u>VII. Application of Principles of Statutory Interpretation to Section 172D TCA 1997</u>

19) In order for Shareholder A to avail of the exemption provided by section 172D TCA 1997 and establish that she is a qualifying non-resident, she must show that:-

i) she is neither resident nor ordinarily *resident* in Ireland,
ii) she is resident in a relevant territory, in this case the UAE and under the law of that relevant territory she is resident for the purposes of tax (being income or corporation tax).
iii) that she has made a declaration in the prescribed form to the Appellant making the distribution prior to the payment of the dividend
iv) i.e. she complies with paragraph 8 of Schedule 2 A.

Subsections (ii) and (iii) are particularly in issue between the parties. The Respondent does not believe that Shareholder A has satisfied the provisions of 172D TCA 1997 and established that she is resident in the UAE for tax purposes. In order to do so, it is submitted by the Respondent that she must show that she is resident for tax purposes in a "*relevant territory*".

"Relevant territory", as defined by 172A TCA 1997 (see above), means a territory, not being an EU Member State, with the government of which arrangements having the force of law by virtue of section 826(1) TCA 1997 have been made by the State, i.e. a double taxation convention. The DTC between Ireland and UAE was given force of law on foot of the Double Taxation Relief (Taxes on Income and Capital Gains)(United Arab Emirates) Order 2011 (S.I. No. 20/2011). This, in turn, is reflected in Schedule 24A TCA 1997, which sets out the arrangements made by the Government with other jurisdictions in terms of relief from double taxation.

The relevant territory here is, therefore, the UAE, and the convention is the DTC concluded in 2010. There is a direct correlation in statute between section 172D and the DTC. It must therefore be established, by the Appellant, that Shareholder A is resident in UAE, with reference to the DTC. Put another way, it is submitted that tax residency for the purpose of 172D TCA 1997 must be read as residency under the DTC.

Subsection (ii) of section 172D (3)(a) goes further. It requires Shareholder A here to show that she is resident in a treaty territory "for the purposes of tax". "Tax" in section 172A in relation to a relevant territory (the UAE) is defined as meaning any tax imposed by that territory which corresponds to income tax or corporation tax in this jurisdiction. It will be for the Appellant to prove, in this appeal, that income tax, is, in fact, imposed on individuals in the UAE in order for Shareholder A to satisfy this section and its payment of the distributions to her gross not to give rise to liability. Where no income tax is imposed by a relevant territory, or where there is no concept of income tax therein, an individual seeking an exemption under 172D(3)(a) does not satisfy subsection (ii) thereof.

The Respondent takes issue with the certificate provided by the Ministry of Finance to Shareholder A, as it does not constitute sufficient evidence of tax residency by Shareholder A in UAE. Paragraph 8(f) of Schedule 2A TCA 1997 requires that the declaration made in section 172D(iii) TCA 1997 "*is accompanied by a certificate given by the tax authority of the relevant territory in which the person is, by virtue of the law of that territory, resident for the* *purposes of tax certifying that person is so resident in that territory*". The Respondent awaits proof that the Ministry of Finance of UAE is the tax authority of the relevant territory for the purpose of this section.

VIII. Application of the DTC and Protocol

In Article 5 of the DTC the term "*resident of a Contracting State*" means a person who, under the laws of that State is liable to tax therein. This must be read in conjunction with Article 2 of Protocol which clarifies who will be considered resident for the purpose of the Treaty, with reference to establishing residence in the UAE.

The first paragraph of the Protocol states it to be an "*integral part of the Convention*" and, although it was concluded on the same date as the DTC, it elucidates the meaning of Article 5 DTC. The Protocol clarifies who will be considered resident for the purposes of the DTC. Article 2 of the Protocol commences with: "*Notwithstanding the provisions of paragraph 1 of Article 5*". Therefore, it is clear that the Protocol alters substantially what might otherwise be the interpretation of paragraph 1 of Article 5 DTC. The relevant material effect for the purposes of these appeals is seen at Article 2(a), indent (iv) of the Protocol, which states (with reference to whom shall be regarded as a resident of the UAE and, accordingly, entitled to claim the benefits provided by the Convention) that:

> *"any person if that person shall pay income tax or corporate tax in the United Arab Emirates on income, by reason of domicile, residence, place of management or any other criterion of a similar nature, where that person is in receipt of income".*

Shareholder A must, accordingly, establish not only that that she is "liable to tax" in the UAE, but also clearly, the Respondent submits, that she pays income tax there.

The concept of a "liability to tax" was canvassed in a recent case before the TAC, *Ref 17TACD2019,* where the issues concerned, inter alia, whether a limited liability company (LLC) in the United States incorporated under the law of Delaware was "a company" for the purpose of section 411 TCA 1997. If so, was it resident in the United States for tax purposes? Although not entirely on all fours with this case, in order to address the issues, the TAC had to consider the issue of residency of companies and the double tax treaty concluded with the USA, which section 411 was amended to include. The Determination cites several relevant decisions which the Respondent therein (Revenue) agreed set out general principles concerning residency. Article 4 of the USA DTA is similar to Article 5 of the Ireland/UAE Double Taxation Agreement). At page 38, the TAC states the following:-

> *"Some tax treaties use the words "subject to tax" rather than "liability 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.*
>
> *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. 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.

Judge Berner expressly approved of the principles of Lady Arden in Bayfine wherein she stated that the words in the preamble to the treaty (the US/UK treaty in that case) 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. (See paragraphs 16 and 17).

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 on a person's worldwide income and the expression "subject to tax" which may require an effective liability to tax on a person's income."

Kelly J. (as he then was) in the High Court in *Kinsella v Revenue Commissioners* [2011] 2IR 417 @ page 430 (and referred to in *17TACD2019*) also adopted a purposive approach when interpreting the double taxation convention between Ireland and Italy. Kelly J. found that where there is ambiguity reliance can be had to Commentary on the Model Convention. In *O'Brien v Quigley* [2013] IR 790 Laffoy J. (in the High Court) concluded*, inter alia,* that double taxation conventions ought to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms, in their context and in light of their object and purpose. If such an interpretation left the meaning ambiguous or unreasonable result, recourse could be had to supplementary means of interpretation including the OECD Model Convention and commentaries thereon. (Headnote to decision)

In the present circumstances, Article 5 of the DTC refers, in establishing residency, to an individual being "*liable to tax*". The case-law suggests that this is an abstract concept that incorporates potential liability to tax. This falls, however, to be read in conjunction with Article 2 of the Protocol, which provides that an individual, in order to establish residency, <u>shall pay</u> income tax or corporation tax. This latter provision therefore concretises the abstract and makes provision for an effective subjection to tax.

It is further submitted that the clear intention of the contracting states to the DTC was to ensure that tax would be paid if someone were to seek treaty benefits by virtue of residency. The intention of double taxation agreements generally is that there should be relief from double taxation rather than double non-taxation. This is in line with the purposive approach approved in the *Kinsella and O'Brien* case- law.

In consequence, the Respondent submits that the liability to tax in this case must encompass payment of tax and in order to establish that she is resident, for the purpose of section 172D TCA 1997 and the DTC, Shareholder A must pay tax in the UAE. This has not been established and, accordingly, the Appellant is liable and the assessments under appeal should be upheld.

<u>IX. Application of EU Law</u>

It is stated as a ground of appeal by the Appellant that the course of action adopted by the Respondent seeks to treat a UAE national resident in the UAE preferentially to a non-UAE national resident in the UAE, where he or she receives a dividend from a direct investment in an Irish company. This, it is asserted, is contrary to the free movement of capital provisions of EU law (Article 63 Treaty on the Functioning of the European Union (TFEU)). It is further asserted that this also amounts to supposed discriminatory treatment amounting to a breach of Article 18 TFEU, in that it is suggested that an EU national resident in the UAE is not entitled to the benefits of the DTC unless he or she is a UAE national.

The Respondent respectfully submits that such general and unparticularised arguments concerning alleged applicability of certain provisions of the TFEU with regard to the interpretation of the residency provisions of the DTC are not matters that fall within the jurisdiction of TAC and, insofar as they appear to relate to claimed discrimination by the Respondent in favour of third-country UAE nationals to the detriment of EU nationals like Shareholder A are matters that may and should (insofar as a stateable claim arises (*quod non))* more properly be ventilated before the High Court…

As set out above, the Respondent is not satisfied that Shareholder A is resident in UAE for the purpose of the DTC and, accordingly, submits that no issue of any possible misapplication thereof in relation to Shareholder A as compared to a UAE national resident in the UAE arises. It is manifestly not the case that an EU national resident in the UAE may not benefit from the terms of the DTC without also being a UAE national. If an EU national can satisfy any of the residency provisions of Article 5 of the DTC read in conjunction with Article 2 of the Protocol, then relief thereunder is available. In this regard, the situation of a UAE national is dealt with in Article 2(a), indent (i) thereof. A UAE national must be present in the UAE for a period(s) totalling in the aggregate at least 183 days in the fiscal year concerned to be resident in the UAE. Other persons are dealt with by Article 2(a), indent indent (iii), of the Protocol, and, as regards natural persons like Shareholder A, they *"shall pay income … tax in the United Arab Emirates on income … where that person is in receipt of income*" in order to qualify as a resident for the purposes of the DTC. If the Appellant wishes to make some, as-of-yet unarticulated claim that Article 2(a), indent indent (iii), of the Protocol to the DTC is incompatible with some provision of the TFEU, that , it is respectfully submitted, would clearly be outside the jurisdiction of the TAC and require to be litigated in the High Court.

Without prejudice to this position, insofar as Article 63 TFEU might (quod non) have some possible application in the within case, the Respondent submits that the TAC would be required to consider the provisions of Article 65 TFEU, which provides as follows:-

> *"The provisions of Article 63 shall be without prejudice to the right of Member States:*
>
> *(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;*
>
> *(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."*

As set out above the purpose of the DTC is stated to be the "*avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains*". There is an onus on a Member State to ensure that there are provisions in place to prevent tax avoidance and double taxation. Member States retain the power to define their taxation regime and, where necessary to provide for reasonable restrictions by reference to residence, particularly in the context of a DTC with a third country, which, while they might potentially restrict the freedom of movement of capital, are necessary to prevent tax avoidance and double taxation. For the avoidance of doubt the Respondents in this case do not consider that the residency provisions of the

DTC comprise any restriction on the freedom of movement of capital contrary to Article 63 TFEU. In this regard, the Respondent would, for the purpose of this Outline of Arguments confine itself to referencing the CJEU's judgment in Case C-176/15 *Guy Riskin, Genevieve Timmermans v Etat Belge*, a case that concerned a DTC, where it stated the following:-

> *"29 In that respect, it must be borne in mind that it is for the Member States to organise, in compliance with EU law, their systems for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them, and that, in the absence of any unifying or harmonising EU measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (see, to that effect, judgment of 20 May 2008 in Orange European Smallcap Fund, C- 194/06, EU:C:2008:289, paragraph 48).*
>
> *30 Consequently, given the resulting disparities between the tax laws of the various Member States, a Member State may find it necessary, by treaty or unilaterally, to treat dividends from the various Member States differently so as to take account of those disparities (see, to that effect, judgment of 20 May 2008 in Orange European Smallcap Fund, C-194/06, EU:C:2008:289, paragraph 49).*
>
> *31 In the context of bilateral tax conventions, it follows from the case-law of the Court that the scope of such a convention is limited to the natural or legal persons defined by it. Likewise, the benefits granted by it are an integral part of all the rules under the convention and contribute to the overall balance of mutual relations between the two contracting States (see, to that effect, judgments of 5 July 2005 in D., C-376/03, EU:C:2005:424, paragraphs 54 and 61 to 62, and of 20 May 2008 in Orange European Smallcap Fund, C- 194/06, EU:C:2008:289, paragraphs 50 to 51). It must be noted, as the Advocate General did at point 43 of her Opinion, that that situation is the same with regard to double taxation conventions concluded with Member States or with third States."*

The reliance upon Article 18 TFEU by the Appellant in its Notice of Appeal appears, with respect, to be particularly misconceived. Article 18 TFEU expresses the general principle in EU law that discrimination on grounds of nationality is prohibited. The nationality-based discrimination envisaged is patently discrimination between EU nationals, i.e. those who are EU citizens. In this regard, the provision is the first provision in Part Two of the TFEU concerning 'Non- discrimination and Citizenship of the Union'. Insofar as it appears that the Appellant's claim concerns supposed discrimination in favour UAE nationals resident in the UAE under the DTC and Protocol thereto, such a claim, apart from being one that, in the Respondent's respectful submission, manifestly falls outside the tax jurisdiction of the TAC, is equally one that is manifestly not covered by Article 18 TFEU.

X. Conclusion

For the reasons outlined in this Outline of Arguments, the Respondent submits that the Appellant has not established that Shareholder A had established residency in the UAE under the DTC in the relevant years concerned by the distributions at issue. She was, therefore, not entitled to the exemption provided by section 172D TCA 1997. In those circumstances, the Appellant should have withheld DWT from the distributions it made gross to Shareholder A. Accordingly, the within appeals should be refused and the assessments confirmed…

ANALYSIS & CONCLUSIONS

28. This appeal relates to the operation of Irish DWT by two Irish resident companies in respect of dividends paid in the years 2017, 2018, 2019 and 2020 to certain non-resident shareholders (Shareholder A in respect of Appellant 1 and Shareholder B in respect of Appellant 2) living in the UAE. The background to this appeal is outlined earlier under the headings, "Background" and the "Submissions" put forward by both Appellant 1 and 2 and the Respondent.

Taxation of dividends and the law on DWT

29. In order for the Appellants to avail of the exemption, provided by section 172D TCA 1997, from applying DWT under section 172B to distributions / dividends, they must establish that Shareholder A and Shareholder B are each a "qualifying non-resident person" in respect of each distribution/ dividend. Shareholder A and Shareholder B are a qualifying non-resident, if:-

    i)They are neither resident nor ordinarily resident in Ireland,
    ii)They are, by virtue of the law of the UAE, resident in the UAE for the purposes of tax in the UAE,
    iii)They have each made a declaration to the Appellants in the prescribed form in accordance with paragraph 8 of Schedule 2 A, prior to the payment of the dividend.

30. Condition i) above is not in dispute between the parties. However (ii) and (iii) are particularly in issue between the parties. The Respondent does not believe that Shareholder A nor Shareholder B has satisfied the provisions of 172D TCA 1997 and established that they are resident in the UAE for tax purposes. In order to do so, it is submitted by the Respondent that they must show that they are resident for tax purposes in a "relevant territory".

31. The DTC between Ireland and UAE was given force of law on foot of the Double Taxation Relief (Taxes on Income and Capital Gains)(United Arab Emirates) Order 2011 (S.I. No. 20/2011) and is listed in Schedule 24A TCA 1997, which lists the agreements made by the State with other jurisdictions in terms of relief from double taxation. So we know that the UAE is a "relevant territory" as defined in section 172A TCA 1997. The DTC is part of Irish tax law.

32. The Appellant argued that both shareholders were resident under the DTC. It is submitted by the Respondent that tax residency for the purpose of 172D TCA 1997 must be read as residency under the DTC but their reading of the DTC is that neither Shareholder A nor Shareholder B is so resident as defined. Both sets of argument are outlined in their submissions.

33. The provisions of Chapter 8A TCA1997 set out the machinery for the collection of DWT imposed on Irish resident companies making distribution and dividend payments. When this legislation was originally being formulated, there was great concern among companies operating in the IFSC that investment companies and certain collective undertakings with primarily non-Irish shareholders / investors, which were resident in Ireland but had nothing to do with Irish investment, would unwittingly be caught by the DWT provisions. So exemptions from DWT, relating to certain non-resident recipients of Irish distributions / dividends were introduced by the Oireachtas.

34. Subsection (ii) of section 172D (3)(a) requires both Shareholder A and Shareholder B to show that they are resident by virtue of the law of the UAE, resident in the UAE for the "purposes of tax" in the UAE. "Tax" is defined in section 172A in relation to a relevant territory such as the UAE, as meaning "*any tax imposed in that territory which corresponds to income tax or corporation tax in the State*".

35. Under the DTC, Article 2 (dealing with taxes covered by the Convention) says that under that Convention

> 1. *This Convention shall apply to taxes on income and capital gains imposed by each Contracting State…*
>
> *3* "*existing taxes* to which the Convention shall apply are in particular… (b) in the case of the United Arab Emirates:*
>
> *(i) The income tax*
>
> *(ii) the corporation tax;..*" (emphasis added)

36. Now we know from expert witness testimony put before me that the UAE has not, to date, introduced either income tax or corporation tax on its residents. So the use of "existing taxes" in Article 2 is curious. To me the only explanation for its use is that the Convention is dealing with prospective taxation in the UAE in relation to an understood existing tax such as income tax and corporation tax. Article 2.4 reinforces this when speaking about any identical or substantially similar taxes that are imposed after the date of the Convention.

37. In my view the use of the word "imposed" in section 172A is not time specific and could apply as much to the future, similar to the DTC, as to the past. As such, it is similar in concept to being "liable" to tax. The Respondent has already conceded that "liable to tax" may mean being "subject to tax" in the future.

38. We know that the UAE Ministry of Finance, in respect of Application date 12 March 2017 (for Shareholder A) issued a "*Tax Domicile Certificate for Individuals*" to Shareholder A which stated:

    "Pursuant to the Agreement for the Avoidance of Double Taxation signed between the Government of the United Arab Emirates and the Government of Ireland on 1 July 2010, the UAE Ministry of Finance certifies that Shareholder A is resident of the United Arab Emirates".

    This certificate was valid for year 2017 only.

39. A similar certificate was issued to Shareholder A on 17 April 2018, valid for year 2018 only.

40. A similar certificate was issued to Shareholder B in respect of an application on 12 March 2017, valid for year 2017 only.

41. A similar certificate was issued to Shareholder B on 11 December 2018, valid for year 2018 only.

42. The tax position in the UAE was explained in two expert reports, one for the Appellant and one for the Respondent, in expert witness testimony provided during the hearing.

43. Under UAE law, a person can be resident in the UAE without being tax resident in the UAE. A person is regarded as tax resident in the UAE for a particular year if they are issued a tax residency certificate by the competent authority under the terms of a tax treaty entered into by the UAE. This was confirmed by Dr. Voda, from law firm Fitche & Co, a UAE legal expert, provided by the Respondent, in her report set out in Appendix 2:

"3.5 Please note that a tax residency certificate has a validity period specified in the document itself. For the Tax Residency Certificates submitted to us for review, the validity is from January 1 2017 to December 31 2017 and from January 1 2018 to December 31 2018.

3.6 As such, an applicant may not claim tax residency in UAE outside the validity period of the tax residency certificate. For example, for the case at issue, the Irish individuals may not claim the status of tax resident in UAE on January 1, 2019 unless they provide a tax residency certificate valid as of January 1 2019."

44. The expert report, reproduced by [redacted] and [redacted] from Advocates and Legal Consultants, [redacted] in the UAE, states:

"Therefore, it follows that at the time the MOF issued the referred UAE tax residency certificates for the purposes of the UAE-Ireland double tax treaty in 2017 and in 2018, Shareholder B and Shareholder A complied with all the requirements imposed by the UAE authorities to obtain them and, accordingly, they were valid in the UAE. Further, these certificates are the official documents that the MOF issued to prove tax residency in the UAE for the purposes of a double tax treaty, including for the purposes of the double tax treaty with Ireland. "

45. The Respondent's expert in UAE tax gave testimony that you can be resident in the UAE without being tax resident in the UAE. The same expert witness said that you become tax resident in the UAE only when the Ministry of Finance (the competent tax authority for the Ireland / UAE tax treaty) issued you with a certificate of residence for a particular year, for the purposes of a UAE tax treaty. Absent this certificate, you are not tax resident in the UAE, albeit you are resident in the UAE.

46. The Declaration issued by the UAE Ministry of Finance coupled with the Respondent's own expert witness is prima facie evidence that section 172D TCA 1997 (3) (a) (ii) has been complied with, at least, some of the dividends paid for years 2017 and 2018. The absence of a Certificate for 2019 and 2020 for either shareholder

means that the Appellant has not proved that section 172D TCA 1997 (3) (a) (ii) has been complied with for dividends paid in 2019 and 2020.

47. What is important in looking at section 172D TCA 1997 (3) (a) (ii) is the status of the Shareholders under UAE law and not necessarily how the Respondent interprets their status under Irish law or how the Respondent interprets the DTC from an Irish tax perspective.

48. Furthermore, Section 172 B (4) states: *"…where the company has satisfied itself that a relevant distribution to be made by it to a specified person is not, by virtue of the following provisions of this Chapter, a distribution* to *which this section applies, subject to those provisions, be entitled to so treat the relevant distribution to be made by it to the specified person until such time as it is in possession of information which can reasonably be taken to indicate that a relevant distribution to be made to the specified person is or may be a relevant distribution to which this section applies.".*

49. The words "*to be made*" indicate that the company must so satisfy itself before the making of the distribution and not after.

50. It is my view that the Appellants were entitled to rely on certificates of tax residence, issued by the UAE authorities, before a particular distribution, in order to "satisfy" themselves that the particular distribution did not require DWT to be applied to it.

51. The UAE tax residence certificates put before me in evidence for years 2017 and 2018 for Shareholder A and Shareholder B prima facie indicate that the Appellants met condition 172D TCA 1997 (3) (a) (ii) in respect of any distributions paid in those years to Shareholder A or Shareholder B where sight of those certificates was had by the Appellants before the making of a particular distribution / dividend to them.

52. No UAE tax residence certificates were put before me in evidence for years 2019 and 2020 for Shareholder A and Shareholder B. This fact coupled with the fact that the Appellants knew in 2018 when assessments for DWT were raised by the Respondent for a number of years relating to dividends paid to Shareholder A and Shareholder B, indicates that the Appellants could not satisfy themselves under Section 172 B (4)

(ii) that any dividends paid to Shareholder A or Shareholder B in 2019 and 2020 were not subject to DWT under section 172 B.

53. Having concluded that the Appellants satisfied two of the three conditions in section 172D (3) (a) for some of the dividends it paid in 2017 and 2018 (and having failed the conditions in section 172D (3) (a) for 2019 and 2020) it remains to be established if the Appellants meet the conditions of section 172D (3) (a) (iii).

54. The Respondent argued that the Appellants failed this condition; that the certificate provided by the Ministry of Finance to Shareholder A, does not constitute sufficient evidence of tax residency by Shareholder A in UAE. The Respondent argued that Paragraph 8(f) of Schedule 2A TCA 1997 requires that the declaration made in section 172D(iii) TCA 1997 "*is accompanied by a certificate given by the tax authority of the relevant territory in which the person is, by virtue of the law of that territory, resident for the purposes of tax certifying that person is so resident in that territory".* The Respondent wanted proof that the Ministry of Finance of UAE is the tax authority of the relevant territory for the purpose of this section.

55. I fail to understand the Respondent's latter requirement for proof that the Ministry of Finance of UAE is the tax authority of the relevant territory. The DTC Article 4 defines the Ministry of Finance in the UAE as the competent authority. Also the expert witnesses confirmed that for 2017 and 2018 that Ministry dealt with tax matters in the UAE. With regard to their former argument about tax residency invalidating their declarations under section 172D(iii), I see this as a rerun of their argument under section 172D(ii) which I do not accept.

56. Following my analysis and conclusions above, the following table sets out my decision in relation to the various dividends paid to Shareholder A by Appellant 1.

Tax Residency Certificate date	Dividend date	DWT assessed	DWT Due	Explanation
12 March 2017	27 March 2017	€280,721.48	Nil	S172D (3) (a) complied with
12 March 2017	31 May 2017	€32,000	Nil	S172D (3) (a) complied with
12 March 2017	24October 2017	€30,000	Nil	S172D (3) (a) complied with
17 April 2018	16 January 2018	€16,000	€16,000	Distribution predates available UAE Tax Certificate
17 April 2018	1 February 2018	€15,000	€15,000	Distribution predates available UAE Tax Certificate
17 April 2018	30 November 2018	€398,875	Nil	S172D (3) (a) complied with
No Certificate	23 December 2019	€16,000	€16,000	S172D (3) (a) not complied with
No Certificate	3 June 2020	€281,250	€281,250	S172D (3) (a) not complied with

57. The following table sets out my decision in relation to the various dividends paid to Shareholder B by Appellant 2

Tax Residency Certificate	Dividend date	DWT assessed	DWT Due	Explanation
12 March 2017	27 March 2017	€37,500	Nil	S172D (3) (a) complied with
11 December 2018	17 January 2018	€5,000	€5,000	Distribution predates UAE Tax Certificate
11 December 2018	19 December 2018	€73,650	Nil	S172D (3) (a) complied with
No Certificate	23 December 2019	€22,500	€22,500	S172D (3) (a) not complied with

EU Law

58. It was stated as a ground of appeal by the Appellant that the course of action adopted by the Respondent in applying DWT to the dividends payable to shareholder A and Shareholder B seeks to treat a UAE national resident in the UAE preferentially to a non-UAE national resident in the UAE, where he or she receives a dividend; that this amounts to discriminatory treatment amounting to a breach of Article 18 TFEU, in that it is suggested that an EU national, resident in the UAE, is not entitled to the benefits of the DTC unless he or she is a UAE national. The Respondent sought to argue that this area of EU law is outside my jurisdiction.

59. The Supreme Court in the case of Zalewski v WRC. recently issued a majority decision delivered by Mr Justice O'Donnell who found that:-

1. Statutory bodies such as the WRC (and similar to the Tax Appeals Commission) are involved in the administration of justice and hence come within Article 37 of the Constitution*;*

2. *"the obligation to disapply national law considered to be inconsistent with E.U. law was an obligation that lay on any body, whether judicial or administrative, which had the obligation to apply or enforce law"* (paragraph 125).

60. Thus we now have the Supreme Court in Zalewski confirming all previous jurisprudence of the CJEU that any body, whether judicial or administrative, which as an obligation to apply or enforce law must disapply national law considered to be inconsistent with EU law. For that reason I reject the Respondent's assertion the EU law considerations (as asserted by the Appellant) are outside the jurisdiction of the Tax Appeals Commission.

61. The Respondent referenced the CJEU's judgment in Case C-176/15 *Guy Riskin, Genevieve Timmermans v Etat Belge*, a case that concerned a DTC, where it stated the following:-

> *"29 In that respect, it must be borne in mind that it is for the Member States to organise, in compliance with EU law, their systems for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them, and that, in the absence of any unifying or harmonising EU measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (see, to that effect, judgment of 20 May 2008 in Orange European Smallcap Fund, C-194/06, EU:C:2008:289, paragraph 48)…*
> *4 In the context of bilateral tax conventions, it follows from the case-law of the Court that the scope of such a convention is limited to the natural or legal persons defined by it. Likewise, the benefits granted by it are an integral part of all the rules under the convention and contribute to the overall balance of mutual relations between the two contracting States (see, to that effect, judgments of 5 July 2005 in D., C-376/03, EU:C:2005:424, paragraphs 54 and 61 to 62, and of 20 May 2008 in Orange European Smallcap Fund, C- 194/06, EU:C:2008:289, paragraphs 50 to 51). It must be noted, as the Advocate General did at point 43 of her Opinion, that that situation is the same with*

regard to double taxation conventions concluded with Member States or with third States."

62. Article 18 TFEU expresses the general principle in EU law that discrimination on grounds of nationality is prohibited. The nationality-based discrimination envisaged is discrimination between EU entities and EU nationals, i.e. those who are EU citizens. The reliance upon Article 18 TFEU by the Appellant when claiming discrimination in favour UAE nationals resident in the UAE under the DTC and Protocol is incorrect and I agree with the Respondent, not covered by Article 18 TFEU.

63. I found the Appellant's argument that the Respondent's interpretation of Irish DWT rules in conjunction with their interpretation of the term "resident" under the Ireland – UAE double tax treaty would amount to "discrimination on the basis of pedigree" difficult to follow and largely baseless. I found the Appellant's arguments that the application of DWT to the dividends question would in some way breach of rules under on the free movement of capital provisions of EU law (Article 63 Treaty on the Functioning of the European Union (TFEU)) largely hypothetical and not credible. In any event, in my view, the CJEU's judgment in Case C-176/15 *Guy Riskin, Genevieve Timmermans v Etat Belge* would override any perceived restrictions on the movement of capital argument.

64. Furthermore, this appeal is not being made by the UAE resident Shareholders A and B. The appeal is by two Irish resident companies and the operation of a withholding tax on dividends. As such, I fail to see how discrimination or breach of EU law is applicable in this case, as argued by the Appellant.

65. Finally, it is moot whether Shareholder A and Shareholder B remain liable to Irish tax under the terms of the DTC in respect of any Irish dividends they received which are not liable to DWT. I do not have to consider whether shareholders A and B are liable to Irish tax under Schedule F, even where there is no obligation on the Appellants to operate DWT on their dividends, as this is not the subject of this appeal. The Respondent, in its submissions noted that Maguire (Irish Income Tax 2020, Tom Maguire) opines that section 153 TCA 1997 provides that with effect from 6th April

1999 exemption from liability under Schedule F will only apply to non-residents who are exempt from dividend withholding tax.

66. It is also moot whether the Shareholders A and B are entitled, under the DTC, to recover any DWT they suffer on their Irish Dividends, as this is not the subject of this appeal.

DETERMINATION

67. Based on my reasoning set out above, I determine the following:

- The assessment for DWT, in the aggregate amount of €373,721.48 dated 2 July 2018 raised on Appellant 1 covering five distributions to Shareholder A, should be amended reducing the DWT assessed to €31,000 (being €16,000 due in respect of distribution of €80,000 paid on 17 January 2018 and €15,000 due in respect of distribution of €75,000 paid on 1 February 2018).

- The assessment for DWT, in the amount of €398,875 dated 21 January 2019 raised on Appellant 1 covering a distribution to Shareholder A (in respect of distribution of €1,994,375 paid on 30 November 2018), should be amended, reducing the DWT assessed to € Nil.

- The assessment for DWT, in the amount of €16,000 dated 28 February 2020 raised on Appellant 1 covering a distributions of €80,000 paid on 23 December 2019 to Shareholder A, should stand.

- The assessment for DWT, in the amount of €281,250 dated 15 July 2020 raised on Appellant 1 covering a distributions of €1,125,000 to Shareholder A, should stand.

- The assessment for DWT, in the amount of €37,500 dated 5 December 2018 raised on Appellant 2 covering a distribution to Shareholder B (in respect of distribution of €187,500 paid on 27 March 2017), should be amended, reducing the DWT assessed to € Nil.

- The assessment for DWT, in the amount of €5,000 dated 5 December 2018 raised on Appellant 2 covering a distribution of €25,000 to Shareholder B on 17 January 2018, should stand.

- The assessment for Dividend Withholding Tax, in the amount of €73,650 dated 12 February 2019 raised on Appellant 2 covering a distribution to Shareholder B (in respect of distribution of €368,250 paid on 19 December 2018), should be amended, reducing the DWT assessed to € Nil.

- The assessment for DWT, in the amount of €22,500 dated 28 February 2020 raised on Appellant 2 covering a distribution of €112,500 paid to Shareholder B on 23 December 2019, should stand.

68. This consolidated appeal has been determined pursuant to TCA, section 949AK

Paul Cummins

PAUL CUMMINS
TAX APPEALS COMMISSIONER
Designated Public Official

2 July 2021

The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court under Chapter 6, Part 40A of the Taxes Consolidation Act, 1997

Appendices 1 and 2 have been fully redacted.