128TACD2021

BETWEEN/

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This determination relates to an appeal against additional income tax assessments raised by the Revenue Commissioners ("Respondent") on [redacted] ("Appellant") covering the periods [redacted] to 20[redacted]

2. This appeal will explore:

    - whether some of the additional assessments are valid and whether some of the assessments are out of time.
    - were oral trusts created.
    - what was the source of funds settled by the Appellant and his wife on certain Jersey and Isle of Man trusts.

- explore the factual matrix of the life of the Appellant in the Republic of Ireland ("ROI") and Northern Ireland (NI(UK)), both before and during the appeal period.
- the tax residence and domicile of the Appellant during the appeal period.
- determine whether the additional assessments covering the period [redacted] to 20[redacted] should stand, be increased or be reduced.

3. A hearing of this Appeal, under Chapter 4 Part 40A TCA 1997, was held over 7 days under the auspices of the Tax Appeals Commission, concluding on [redacted] 2021.

4. This is a complex appeal. For that reason, I have set out below a guide to the contents of this determination.

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BACKGROUND

5. By letter dated the [redacted] [redacted] 201[redacted], the Appellant (through his Isle of Man (IOM) legal advisors) confirmed that he had connections with the following trusts: [redacted] (T1 [redacted] (T2 and [redacted] (T3 that he was obtaining advice from his IOM legal advisers on this with a view to assisting the Appellant and his wife in making a full disclosure to the Irish Revenue of their connections with those trusts. The Appellant referred to the request for information that had been made by the Irish Revenue to the Assessor of Income Tax in the Isle of Man under the Tax Information Exchange Agreement pursuant to the Exchange of Information Relating to Tax Matters and Double Taxation Relief (Taxes on Income) (Isle of Man) Order 2008 (S.I. No. 459 of 2008) ("the TIEA"). The Appellant sought

a suspension of that request in those circumstances and on foot of that request the Respondent suspended the request under the TIEA.

6. A request under the TIEA was made again by the Irish Revenue to the Isle of Man on the [redacted] 20[redacted]. A separate request was made by the Respondent to the Appellant for *inter alia* documents connected with the T1 T2 and T3 and offshore bank statements.

7. By letter dated the [redacted] 201[redacted], the Appellant (through his advisors,) asserted that he and other members of his family were beneficiaries of a settlement comprising four trusts; T1 T2 T3 and also a trust called the T4 ("the Trusts"). The first three trusts were established by Declarations of Trust by [redacted] Jersey Trust Co by Deeds dated the [redacted] 199[redacted]. The Appellant asserts that the funds held on those [redacted] trusts comprise money from earlier trusts created orally by his father-in-law ([redacted]) who died in [redacted] He asserts that his father-in-law was domiciled and tax resident in Northern Ireland and made the trusts during the period 196[redacted] to 197[redacted].

8. The [redacted] Trust (T4 was settled by the Appellant and his wife as joint settlors. The Deed is dated the [redacted] 199[redacted]. The Appellant asserts again that the funds held in this T4 comprise money from an earlier trust created orally by his father-in- law during the period [redacted] to [redacted]. The Appellant asserts that the Deed does not take account of this oral trust and erroneously lists the Appellant and his wife as settlors.

9. The Appellant's tax returns did not disclose the income settled on the Trusts, the existence of the Trusts, the funds settled therein or the income deriving therefrom. Neither did the returns disclose any offshore bank accounts, the Appellant's asserted non-resident status or the Appellant's asserted non-domicile status.

10. The Appellant completed Statements of Affairs as at [redacted] 199[redacted], [redacted] 199[redacted] and [redacted] 200[redacted]. Neither the Trusts nor any offshore bank accounts were disclosed therein.

11. The Respondent made additional and amended assessments on the Appellant for the years 1987/88 to 2003 as follows:

1987/1988	Schedule D	Case IV	£193,000
1988/1989	Schedule D	Case IV	£193,000
1989/1990	Schedule D	Case IV	£193,000
1990/1991	Schedule D	Case IV	£193,000
1991/1992	Schedule D	Case IV	£193,000
1992/1993	Schedule D	Case III	£85,541
	Schedule D	Case IV	£441,000
1993/1994	Schedule D	Case III	£91,762
	Schedule D	Case IV	£54,812
1994/1995	Schedule D	Case III	£46,648
	Schedule D	Case IV	£495,538
1995/1996	Schedule D	Case III	£50,368
1996/1997	Schedule D	Case III	£178,417
1997/1998	Schedule D	Case III	£224,628
1998/1999	Schedule D	Case III	£149,700
1999/2000	Schedule D	Case III	£91,032
2000/2001	Schedule D	Case III	£36,374
31/12/2001	Schedule D	Case III	£194,726
31/12/2002	Schedule D	Case III	€272,957
31/12/2003	Schedule D	Case III	€23,951

MATERIAL FINDINGS OF FACT

The Appellant

12. The Appellant, [redacted] resides in [redacted], ROI.

13. The Appellant was born in [redacted], in the Republic of Ireland on [redacted]. His parents, [redacted], were farmers and he, the Appellant, was the eldest of [redacted] children. The Appellant's mother died when he was [redacted]. He remained in Ireland and took care of his father and his two younger sisters. The Appellant's father's farm was 26 acres, plus conacre. From the age of [redacted] or [redacted], the Appellant began earning some money himself and used this money to buy some sheep which he farmed on his father's land. Later, in his early [redacted]s, he rented conacre to farm.

[redacted] *&* [redacted] *(nee* [redacted]*), the Appellant's in-laws*

14. The Appellant's father-in-law, [redacted] ("father –in-law") was born, raised and spent his early life farming [redacted] in NI(UK).

15. [redacted], mother-in law, inherited a dwelling, farm and livestock, known as NI Farm at [redacted], later changed by the post office to [redacted], NI (UK). After their marriage, the father-in-law moved onto NI Farm

16. The Appellant's father-in-law expanded NI Farm through renting conacre. His farming operation included [redacted]

17. The Appellant's mother-in-law [redacted]

[redacted]

18. The Appellant considered [redacted] to be a [redacted].

[redacted], *Appellant's wife*

19. The Appellant married [redacted] ("Appellant's wife") in [redacted]. The Appellant's wife was born in NI (UK) and was one of two children of [redacted] and [redacted] Northern Ireland. The Appellant's wife has a brother, named [redacted].

20. After leaving school, the Appellant's wife undertook a [redacted] in [redacted], Northern Ireland. She also at one time worked in a [redacted] in [redacted].

196[redacted]-197[redacted]

Living arrangements

21. Upon his marriage in [redacted], the Appellant left the ROI and moved to NI (UK) to live at NI Farm with his wife, parents-in-law and began farming there on a conacre basis.

22. During the period between [redacted] and [redacted] the Appellant's [redacted].

23. In [redacted], with his [redacted] son was about to begin secondary school and it was decided by the Appellant to send his children to school in ROI. The Appellant's wife and children moved in that year to live on the ROI Farm ROI, acquired by the Appellant in [redacted].

24. Even though the Appellant's wife and children moved to the Republic of Ireland, residing on the ROI Farm the majority of the Appellant's time and effort was spent working in NI (UK) on NI Farm

25. The Appellant stayed for periods at NI Farm to ensure the property was kept secure. Due to security threats received by the Appellant, he also spent time residing, for unspecified periods, with his wife's relatives, who lived on neighbouring farms within (NI) UK).

26. The house at NI Farm was renovated in the [redacted]seventies. The Appellant continued to maintain the house at NI Farm throughout the 1980s and 1990s,

27. The Appellant's mother in law, [redacted], died in [redacted] while his father in law died in [redacted].

Assets 196[redacted]-197[redacted]

28. In [redacted], the Appellant purchased a small [redacted] [redacted] in the small rural village of [redacted].

29. In [redacted], Appellant borrowed £31,000 from his father to purchase a farm in ROI (ROI Farm) The Appellant's father ultimately waived the loan of £31,000 owed by the Appellant.

30. Before his father-in-law's death in [redacted], the Appellant placed money with various banks depending on which banks were paying the best interest rates at the time.

31. During the [redacted] 1960s, [redacted] 1970s, the Appellant acquired a [redacted] in the centre of [redacted] NI (UK) from where he [redacted] [redacted] [redacted] in partnership with another individual. The town centre [redacted].

197[redacted]-198[redacted]

Living arrangements 197[redacted]-198[redacted]

32. The Appellant continued to stay for periods at NI Farm to ensure the property was kept secure. The Appellant continued to maintain the house at NI Farm throughout the 1980s. The Appellant also spent periods living at the ROI Farm.

Assets 197[redacted]-198[redacted]

33. After his father-in-law's death, the Appellant continued to place money with various banks depending on which banks were paying the best interest rates at the time.

34. In [redacted], the Appellant expanded the ROI Farm by purchasing further lands at [redacted] which were adjacent to the ROI Farm. This land of circa [redacted] acres was marginal land, [redacted] acres of which was heather land. This land, together with the ROI Farm. is referred to as "[redacted]". To pay for this land, the Appellant borrowed £80,000 by way of a seven year loan from Bank of Ireland on [redacted]198[redacted], secured on the ROI

35. The Appellant was the registered owner of a site at [redacted] between [redacted] and [redacted]. This property was not treated by the Appellant as his property In [redacted], his son [redacted] sought to buy a [redacted], ROI. The [redacted] funding was structured so that the Appellant would be on title for the site and would act as guarantor for the loan to [redacted] to acquire the [redacted]. The loan was revised in [redacted].The letter of guarantee was dated [redacted] 198[redacted] This arrangement was documented by deed of transfer dated [redacted] 200[redacted] which confirms that [redacted] made all of the loan repayments and title to the [redacted] was transferred into his sole name. [redacted] operated the [redacted] and returned the profit.

36. In early [redacted], the Appellant became the registered owner of a [redacted] unit. This property was not treated by the Appellant as his property. The Appellant's daughter [redacted], approached [redacted] for a loan to acquire the [redacted]. The funding with [redacted] was structured so the Appellant would be on title for the premises and would act as guarantor for the loan to [redacted]. [redacted] operated the [redacted] in her own name.

199[redacted]-199[redacted]

Living Arrangements 199[redacted]-199[redacted]

37. The Appellant continued to stay for periods at NI Farm to ensure the property was kept secure. The Appellant also spent unspecified periods living at the ROI Farm.

38. Circa 199[redacted], the Appellant's [redacted].

39. The Appellant continued to maintain the house at NI Farm throughout the 1990s until circa [redacted].

Assets 199[redacted]-199[redacted]

40. The Appellants son [redacted] took over the [redacted] [redacted] in [redacted] in [redacted] and purchased it outright from the Appellant in [redacted].

41. The Appellant leased a vehicle from [redacted] Finance between [redacted] and [redacted].

42. The Appellant obtained a loan from [redacted] Finance on [redacted] 199[redacted] to purchase a [redacted] [redacted] lorry.

Involvement with Professional Trustees 199[redacted]-199[redacted]

43. In or about [redacted] the manager of the [redacted] (from an unknown branch)advised the Appellant place funds under the control of the Appellant on deposit in Jersey where better interest rates were available and to transfer the money to the care of professional trustees. The Appellant was introduced to [redacted] Jersey Trust Co . Money, totalling in value IR£ 1,405,479 was placed in three declared trusts, referred to as the T1 T2 and T3 on [redacted] 199[redacted], by the Appellant and his wife. On 26 August 1993 the equivalent of IR£54,812 was transferred into the T3 On 24 February 1995, IR£ 194,587 and £131,523 was settled by the Appellant on the T4 in the IOM. On 7 March 1995 £65,000 was settled on the T3 and £105,000 was settled on the T2

44. The address documented for the Appellant and his wife, as settlors of the T4 was given as NI Farm

199[redacted]-200[redacted]

Living Arrangements 199[redacted]-200[redacted]

45. Circa [redacted], the Appellant became unable to continue [redacted] and [redacted]. From that time, he resided full time in ROI and the Appellant no longer spent periods residing at NI Farm

46. In 2006 the Appellant was [redacted] [redacted] [redacted].

Assets 199[redacted]-200[redacted]

47. His son, [redacted], took over the running of NI Farm from [redacted]. The Appellant later transferred NI Farm to his son [redacted] by way of gift.

48. In 200[redacted] the Appellant decided to put ROI Farm up for sale. Over the next 18 months various parties came to view the farm but no sale was effected. The Appellant sold the livestock between [redacted] and [redacted].

49. Ultimately the Appellant sold the ROI Farm to his sons [redacted], [redacted] and [redacted] in [redacted] and [redacted].

50. [redacted] paid the Appellant €645,221 for his share of the ROI Farm and a charge was registered on the land he acquired in favour of [redacted] Bank Limited.

51. [redacted] paid the Appellant €212,220 for his share of the ROI Farm A charge was registered on the land he acquired in favour of [redacted] Bank

52. [redacted] paid the Appellant €428,891 for his share of the ROI Farm A charge was registered on the land he acquired in favour of [redacted] Irish Bank.

53. The Appellant leased a vehicle [redacted] from [redacted] Bank between [redacted] and [redacted].

54. The Appellants son [redacted] purchased the [redacted] in [redacted] outright from the Appellant in [redacted] [redacted] obtained financing from [redacted] Bank in [redacted] of €419,223 to fund the purchase of the property from the Appellant.

Involvement with Professional Trustees 199[redacted]-200[redacted]

55. The trusteeship of each of the trusts T1 T2 and T3 were transferred to [redacted] IOM in [redacted], after [redacted] Jersey Trust Co ceased to provide trust services.

WITNESS TESTIMONY

56. The Appellant gave sworn evidence on Days 2, 3, 4 of the hearing. The Appellant was excused before Day 5, on grounds of [redacted], without his cross examination by the Respondent being completed.

57. Sworn evidence, was provided by Mr [redacted], a son of the Appellant.

58. [redacted], provided expert written witness testimony, by way of affidavit, on the permissibility of establishing an oral trust under NI (UK) law.

59. Inspector of Taxes Mr. [redacted] gave sworn evidence relating to the computer records kept by the Revenue Commissioners.

Relevant legislation

Section 52 & 53 of the Income Tax Act 1967
Section 76 of the Income Tax Act 1967
Section 181 of the Income Tax Act 1967
Section 186 of the Income Tax Act 1967
Section 9 of the Finance Act 1988
Section 14 of the Finance Act 1988

Section 150 of the Finance Act 1994
Section 18 of the Taxes Consolidation Act 1997
Section 58 of the Taxes Consolidation Act 1997
Section 71 of the Taxes Consolidation Act 1997
Section 791 of the Taxes Consolidation Act 1997.

Section 806 of the Taxes Consolidation Act 1997

Section 819 of the Taxes Consolidation Act 1997
Section 820 of the Taxes Consolidation Act 1997
Section 908 of the Taxes Consolidation Act 1997
Section 933 of the Taxes Consolidation Act 1997

Section 934 of the Taxes Consolidation Act 1997
Section 942 of the Taxes Consolidation Act 1997
Section 949AA of the Taxes Consolidation Act 1997
Section 949AC of the Taxes Consolidation Act 1997
Section 949H of the Taxes Consolidation Act 1997
Section 950 of the Taxes Consolidation Act 1997
Section 955 of the Taxes Consolidation Act 1997
Part 33, Chapter 1 of the Taxes Consolidation Act 1997
Part 39 of the Taxes Consolidation Act 1997
Part 40A of the Taxes Consolidation Act 1997
Part 41 of the Taxes Consolidation Act 1997
Section 6(4) of the Finance (Tax Appeals) Act 2015
Article 4 of the Double Taxation Treaty between Ireland and United Kingdom.

Relevant Case Law & Authorities

Irish Case Law

Hughes v Smyth [1933] IR 253
Joyce, Corbet v Fagan [1956] IR 277
Sillar, Hurley v Wimbush [1956] IR 344
Kiely v Minister for Social Welfare (No.2) [1977] LR. 267
Revenue Commissioners v Shaw and Anor [1982] lLRM 433
The State (Calcul International Ltd and Solatrex International Ltd) v The Revenue Commissioners III ITR 577
Gallagher V Revenue Commissioners (No2) (1995) IIR 55

Proes *v The Revenue Commissioners* [1998J 4 IR 174
CAB V Hunt & Anor (2003) IESC20
DT v FL ([2003] IESC 59)
Borges v Medical Council (2004) 1IR 103
DS V Minister for Health and Children (2005) IEHC 58
CG V The Appeal Commissioners (2005) 2 IR 472
McCormack & Paolozzi v Duff and Rabbitte ([2012] IEHC 285)
O*'Brien v Quigley* [2013] 1 IR 790
O'Rourke v Revenue [2016] 2 I.R. 615
The Revenue Commissioners v Hans Droog [2011] IEHC 142
The Revenue Commissioners v Droog [2016] IESC 55
McDonagh V Sunday Newspapers Ltd (2018) 2 IR 1
Stanley v Revenue Commissioners [2019] IR 218
Bookfinders Ltd v The Revenue Commissioners [2020] IESC 60
Kenny Lee v Revenue Commissioners (2021) IECA 114
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Other Case Law

Knight v. Knight [1840J 3 Beav 148
Paterson v Murphy [1853] 11 HARE, 86
Udny v. Udny 1 SC & Div [1869] 441
Rv Doolin (1882) 1 Jebb CC 123

Colquhoun (Surveyor of Taxes) v Brooks - 2 TC 490

Inland Revenue Commissioners v. Lysaght [1928] AC 234
Levene v Inland Revenue Commissioner [1928] AC 217
Ross v Ross ([1930] AC I)

In the Estate of Fuld deceased (No. 3) [1968] P 675

Bank of Montreal v Drycreek Livestock Enterprises 1981 Can L11 3487 (MB QB)
R v Stretton (1986)86 CR App R7
Lord Advocate V McKenna (1989) STC 485

Stephen D Podd v Commissioner of Internal Revenue [1998] 1 ITLR 539
Crownx Inc v Edwards [1994] 20 O.R
Yoon v R [2005] 8 ITLR 129
R V M (2008) EWCA Crim 2787
R (on the application of Davies) v Revenue and Customs Comrs, R (on the application of Gaines-Cooper) v Revenue and Customs Comrs [2011] UKSC 47
Autoclenz Ltd v Belcher and others (2011)4 All ER 745
JSC Mezhdunarodniy Promyshlenniy Bank and Another v Sergei Viktorovich Pugachev and Others(2017) EWHC 2426 (Ch)

Other Sources

Judge, *Irish Income Tax,* para 1.503 (1996-1997 edition)
OECD Commentary on Article 4 of the Model Convention

Donson and O'Donovan, *Law and Public Administration in Ireland,* at paragraph 10-110

McGrath, *Evidence* (2nd ed.) Chapter 5

McGrath, *Evidence* (2nd ed.) Chapter 6,
paragraphs 6-.05 - 6-099

Private International Law, Cheshire, North & Fawcett (Fourteenth Edition), Chapter 9
Double Taxation Agreements, O'Brien (6th Edition), Irish Taxation Institute, par 1.7 and Article 1 OECD
McAteer and Reddin, Income Tax (5th Edition),
Wylie, Land Law (3rd Edition)
Snell's Equity (Thirty Fourth Edition)
Vogel on Double Taxaton Conventions (Fourth Edition)

Halsbury's Laws of England/Charities (Volume 8 (2019),
Halsbury's Laws of England/Trusts and Powers (Volume 98 (2019),
Halsbury's Laws of England/Taxation Law (Volume 99 (2020)

SUBMISSIONS

FACTUAL MATRIX -Extracts from **Appellant's Submissions**

60. The Appellant was born in [redacted], in the Republic of Ireland on [redacted]. The Appellant's parents [redacted]. The Appellant was the [redacted] children. The Appellant's mother died when he was just [redacted] (the youngest being [redacted] years old) and [redacted]. He was the only child to remain in Ireland and ultimately took care of his father. The Appellant's father's farm was very small, just 26 acres, and was partly conacre.

61. The Appellant married [redacted] in [redacted]. [redacted] was born in Northern Ireland on [redacted] and was one of [redacted] children of [redacted] of [redacted], Northern Ireland. [redacted] is [redacted].

62. [redacted] was born, raised and spent his entire life farming close to the [redacted] in Northern Ireland (the NI Farm His domicile and tax residence were in Northern Ireland for his entire life. [redacted] farmed the NI Farm with his [redacted], jointly until [redacted] married [redacted] in or about [redacted]. After their marriage, [redacted], was also involved with a [redacted] and [redacted] together.

63. [redacted] was entrepreneurial in his approach to [redacted] was particularly renowned for [redacted]. In addition [redacted]. For a time, [redacted] also operated a [redacted]. [redacted] also [redacted]

64. [redacted] had never had a bank account and had kept the money in cash. [redacted] was extremely frugal and had no time for people who wasted money. The Appellant and his wife considered [redacted]

65. After school, the Appellant's wife undertook a [redacted], but did not complete the course. She worked as a [redacted] for some time and helped her [redacted]

66. Upon his marriage, the Appellant left the Republic of Ireland and moved to Northern Ireland to live at NI Farm with the full intention of remaining there permanently for the rest of his life and never returning to live in Ireland. At that time, Northern Ireland was much more prosperous than the Republic of Ireland and income available from farming activities was much better.

67. In 196[redacted], the Appellant purchased NI Farm from his father in law. Prior to the purchase of NI Farm the Appellant had farmed a small part of NI Farm on a conacre basis. NI Farm was registered in the Appellant's name under [redacted] in the [redacted] on [redacted]. As the Appellant did not have the means himself to purchase NI Farm outright, the farm was the subject of a charge in favour of the Appellant's father in law in the sum of STG£1400, which was repaid by the Appellant by way of instalments and the charge on NI Farm was released on [redacted].

[redacted] [redacted] *and the creation of oral trusts*

68. During the period between [redacted] and [redacted] the Appellant's father in law, [redacted], [redacted]

69. Over the years following the sale of the NI Farm to the Appellant, [redacted] had invested the proceeds of the sale of the farm, along with other funds derived from his numerous businesses, in various deposit accounts and investments. [redacted] lived with the Appellant and his family at NI Farm for some time after disposing of it but then lived with [redacted] and his wife in the latter years of his life.

70. [redacted]

71. During the period of [redacted] gradually divested himself of these funds, in the expectation that he did not have long to live. Moreover, it is the Appellant's view that [redacted]

72. As part of the process of divesting himself of these funds, [redacted] made a number of oral settlements whereby he settled significant income (the "Trust Monies") on trust for the benefit of the Appellant, his wife and the children born of their marriage. [redacted] gave these funds to the Appellant and his wife with the express instruction that they invest the monies in secure investments for the benefit of the Appellant, his wife and the children born of their marriage. The Appellant and his wife did not consider these funds to be their personal property, but that it was to be held and invested for the benefit of the family.

73. As a matter of Northern Irish law, the relevant certainties were present for the establishment of these Trusts in oral form. The three certainties were present:

certainty of intention [redacted] instructed the Appellant and his wife to hold the funds for the benefit of beneficiaries), certainty of subject matter (the monies concerned were kept separate), and certainty of objects (the beneficiaries were clearly identified).

74. [redacted] was domiciled and resident in Northern Ireland during his lifetime.

75. [redacted], [redacted] brother, was not aware of [redacted] settling monies on trust for the Appellant and his family. [redacted] had paid for [redacted] to be educated in [redacted].

76. During [redacted] lifetime and throughout the years when the Appellant and his wife held the funds in a fiduciary capacity, they did not receive any benefit from the Trust Monies and they did not use the funds for their own personal use, despite being of limited resources and on occasion in financial need.

77. Both before and after [redacted] death, the Appellant and his wife duly carried out [redacted] wishes and placed the Trust Monies with various banks (including the [redacted] and [redacted]), depending on which banks were paying the best interest rates from time to time. The Appellant made the relevant enquiries with the banks as his wife's principal focus was rearing their young family during this time. The Appellant would contact the banks to enquire as to what the best deposit interest rates were and would check what interest rates were being advertised, in deciding where to invest the Trust Monies.

78. Notwithstanding the fact that the Appellant and his wife had very little technical knowledge about tax and trust law, they knew that the funds entrusted to them by [redacted] were not their personal funds, but were to be invested and held by them for the benefit of the family.

79. When [redacted] ultimately passed away in [redacted], no grant of representation was extracted upon his death in relation to his personal estate in Northern Ireland as he had divested himself entirely of his estate by the time of his death. [redacted] wife [redacted] predeceased him in [redacted].

The Troubles in Northern Ireland

80. [redacted]

81. During [redacted] 1960s, [redacted] 1970s, the Appellant also acquired a [redacted] in the town of [redacted] from where he ran a [redacted] in partnership with another individual. The [redacted] which the Appellant operated in the town was [redacted]. It was eventually necessary for the Appellant to cease trading and board up the property, despite having intended this business to be operated by some of his children.

82. As a result, the Appellant and his wife became very concerned that the [redacted] The Appellant and his wife had serious concerns for their children's' welfare and as their [redacted] child was about to begin secondary school, it was an appropriate time to do so.

83. To facilitate his family's need to leave Northern Ireland, the Appellant purchased a farm in ROI which comprised [redacted] acres, all of which was marginal land and was therefore of very poor quality. Furthermore, [redacted] acres of the [redacted] acres was heather land which was of extremely poor quality. The Appellant had to borrow Stg£31,000 from his father to purchase this farm (the ROI Farm [redacted]. This sum represented the Appellant's father's entire life savings at the time and the Appellant believes that his father may have inherited this sum from his own parents. In later years, the Appellant's father [redacted] ultimately went to live with the Appellant and his wife. As the Appellant and his wife had cared for the

Appellant's father, the Appellant's father ultimately waived the loan of Stg£31,000 that was due by the Appellant to his father.

84. The Appellant later expanded the ROI Farm by purchasing lands at [redacted] which were adjacent to the ROI Farm. The Appellant purchased this farmland in [redacted] to increase the size of the ROI Farm. This land of circa [redacted] acres was also all marginal land, [redacted] acres of which was heather land. This land, together with the ROI Farm is referred to herein as "[redacted] Farm". The Appellant borrowed £80,000 by way of a seven year term loan from [redacted] on [redacted] 198[redacted] to purchase this additional land, secured on the ROI Farm.

85. The Appellant's wife and children moved to the Republic of Ireland but the Appellant continued to live at NI Farm in [redacted]. As [redacted] Farm comprised only marginal land it could only be used for grazing sheep and thus was not labour intensive. NI Farm comprised better quality land and the Appellant [redacted] on it. Therefore, the vast majority of his time and effort was spent working in Northern Ireland on NI Farm as opposed to [redacted] Farm.

86. From the time of his marriage in [redacted] to [redacted], the Appellant lived in Northern Ireland and was tax resident there. In particular, from [redacted] when his family moved to [redacted] Farm, the Appellant remained at NI Farm in order to ensure that NI Farm was protected as the Appellant was of the view that it would be [redacted]. [redacted] [redacted] [redacted]. [redacted] The Appellant also frequently stayed with his wife's uncle, who lived half a mile from NI Farm within Northern Ireland.

87. During this period, the Appellant and his family continued to attend Sunday Mass at their parish church in [redacted] in Northern Ireland (situate a few miles from NI Farm The Appellant's children made their Holy Communion and were confirmed in their parish of [redacted] and the Appellant's wife and children kept close connections with Northern Ireland. The Appellant voted in Northern Ireland.

88. The Appellant and his wife had every intention that they would resume their family life in Northern Ireland. The Appellant's wife was domiciled in Northern Ireland and

wished to return to her home, having only moved to ROI out of necessity. The Appellant had renovated his family home at NI Farm in the [redacted]1970s. The Appellant continued to maintain his home at NI Farm throughout the 1980s and 1990s, including plastering and painting it. The house also had a [redacted] which required regular maintenance.

89. The Appellant and his wife gave their address as [redacted] in the instrument executed on [redacted] referring to the T4 on [redacted]. [redacted] is the address of NI Farm

90. During this period the Appellant retained his domicile of choice in Northern Ireland.

The Appellant's return to the Republic of Ireland

91. Around 199[redacted], the Appellant's [redacted] for a [redacted] in 1990.

92. In or around [redacted], the Appellant became unable to continue farming. At this time, the Appellant's son [redacted] took over the running of NI Farm The Appellant ceased to claim the farm subsidy payments in respect of NI Farm and his son [redacted] claimed the subsidies for NI Farm from [redacted]. The Appellant transferred NI Farm to his son [redacted] by way of gift. [redacted] continued to rent the land on a conacre basis from [redacted] up until [redacted].

93. At that stage, the Appellant moved to [redacted] Farm to live with his wife and his domicile of origin in the Republic of Ireland may have revived. By the revival of his domicile of origin in [redacted], the Appellant's domicile of choice in Northern Ireland would have been abandoned but notably, he continued to retain his domicile of choice in Northern Ireland for the period [redacted] to [redacted]. The revival of the Appellant's domicile of origin in [redacted] cannot have retrospective effect so as to somehow override the fact of his domicile in Northern Ireland from around the time of his marriage and move to Northern Ireland in [redacted] to [redacted]. The Appellant has been domiciled and resident in the Republic of Ireland since [redacted].

94. Following the Appellant's move to [redacted] Farm, the house at NI Farm fell into disrepair. The Appellant and his wife had instructed an architect to repair the property and had applied for a grant to rebuild the property. However, those plans were eventually stayed when the Appellant [redacted]

95. The Appellant sold parts of [redacted] Farm to each of his sons, [redacted], [redacted] and [redacted], in [redacted] following a [redacted]s.

96. The Appellant's sons each obtained loans from [redacted] Bank Limited to finance these purchases in full and the associated expenses.

97. A charge in favour of [redacted] Bank Limited is registered at Part 3 of the land acquired by [redacted], Folio [redacted]. He paid the Appellant €645,221 which represented the full open market value for same.

98. The Appellant's son [redacted] also purchased part of [redacted] Farm. He obtained a loan of €226,500 in [redacted] 200[redacted] to purchase [redacted] acres of lands at [redacted] including [redacted] acres planted as forestry, part of Folio [redacted] and [redacted], and another site of an acre. A charge (in favour of [redacted] Bank which bought [redacted] Bank in 2005) is registered on all three folios. [redacted] paid the Appellant €212,220 which represented the full open market value for same. The balance of borrowed monies was used to discharge the stamp duty and associated costs of the purchase.

99. The Appellant's son [redacted] also purchased part of [redacted] Farm. He also obtained a loan from [redacted] Bank to purchase [redacted] acres of arable lands and [redacted] acres of forestry land at [redacted] (part of the property comprised in folio [redacted] and all of the property comprised in [redacted]). [redacted] paid the Appellant €428,891 which represented the full open market value for same.

The Appellant's properties in the Republic of Ireland

100. On [redacted], the Appellant purchased a [redacted] [redacted] in [redacted] [redacted] from the profits saved from farming at NI Farm The Appellant's son [redacted] took over the business in [redacted] and purchased it outright from the Appellant in [redacted]. [redacted] obtained financing from [redacted] Bank in [redacted] of €419,223 to

fund the purchase of the property from the Appellant. [redacted] borrowed all costs associated with the purchase, including the purchase price, legal fees, stamp duty and the arrangement fee.

101. The Appellant was the registered owner of a site at [redacted] between [redacted] and [redacted]. In [redacted], the Appellant's son sought to open a [redacted] in [redacted]. [redacted] was [redacted] years old at the time and [redacted] (the bank funding the purchase) refused to give a loan to [redacted] directly, so it was agreed that the Appellant would be on title for the site and would act as guarantor for the loan to [redacted]. The loan was revised in [redacted] due to an inability to make repayments. The letter of guarantee was dated [redacted] 198[redacted]. The guarantee confirms that the sum of £40,000 was to be loaned for the account of [redacted], the [redacted]. All of the purchase money, and the money for the development of the shop premises, was borrowed from [redacted] by [redacted] and the Appellant was merely on title to facilitate his [redacted] son getting started in business. [redacted] operated the trading business and returned the profit. The Appellant received no profit from this business. Furthermore, this arrangement was documented by a deed of transfer dated [redacted] which confirms that [redacted] made all of the loan repayments and title to the shop was to be transferred into his sole name.

102. Similarly, the Appellant was the registered owner of a [redacted] premises run by his daughter [redacted] in [redacted] from [redacted] which neighboured the [redacted] [redacted] by his son [redacted]. The Appellant's daughter [redacted] was just [redacted] when she opened up the [redacted] and [redacted] would not allow her to put the property into her own name, due to her young age, and insisted that the property be put in the Appellant's name and that he act as guarantor. There was no deposit paid and the full monies were funded by way of loan. [redacted] operated the trading business and returned the profit. The Appellant received no profit from this business. [redacted] agreed finance with [redacted] in [redacted]. She also applied for planning permission to extend the [redacted], which was granted to her in [redacted].The arrangement with the Appellant was documented by deed of transfer dated [redacted] which confirms that [redacted] made all of the loan repayments and title to the shop was to be transferred into her sole name.

103. Following the sale of [redacted] Farm in [redacted], the Appellant retained two small plots of land, which the Appellant later sold to his sons [redacted] and [redacted] for market value in [redacted]. The first plot, which was sold to [redacted] at market value for a small sum, was acquired on [redacted] [redacted] and consisted of [redacted] hectares. This plot was a garden with a derelict cottage on it which the Appellant had originally purchased because it was adjacent to the [redacted] Farm. The second plot, which was sold to [redacted] at market value for a small sum, was an old quarry which was landlocked within the area of land which had formed part of [redacted] Farm.

Factual Matrix -Extracts from **Respondent's Submissions**

104. This is the Appellant's case and so the onus of proof on appeal is on the Appellant including in relation to any domicile or other legal matter that the Appellant may assert. The Appellant relies on s.955(2)(a) TCA to assert that the assessments are out of time and to the extent that the Respondent has any prima facie burden of proof (which is denied) the Respondent will rely on Part 39 and Part 41 as appropriate. The Appellant has not appealed against any enquiries or actions taken by the Inspector pursuant to s.956(2)(a) TCA and therefore no such issues arise on this appeal…

105. The following income was included in assessments for the tax years 19[redacted]19[redacted] to 200[redacted]

19[redacted]/19[redacted]	Schedule D	£17,734
19[redacted]/19[redacted]	Schedule D	£21,352
19[redacted]/19[redacted]	Schedule D	£23,512
19[redacted]/19[redacted]	Schedule D	£21,782
19[redacted]/19[redacted]	Schedule D	£19,295
19[redacted]/19[redacted]	Schedule D	£40,456
19[redacted]/19[redacted]	Schedule D	£37,983

19[redacted]/19[redacted]	Schedule D	£41,590
19[redacted]/19[redacted]	Schedule D	£41,590
19[redacted]/19[redacted]	Schedule D	£43,315
19[redacted]/19[redacted]	Schedule D	£40,262
19[redacted]/19[redacted]	Schedule D	£40,313
19[redacted]/20[redacted]	Schedule D	£42,809
20[redacted]/20[redacted]	Schedule D	£45,167
	Schedule F	£39
[redacted]/20[redacted]	Schedule D	£7,500
[redacted]/20[redacted]	Schedule D	€15,200
[redacted]/20[redacted]3	Schedule D	€18,404

106. By letter dated the [redacted] 20[redacted], the Appellant (through [redacted] - his legal advisors in the Isle of Man) confirmed that he had connections with the following trusts: T1, T2 and T3 that he was getting advice from [redacted] on this with a view to assisting the Appellant and his wife in making a full disclosure to the Irish Revenue of their connections with those trusts. The Appellant referred to the request for information that had been made by the Irish Revenue to the Assessor of Income Tax in the Isle of Man under the Tax Information Exchange Agreement pursuant to the Exchange of Information Relating to Tax Matters and Double Taxation Relief (Taxes on Income) (Isle of Man) Order 2008 (S.I. No. 459 of 2008) ("the TIEA''). The Appellant sought a suspension of that request in those circumstances and on foot of that request the Respondent suspended the request under the TIEA. No disclosure was made by the Appellant to the Respondent notwithstanding the commitment contained in that letter to make such disclosure.

107. In the absence of a full or any disclosure by the Appellant, a request under the TIEA was made again by the Irish Revenue to the Isle of Man on the [redacted] 20[redacted]. A separate request was made by the Respondent to the Appellant for *inter*

alia documents connected with the T1 T2 and T3 and offshore bank statements. Save for the letter enclosing the Deeds of Trust, the Appellant objected to that request.

Was the Respondent precluded from raising 'out of time' amended assessments on the Appellant? – extracts from **Appellant's Submissions**

108. The assessments raised by the Respondent are out of time.

109. The Respondent significantly delayed in raising these assessments. The Respondent first made enquiries into the Appellant's tax affairs in 200[redacted] but made no enquiries of the Appellant's tax affairs between 200[redacted] and 201[redacted], where there appears to have been a period of total inactivity on the Respondent's part. The failure of the Respondent to complete their enquiries in a timely manner and raise these assessments in a timely manner has naturally prejudiced the Appellant's ability to deal with these assessments due to the significant passage of time.

110. Section 186 of the ITA applies to the years of assessment [redacted] to [redacted]. Section 186 provides:

"(1) If the inspector discovers-

(a) that any properties or profits chargeable to tax have been omitted from the first assessments, or

(b) that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments, or

(c) that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act,

then, where the tax is chargeable under Schedule D, E or F, the inspector shall make an additional first assessment:

Provided that any such additional first assessment shall be subject to appeal and other proceedings as in the case of a first assessment."

111. Section 186(2) stated:

"(a) subject to any provision allowing a longer period in any class of case, as assessment or an additional first assessment may be made at any time not later than ten years after the end of the year to which the assessment relates.:

Provided that in a *case in which any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to* income tax, *an assessment or an additional first assessment may be made at any time for any year for which, by reason of the fraud or neglect, income would be lost to the exchequer…*

(d) In this subsection 'neglect' means negligence or a failure to give any notice, to make any return, statement or declaration, or to produce or furnish any list, document or other information required by or under the Income Tax Acts:

Provided that a *person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Revenue Commissioners or officer concerned may have allowed; and where* a *person had a reasonable excuse for not doing anything required to be done, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."*

112. Section 955(2)(a) of the TCA applies to the years of assessment 199[redacted]/199[redacted] to 200[redacted] and it states:

> *"Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 6 years commencing at the end of the chargeable period in which the return is delivered and no additional tax shall be payable by the chargeable person and no tax shall be repaid to the chargeable person after the end of the period of 6 years by reason of any matter contained in the return."*

113. Section 955(2)(b) of the TCA

> *"Nothing in this subsection shall prevent the amendment of an assessment -*
>
> *(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a)..."*

114. The Respondent must meet the tests prescribed by s186 of the ITA and s955 of the TCA in order to establish that the Respondent was entitled to raise these assessments out of time.

115. It is the Appellant's case that there was no negligence or fraud in the returns he made for the years [redacted] to [redacted] in respect of the tax to which he was chargeable. It is also the Appellant's case in respect of the returns he made between [redacted] to [redacted] that he made a full and true disclosure of all material facts in those returns necessary for the making of an assessment for the chargeable period.

116. In particular, the Appellant returned all income he received in respect of those trades he carried out in the Republic of Ireland.

117. Furthermore, the Appellant was non-resident and non-domiciled in Ireland between [redacted] and [redacted]. The Appellant, as a non-resident individual, filed income tax returns in the Republic of Ireland in respect of property in the State, and from any trade, profession or employment exercised in the State, as he was required to do in accordance with s52 of the ICA.

118. The Appellant, as a non-domiciled individual, filed income tax returns in the Republic of Ireland in respect of income arising from securities and possessions in any place outside the State to the extent that such income was remitted into the State, as he was required to do in accordance with s76 of the ICA and s71 of the TCA.

119. It is the Appellant's submission that if the Respondent is to establish that the Appellant was negligent in the making of his tax returns or failed to make a full and true disclosure of all material facts so as to give rise to a charge to tax under Schedule D Case Ill and Case IV, the Respondent must first establish that the Appellant was resident and domiciled in the Republic of Ireland so as to come within the charge to tax under Schedule D Case Ill and Case IV in the manner alleged. The Respondent cannot establish that the Appellant was negligent in the making of his tax returns or failed to make a full and true disclosure of all material facts in respect of a charge to tax under Schedule D Case Ill and Case IV without first establishing that that the Appellant was resident and domiciled in the Republic of Ireland.

Conclusion

120. The assessments raised by the Respondent are out of time. The Respondent significantly delayed in raising these assessments. The Respondent first enquired into the Appellant's tax affairs in [redacted] but made no enquiries of the Appellant's tax affairs between [redacted] and [redacted], The failure of the Respondent to complete their enquiries in a timely manner and raise these assessments in a

timely manner has naturally prejudiced the Appellant's ability to deal with these assessments due to the significant passage of time.

121. It is the Appellant's case that there was no negligence or fraud in the returns he made for the years [redacted] to [redacted] in respect of the tax to which he was chargeable. It is also the Appellant's case in respect of the returns he made between [redacted] to [redacted] that he made a full and true disclosure of all material facts in those returns necessary for the making of an assessment for the chargeable period.

Was the Respondent precluded from raising 'out of time' amended assessments on the Appellant? – extracts from **Respondent's Submissions**

122. The Respondent submits that the additional and amended assessments were correctly made in accordance with the statutory powers contained in Parts 39 and 41 respectively.

123. The tax liabilities the subject of the appeal arise in connection with undisclosed offshore trusts connected to the Appellant.

124. It is common case that Ireland is the domicile of origin of the Appellant. The Appellant's case (which is disputed) is that he was non-domiciled and non-resident from [redacted] when he says he moved to Northern Ireland until [redacted] when he says he returned to Ireland. The Respondent disputes this and the onus is on the Appellant to establish non-domicile and non - residence as alleged and the Respondent awaits proof of the material facts on which these assertions are based.

125. In the alternative, the Appellant says he was a fiduciary in respect of the undisclosed offshore trusts and did not derive benefit therefrom. The Respondent disputes that stated position that the trust monies were held in a fiduciary capacity and awaits proof of the material facts on which this assertion is based.

Amended Assessments

126. The Respondent submits that the additional and amended assessments were correctly made in accordance with the statutory powers contained in Parts 39 and 41 respectively. The power to assess under the self-assessment machinery is set out in Section 955 TCA which deals with amending assessments and the time limit for assessments. The Section starts by conferring on an inspector of taxes the power to amend an assessment *"at any time"* subject to subs.(2). As noted by Laffoy J in *The Revenue Commissioners v Hans Droog:* (Unreported, High Court (Laffoy J), 31/3/2011; [2001] IEHC 142 at para 5.2)

> *"The substantive power which s.955(1) confers on an inspector to amend an assessment* "at any time" *is expressed to be subject to subs. (2)."*

127. The time limit for assessments is stipulated in s.955(2)(a) TCA which provides as follows:

> *"Where a chargeable person has delivered a return for a chargeable period and has made in the return a <u>full and true disclosure of all material facts necessary</u> for the <u>making of an assessment for the chargeable period,</u> an assessment for that period or an amendment of such assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and -*
>
> *(i) no additional tax shall be payable by the chargeable person after the end of that period of four years, and*
>
> *(ii) no tax shall be repaid after the end of a period of four years commencing at the end of the chargeable period for which the return is delivered, <u>by reason of any matter contained in the return</u>."* S955(2)(a) TCA (emphasis added)

128. To benefit from the temporal limit the taxpayer must firstly fulfil the conditions set out in that sub-section. There is an important qualification in the final

phrase of that provision in that the proscription on assessment outside the limitation period applies only *"by reason of any matter contained in the return''.*

129. Therefore it is submitted that the temporal limit only extends to the power of an inspector to assess any matter contained in the return. It does not circumscribe the power of an inspector to assess any matter not contained in the return. This is a balanced scheme predicated on the taxpayer having made full and true disclosure in the return. On the one hand the inspector has a finite period in which to interrogate a taxpayer's return and may make assessments based on any matter disclosed in the return. On the other hand, the taxpayer is given closure and certainty in relation to its tax matters after four years in relation to any matter that is contained in the return.

130. In contrast, in the case of non-disclosure, the inspector will not have had any opportunity to interrogate an item of which he is not aware. It would be an affront to common sense to suggest that Revenue loses its right to interrogate a matter not included in a return once the temporal limit expires. The temporal limit is determined by reference to the time of filing the return and is clearly providing a cut-off point for the interrogation of items in the return only.

131. That this is a balanced scheme is supported by an expression of doubt facility contained in s.955(4) which allows a taxpayer in doubt as to the application of law to or the treatment for tax purposes of any matter to simply make the return to the best of his belief as to that matter provided he draws attention to that matter in the return by specifying the doubt. In those circumstances, the taxpayer will be treated as having made a full and true disclosure in relation to the matter provided the doubt was genuine and the taxpayer was not acting with a view to evasion or avoidance of tax.

132. The assessments the subject of the appeal were not made and the additional tax does not arise *"by reason of a matter contained in the return"* but instead by reason of a matter that was not contained in the return. This is a case of non-disclosure and as such the temporal protection simply does not apply.

133. That the temporal limit is not absolute is clear from the wording of subs.(2) which expressly provides for a number of situations where it does not apply as follows:

> *"Nothing in this subsection shall prevent the amendment of an assessment-*
>
> *(i) where a relevant return does not contain a full and to disclosure of [all material facts necessary for the making of an assessment for the chargeable period],*
>
> *(ii) to give effect to a determination on any appeal against an assessment,*
>
> *(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,*
>
> *(iv) to correct an error in calculation, or*
>
> *(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,*
>
> *and tax shall be paid or repaid notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3)."*

134. The time-limit is not absolute and does not prevent the amending of assessments to take account of a fact or matter arising by reason of an event occurring after the returns were delivered, the correction of an error in calculation, to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person or to give effect to a determination on any appeal. This further bolsters the submission that the four-year rule is not absolute as it does not apply in certain instances.

135. In *Bairead v McDonald* (4 1TR 475) the Revenue sought judgment for income tax and interest on foot of a certificate of the Collector General. Barron J

referred to the usual practice in pre self - assessment cases where the taxpayer denied liability, the inspector permitted the taxpayer to make returns in respect of the disputed years. In this case, the returns were for sums which equalled the defendant taxpayer's income exemption limits on foot of which no liability for tax would have arisen. The inspector did not accept these as valid returns. Barron J held that the taxpayer could only answer the claim by making returns which could be seen to be proper returns and which would establish the factual situation that no tax had ever been payable.

136. In the past, Australian tax law limited the making of amended assessments where the taxpayer has in its return made a full and true disclosure of all the material facts necessary for its assessment. The test for what constitutes a full and true disclosure in this context was considered in *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (179 ALR 593) wherein the Federal Court of Australia approved the test of what is meant by *full* disclosure as follows:

> *"The requirement of s170 of the Income Tax and Social Services Contribution Assessment Act 1936 (Cth) is not met by anything less than full disclosure of all the material facts, and a disclosure that leaves the Commissioner to speculate as to some of the material facts is not sufficient....The matter can be tested* in *this way. If advice were to have been sought by the taxpayer whether or not the sum in question was a taxable premium, would the person from whom the advice was sought have required more information than this return disclosed to the Commissioner "* (Ibid para 53)

137. In *Stapleton v Federal Commissioner of Taxation* (89 ATC 4818 at 4829) the Court commented that in substance the purpose of the above requirement is to ensure that the Commissioner of Taxation is given an adequate opportunity of considering whether a particular receipt is assessable income or a particular outgoing an allowable deduction.

138. The power to assess under the direct assessment machinery is set out in Section 186 Income Tax Act 1967, as amended, which provides for the making of additional first assessments and the time limit for assessments. In relation to the time-limit, subs. 2(a) provides as follows:

"(a) Subject to any provision allowing a longer period in any class of case, an assessment or an additional fist assessment may be made at any time not later than ten years after the end of the year to which the assessment relates:

Provided that in a case in which any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to income tax, an assessment or an additional first assessment may be made at any time for any year for which, by reason of fraud or neglect, income tax would otherwise be lost to the Exchequer...

(d) in this subsection, "neglect" means negligence or a failure to give any notice, to make any return, statement or declaration, or to produce or furnish, any list, document or other information required by or under the Income Tax Acts"

139. This empowers an inspector to make an additional assessment at any time for any year in a case of fraud or neglect as defined.

ONUS OF PROOF- Extracts from **Appellant's Submissions**

140. All of the assessments raised by the Respondents on the Appellant are out of time pursuant to s955(2)(a) of the Taxes Consolidation Act 1997 (the "TCA"). Accordingly, the Respondents bear the burden of proof of establishing that they are entitled to raise these assessments on the Respondents.

141. It is not clear to the Appellant on what basis the Respondents have raised amended assessments on the Appellant and moreover, what enquiries were made by the Respondents so as to enable them to raise these assessments and whether these enquiries were made out of time contrary to s956 of the TCA. It must be presumed some enquiries were carried out.

142. The Appellant is equally unaware what powers the Respondents invoked in raising these assessments and whether the making of such enquiries were within the Respondents' powers.

143. The Appellant ceased to be domiciled in the Republic of Ireland from the time he moved to Northern Ireland in [redacted] following his marriage to [redacted] until his return to the Republic of Ireland in [redacted] and accordingly, was only liable to pay tax during this period on his Irish source income, which he did. If the Respondents wish to assess the Appellant for income other than Irish source income for these periods, the Respondents must establish that the Appellant was domiciled and resident in the Republic of Ireland at the material time.

144. The Appellant must therefore reserve the right to reply to any facts to which the Respondents may refer in outlining their statement of case with regard to these preliminary issues and in respect of which, the Respondents bear the burden of proof.

ONUS OF PROOF- Extracts from **Respondent's Submissions**

145. In any appeal against an assessment the onus is on the taxpayer to produce evidence acceptable to the Appeal Commissioners that the assessment is excessive. This was described by Charleton J in *Menolly Homes Limited v The Appeal Commissioners* ([2010] IEHC 49.) in the following terms:

> *"Under the Value Added Tax Act, 1972 the burden of proof 'that the amount due is excessive rests on the taxpayer. This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland. Powers are given to the inspector to be present, to produce evidence and to which give reasons in support of the assessment. The Appeal Commissioners, if the taxpayer proves over-charging, must abate or reduce the assessment accordingly, but otherwise an order must be made that the assessment shall stand. The Appeal Commissioners are also given the power to charge the taxpayer to tax in an amount exceeding that contained in the assessment.*

*So, their powers indicate that the amount due may go up or down or remain the same." (*Ibid para 20.)

146. Later he continues:

"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in TJ v Criminal Assets Bureau *[2008] IEHC 166" (*Ibid para 22.)

147. In *TJ v CAB,* Gilligan J concluded in the following terms:

'"The whole basis of the Irish taxation system is developed on the premise of self-assessment. In this case, as in any case, the applicant is entitled to professional advice, which has availed of, and he is the person who is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents" (at para 50)

148. There is no express provision in the statutory framework for appeals that the burden shifts to the Respondent at any stage. The reason that the burden of proof in a tax appeal falls on the taxpayer is stated by the Court of Appeal in *Eagerpath v Edwards* ([200I] STC 26.) as follows:

"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"* (Ibid p 73)

149. In the U.K. it has been established that the onus on HMRC in cases that would normally be out of time is no more than a *prima facie* one and that *prima facie* case may be established from a consideration of all of the evidence proffered in the hearing. *Halsbury* comments as follows:

> *"There is no need to give particulars of fraud at the beginning of an appeal hearing, since it is sufficient if it appears from the evidence as it emerges" (*Halsbury's Laws of England, Income Taxation (Vol 23(1)(reissue) paras. 1-950, Vol.23(2)(reissue) paras. 951-1836/20 (iii) 1741 quoting from Denning LJ in RY Special Commissioners of Income Tax (*ex parte Martin*) 48 TC I at 11.)

150. In *R v Special* Commissioners *of* Income *Tax (ex parte Martin)*(48 TC I) Denning MR dealt with the *prima facie* case for re-opening out of time assessments as follows:

> *"Whenever there is no jury, it is perfectly proper for the tribunal to say: '/ am not going to rule on this submission of no case. I am not going to say what I think. The evidence is only half given.. I will wait and see whether you, the defendant, call evidence. After hearing all the evidence, then I will decide'. That was done in Alexander v Rayson [1936] 1 KB. 169. The defendant is put to his election whether he is going to rely on the evidence as it stands or whether he is going to call further evidence. That is the best way of dealing with the submission. As was said in Alexander v Rayson [p.178] itself the judge in such cases is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed"* (Ibid at p. II and p.12)

151. In Hudson *v Hudson (HM* Inspector *of Taxes)* (42 TC 380) the Court citing *Amis v Colls* stated:

> *"It is well established that where the Revenue makes an assessment which would be out of time apart from the [fraud or wilful default proviso}, the burden lies upon the Revenue to establish that some form of fraud or wilful default has been committed by the taxpayer in connection with or in relation to Income Tax. If the Revenue succeeds at this stage, the burden then shift to the taxpayer to displace the assessment - for example, on the ground that it is excessive in amount."* (Ibid at 384)

152. The Court went on to look at how that *prima facie* burden might be discharged by the Revenue concluding as follows:

> *"I do not think it is necessary for the Revenue, in order to raise a prima facie case, to show the quality or source of the receipts which had not been accounted for...[Adding] [this) appears to be in accordance not only with the terms of the proviso but with the justice and common sense of the matter. The taxpayer knows the facts, and the Revenue does not. In the nature of things, it must often be the case that, even if the Revenue can show a prima facie case that receipts have not been satisfactorily accounted for, it has no material upon which to set up a prima facie case for bringing the receipts in question under one or other source of income. On the other hand, it is always open to the taxpayer to challenge the assessment, not only on the ground that there has been no wilful default but also on the ground that the receipts did not represent the income from the particular source selected by the Revenue."* (ibid at 386-387)

153. It is submitted that this reversal in what is the normal onus of proof falling on a Taxpayer in a tax appeal should be no more than a *prima facie* one. This is supported by the above dicta and approach of McKechnie J *in Revenue Commissioners v O'Flynn Construction* (2013) 3 IR 533) and the above quoted English cases. It also finds support in the statutory framework for tax appeals and the self-assessment nature of the tax system. The taxpayer is best placed to know his own affairs in contrast to an inspector whose knowledge of the taxpayer's affairs is limited and is usually predicated on the level of information provided by the taxpayer himself. Therefore, the burden of proof on the

inspector must accord with this and the nature of assessment machinery and in the context of such a system cannot be more than a *prima facia* one. To impose a higher burden on an inspector would therefore fly in the face on the established position in relation to the burden of proof in tax appeals. To impose a higher burden on the inspector would trespass on the ordinary burden of proof that rests on the taxpayer in income tax appeals and offends against first principles of he who asserts must prove.

154. It is submitted that the additional assessments to income tax on the Appellant for the tax year [redacted] and amended assessments for the tax years [redacted] to [redacted] were correctly made in accordance with the statutory powers conferred in Parts 39 and 41 respectively.

155. The Respondent disputes any assertion of prejudice.

156. It is submitted that the Appellant did not comply with his statutory obligation to make a full and true return for each of the years in question in order to avail of the time-limit protection in s.955(2)(a) TCA in respect of relevant years - in this case the tax years [redacted] to [redacted]. Further, it is submitted that the Appellant was not entitled to the time-limit protection in s.186 Income Tax Act 1967, as amended, by reason of fraud or neglect in respect of tax year [redacted].

157. It is submitted that this reversal in what is the normal onus of proof falling on a Taxpayer in a tax appeal should be no more than a *prima facie* one. The Respondent refers to and relies on *inter alia* the outline of facts set out in the Respondent's Statement of Case and submissions in discharge of any *prima facie* onus. The Appellant had his family home in ROI throughout the entire period at issue in this appeal. The tax liabilities the subject of the appeal arise in connection with undisclosed offshore trusts connected to the Appellant. His tax returns did not disclose the income settled on trust, the existence of the trusts, the funds settled therein or the income deriving therefrom. His returns failed to disclose offshore bank accounts connected to the trusts. Contrary to the assertion made by the Appellant in his submissions, the returns from [redacted] to [redacted] did not disclose the Appellant as a non-resident or a non-domiciled person. Neither did the Appellant

disclose the matters in Statements of Affairs as at [redacted] 199[redacted] [redacted] 199[redacted] and [redacted] 200[redacted]. The Appellant submits in the alternative to having been a fiduciary in relation to the trust monies in which case there were no returns made by the Appellant in that capacity either.

158. It is submitted that the burden then shifts back to the normal onus on the Appellant to show non-domicile, non-residence and non-taxability as asserted consonant with the normal rules in tax appeals and with the first principles - that he who asserts must prove.

Did the Appellant's father-in-law create an oral trust or trusts? – extracts from **Appellant's Submissions**

The creation of parol trusts

159. Between [redacted] and [redacted], in line with the express instructions of [redacted], the Appellant and his wife had invested the Trust Monies in secure investments to be held on trust for the benefit of the Appellant, his wife and the children born of their marriage. In particular, the Appellant and his wife had placed the Trust Monies in various accounts with [redacted] and [redacted] so as to benefit from favourable interest rates. In or about [redacted] [redacted] advised the Appellant and his wife to place the Trust Monies on deposit in Jersey where better interest rates were available and to transfer the Trust Monies to the care of professional trustees. To enable this, the Appellant was introduced to [redacted] Jersey Trust Co

160. On trust monies coming under the control of the professional trustee, [redacted] Jersey Trust Co part of the monies were settled by way of oral trust … in three separate trusts, referred to as the T1 T2 and T3 on [redacted] 199[redacted]. The remaining trust assets were referred to as the T4 on [redacted] 199[redacted] after coming under the control of the professional trustee, [redacted] IOM Trust Co The T2 T3 and T4 were later terminated on [redacted] 201[redacted] and all trust assets appointed to the T1 which is the sole remaining trust.

161. The Appellant did not receive the income as alleged. The Appellant and his wife held the Trust Monies in a fiduciary capacity, they did not receive any benefit from the Trust Monies and they did not use the funds for their own personal use, despite being of limited resources and on occasion in financial need.

162. The Appellant did not receive the income as alleged.

163. Without prejudice to the Appellant's position that he was neither domicile or resident in the Republic of Ireland between the years of assessment [redacted] and [redacted], should the Appeal Commissioners find otherwise and should the Appeal Commissioners also find that the Respondent was entitled to raise assessments on the Appellant out of time, then it is the Appellant's contention that he did not receive the income as assessed in the assessments for the years [redacted] and [redacted]

164. The Appellant's Statement of Case outlines in detail the fact that his father in law, [redacted], asked him to hold the Trust Monies on trust for the Appellant's family. The income settled on the trusts was at no stage the Appellant's income. The Appellant and his wife held the Trust Monies in a fiduciary capacity, they did not receive any benefit from the Trust Monies and they did not use the funds for their own personal use, despite being of limited resources and on occasion in financial need.

165. Trusts may be established orally under Northern Irish law.

166. As a matter of Northern Irish law, the relevant certainties were present for the establishment of trusts by [redacted] in oral form. (Knight v Knight (1840) 3 Beav 148) The three certainties were present: certainty of intention ([redacted] instructed the Appellant and his wife to hold the funds for the benefit of beneficiaries), certainty of subject matter (the monies concerned were kept separate), and certainty of objects (the beneficiaries were clearly identified).

Conclusion

167. The Appellant did not receive the income as alleged. The Appellant and his wife held the Trust Monies in a fiduciary capacity, they did not receive any benefit from the Trust Monies and they did not use the funds for their own personal use, despite being of limited resources and on occasion in financial need.

The Appellant's means

168. The Appellant purchased property by way of loans and leased the equipment necessary for his business. The manner in which the Appellant funded his various property purchases during the period has been outlined in detail above.

169. By way of example of the kind of equipment and machinery the Appellant leased, the Appellant leased a [redacted] tractor from [redacted] Finance between [redacted] he obtained a loan from [redacted] Finance on [redacted] to purchase a [redacted]; he leased a vehicle from [redacted] Finance between [redacted]; and he leased a vehicle [redacted] from [redacted] Bank between [redacted]

170. At the time, interest rates would have been quite severe and by choosing to borrow funds or lease equipment, instead of using the Trust Monies, the Appellant was incurring significantly more expense. This corroborates the Appellant's submission that he did not consider the Trust Monies his own.

171. The only businesses which [redacted] had in the Republic of Ireland were [redacted] Farm and the [redacted] in [redacted], the profit of which he accounted for. He did not receive any benefit from the [redacted] or [redacted] that his children ran. Furthermore, the Appellant's children had to borrow from financial institutions to fund their property purchases and incurred additional cost in doing so.

172. The Appellant did not have the means himself to fund the settlements to these trusts.

Did the Appellant's father-in-law create an oral trust or trusts and the consequences if he did so? -Extracts from **Respondent's Submissions**

173. Prior to a final response from the IOM authorities to the TIEA request of the [redacted] 201[redacted], by letter dated the [redacted] 201[redacted], the Appellant (through his advisors, [redacted]) asserted that he and other members of his family were beneficiaries of a settlement comprising four trusts; T1 T2 T3 and also a trust called the T4 ("the Trusts"). The first three trusts were established by Declarations of Trust by [redacted] Jersey Trust Co by Deeds dated the [redacted] 199[redacted]. The Appellant asserts that the funds held on those [redacted] trusts comprise money from earlier trusts created orally by his father-in-law [redacted] who died in [redacted]. He asserts that [redacted] was domiciled and tax resident in Northern Ireland and made the trusts during the period [redacted]. However, certain of the documents concerning the [redacted] trusts describes the Appellant as the settlor and he signed in that capacity.

174. The T4 was settled by the Appellant and his wife as joint settlors. The Deed is dated the [redacted] 199[redacted]. The Appellant asserts again that the funds held on this [redacted] trust comprise money from an earlier trust created orally by his father-in- law [redacted] during the period [redacted]. The Appellant asserts that the Deed does not take account of this oral trust and erroneously lists the Appellant and his wife as settlors. However, again, further documentation concerning the Trust describes the Appellant and his wife as joint settlors and they signed in that capacity.

175. The Appellant confirmed that he benefited from the Trusts and acknowledged that he may have a liability to Irish tax in respect of this but he did not quantify that liability. Instead, he sought agreement from the Respondent in relation to a proposed methodology to estimate a liability to which agreement was not forthcoming from the Respondent. This had been sought on the basis of a lack of records for the Trusts for the period prior to their establishment by Deeds dated the [redacted] 199[redacted] and [redacted] 199[redacted] respectively.

176. The initial amounts settled in the T4 were IR£194,587.36 and Stg£131,522.93. The initial amounts settled in the other trusts were nominal. Further financial information for the Trusts was obtained by the Respondent from the Isle of Man pursuant to a request under TIEA.

177. The Appellant asserts that he was a fiduciary in respect of the undisclosed offshore trusts and did not benefit from those trusts. Further, the Appellant asserts the trusts were established orally under Northern Irish law. The Respondent awaits proof of the material facts on which this assertion is based…

Where was the Appellant tax resident in the period 198[redacted]/8[redacted] up to 199[redacted]? - Extracts from **Appellants Submissions**

178. The Appellant was at all relevant times resident and domicile in Northern Ireland from [redacted] and accordingly, was not within the charge to Irish tax under Schedule D Case Ill or Schedule D Case IV, save to the extent that the income under Schedule D Case Ill was remitted into the Republic of Ireland.

179. The Appellant was resident and domiciled in Northern Ireland from [redacted].

180. Strictly without prejudice to the Appellant's position that all of the assessments raised by the Respondent on the Appellant are outside of time, it is

the Appellant's case that he was resident and domiciled in Northern Ireland from [redacted].

181. The Appellant was born in [redacted], in the Republic of Ireland on [redacted]. The Appellant's father was domiciled in the Republic of Ireland at the time of his birth. The Appellant's domicile of origin is the Republic of Ireland.

182. Upon his marriage to [redacted] in [redacted], the Appellant left the Republic of Ireland and moved to Northern Ireland to live at NI Farm with the full intention of remaining there permanently tor the rest of his life and never returning to live in Ireland. The Appellant purchased NI Farm in [redacted]. He ran a [redacted] business in NI in the 1970s and also had a [redacted] in [redacted] which his son took over in [redacted]. The Appellant submits that he acquired a domicile of choice in Northern Ireland in [redacted]

183. As outlined in detail in the Appellant's Statement of Case, in [redacted] the Appellant and his wife [redacted] NI Farm [redacted] To facilitate this the Appellant purchased the ROI Farm and later, [redacted] Farm. ROI and [redacted] Farms comprised poor quality land which the Appellant used for keeping [redacted] on. They were not labour intensive farms and the vast majority of the Appellant's time and effort was spent working in Northern Ireland on NI Farm.

184. As outlined in detail in the Appellant's Statement of Case, the Appellant remained at NI Farm in order to ensure that NI Farm was protected as the Appellant was of the view that it would be vulnerable to occupation by the British army were he to leave it. Furthermore, during this period, the Appellant and his family continued to attend Sunday Mass at their parish church in

[redacted] in Northern Ireland (situate a few miles from NI Farm The Appellant's children made their First Holy Communion and were confirmed in their parish of [redacted] and the Appellant's wife and children kept close connections with Northern Ireland. The Appellant voted in Northern Ireland.

185. The Appellant and his wife had every intention that they would resume their family life in Northern Ireland. The Appellant's wife was domiciled in Northern Ireland and wished to return to her home, having only moved to ROI out of necessity. The Appellant and his wife did not see the move to ROI as a permanent one. The Appellant had renovated his family home at NI Farm in the mid-1970s. The Appellant continued to maintain his home at NI Farm throughout the 1980s and 1990s, including plastering and painting it. The house also had a thatched roof which required regular maintenance.

186. The Appellant and his wife gave their address as [redacted] in the instrument executed on [redacted] referring to the [redacted] Trust on [redacted] 199[redacted]. [redacted] is the address of NI Farm

187. After a period of [redacted], the Appellant decided to retire from [redacted] in or around [redacted]. At that stage, the Appellant moved to [redacted] Farm to live with his wife and his domicile of origin in the Republic of Ireland may have revived.

The Appellant's residence

188. For the tax years [redacted] to [redacted] there were no statutory residence rules for determining whether a person was resident in the Republic of Ireland for a tax year. Judge, *Irish Income Tax* (1996-1997 edition) described the then test as follows:

> *"An individual's residence in any tax year was a question of fact. In the great majority of cases it was a straightforward matter, but where the matter was in doubt the Revenue Commissioners devised as a matter of practice a set of rules which were applied to decide whether the individual in question was to be*

treated as a residence or a non-resident for the relevant tax year. An individual was regarded as residing in the State (ie resident in the State) in a given tax year if:

(a)The individual had a place of abode of any kind available for his or her use, and if he or she was physically present in the country for any period, however short, in that tax year; or
(b)Where no such place of abode was available for the individual's use, he or she spent more than 183 days in the country in that year; or
(c) Even if not held to be resident under either of the first two rules, the individual made habitual visits to the country for substantial periods of time over a period of years." (At para 1.503)

189. With effect from s150 of the Finance Act 1994, the 183 day rule for residency was introduced (together with the a combined residency test of 280 days over two years) with the specific requirement under s.150(3) of the Finance Act 1994, that in order to be considered resident for a day, a person had to be present at the end of the day. This test continued with s819 of the TCA, as did the requirement that in order to be considered resident for a day, the person had to be resident in the Republic of Ireland at the end of the day. This 'midnight' test applies for all relevant periods the subject of this appeal.

190. The Appellant did have a place of abode available to him in the Republic of Ireland from 197[redacted]. However, it is the Appellant's contention that with effect from [redacted] he was not resident in the Republic of Ireland within the meaning of s150 of the Finance Act 1994 or s819 of the TCA.

191. Therefore, there is a possibility that the Appellant could have been considered tax resident in the Republic of Ireland for the tax years [redacted] to [redacted]. However, it is equally possible that the Appellant could have also been considered resident in Northern Ireland during that time.

192. The United Kingdom (the UK) rules in respect of tax residence for the tax years [redacted] to [redacted] were derived from case law. Generally, where an individual was present in the UK for 183 days, that individual was considered

resident. The Appellant asserts that he satisfied the day count for the period in question.

193. The Convention between the Government of Ireland and the Government of the United Kingdom for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (the DTA) provided a tie-breaker clause whereby an individual is resident both in the Republic of Ireland and Northern Ireland.

194. Article 4 of the DTA provided:

> *"(1) For the purposes of this Convention, the term 'resident of a Contracting State' means, subject to the provisions of paragraphs (2) and (3) of this Article, any person who, under the Law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature; the term does not include any individual who is liable to tax in that Contracting State only if he derives income from sources therein. The terms 'resident of Ireland' and 'resident of the United Kingdom' shall be construed accordingly.*
>
> *(2) Where by reason of the provisions of paragraph (1) of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:*
>
> *(a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);*
>
> *(b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;*

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

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

The Appellant did have a home available to him in both the Republic of Ireland and Northern Ireland between 198[redacted]/198[redacted] and 199[redacted]/199[redacted].

195. In such circumstances, Article 4(2)(b) then looks to where a person's centre of vital interests is in order to determine the Appellant's residency between [redacted] and [redacted]

196. In this regard, the OECD Commentary on Article 4 of the Model Convention, from which Article 4 of the OTA is derived, states:

".. .*regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc.*
*The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.' (*OECD Commentary on the Model Convention at p.87)

197. It is the Appellant's submission that his centre of vital interest between [redacted] and [redacted] was Northern Ireland. The Appellant lived and worked in Northern Ireland. The Appellant claimed agricultural grants in Northern Ireland in respect of his farming business. The Appellant's bank account was with [redacted] in [redacted], as was his regular medical practitioner, Dr [redacted]. The Appellant voted in Northern Ireland, The Appellant's motor vehicles were registered in Northern Ireland and he paid road tax there. The Appellant and his family attended mass at the parish church in [redacted]. The Appellant's children were christened in Northern Ireland and later attended primary school and received communion there. The Appellant's children also played for local GAA teams until the early 1990s.

198. Laffoy J in *O'Brien v Quigley* ((2013] 1 IA 790) outlined the principles of interpretation to be applied in interpreting and applying Article 4 of the DT*A:*

> *'(6) The relevant principles of interpretation applicable to the construction and application of a Double Taxation Convention, such as the Convention, were considered by the High Court (Kelly J) in Kinsella v Revenue Commissioners [2007] IEHC 250, 1O ITLR 63, {2011J 2 IR 417, where, in the context of the application of a Double Taxation Convention with Italy dating from 1971 and incorporated into Irish law in 1973, it was stated (at para 41):*
>
> > 'This State acceded to the Vienna Convention on the Law of Treaties with effect from 6 September 2006. Even before that event it is clear from the decision of Barrington J in McGimpsey v Ireland [1988] IR 567 that in interpreting an international treaty the court ought to have regard to the general principles of international law and in particular the rules of interpretation of such treaties as set out in Articles 31 and 32 of the Vienna Convention.'
>
> *(7) The decision in McGimpsey v Ireland concerned a constitutional challenge to the Anglo- Irish Agreement of 15 November 1985. In that case, it was held by the High Court that an international treaty must be interpreted having regard to*

international law and such interpretation should not be coloured by reference to the Constitution. In his judgment, Barrington J stated (at p 582):

> 'An international treaty has only one meaning and that is its meaning in international law. Its interpretation cannot be coloured by reference to the Constitution. The approach to the interpretation of post constitutional statutes laid down in East Donegal Co-Operative Society v The Attorney General [1970] IR 317 can have no application to the interpretation of a treaty. For guidance on this subject one must look to the general principles of international law and in particular to the rules of interpretation set out in article 31 of the Vienna Convention on the Law of Treaties. Ireland, admittedly, is not a party to that convention, but article 31 is acknowledged to have codified the relevant principles of interpretation.'

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

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

> 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or

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

(10) In Kinsella v Revenue Commissioners, having outlined the provisions of arts 31 and 32 of the Vienna Convention, Kelly J stated (at para 44):

> 'In accordance with what is prescribed by the Vienna Convention, I must therefore interpret the Convention in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Convention's object and purpose. Where such an interpretation leaves the meaning of the Convention ambiguous or obscure or leads to a manifestly absurd or unreasonable result then recourse can be had to supplementary means of interpretation. These means of interpretation could, in an appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon.'

*That passage, in my view, clearly sets out the proper approach to be adopted in interpreting and applying a Double Taxation Convention." (*Ibid at paragraphs 6-11)

199. International case law has looked to a variety of factors in considering where a person's centre of main interests is, such as where family and friends are located, where leisure activities are carried out, where political votes are registered, where driving licences are obtained (*Stephen D Podd et al v Commissioner of Internal Revenue (Further Hearings)* 1 ITLR 539) where cars are registered, where road tax is paid, where medical insurance is held (*Chung Ja Huh v R; Hun Huh v R* 2 ITLR 902) where doctors are located (*Yates v Revenue and* Customs *Commissioners* 15 ITLR 205) and where bank accounts are located (Ibid at fn6).

200. If the Appeal Commissioners are of the view that the Appellant's centre of vital interests cannot be determined, then the Appellant further submits that Article 4(2)(b) resolves the issue as the Appellant had his habitual abode in Northern Ireland. The OECD commentary on this provision states that in a case

where the centre of vital interest cannot be determined, the habitual abode test *"tips the balance towards the State where he stays more frequently." (*Ibid at p88).

201. The US Tax Court in the case of *Podd v* Comr ((1998) 1 ITLR 539) agreed. Wells J stated that where doubt exists as to an individual's *'(centre] of vital interest',* the commentary tips the balance in favour of the country where the individual stays most frequently and the day-counts for the respective competing territories should be determinative.

202. The Canadian Tax Court of in *Yoon v R (*2005 TCC 366, (2005) 8 ITLR 129*)* also came to a similar conclusion. O'Connor J held that where doubt exists as to an individual's centre of vital interest, the balance is tipped in favour of the country where the individual stays more frequently and that is where his habitual abode should be held to be.

203. It is the Appellant's submission that between ROI and NI he stayed more frequently in Northern Ireland than he did in the Republic.

204. The Appellant submits that a UK decision on residence may also be of assistance to the Appeal Commissioners even though it does not directly relate to Article 4 of the DTA. The UK Supreme Court in *R (on the application of Davies) v Revenue and Customs Comrs, R (on the application of Gaines-Cooper) v Revenue and Customs* Comrs ([2011] UKSC 47, [2011] STC 2249) noted that since the decision of the House of Lords in *Levene v IRC (*[1928] AC 217*),* the hallmark of residence in the UK had been a *"settled or* usual *abode"* there. Lord Wilson noted that for a cessation of a taxpayer's settled or usual abode in the UK to take place a *"distinct break"* in the sense of a change in the pattern of the taxpayer's life in the UK was necessary. The Supreme Court held that a *"multifactorial inquiry'* is necessary in order to determine, in any particular case, whether there has been a distinct break in the pattern of a taxpayer's life for these purposes. Although a severance of social and family ties (with the UK) is not necessary for there to have been a distinct break, a substantial loosening of such ties is to be expected.

205. It is the Appellant's position that at no stage between the tax years [redacted] to [redacted] did he make a "distinct *break"* from Northern Ireland.

Where was the Appellant tax resident in the period [redacted] up to [redacted]? - extracts from the **Respondent's Submissions**

206. The Appellant's case is based on asserted non-residence for a period from 19[redacted] when he says he moved to Northern Ireland to about 19[redacted] when the assets that he returned to Ireland. The Appellant had his family home in ROI throughout the entire period in issue. In his own case he concedes that he may well have been Irish resident for the period [redacted] to [redacted] and relies on the treaty tie-breaker for his case and relies on the statutory 'midnight test' to make his case for the period [redacted] to [redacted] when he says he returned to Ireland. The onus of proof rests with the Appellant to establish non-residence consonant with the normal rule in tax appeals and with first principles that he who asserts must prove. The Appellant awaits proof of the relevant facts on which the Appellant seeks to rely in support of this assertion.

Where was the Appellant domiciled in the period 19[redacted] up to 19[redacted] ? - extracts from **Appellant's Submissions**

207. A child takes his domicile of origin from the jurisdiction in which the relevant parent was domiciled at the time of his birth (Udny v Udny 1 Sc & DIV) The Appellant was born in [redacted], in the Republic of Ireland on [redacted]. The Appellant's father was domiciled in the Republic of Ireland at the time of his birth. The Appellant's domicile of origin is the Republic of Ireland.

208. The Appellant married [redacted] in [redacted] and moved to Northern Ireland. He bought NI Farm in Northern Ireland from his father in-law in 196[redacted]. For the Appellant to change from his Republic of Ireland Irish domicile of origin to that of another country, he must establish a physical presence in the new jurisdiction and demonstrate an intention to reside there permanently.

209. The test is one of fact and not law:

"In order to acquire another domicile a person must have the intention of doing so together with actual residence in the country of his choice. The

*intention must be an intention to reside in that country for an unlimited time. A domicile of origin persists until it has been shown to have been abandoned and another acquired and the onus of proving a change of domicile is on the person alleging it."(*Revenue Commissioners v Shaw & Anor H.C (1982 ILR) McWilliam J)

210. The Irish High Court in *Re: Sillar, Hurley v Wimbush* ((1956) IA 344) considered a person's domicile for the purposes of making a will. The Court had to decide whether a testator at the date of the making of his will had acquired an Irish domicile of choice. Budd J. commented that domicile means a person's home and that this simple and elementary proposition was sometimes in danger of being forgotten. He went on to cite the following statement of the law by Black J. in *Re: Joyce, Corbet v Fagan* ((1946) IA 277):

> *"Now, whatever difference of view may be possible on any other aspect of the law of domicile, one principal at least is beyond doubt, namely, that the domicile of origin persists until it is proved to have been intentionally and voluntarily abandoned."*

211. Having said that a domicile of choice was acquired by residence coupled with an intention to reside permanently or indefinitely, Budd J also cited the following passages from the speech of Lord Westbury in *Udny v Udny (* (LR 1H.L. (Sc) 441)

> *"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in* a *particular place, with an intention of continuing to reside there for an unlimited time...? It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or animus manendi, can be inferred the fact of domicile is established."*

212. Budd J summed up his conclusions on the law as follows:

> *"From* a *consideration of the case law it is clear that it is* a *question of fact to determine from* a *consideration of all the known circumstances in each case whether the proper inference is that the person in question has shown unmistakably by his conduct, viewed against the background of the surrounding circumstances, that he had formed at some time the settled purpose of residing indefinitely in the alleged domicile of choice. Put in more homely language, that he had determined to make his permanent home in such place. That involves, needless to say, an intention to abandon his former domicile."*

213. The leading UK authority on whether a person has acquired a new domicile of choice is *In the Estate of Fuld,* deed *(No* 3)([1968] 675) whereby Scarman J described the test for acquiring a domicile of choice as follows:

> *"(1) The domicile of origin adheres - unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice;*
>
> (2) a *domicile of choice is acquired only if it be affirmatively shown that the propositus* is *resident within* a *territory subject to* a *distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If* a *man intends to return to the land of his birth upon* a *clearly foreseen and reasonably anticipated contingency, eg, the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such* as *making* a *fortune (a modern example might be winning* a *football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact - of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities.*

> *(3) It follows that, though* a *man has left the territory of his domicile of origin with the intention of never returning, though he be resident in a new territory, yet if his mind be not made up or evidence be lacking or unsatisfactory as to what* is *his state of mind, his domicile of origin adheres. And, if he* has *acquired but* abandoned a *domicile of choice either because he no longer resides in the territory or because he no longer intends to reside there indefinitely, the domicile of origin revives until such time as by a combination of residence and intention he acquires a new domicile of choice." (*Ibid at 685)

214. The Irish case of *Proes v The Revenue Commissioners (*[1998] 4 IA 174*)* is also of assistance. Mrs Proes had an Irish domicile of origin but left Ireland as a young woman and went to live in the UK where she married an Englishman. Mrs Proes and her husband worked around the world but eventually took up residence in the UK where they were living at the time of his death in 1982. As her then accommodation in the UK was provided by her husband's employer, Mrs Proes was obliged to leave her accommodation. Mrs Proes returned to their holiday home in Kinsale, Cork, which she and her husband had bought in 1970. Mrs Proes continued to visit the UK frequently, where her daughters lived and her evidence was that she intended her house in Cork to be a permanent home *"for the time being"* (Ibid at 180) but that she intended to move to London to live near them. She bought a property in London in 1992.

215. The High Court held that the question to be asked was not whether Mrs Proes had acquired a new domicile of choice in Ireland but whether she had abandoned her English domicile of choice:

> *"When a person who has acquired a domicile of choice in England returns to Ireland (his/her domicile of origin), the question is not whether a new domicile of choice has been acquired in this country, but whether the English domicile of choice had been abandoned. If it had, then the Irish domicile of origin revives. This means that the question which should have been posed was: 'Did the appellant abandon her English domicile by (a) residing in Cork and (b) deciding not to return to live permanently in England?', and not 'Did*

the appellant decide to live permanently in Ireland and thereby acquire a new domicile of choice?"(Ibid at 182-183)

216. The High Court held that on the facts, there was no intention by Mrs Proes to abandon her English domicile:

> " .. .*in the light of all the evidence ... her intention to return to reside in London was [not] so vague and indefinite as to justify the conclusion that her domicile of choice had in reality been abandoned. She continued actively to search for a suitable residence in London and she eventually purchased and refurbished a residence for herself - facts which raise in a compelling fashion an inference that she had never abandoned her intention to return to reside permanently in London when she felt that it was appropriate for her to do so...'(*Ibid at 184-185)

217. The Appellant submits that he had a physical presence in Northern Ireland from [redacted] and an intention to reside there permanently and indefinitely. The Appellant's wife was domiciled in Northern Ireland and she considered it her home. The Appellant purchased NI Farm and his children were all born there. The Appellant had no intention of ever returning to the Republic of Ireland to live and he abandoned his domicile of origin and acquired a new domicile of choice in Northern Ireland from [redacted]. The Appellant continued his intention to reside at NI Farm permanently and indefinitely even when his wife and children moved to ROI The Appellant did not change his intention to reside in Northern Ireland permanently and indefinitely until he decided to move to the Republic of Ireland in [redacted]. It is only in [redacted] that the Appellant ceased residing in Northern Ireland and no longer intended to reside there permanently and indefinitely. Therefore, it is only in [redacted] that the Appellant abandoned his Northern Irish domicile of choice. In abandoning his Northern Irish domicile of choice in [redacted], the Appellant, thereby revived his domicile of origin in the Republic of Ireland from [redacted].

218. Without prejudice to the Appellant's submission that he was domiciled in the Northern Ireland from [redacted] to [redacted], if the Appeal Commissioners form the

view that the Appellant was also domiciled in the Republic of Ireland at the time, then the tie-breaker clause at Article 4 of the DTA would again apply.

219. On the basis of the foregoing legal submissions outlined above at 5.14 to 5.19 above, it is the Appellant's submission that by virtue of the fact that his centre of main interests remained in in Northern Ireland from [redacted] to [redacted] or, in the alternative, that his habitual abode remained in Northern Ireland from [redacted] to [redacted], that by virtue of the tie-breaker provision in Article 4 of the DTA, he was domiciled in Northern Ireland from [redacted] to [redacted].

Conclusion

220. The Appellant was at all relevant times resident and domiciled in Northern Ireland from [redacted] to [redacted] and accordingly, was not within the charge to Irish tax under Schedule D Case Ill or Schedule D Case IV, save to the extent that the income under Schedule D Case Ill was remitted into the Republic of Ireland.

Where was the Appellant domiciled in the period 198[redacted]/8[redacted] up to 199[redacted]? - Extracts from **Respondent's Submissions**

221. The Respondent will rely on the well-established legal principles governing the determination of domicile. Every individual is born with a domicile of origin and it is common case that Ireland is the domicile of origin of the Appellant.

222. During the lifetime of an individual, a domicile of origin can be abandoned in favour of domicile of choice by combination of residence and an intention to continue permanent or indefinite residence and not otherwise. In the leading case of *Udny v Udny* ([1869] LR I hl441) Lord Westbury formulated the principle in the following terms:

> *'"Domicile of origin is a conclusion or influence which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place,*

with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be residence, freely chosen, and not prescribed or dictated by any from illness; and it must be residence fixed, not for a particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary, or intended for a limited period, may afterwards become general and unlimited: and in such a case so soon as the change of purpose, or "animus manendi", can be inferred, the fact of domicile is established."

223. Domicile is therefore a concept which arises from the inferences to be drawn from an individual's residence including the circumstances and quality of that residence and his intentions to be inferred from the surrounding facts. There is a presumption in favour of a domicile of origin and in order to establish abandonment, it is necessary to show residence and an intention to reside in another country permanently and indefinitely. In the case of *Re Joyce* (R. 277) Black J. noted:

> *"One principle at least is beyond doubt, namely, that the domicile of origin principle is proven to have been intentionally and voluntarily abandoned and supplanted by another."* (at page 301).

224. A statement to similar effect is to be found in the judgment of McWilliam J. in *Revenue* Commissioners *v Shaw* ([1982] II.RM 433). It is well established that the burden of proof of a change of domicile falls on the party asserting it.

225. The seminal statement regarding the requisite intention for the purposes of determining a change of domicile and which has been cited with approval on a number of occasions in the High Court and the Supreme Court over the past two decades is that of Budd J. in Re Sillar ([1956] IR. 344) as follows:

> *"From consideration of the case law it is clear that it is a question of fact to determine from a consideration of all the known circumstances in each case whether the proper inference is that the person is shown unmistakably by his conduct, viewed against the background of the surrounding circumstances, that he had formed at some time the settled purpose of residing in the alleged*

domicile of choice. Put in a more homely language, that he had determined to make a permanent home in such a place. That involves, needless to say, an intention to abandon his former domicile. "

226. That there is a significant onus to discharge to establishing abandonment of domicile of origin was described by Keane CJ in *DT v FL* ([2003] IESC 59) in the following terms:

"... *It is important to bear in mind that a decision to move ones residence to another country in circumstances of that nature may not be sufficient to discharge the significant onus of establishing that a person has abandoned his domicile of origin and acquired another domicile of choice ... I am satisfied, in applying these well settled principles of law, it would have not been possible for the trial judge in the present case, in either the agreed or admitted facts, to hold that the presumption as to the continuance of the domicile of origin has been rebutted"*

227. In contrast, a domicile of choice is easily and simply abandoned by ceasing to reside in a country and ceasing an intention to reside there indefinitely. A domicile of origin revives on the abandonment of a domicile of choice when this occurs without acquisition of a new domicile of choice.

228. Declarations of intention while a factor must be viewed in the context in which they are given for example declarations of intention *Ross v Ross* ([1930] AC I)

"Declarations of intention are rightly to be regarded in determining *the question of a change of domicile, but they must be examined by considering the persons to whom, the purpose of which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions* ".

229. In *McCormack & Paolozzi v Duff and Rabbitte* ([2012] IEHC 285) a deceased man declared himself an Italian and to be domiciled in ltaly. In determining the deceased's domicile at the time the will was made, Herbert J. was of the view that

the rest of the evidence clearly established that the deceased had been domiciled in Ireland, In particular, the Court was influenced by the fact that the deceased's chief place of residence, his business interest and his hobbies were all located in Ireland. Although the deceased owned a holiday home in Italy, held an Italian bank account and declared himself in the will to be of Italian domicile he had done nothing from which it could be inferred that he had determined to make Italy his chief place of residence on a permanent and indefinite basis. Accordingly, the deceased was held to be domiciled in Ireland at the time of making the will.

230. The matters behind such declaration will also be relevant to its probative value and in CM v TM ([1990] 2 I.R. 52) Barr J. attached little weight to a declaration in a will that a person was domiciled in Ireland on the basis that the statement was made for the purposes of obtaining certain tax benefits. The Court was of the view that this declaration was inconsistent with the conduct of a person who had never demonstrated an intention to abandon his domicile of origin in England (see also *Re Dunne (A Bankrupt)* [2013] 2 IR 796).

231. It is common case that Ireland is the domicile of origin of the Appellant. The Appellant's case (which is disputed) is that he was non-domiciled and non-resident from [redacted] when he says he moved to Northern Ireland until [redacted] when he says he returned to Ireland. The Respondent disputes this and the onus is on the Appellant to establish non-domicile and non - residence as alleged. There is a presumption in favour of Irish domicile and thus a significant onus falls on the Appellant to establish abandonment of an Irish domicile for the years in question. The Appellant's case is to assert non-domicile status for a period from [redacted] to about [redacted] only and effectively conceding Irish domicile from [redacted]. The Respondent awaits proof of the relevant facts on which the Appellant seeks to rely in support of his assertion of non-domicile.

What liability arises, if any, under section 806 TCA 1997? - extracts from **Appellant's Submissions**

Miscellaneous income

232. By notices of assessments dated [redacted] 201[redacted], the Respondent raised additional assessments to income tax on the Appellant for the years [redacted] to [redacted] inclusive.

233. The additional income raised on the Appellant is raised under Schedule D, Case IV in respect of the years [redacted], being annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule miscellaneous income.

234. Section 52 of the Income Tax Act 1967 {the ITA) applies to the years of assessment [redacted] to [redacted] and provides that tax under Schedule D *"shall be charged in respect of-*

(a) the annual profits or gains arising or accruing -

(i)to any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere; and

(ii)to any person residing in the State from any trade, profession or employment, whether carried on in the State or elsewhere; and

(vi) to any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, and from any trade, profession or employment exercised within the State; and

(vii) to any person, whether a citizen of Ireland, or not, although not resident in the State, from the sale of any goods, wares, or merchandise manufactured or partly manufactured by such person in the State,

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule C or Schedule E, and not specially exempted from tax,

in each case for every twenty shillings of the annual amount of the profits or gains."

235. Section 53 goes on to state:

"(1) Tax under Schedule D shall be charged under the following Cases:…

Case IV - Tax in respect of any annual profits or gains not falling under any other Case of Schedule D and not charged by virtue of any other Schedule".

Income from foreign securities and possessions

236. The additional income raised on the Appellant is also raised under Schedule D, Case Ill, income from foreign securities and possessions, in respect of the years 199[redacted]/199[redacted]-200[redacted].

237. Section 76 of the ITA, which applies to the years of assessment 199[redacted]/199[redacted] to 199[redacted]/199[redacted] states:

"Subject to this section and section 77, tax chargeable under Case Ill of Schedule D in respect of income arising from securities and possessions in any place outside the State shall be computed on the full amount of such income arising in the year of assessment whether the income has been or will be received in the State or not, subject, in the case of income not received in the State -

(a) to the same deductions and allowances as if it had been so received; and,

(b) to the deduction, where such deduction cannot be made under, and is not forbidden by, any other provision of this Act, of any sum paid in respect of income tax in the place where the income has arisen; and

(c) to a deduction on account of any annual interest or any annuity or annual payment payable out of the income to a person not resident in the State,

and the provisions of this Act (including those relating to the delivery of statements) shall apply accordingly.

(2)Subsection (1) shall not apply to any person who satisfies the Revenue Commissioners that he or she is not domiciled in the State, or that, being a citizen of Ireland, he is not ordinarily resident in the State.

(3)In the cases mentioned in subsection (2), the tax shall, subject to section 77, be computed on the full amount of the actual sums received in the State from remittances payable in the State, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of such remittances, property, money or value brought into the State in the year of assessment without any deduction or abatement."

238. The relevant parts of s71 of the Taxes Consolidation Act 1997 (the TCA) which applies from [redacted] mirrors this provision.

239. Section 806 of the Taxes Consolidation Act 1997 applies if the Commissioner finds as a matter of fact that the Appellant was the settlor of the trusts and that the Appellant was tax resident and domiciled in Ireland at the material time of the "transfers abroad", the Appellant would in fact be subject to tax under section 806 of the Taxes Consolidation Act 1997 on the income of the trustees arising under Schedule D, Case IV (whereas he has been incorrectly assessed on this income under Schedule D, Case III, being a charge to tax on interest earned by an individual, rather than by a trustee). If the Commissioner finds as a matter of fact that the Appellant was the settlor of the trusts and subject of the provisions of section 806 and this income was earned by his trustees, the Appellant would be entitled to deduct certain management expenses incurred by the trustees and the Respondents have made no provision for this. No assessment to s806 has been made by the Respondent and therefore, the Commissioner can make no determination in respect of s. 806.

240. If the Commissioner finds as a matter of fact that the Appellant was the settlor of the trusts and that the Appellant was tax resident but not domiciled in Ireland at the material time, he is only liable to income tax on that income under s806 of the Taxes Consolidation Act 1997 to the extent that that income is

remitted into Ireland. As no assessment arises in respect of a charge under s806, this issue is outside of the scope of the appeal.

ANALYSIS

I have divided my analysis into separate parts consistent with the arguments put before me at the Appeal, as follows:

Part 1- Was the Respondent precluded from raising 'out of time' amended assessments on the Appellant?

Part 2- On whom does the "Onus of Proof" rest?

Part 3- Witness testimony

Part 4- Source of the Funds? Were oral trusts created by the Appellant's father-in-law?

Part 5- The residence of the Appellant.

Part 6- The domicile of the Appellant.

Part 7- What liability arises, if any, under section 806 TCA 1997?

PART 1

Was the Respondent precluded from raising 'out of time' amended assessments on the Appellant?

241. The system of assessment of income tax collection tax was fundamentally changed with the introduction of self-assessment as contained in the Finance Act 1988, Part 1, Chapter 2. Under that system the Inspector of Taxes is permitted to make such enquiries or to take any other action, within the powers given to him under the taxes Acts, as he thinks necessary to check up on the figures statements and other particulars given in the taxpayer's tax return. This applies whether or not the Inspector of Taxes previously accepted all or some of the particulars stated on the return. If as a result of these enquiries, the Inspector ascertains that the return is not accurate or complete or if he is not satisfied that it is accurate or complete, he may make such amendments to the previous assessment as he considers necessary.

242. From [redacted] there is a six year time limit (later amended to four years for years outside this appeal) for the Inspector to make such enquiries unless he has reasonable grounds for believing that the return has not made a full and true disclosure. This provision replaced the ten year time limit which applied for assessments up to 198[redacted]/198[redacted] inclusive. It also changed the criteria, from "fraud or neglect" applicable up to 198[redacted]/8[redacted], as the basis for the Inspector being permitted to raise assessments outside the time limit.

243. In this appeal, the tax rules governing the right of the Respondent to raise assessments outside the statutory limitation period are governed by different statutory provisions. Section 186 of the ITA 1967 applies to the year of assessment 198[redacted]/198[redacted]. Sections 14 FA 199[redacted] apply to years 199[redacted]/198[redacted] to 199[redacted]/199[redacted] Section 955(2)(a) of the TCA 1997 applies to the years of assessment 199[redacted]/199[redacted] to 200[redacted].

244. The first part of the hearing was taken up with consideration as to whether the Respondents were precluded from making amended assessments outside the statutory limitation period. Also, with reference to five particular tax years, the Appellant argued that the Respondents where further precluded as they were unable to locate, within their records, the actual physical tax return originally filed by the Appellant. The Respondents were, however, able to produce copies of print outs from their computer records system, being an electronic record, albeit in a different format, of the contents of the originally tax returns filed by the Appellant for the five years in question.

245. Within Part 1 of my analysis, the Appellant identified 3 issues for my consideration and decision.

Issue 1

246. Have the Respondents satisfied me that they were not precluded from raising amended assessments for the years 198[redacted]/198[redacted] to 200[redacted] on the Appellant? The tests for this, is whether the Respondents have established that the Appellant:

- committed "*fraud or neglect" "in connection with or in relation to income tax"* for the years 198[redacted]/198[redacted]; or
- failed to make a full and true disclosure of a material fact in his returns for the years 198[redacted]/198[redacted] to 200[redacted].

247. The Appellant argued that if I determine the Respondents were so precluded, then all the assessments must be determined to be void in accordance with s949AK(3) of the Taxes Consolidation Act 1997.

Issue 2

248. The Appellant's argued that the Respondents were precluded from making 'out of time' amended assessments for the five years 8[redacted]/8[redacted] and 9[redacted]/9[redacted] to 9[redacted]/9[redacted] in the absence of the original tax returns. The Appellant argued that if I determine the Respondents were so precluded, then those five amended assessments must be determined to be void in accordance with s949AK(3) of the Taxes Consolidation Act 1997.

Issue 3

249. Were the Respondents precluded from making amended assessments for the years 8[redacted]/8[redacted] and 9[redacted]/9[redacted] to 9[redacted]/9[redacted] on the basis of computer printouts and can I, as the Commissioner, rely on those computer printouts for the purposes of my determination where, the Appellant argues, I have no evidence as to the veracity or integrity of these computer printouts?

250. Again the Appellant argued that if I determine the Respondents were so precluded, then the five amended assessments must be determined to be void in accordance with s949AK(3) of the Taxes Consolidation Act 1997.

251. If however, I determine that the Respondents were entitled to raise some or all the amended assessments, then further issues arise which are considered in Part 2 of my analysis.

252. I will now deal three issues identified by the Appellant:

Issue 1

253. Section 186 of the ITA 1967 applies to the years of assessment 198[redacted]/198[redacted]. It stated:

> *186.—(1) If the inspector discovers—*
>
> *(a) that any properties or profits chargeable to tax have been omitted from the first assessments, or*
>
> *(b) that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments, or*
>
> *(c) that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act,*
>
> *then, where the tax is chargeable under Schedule …D or E or F, the inspector shall make an additional first assessment…*

254. Section 186(2) stated:

"(a) subject to any provision allowing a longer period in any class of case, as assessment or an additional first assessment may be made at any time not later than ten years after the end of the year to which the assessment relates.:

Provided that in a *case in which any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to income tax, an assessment or an additional first assessment may be made at any time for any year for which, by reason of the fraud or neglect, income would be lost to the exchequer…*

(d) In this subsection 'neglect' means negligence or a failure to give any notice, to make any return, statement or declaration, or to produce or furnish any list, document or other information required by or under the Income Tax Acts:

255. Sections 14 FA 1988, applicable for 199[redacted]/198[redacted] to 199[redacted]/199[redacted] was subsumed into Section 955(2)(a) of the TCA 1997 which applies to the years of assessment 199[redacted]/199[redacted] to 2003. 955(2) (now deleted by FA 2012 s.129) provides:

"(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 6 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person, after the end of that period of 6 years, and

(ii) no tax shall be repaid to the chargeable person after the end of a period of 6 years commencing at the end of the chargeable period for which the return is delivered,

By reason of any matter contained in the return.

b) Nothing in this subsection shall prevent the amendment of an assessment—

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),…" (emphasis added)

256. It was admitted by the Respondent that there was an onus on the Revenue to establish a "prima facie" case for the application of section 186 and section 955. In support of this the Respondent, among other things, said that:

- the Appellant had lodged £300,820 to his bank account in Jersey which was in his name.
- for the year [redacted] the Appellant introduced funds of IR£ 495,000 to combination of the Trusts settled by him and his wife.
- that for years [redacted] significant amounts of interest was credited to the accounts of three of the Trusts.
- that the Appellant had never returned interest on bank accounts in his name from [redacted] to [redacted].
- information tendered by the Isle of Man Tax authorities provided information which caused a suspicion that proper ROI tax returns were not made by the Appellant.

257. Both parties to this appeal quoted from the Irish Supreme Court case of the *Revenue Commissioners v Hans Droog* (2016) in support of their case. The following statement by Justice Clarke, J at paragraphs 4.7 and 4.8 indicate that what is required of me is to establish whether the Respondent has established a prima facie case that the Appellant had not made a full and true disclosure of all material facts in his income tax returns under appeal.

"4.7 ….An inspector is not, therefore, entitled to engage in a purely "fishing" exploration of whether old returns (i.e. returns more than four years previous) were inaccurate but rather is required to have some reasonable basis for considering the return was fraudulent or negligent before embarking on inquiries. Section 956 (2) (a) allows a taxpayer who feels that an inspector is making inquiries outside the time limit in circumstances not permitted to appeal to the Appeal Commissioners.

4.8 it follows that, at least in general terms, ss. 955 and 956 are designed to prevent the reopening of the tax affairs of the taxpayer in respect of the types of tax covered by Part 41 outside the four year period except in circumstances where the original return

was, or was reasonably suspected to be, fraudulent or negligent. Even if such a reasonable suspicion exists no ultimate exposure to adverse tax consequences can be placed on the taxpayer concerned unless it is ultimately established that the relevant return was in fact not full and true in its disclosure"

258. I have concluded based on the submissions and documents put before me that the Respondent had established such a prima facie case before raising additional income tax assessments for tax years 1[redacted] to [redacted].

Issue 2 and 3

259. The Respondent argued that in relation to the tax year [redacted] there was no specific mention of a "return" in section 186 and the argument whether the amended assessment was 'out of time' for that tax year was not dependent of the availability of the original paper return.

260. The Appellant argued that for tax years [redacted] to [redacted] under section 955 (2)(and its predecessor section 14 FA 1988) it says that "no additional tax shall be payable by the chargeable person … after the period of six years by reason of any matter contained in the return. In the absence of the original return it was not possible to raise an additional assessment on the Appellant.

261. Countering this, the Respondent said the focus in section 955 (2) is not on the "return" but instead on the failure to disclose material facts. The Respondent cited 955(2) (b) which states:

"Nothing in this subsection shall prevent the amendment of an assessment-

(i) *where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),…"*

262. In sworn evidence, provided by Inspector of Taxes [redacted], given on [redacted] 202[redacted] confirmed that Revenue records were kept in Santry, Dublin. He testified as to how the electronic record (called an "AIN") is created. He testified that the information is inputted by an officer of the Revenue from the physical return. He testified as

to what the entries on the AIN signifies, namely the date of the return, the income returned, the allowances and reliefs claimed, the income sector from which the income returned is derived from, the tax, PRSI and health levy assessed. He also gave evidence that the physical returns are retained within the tax district for a number of years and then they are placed in a deep storage facility in Santry.

263. He also confirmed that he had reviewed the electronic record called the "AIN" computer print-outs in relation to each of the tax years [redacted] and [redacted] to [redacted] on the previous [redacted] December. He confirmed that the entries on the printout produced accurately reflect the entries on the electronic record. He also drew attention to the fact that the printout of the AIN for [redacted] (which is not one of the years for which a hardcopy paper return is missing from Revenue records) that that correctly records the income returned on the physical return for that year.

264. The Appellant, through Counsel argued that the records were hearsay in the absence of evidence from the individuals within Revenue who actually inputted the data into the computer records from the original returns. The Respondent countered by stating that:

- hearsay evidence, unlike a criminal case, is permitted in a tax appeals case
- the sworn evidence of [redacted] confirms the position
- the information tendered by the Isle of Man Tax authorities provided information which caused a suspicion that proper returns were note made by the Appellant
- the Public Document exception (highlighted from McGrath, *Evidence* 2 nd edition– *Cullen v Clarke, Coleman V Southwick*) which grants a qualifying document to be prima facia evidence of their contents, applied to tax returns.

265. Counsel for the Appellant argued that the Public document exception could not apply to the private tax returns of the Appellant. I am in agreement with the Appellant on that specific point.

266. Counsel for the Appellant argued that absent sight of the original hard copy tax returns (the Respondent admitted it could not find the five original returns) that Revenue could not form a view that the return was not a full and true return; that Revenue cannot form the view, in the absence of the paper return, that full and true disclosure had not been made of all material facts necessary for raising an assessment.

267. Counsel for the Respondent argued that in the absence of a return being made, that six-year limitation period doesn't begin to run because it runs from the end of the year in which the return is made. So, if the Appellant is arguing that he didn't make returns, then there is no limitation period.

268. The Respondent argued that there is nothing in section 955 that could possibly justify an assertion that it is in some way a condition precedent that the physical return either be available to the Revenue Commissioners in forming a reasonable suspicion, or indeed that it be produced during the Appeal.

269. For guidance in relation to the interpretation of Section 955, the Respondent opened a recent pronouncement of the Supreme Court on the interpretation of tax statutes in the "Bookfinders" decision. This was the decision of Mr. Justice O'Donnell in the Supreme Court in which he considered the correct approach to be taken to the construction of charging sections of the Taxes Consolidation Act. Counsel for the Respondent pointed out that a distinction is to be drawn between charging sections and procedural sections; that Section 955 is not a charging section; that it does not create a charge to tax; that it merely controls and regulates the manner in which a taxpayer is to be assessed to tax and in that way it is solely procedural.

270. Counsel for the Respondent explained the background to the 'Bookfinders' case that there was uncertainty in relation to charging sections as to whether the stricter traditional more literal approach should apply where you look at the words themselves and their plain and ordinary meaning and if the taxpayer comes within the charge to tax as defined by those words, then they are within the charge and if they don't, they're not within the charge. Or whether a more interpretative approach, a purposive approach, should be applied where you look to the object of the Section in order to determine whether or not the taxpayer comes within the charge.

271. During the hearing, the following was quoted by Counsel for the Respondent from the judgement of Mr. Justice O'Donnell in the Supreme Court in the Bookfinders case:

> *"53. In the relatively recent case of Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., 4th June, 2019), McKechnie*

J. (who, it might be observed, was the author of the dissenting judgment in O'Flynn) delivered a judgment in relation to the application of difficult to construe provisions of the Tax Acts. I agree fully with what he said there, and which merits an extensive quotation (para. 62):- "62. In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation involved, those provisions, when construed and interpreted appropriately, are still capable of giving rise to the liability sought, then such should be so declared.

63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet &Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that…"

272. I agree with the Counsel for the Respondent who argued that for the Appellant to suggest that it is a precondition to Revenue forming that reasonable suspicion, or for me to exercise my appellate jurisdiction, that the physical return must be available for submission (at the appeal), would make "a travesty of the balanced system which is guaranteed by the Taxes Consolidation Act, and the balance between the rights of the taxpayer and the rights of the Revenue Commissioners as the body in which the care and management of the raising of taxes in order to fund the State is vested". For me to accede to the Appellants argument, which I cannot, would mean that the taxpayer would get a benefit of a tax-free exemption in perpetuity, purely because his physical return for the relevant

years could not be traced within the deep storage facility, even though there is a perfectly reliable record on the computer record of what was returned by him in relation to his income for those years.

273. Accordingly, it is my view that the Respondent was not precluded from raising an additional assessment for tax year 198[redacted]/8[redacted] within the provisions of section 186 ITA 1967 in the absence of the original hard copy paper tax return and that the Respondent is entitled to rely on the "AIN" computer record for that year in forming its view on the veracity of the Appellant' tax return for that year.

274. I am also of the view that the Respondent was not precluded from raising an additional assessment under section 955 / section 14 FA1988 for each of the four years [redacted] to [redacted] in the absence of the original hard copy paper tax returns and that the Respondent is entitled to rely on the "AIN" computer record for those years in forming its view on the veracity of the Appellant' tax return for those years.

PART 2

ONUS OF PROOF

275. Submissions were put forward by both the Appellant and the Respondent as to where the burden of proof lies in this appeal.

276. The issue of delay arose early in the hearing. The Appellant argued that the Respondent should be criticised for the delay that arose in the course of the investigation they undertook in respect of the funds associated with the Appellant and the Trusts. The Appellant argued that he had responded to the initial Respondent queries raised in [redacted] 200[redacted], by [redacted] 200[redacted] when he furnished statements of affairs in respect of the years 199[redacted], 909[redacted] and 200[redacted] and that the matter did not then proceed for a number of years until 27 November 2012, when Revenue took up their inquires afresh and pursued them with the Appellant.

277. The Respondent argued that the Appellant was suggesting that he should be relieved of the burden of proof which typically rests on the Appellant in tax cases and that in some way I should give greater weight to his untested evidence and ignore the fact that there are inconsistencies in his account and evidence which he has furnished. The Respondent acknowledged that there was a delay between 200[redacted] and 201[redacted]. However the Respondent felt that the Appellant had not fully answered the questions raised in 200[redacted] as he had not disclosed the source of the funds settled on the Trusts and that the Appellant could be under no misapprehension that the tax investigation was continuing. Secondly, at no stage was it indicated to the Appellant that the investigation had be concluded. Thirdly, the Respondent felt that there had been a significant delay on the Appellant's part, between November 201[redacted] with the resumption of the Revenue's enquiries and the matter coming to appeal in 202[redacted], following assessments having been raised in [redacted] 201[redacted].

278. It is my view that there were delays on both sides in relation to this appeal and as such nothing hangs on these delays in relation to my determination.

279. Having considered the submissions, I agree with the Respondent that reversal of what is the normal onus of proof falling on a taxpayer in a tax appeal, should be no more than a *prima facie* one. I find support for this in the statutory framework for tax appeals and the self-assessment nature of the tax system. The taxpayer is best placed to know his own affairs in contrast to an Inspector whose knowledge of the taxpayer's affairs is limited and is usually predicated on the level of information provided by the taxpayer himself. It is my view that the burden of proof on the Inspector must accord with the nature of self-assessment machinery and in the context of such a system cannot be more than a *prima facia* one. I agree with the Respondent, who argued that to impose a higher burden on an Inspector would therefore fly in the face on the established position in relation to the burden of proof in tax appeals. To impose a higher burden on the Inspector would trespass on the ordinary burden of proof that rests on the taxpayer in income tax appeals and offends against first principles of he who asserts must prove.

280. It is my view that the additional assessments to income tax on the Appellant for the tax year [redacted] to [redacted] were correctly made.

PART 3

Witness Testimony

Medical Condition of the Appellant

The Appellant gave sworn evidence on Day 2, 3, 4 of the hearing.

281. The Appellant gave his evidence-in-chief and was cross examined on his evidence by Counsel for the Respondent during this time. At the end of Day 4, the cross examination by the Respondent was incomplete. After day 4 (on [redacted] 202[redacted]) and before day 5 (on [redacted] 202[redacted]) following submissions from the Appellant's Counsel and advisors, and following a report of [redacted] dated [redacted] 202[redacted](relating to A[redacted] , with objections from the Respondent, I excused the Appellant from further attendance at the Hearing. He was thereby precluded from providing further sworn evidence. At that stage, the Respondent's cross-examination remained incomplete.

282. As part of the submissions to the TAC both before and during the Hearing I received medical reports relating to the cognitive ability of the Appellant. These were as follows:

1. Report from Dr. [redacted], dated [redacted] 202[redacted]
2. Report from Dr. [redacted], dated, [redacted] 202[redacted].
3. Report from Dr. [redacted], dated, [redacted] 202[redacted]

283. In summary the [redacted]

- In [redacted]

- The consultant psychiatrist indicated that the Appellant's [redacted].

284. I invited the parties to the Appeal to make submissions to me on the weight I should attach to the evidence provided by the Appellant through a sworn affidavit supplied in advance of the hearing and through sworn oral evidence provided by him on days, 2, 3 and 4.

Weight to attach to Appellant's evidence

285. The Appellant argued that I must determine the weight to attach to the oral evidence already given by the Appellant notwithstanding his evidence was not subject to a complete cross-examination. The Respondent argued that I should disregard all the evidence provided by the Appellant as his evidence was not fully tested through cross examination or at best treat the Appellant's evidence with extreme caution.

286. Counsel for the Respondent argued that in reviewing the weight of the evidence provided by the Appellant I should consider and:

- regard the Appellant's evidence as extremely fragile, as it was not subject to full cross-examination;
- that the evidence given by the Appellant was, in large part, not evidence-in-chief , meaning not spontaneous evidence out of his own mouth. What he was doing was he was confirming a witness scripted statement.
- that large tracks of the Appellant's evidence consisted of confirming volumes of documentation which the parties agreed could be tendered in evidence but which are not particular relevant to the issues under appeal.
- That the Appellant's witness statement is in very large part substantially a reproduction of what's in the Appellant's Statement of Case and therefore cannot have been based on the Appellant's original language. It includes terms of art,

technical, legal terms that the Appellant could never have known of himself, much less have understood, For example his repeated use of the word "divested" , a word not in common usage, not a word in common parlance.

287. The Respondent argued that in [redacted] 201[redacted] when the Appellant's cognitive status was considered by a [redacted].

288. Given that there is no benchmark in respect of the Appellant's MoCa score prior to him commencing his evidence in [redacted] 202[redacted]. and given that his previous available MoCa score was taken in [redacted] 201[redacted], some two and a half years before he commenced giving his evidence, [redacted]

289. I found that I could rely on elements of the witness statement to extent that they were backed up by verifiable documents put in the documentation submitted to me in advance of the hearing.

290. The Respondent also cited the conduct of the Appellant while undergoing cross-examination (albeit incomplete). The Respondent felt that the Appellant's answers deteriorated and he showed a determination not to engage or an inability to engage with certain questions put to him by the Respondent.

291. I found that the Appellant, when giving sworn evidence before being excused from the Hearing, had difficulty in recalling certain facts and there were certain inconsistencies in his evidence. The Appellant appeared to have very good recollection on minute points of detail relating to his farming and business activities, yet was vague, somewhat evasive and imprecise when dealing with questions pertaining to his tax affairs. He appeared to have some difficulty in answering some of the questions put to him by Counsel for the Respondent. I was unclear whether this was a lack of understanding on the Appellant's part or alternatively an unwillingness by him to answer the questions put to him.

292. For the above reasons and taking account of the Appellant's and Respondent's submissions on this issue, I must necessarily not attach too much weight to the evidence provided by the Appellant during his sworn testimony and incomplete cross-examination by the Respondent. I must, therefore, treat statements of fact made by the Appellant in his sworn affidavit with some caution and some scepticism.

Evidence of Appellant's Son, Mr. [redacted]

293. Sworn evidence was provided by Mr [redacted], a son of the Appellant.

294. The witness indicated that at no stage was he aware that he and his siblings were beneficiaries of the trusts in Jersey and Isle of Man nor was he or his siblings aware of any trust established by the Appellant's father-in-law for his benefit, as asserted by the Appellant (the inference I gleaned is that he would not have expected financial support from the Trusts when he and his siblings were entering into the purchase of business assets after the establishment of the Trusts and therefor recourse to bank borrowings was required). He also indicated that he was unaware that he and some of his siblings were listed as beneficiaries in the Jersey and Isle of Man trusts even during the Appeal process which became active from 2013 onwards as he said this matter was not discussed with him by his father. I found this difficult to reconcile with the witnesses' background [redacted], supporting his father through his attendance at the Hearing days and prior to that, accompanying his father to meet legal advisors in the Isle of Man.

295. The Appellant's son also said that his father lived exclusively in NI(UK), continuously up to [redacted] while the rest of his family continued living in ROI, notwithstanding it was the Appellant's own submission that around [redacted]

Evidence of the Appellant's wife

296. The Appellant's wife, [redacted], was not capable of giving oral evidence. The question arose as to whether the Appellant's wife should be allowed give evidence through an admitted affidavit. The Appellant submitted, through Counsel, that the Appellant's wife's evidence by way of sworn affidavit should be allowed by reason of s949AC and s949H of the Taxes Consolidation Act 1997 and a tribunal's greater flexibility in accepting evidence of this kind. The Respondent argued that it should not be admitted because it would not be in a position to cross examine the Appellant's wife.

297. During the Hearing I determined that I would not accept as evidence, a sworn affidavit from the wife of the Appellant, when Counsel for the Appellant, indicated that the Appellant's wife was unable to attend for [redacted]. I made this determination because the Respondent's would necessarily be unable to cross examine the Appellant's wife.

Expert Witness on the Establishment of Oral Trusts in NI (UK)

298. [redacted], provided expert written witness testimony on the permissibility of establishing an oral trust under NI (UK) law. This testimony was not challenged by the Respondent.

Sworn Evidence of Inspector of Taxes Mr. [redacted]

299. Inspector of Taxes [redacted] gave sworn evidence relating to the computer records kept by the Revenue Commissioners. I found his evidence to be entirely credible.

PART 4

Source of the Funds? Were oral trusts created by Appellant's father-in-law?

300. The submissions from the parties explain their views as to the provenance of the funds, in the name of the Appellant and his wife and how they came to light, through an exchange of information between the Irish tax authorities and the Isle of Man tax authorities.

301. The next part of the hearing was taken up with consideration of whether or not the father-in-law of the Appellant, had created an oral trust or trusts for the benefit of the Appellant's children, as asserted by the Appellant, and thereby this was the source of the unexplained funds held in the name of the Appellant (and his wife) or in the offshore Trusts during the tax years under appeal.

302. The Appellant also asserted that the establishment of the Trusts were in effect the formalisation of an earlier (pre 198[redacted]/8[redacted] oral trust which was established by his father-in-law in favour of the Appellant's children.

303. Before the hearing, I directed that a certain document , which I will call "TAB 137", referred to by Appellant as listed in the documentation submitted to the TAC prior to the Hearing but not actually included therein, should be identified and forwarded to the Respondent and the TAC in advance of the Hearing. The Appellant forwarded this document as directed. During the hearing I did not receive a fully satisfactory explanation from the Appellant or Counsel for the Appellant as to the provenance of this document, notwithstanding its importance in the trail of establishing the veracity of the oral trust asserted by the Appellant. I will address this further below.

304. Within TAB 137, the Appellant identified bank statements dated [redacted] 201[redacted] (this document appears to have been generated on [redacted] 201[redacted]) in the name of the Appellant and his wife and was described as a "Sterling deposit, general non-resident account". The IBANs indicate that the accounts are either UK or NI (UK). At the top left of this document it says "Hold correspondence". This appears to mean that the owner of the

Account (the Appellant) did not wish to receive correspondence in relation to this account at his home address. It also appears that the Appellant is classified for bank purposes as non-resident in the UK or NI (UK).

305. This document appears to show transfers from the Appellant and his wife's other bank accounts (Some of unknown identity but some from [redacted] NI According to the Appellant they represent oral trust funds settled by the Appellant's father-in-law) into a Sterling pound deposit account in NI(UK)) prior to those funds together with credited interest, being withdrawn by the Appellant and then settled on the Trusts on [redacted] 199[redacted]

306. I examined TAB 137 and it appears that one of the accounts or statement with a number ending in "45" runs from [redacted] 198[redacted] to [redacted] of 199[redacted] and it shows three substantial lodgements, together with credited interest as follows:

- Cheque received (presumably from the Appellant) on 1st September of £300,820.52,
- Various interest credits amounting to £301,336.09
- In February 1990 a deposit of two cheques amounting to Stg£250,347.74 from the Appellant.
- In February of 1992 again cheques amounting to £61,365.19 received from the Appellant and his wife.

The last entry on the statement is cash collected by the Appellant where it is debited £913,849.54 which is the day before the first declaration of trust by the Appellant of the offshore Trust.

307. Another of the Statements in TAB 137 with account number ending in "46" shows the first entry in [redacted] '9[redacted] which reads: "Received by Telex from [redacted] NI and £243,463.23 is credited, The following entry, value date of [redacted] 199[redacted] is the closure of the account having been opened in error.

308. The third statement within TAB137 is a statement generated on [redacted] 201[redacted], with account number 142407 in the name of the Appellant and his wife. It is a Sterling deposit general non-resident account. The first entry is [redacted] 199[redacted] and it's £106,671.51 received from the Appellant and his wife (account number [redacted]). Then there is interest

credit and then on [redacted] 199[redacted], again the account is closed and cash collected by the Appellant of Stg£107, 248.71.

309. On the 4th statement in TAB 137, there is yet another account numbered [redacted], again in the name of the Appellant and his wife. On [redacted], this account states that it received in error funds by Telex from [redacted] NI £106,671 and then this account was closed and the funds transferred to the account 142407 (see 3rd statement in Tab 137.).

310. During the hearing I thought to establish the provenance of this document (submitted by the Appellant and relied upon by the Respondent). The Appellant said he could not remember the document and did not know where it came from. Counsel for the Appellant offered little entitled enlightenment. After a number of my questions to Counsel I deduced, although I cannot be certain, that the following is the provenance of the document: this document was sourced from the current trustees ([redacted]) of the T1 still in existence, settled by the Appellant. In 201[redacted], [redacted] undertook an exercise putting together documents, relating to this appeal on behalf of the Appellant, relating to the Trusts and offshore bank accounts related to the Appellant. The document shows banking transactions to [redacted] 199[redacted], which predates the establishment of the offshore Trusts,

311. This means that transfers into the bank accounts shown in this document represent transfers from the Appellant and his wife of monies having their name in the period up to [redacted], some of which are from [redacted] NI (UK) non-resident bank accounts in the name of the Appellant and or his wife.

312. The Respondent argued that there was no evidence whatsoever that the Appellant's father-in-law had created an oral trust in favour of the Appellant's children. The only evidence put forward by the Appellant was four paragraphs of unsubstantiated statements in his sworn affidavit that his father-in-law had created these trusts. The Respondent questioned that the father-in-law asked the Appellant to wisely invest the money in the oral trust at a time when the father-in-law himself had no bank account; that the bank accounts holding the money in the purported oral trust were not described as trust accounts nor were they ever reported as trust accounts.

313. The following is an extract from the Appellant's sworn affidavit:

"…during the period of his [redacted]nd the onset of the troubles, [redacted], father in law of the Appellant) gradually divested himself of his funds, in the expectation that he did [redacted]… and he often mentioned that it was no longer safe to have any money around the house.

In particular, I recall one Sunday morning after mass when [redacted] told [redacted] and I that he was going to give us money for the benefit of our children, and he started to give us cash sums after that.

As part of the process of divesting himself of this cash, [redacted] asked my wife and me to hold money on trust for the benefit of our children. He expressly told us to invest this money in secure investments. On each occasion when [redacted] would give me money, I would immediately go to a bank to lodge it. [redacted] and I never considered this money to be our own money and were always of the view that it was to be held and invested for the benefit of our children."

314. With regard to the creation of oral trusts, the Appellant argued that the creation of an oral trust requires three certainties to be present:

i. Certainty of intention
ii. Certainty of subject matter
iii. Certainty of objects

and that all conditions were met in relation to the father-in-law oral trusts.

315. The Respondent sought to put into context the transfers made from Bank accounts in the name of the Appellant and his wife, purportedly held in a trust settled by the Appellant's father-in-law, for the benefit of the Appellant's children. The Respondent argued the total funds the Appellant transferred to Jersey were IR£1.956 million in the early 1990s, an enormous sum of money by anybody's standards, the owner of which would have been a millionaire twice over in the early 1990s when money values were very, very different to what they are now.

316. We know from my material findings of fact that the following monies were transferred to offshore trusts in Jersey and the IOM. Between [redacted].

- Funds totalling IR£ 1,405,479 was placed in three declared trusts, referred to as the T1 T2 and T3 on [redacted] 199[redacted], with the Appellant and his wife documented as settlors of these trusts.
- On [redacted] 199[redacted] the equivalent of IR£54,812 was transferred into the T3

- On [redacted] 199[redacted] IR£ 194,587 and £131,523 was settled by the Appellant on the T4 in the IOM.
- On 7 March 1995 £65,000 was settled on the T3 and £105,000 was settled on the T2

317. This means that between [redacted] the Appellant and his wife settled funds amounting to IR£1,901,017 in the offshore trusts.

318. (It should be noted that during evidence, the Appellant put forward a highly improbable story about the source of the funds settled on T3 on [redacted] 199[redacted] of IR£54,812. The Appellant identified the source of these funds, under cross examination, as being two creditors of his father-in-law (who had died in 197[redacted] and who had [redacted]); that they had voluntarily come to the Appellant in [redacted], some twenty eight years after his father–in–law retired from farming, with £54,812 and volunteered it to him in settlement of a debt owing by them to the Appellant's deceased father-in-law)

319. It was the Respondent's argument that the Appellant's untested evidence that all of the funds settled on the Jersey Trusts, T1 T3 and T2 in 1992 and the IOM trust, T4 in [redacted], were originally given to him on trust (oral) between [redacted] by his late father-in-law and that these funds together with accumulated interest were settled in the offshore Trusts. That I should regard this as untenable or inherently improbable and the evidence is insufficient.

320. I agree with the Respondent that the Appellant's version of the provenance of the funds is inherently improbable for the following reasons:

321. The only evidence supporting the Appellant's position is the Appellants evidence-in-chief, evidence which was not spontaneous evidence because it was scripted by way of his sworn witness statement.

322. Furthermore, the Respondent rightly argued that it was implausible that the Appellant's father-in-law was the original source of the funds which ultimately were transferred in [redacted] into the Jersey and Isle of Man Trusts, and by inference that the funds must have belonged to the Appellant himself. While the Appellant's father-in-law was a [redacted] Again, in the absence of evidence and given the size of the quantum of funds transferred to the Jersey and Isle of Man Trusts it is difficult to accept that the Appellant's father-in-law was the source of all the funds transferred to the offshore trusts.

323. I do accept that interest rates were very high for periods from [redacted] and that accumulated interest would cause funds to accumulate rapidly. However, the size of the funds settled on the offshore Trusts by the Appellant and his wife is so large that it cannot be explained solely by the effect of high deposit interest rates generated on capital.

324. More importantly, the Appellant asserted that the Trusts were set up for the benefit of his children, at the behest of his father-in-law, yet none of his children benefited from these trusts. The Appellant was excused from the hearing [redacted], before I was able to put this question directly to the Appellant. I then sought an explanation for this from Counsel for the Appellant but received none.

325. If the Trusts were, as the Appellant asserts, setup for the benefit of his children, then why did the Appellant allow, when selling his personal assets to his children, at what appears to have been market value, them to be substantially funded by his children through their taking out high cost and substantial bank borrowings? Surely, if the children were to be the beneficiaries of these Trusts, why were no funds taken from these Trusts to support the children at a time when they most needed it? The Appellant's testimony in relation to these

transactions leads me to believe that the assertion that the funds transferred into the Jersey and Isle of Man Trusts were funds, in effect, settled by the Appellant's, father-in-law for the benefit of the Appellant's children, to be entirely inconsistent with the evidence put before.

326. For these reasons, coupled with the facts that constitutional documents associated the Jersey and Isle of Man Trusts make no mention of the Appellant's father-in-law or the provenance of the funds entering those trusts and that any distributions from the Trusts subsequent to the appeal period were made only to the Appellant, I have concluded on the balance of probabilities that the Appellant is the source of the funds transferred to the Jersey and Isle of Man Trusts.

327. As a consequence of my conclusion that the Appellant's father-in-law was not the source of the funds transferred to Jersey and Isle of Man Trusts I must also conclude that the Appellant had the funds in the years prior to the establishment of the Jersey and Isle of Man Trusts in [redacted] respectively. That being the case it is necessary now to consider where the Appellant was domiciled and resident in the years under appeal, both prior to the establishment of the Trusts and subsequent to the establishment of Trusts, in order to determine whether a tax liability arises on the Appellant in respect of those funds together with any interest income arising in those Trusts.

PART 5

Where was the Appellant tax resident in the period 198[redacted]/8[redacted] up to 199[redacted]/9[redacted]?

328. The following Table sets out the tax implications for the Appellant depending on his domicile and tax residence during the years under appeal. This Table is a table that was put before me during the Hearing and was agreed by both sides.

	Tax Status of the Appellant	**Charge to Income Tax**
1	If Appellant is domiciled and tax resident in NI(UK)	On Irish source income

2	If Appellant is domiciled in NI (UK) and tax resident in ROI	On Irish source income; On foreign income from an employment, trade or profession to the extent that duties of employment, trade or profession are exercised in ROI; On foreign income remitted into ROI
3	If Appellant is domiciled in ROI and tax resident in NI (UK)	On Irish source income
4	If Appellant is domiciled and resident in ROI	On worldwide income

329. The Appellant submits he was domiciled in NI (UK) between [redacted] to [redacted]. The Appellant also submits that he was resident in NI (UK) during this time. The Appellant also submitted that he may have been resident in ROI under Irish tax rules in the period [redacted] – [redacted].

330. The Appellant accepted that he was domiciled and tax resident in ROI from [redacted] onwards.

198[redacted]/8[redacted]- 199[redacted]/9[redacted].

331. The Appellant submitted:

"the appellant did have a place of abode available to them in the Republic of Ireland from 197[redacted], however, it is the Appellant's contention that with effect from 9[redacted]/9[redacted] was not resident in the Republic of Ireland…

Therefore there is a possibility the Appellant could have been considered tax resident in the Republic of Ireland years 8[redacted]/8[redacted] to 9[redacted]/9[redacted], however it is equally possible that the appellant could be considered resident in Northern Ireland during that time…

…it is the Appellant's submissions between 8[redacted]/8[redacted] and 9[redacted]/9[redacted] he stayed more frequently in Northern Ireland than he did in the Republic…"

332. The Appellant and the Respondent both agreed that for the years [redacted] to [redacted] under the ROI tax rules at that time, the Appellant would have been deemed to be resident in ROI under Irish tax rules because he had a home in the ROI then and he spent time in the ROI.

333. Where they disagreed was on whether and how the Ireland UK DTA rules applied so as to treat him, as the Appellant argued, exclusively resident in NI (UK) for those years or as the Respondent argued, exclusively tax resident in ROI in those years.

334. It is necessary therefore to examine the Appellant's tax resident status under the Ireland / UK DTA in the following periods:

198[redacted]/8[redacted] to 199[redacted]/9[redacted]

199[redacted]/9[redacted] to 199[redacted]/9[redacted]

199[redacted]/9[redacted] to 200[redacted] (Agreed between the parties that Appellant is ROI tax resident)

198[redacted]/8[redacted] to 199[redacted]/9[redacted]

335. The Respondent argued that the Ireland / UK tax treaty could not apply in determining the tax residence of the Appellant in this period as there was no known dispute

on double taxation between the ROI and NI(UK) taxing authorities. I reject this argument from the Respondent because the Treaty is part of Irish tax law and the taxing rights of each jurisdiction are prescribed in the DTA.

336. We know that when the Appellant filed his tax return in ROI the year 8[redacted]/9[redacted], 9[redacted]/9[redacted] and 9[redacted]/9[redacted] he did not tick the box on those tax returns to indicate that he was non-resident or non-domiciled in ROI (it was explained to me by the Respondent that there was no requirement to tick such a box in other years returns). The Respondent argued that in his applications for an Irish passport in 198[redacted] and 199[redacted] he furnished his residential address as the ROI Farm ;when filing his tax returns in the ROI relating to his farming activities he provided his address as the ROI Farm ;that the first time he asserted that he was non-resident in this country was on [redacted] 201[redacted] when submitting his notice of appeal and that an earlier submission by his tax agents on [redacted] 201[redacted] made no such contention.

337. Furthermore, the Respondent argued that the Appellant had prepared statements of affairs in [redacted] 200[redacted] in relation to enquiries from the Irish Revenue. One of these statements of affairs related to 199[redacted]. That statement was furnished by [redacted] who were the Appellant's tax consultants. It was not stated at that time that the Appellant was non-resident or indeed non-domiciled in 199[redacted].

338. The Respondent argued that correspondence from the UK Revenue Commissioners dated [redacted] 201[redacted] addressed to the Appellant, which stated :

> *"Thank you for your letter received [redacted] requesting personal information under the terms of the Data Protection Act 1998. Please find enclosed self-assessed tax returns and calculations for 9[redacted]/9[redacted] to 9[redacted]/200[redacted]. There are no other tax returns held. Self-assessment systems notes that self-assessment was only set up in the 9[redacted]/9[redacted] tax year. Information prior to this date was held on other systems which are no longer available…*
>
> *Please note that the number [redacted] which you have quoted is a temporary reference number and I am unable to trace a national insurance number for you."*

confirms that the Appellant never had more than a temporary reference number in NI (UK) and that the Revenue Commissioners in the UK were unable to trace a national insurance number for the Appellant.

339. Furthermore the Respondent argued that if the Appellant was domiciled and resident in Northern Ireland prior to 9[redacted]/9[redacted] that his tax return for the year 9[redacted], which was submitted to the Tax Appeals Commission, is completely inconsistent with that position because the Appellant returned income of just £ 464 in Northern Ireland and that was a year in which he returned income in the ROI of circa £41,000. If he were domiciled and resident in Northern Ireland he would have been required to disclose his worldwide income in his Northern Ireland tax return.

340. The Respondent argued there was no evidence of the Appellant holding a bank account in Northern Ireland; the only disclosed bank accounts in 199[redacted] were in the ROI.

341. The Appellant testified that his records contained in NI Farm NI (UK) were burned in 199[redacted] after he left to reside in the Republic of Ireland.

> *"I would have more documents in Northern Ireland that I had Republic of Ireland. But I couldn't get access to them whenever this enquiry started. Because whenever we left, whenever I left Northern Ireland in 199[redacted] the house was cleaned out and any documents going back any more than 4 or 5 years, they were all destroyed, they were burned I had no call for them anymore."*

342. The Appellant has no entries or other records to confirm his presence or time spent in NI (UK). He did give evidence in his witness statement that he continued to live on the NI Farm in NI (UK) to protect it for security reasons. He did this even though the rest was family, wife and children have moved to the ROI Farm in 197[redacted]. The Appellant produced no utility bills, or home-makers bills for any period after 197[redacted]. However it is curious that in his submissions of evidence, the Appellant submitted volumes of bills, maintenance bills, outgoings but only for years prior to 197[redacted].

343. Interestingly, on [redacted] 198[redacted] the accountants acting for the Appellant, wrote to him in the following terms:

"further to your query regarding the position on opening sterling bank accounts in Northern Ireland, we have been in contact with the Central Bank into Dublin. They have informed us that, in order to open an account such as this, written permission is needed from the Central Bank. This will only be granted if they decide there is sufficient reason. For example, a high level of across the border trading activity. We would imagine therefore that the fact you operate a farm in Northern Ireland might constitute a sufficient reason. However a case still has to be put to the Central Bank before permission may be granted."

344. This implies that the Appellant did not have a bank account in Northern Ireland prior to this date. It is also difficult to reconcile with the Appellant's assertions that he was resident and domiciled in NI (UK) at this time.

345. Also Counsel for the Appellant indicated that the Appellant was only registered to vote in NI (UK) for the qualifying date [redacted] 197[redacted] and documentation from the Department of Culture, Arts and Leisure (NI (UK) indicates while he and his wife were registered to vote on the register in 197[redacted] but neither names were not on the 198[redacted], 199[redacted] and 199[redacted] registers.

346. Based on the evidence put before me and the testimony of the Appellant, I am of the view that the Appellant was tax resident in ROI for the years 198[redacted]/8[redacted] to 199[redacted]/9[redacted]. I have no proof, apart from the testimony of the Appellant, which I must treat with considerable caution, that he was tax resident in the UK in that same period. However, in order to address that possibility, I will look at the Double Tax Treaty between ROI and UK.

347. Given that the Appellant had a presence in both ROI and NI (UK) in this period (although it was not proven that the Appellant qualified under UK tax rules that he was resident in NI (UK) in this period), I believe, nevertheless, that the ROI / UK DTA rules need to be consulted to resolve uncertainties regarding the tax residence status of the Appellant for those years.

348. Paragraph 1 of Article 4 reads:

"the term resident of a contracting state means subject to the provisions of paragraphs 2 and 3 of this article, any person who, under the law of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. The term does not include any individual who is liable to tax in the contracting state only if he drives income from sources therein. The term resident of the United Kingdom and resident of Ireland shall be construed accordingly."

349. Paragraph 2 of Article 4 reads:

"Where by reason of the provisions of paragraph (1) of this article an individual who is resident of both contracting states then his status will be determined in accordance with the following rules:
(a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both contracting states he shall be deemed to be a resident of the contracting state with which his personal and economic relations are closer, that is his centre of vital interest.

350. The Appellant in its submissions asserted the following:

"it is the Appellant's submission that his centre of vital interest between [redacted] *and* [redacted] *was Northern Ireland. The appellant lived and worked in Northern Ireland. The appellant claimed agricultural grants in Northern Ireland in respect of his farming business the Appellants bank account was with* [redacted] *in* NI *as was his regular medical practitioner Dr* [redacted]*. The appellant voted in Northern Ireland. The appellant's motor vehicles were registered in Northern Ireland he paid car tax there. The appellant's family attended mass the parish church in* NI *The appellant children where christened in Northern Ireland and later attended primary school and receive Communion there. The appellant's children also play for the local GAA teams in till the early 1990s."*

351. No evidence was put before me by the Appellant to validate that the Appellant's personal or business bank account was in Northern Ireland. The Appellant's sworn Witness Statement and all of his assets as of 199[redacted] disclosed only accounts with the Bank of Ireland in ROI and none in NI (UK).

352. While, there was no evidence put before me in relation to the Appellant's assertion in relation to his medical practitioner nor in relation to the registration of his vehicles, I am inclined to accept that at some stage within this period that this was the position for the Appellant, based on the demeanour of the Appellant when imparting certain details about his personal domestic arrangements while giving sworn testimony.

353. The Respondent argued that the Appellant's centre of vital interests in this period 198[redacted]/8[redacted] to 199[redacted]/9[redacted] were manifestly in the ROI; that his wife and family resided at all times ROI; his family home was in ROI; he was an Irish citizen and an Irish passport which he applied for in 198 [redacted] and was renewed in 199[redacted]; all his children were educated in ROI from 197[redacted] he owned one property in NI UK, thereafter all his property acquisitions, with the exception of a small [redacted] in NI (UK), were in ROI. He acquired a [redacted] shop in ROI in 196[redacted], a farm in ROI in 197[redacted] and adjacent farms in ROI in 198[redacted]/198[redacted]; that when the Appellant sold these ROI assets to his children in 200[redacted]/200[redacted] these property disposals netted him the sum of €1.7 million and of that sum of only € 212,000 was referable to the NI (UK) property assets.

354. I have formed the view that based on the submissions and evidence put before me the Appellant's centre of vital interest was in ROI for this period and he would in any event be tax resident in ROI under the DTA Rules, were they determinative in this period, which is moot.

199[redacted]/9[redacted]-199[redacted]/9[redacted]

355. The Respondent pointed out that new rules on ROI residency applied after the Finance act 1994. The Respondent argued that the onus is on the Appellant to show that he was non-resident post March 1994 and that the only evidence put forward by the Appellant was his witness statement:

> *"even though my wife and children move to the Republic of Ireland, I continued to live at* NI Farm *in* NI *Therefore the vast majority my time and effort was spent working in Northern Ireland in whole form as opposed to* [redacted] *Farm…*

I also stayed in a NI Farm *to ensure protect because I thought it was* [redacted]*... I frequently stayed with my wife's uncles, who lived in neighbouring farms within Northern Ireland"*

356. The Appellant's son gave sworn testimony that his father had at all times and all nights been spent in NI (UK) until his ultimate return to the ROI in [redacted] .When asked whether he believed his parents were then, in effect, a separated couple, under these living arrangements, the son strenuously argued that that was not the case. I believe his testimony is inconsistent with the position outlined by the Appellant where in his outline of argument he stated that he stayed more frequently in NI (UK) than in the ROI. The son's testimony was that he lived exclusively in NI (UK) until [redacted]. So I cannot rely on the sons' testimony to establish the facts.

357. Based on the dearth of evidence put forward by the Appellant about his purported tax residence in NI (UK), and given the business activities and apparent family activities of the Appellant in this period, I have no evidence to disbelieve, on the balance of probabilities, that the Appellant's ROI tax residence status continued in the period [redacted] to [redacted].

358. I concur with the Respondent when it is said that the Appellant had failed to discharge the onus of proof and as a matter of law he was resident here in the ROI for all the years from [redacted] to 1[redacted] at which point the Appellant admitted that he became resident and domiciled in ROI.

PART 6

Where was the Appellant domiciled in the period 198[redacted]/8[redacted] up to 199[redacted]?

359. The concept of domicile is important in this appeal. As you will see from the table above where the Appellant is domiciled is critical in determining the tax position associated with the assessments under appeal.

360. Domicile is a relationship between an individual and a place. It is their permanent home. Every person has domicile. You have a domicile of origin when you are born. Domicile of origin will be the place where an individual is born unless that is not his father's domicile, in which event, he will take his father's domicile. Again domicile of origin persists, there is a presumption in favour of it throughout an individual's lifetime. Domicile of origin will only be displaced when an individual acquires a domicile of choice.

361. Domicile of choice arises when the facts suggest or infer that an individual has formed an intention to permanently live in another country then that country becomes his domicile of choice. The domicile of choice will cease once the individual ceases to reside in that place and/ or abandons the intention of permanently residing in that place.

362. Counsel for the Respondent pointed out to me that the leading case which distinguishes between a domicile of origin and domicile of choice is *Udny v Udny* (1869 Scotch Appeals).

363. When an individual adopts a domicile of choice, the domicile of origin remains in the background, so to speak, and it resurrects itself once an individual ceases to reside in the location of the domicile of choice and resolves to permanently abandon the domicile of choice.

364. The seminal statement regarding the requisite intention for the purposes of determining a change of domicile and which has been cited with approval on a number of occasions in the High Court and the Supreme Court over the past two decades is that of Budd J. in Re Sillar ([1956] l.R. 344) as follows:

> *"From consideration of the case law it is clear that it is a question of fact to determine from a consideration of all the known circumstances in each case whether the proper inference is that the person is shown unmistakably by his conduct, viewed against the background of the surrounding circumstances, that he had formed at some time the settled purpose of residing in the alleged domicile of choice. Put in a more homely language, that he had determined to make a permanent home in such a place. That involves, needless to say, an intention to abandon his former domicile.* "

365. The Appellant argued that he had moved to NI (UK) upon his marriage in [redacted] with the intention of permanently residing there. He argued that he acquired a domicile of choice in NI (UK) once he moved. He abandoned this domicile of choice when he returned to the ROI in [redacted].

> *"Upon our marriage in [redacted] I left the Republic of Ireland and moved to Northern Ireland to live at* NI Farm *with my wife, parents –in-law and my wife's uncle James, with the full intention of remaining there permanently for the rest of my life. I had made up my mind that I was going to do that…"*

366. When the Appellant was asked why he had decided to do that the Appellant in his testimony replied:

> *" well, it was a better place to… There was a good farm there … Farming was more lucrative Northern Ireland that was in the ROI. I seennwhat I could work there and obviously make a bit of money starting off in life. I was only starting off in life at the time... I made that decision, yes, when I got married that I was going to live the rest my life in Northern Ireland"*

The Respondent argued it was strange for someone at the age of [redacted] would form apparent intention to remain living in Northern Ireland to the exclusion of Republic of Ireland at such a tender age.

367. The Respondent correctly said that I should follow the approach taken in the court case of Ross v *Ross* where I must have regard to the purpose for which the Appellant's evidence was given, and also I must see whether the purpose can be seen to be carried into effect, and is consistent with what happened and came to pass.

368. The Respondent argued that there were a large number of inconsistencies which I must take account of to refute the suggestion that the Appellant had acquired a domicile of choice in NI (UK). These included:

- That the Appellant in filing a number of his tax returns in the appeal period never signified that he was non-domiciled. That the Appellant's assertion that

this was a matter for his accountants can be countered by saying that none of the accountants were called to give evidence in respect of this matter.

- the Appellant never asserted in the statement of affairs he filed in D[redacted], that he was non-domiciled in ROI.
- The first recorded assertion that the Appellant was domiciled in NI (UK) is to be found in the letter from his tax agents on [redacted] 201[redacted] and the purpose of that letter was to mount a case that the Appellant was not liable to tax on the money that has been found in Jersey and in the Isle of Man Trusts which followed his transfers in the early 1990s.
- From [redacted] onwards all his property acquisitions are in the ROI, he made acquisitions in each decade following all of his property transactions are solely exclusively in ROI.
- Family home was in the ROI, acquired in 197[redacted].
- His children were educated in secondary schools and ROI
- he held an Irish passport
- all evidential documents except for three documents uses ROI address. Three documents are his tax returns in North of Ireland, the T4 in which he and his wife remained the settlors and an application for a NI (UK) grant.
- The Appellant and his wife never made their home in NI (UK) after his wife moved to the Republic of Ireland in [redacted]. They never returned to Northern Ireland which the Appellant argued was always their intention, even after the ending of the troubles upon the signing of the Belfast Agreement in 1998
- The absence of any kind of detailed documentation associated with the Appellant's stay in Northern Ireland.

369. The Appellant started acquiring assets in the Republic of Ireland as early as [redacted], four years after his marriage and [redacted] years before [redacted], with the acquisition of a [redacted] [redacted] in ROI Then in [redacted] he acquired the farm in [redacted] together with a homestead into which his entire family moved to in [redacted]. He acquired other farmland circa [redacted] and [redacted].

370. The Respondent explained during the hearing that the bulk of the Appellant's assets were in the Republic of Ireland and the only asset of any significance that he held in Northern Ireland was the NI Farm which he acquired through his wife and her inheritance. When the Appellant eventually divested himself of his assets when retiring from farming, that the assets he held in the ROI generated proceeds of €1.75 million

whereas he only obtained £212,000 in respect of his disposal of the NI Farm in NI (ROI). I support the Respondent when he says that his gives an indication of the scale of his assets and possessions in ROI relative to NI (UK) and suggests that any domicile of choice, if ever created, was abandoned, as evidenced though the scale of the Appellant's ROI land and homestead acquisitions from [redacted] onwards.

371. The Respondent argued that after [redacted] all of the Appellant's children were educated in the Republic of Ireland; the family home was in ROI; that the Appellant remained an Irish citizen at all times; that the Appellant did not take out UK citizenship at any stage.

372. The Appellant argued that there was significant evidential scaffolding supporting his contention that he was domiciled in NI (UK) from [redacted] until [redacted] when he returned to ROI. There is a sworn witness statement prepared by the Appellant which he agreed with in his sworn evidence.

373. The Appellant cited the Irish case of *Proes v The Revenue Commissioners (*[1998) 4 IA 174*)* where the High Court held that the question to be asked was not whether Mrs Proes had acquired a new domicile of choice in Ireland but whether she had abandoned her English domicile of choice:

> *"When a person who has acquired a domicile of choice in England returns to Ireland (his/her domicile of origin), the question is not whether a new domicile of choice has been acquired in this country, but whether the English domicile of choice had been abandoned. If it had, then the Irish domicile of origin revives. This means that the question which should have been posed was: 'Did the appellant abandon her English domicile by (a) residing in Cork and (b) deciding not to return to live permanently in England?', and not 'Did the appellant decide to live permanently in Ireland and thereby acquire a new domicile of choice?"*(Ibid at 182-183)

374. This case is persuasive as I am bound by the dicta of the Irish superior Courts. So the questions I have to consider is (a) did the Appellant acquire a NI(UK) domicile of choice, as he asserts, in [redacted] upon his marriage to his NI(UK) domiciled wife and if the answer to (a) is yes then (b) can the Appellant demonstrate that he did not abandon this

domicile of choice before [redacted]. As Justice Costello put in the *Proes v The Revenue Commissioners:*

> *"Her counsel accepts that the onus was on her to prove that she had acquired a domicile of choice but submits that, having discharged that onus, there is no burden cast on her to establish that it was not abandoned. I cannot agree. It seems to me that the section imposes unheard the burden of proving that she was not domiciled in Ireland and, on the facts of this case, require her to establish that she did not abandon her English domicile."*

375. Further on Justice Costello said:

> *"I do not think, with respect, that the learned judge correctly identified the issue which arose in the case. Rather the issue was whether, in the light of all the evidence, it could be inferred that the appellant had abandoned her English domicile, not only by ceasing to residing in England, but in ceasing to have an intention to return to England as her permanent home "*

376. In this case there is little proof available to establish the intentions of the Appellant when he moved to NI (UK) in 196[redacted] after his marriage, apart from a statement in his sworn affidavit that it was his intention to move there permanently. As said previously, I must necessarily treat statements of fact from the Appellant with some caution. From the his actions in [redacted] to acquire a business in ROI followed by his acquisition of a farm and homestead in [redacted] , together with his entire family moving there from [redacted] does cast uncertainty that he ever acquired a NI (UK) domicile of choice in [redacted] in the first place. If he did so, did these actions in [redacted] and [redacted] indicate that he was abandoning that domicile of choice?

377. Given the Appellant's subsequent apparent lack of engagement with the state of NI(UK) by continuing as an Irish National; by the absence of documentary evidence of any significant engagement with NI(UK) state services; by not declaring non-domicile status in some of his ROI returns, by his significant land purchases in ROI in [redacted] and 1[redacted]; by his tax residence status in Ireland during the period [redacted] to [redacted] and his lack of evidence of NI(UK) tax residence in the period, the onus is on the Appellant to show that he had not abandoned his asserted domicile of choice in NI (UK) prior to [redacted].

378. I believe, on the balance of probabilities, that the Appellant has either, never acquired a domicile of choice in NI (UK) from 196[redacted], as asserted, or alternatively, if he had, that he has not satisfied me that he did not abandon that domicile of choice prior to [redacted] though his personal, family and business activities within ROI before then.

379. That being so I have concluded that the Appellant is domicile in ROI throughout the period under appeal.

PART 7

Whether Section 806 of the Taxes Consolidation Act 1997 applies

380. The Appellant argued that if I find as a matter of fact that the Appellant was the settlor of the Trusts and that the Appellant was tax resident and domiciled in Ireland at the material time of the "transfers abroad", the Appellant would in fact be subject to tax under section 806 of the Taxes Consolidation Act 1997 on the income of the trustees arising under Schedule D, Case IV (whereas he has been incorrectly assessed on this income under Schedule D, Case III, being a charge to tax on interest earned by an individual, rather than by a trustee). Furthermore, if I find as a matter of fact that the Appellant was the settlor of the Trusts and subject of the provisions of section 806 and this income was earned by his trustees, the Appellant would be entitled to deduct certain management expenses incurred by the trustees and the Respondents have made no provision for this. No assessment to s806 has been made by the Respondent and therefore, I cannot make a determination in respect of s806.

381. The Respondent argued that the issue for me to consider is whether or not the appellant had been overcharged to tax under section 71 TCA 97, as regards the interest which accrued on the trust accounts, and indeed for the earlier years, prior to 1997, under section 76 of the income tax act.

382. Section 71 deals with the taxation on income from foreign securities and possessions. The Respondent argued that the Appellants were making the argument that because there is valid trust in place, that for the income from the Trusts to be assessed on the Appellant under Case III that I would have would have to determine that the Trusts

were sham trusts and that I would have to establish a common intention on the part of the trustees and the beneficiaries that the arrangements would not operate in accordance with the terms of the trust instruments.

383. Section 71 (1) reads:

> "*subject to this section and section 70, income tax chargeable under Case III of Schedule D in respect of income arising from securities and possessions in any place outside the State shall be computed on the full amount of such income arising in the year of assessment, whether the income has been or will be received in the State or not."*

384. The Respondent argued there is nothing in this section that requires the foreign securities or possessions to be in the ownership of the taxpayer. So because these trust accounts, bank accounts are in the name of the Trusts, rather than in the name of the Appellant, does not mean that a charge to tax under section 71 cannot arise. Furthermore that the term "*possessions"* is not defined in this section or in the Act and that means that they bear their ordinary or natural meaning. In support of their assertion that the widest possible meaning should be ascribed to the term "possession" the respondent opened for me the case of *Colquhoun V Brooks* (House of Lords, 1889), wherein in this House of Lords case it was stated by Lord Macnaghten:

> *"I am therefore forced to the conclusion that the expression "foreign possessions" as used in the Act of 1799 the word possessions is to be taken in the widest sense possible, as denoting everything that a person has as a source of income…"*

385. I accept the Respondent's argument that the terms possessions should be given a wide meaning. I believe the way in which the Trusts established in Jersey and Isle of Man are structured that they do constitute possessions of the Appellant notwithstanding that they were formally constituted under professional trustees.

386. My reasoning is that the professional trustees, based on the evidence before me, have acted entirely at the behest of the Appellant and his wife. Changes were made to the Trust's deeds to amend the qualifying beneficiaries of the Trusts at the behest of the Appellant. The Appellant, based on the evidence put before me, appears to have complete control of the operation of the Trusts. While the Appellant asserted that these were discretionary trusts, it is my view that all discretion in relation to the operation of these

Trusts was exercised de facto by the Appellant. The Appellant was a named beneficiary in all of the Trusts. Some of the Appellants children were named as beneficiaries of the Trusts but in no instance during the appeal period did any of them receive a distribution from the Trusts. The only beneficiary of the Trusts, albeit after the appeal period was the Appellant.

387. I do not disagree with the Appellant, that following my determination that he is tax resident and domiciled in ROI, he would be liable to tax under section 806. However, this section 806(3) states:

> *"This section shall apply for the purposes of preventing the avoidance by individuals resident or ordinarily resident in the State of liability to tax by means of transfers of assets..."*

This means the section will operate when no other provision applies to bring an individual within the liability to tax in respect of *transfers of assets*. I support the Respondent's argument that the provisions of Case III Schedule D do apply to tax the interest arising on the Trusts, as in my view and I believe, through his actions and behaviour since 1992 it is also the Appellant's belief, that the Trusts are *possessions* of the Appellant.

388. For that reason I determine that the Respondent was within its rights to assess the Appellant on the interest arising within the Trusts in the appeal period, under Case III Schedule D.

CONCLUSIONS

198[redacted]/8[redacted]

389. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI. The Respondents have satisfied me that they were not precluded from raising amended assessments for the year 198[redacted]/8[redacted], notwithstanding the absence of the original hard copy return filed by the Appellant.

198[redacted]/8[redacted]

390. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 198[redacted]/8[redacted].

198[redacted]/9[redacted]

391. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 198[redacted]/9[redacted].

199[redacted]/9[redacted]

392. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

199[redacted]/9[redacted]

393. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

199[redacted]/9[redacted]

394. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

199[redacted]/9[redacted]

395. I have concluded that the Appellant was domiciled and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

199[redacted]/9[redacted]

396. I have concluded that the Appellant was domiciled in ROI for this year. I have concluded, based on the facts and evidence before me, that the Appellant was, on the balance of probabilities, tax resident in both ROI and possibly in NI (UK). I have concluded that, in any event, under Article 4 of the Ireland / UK DTA, the Appellant would, if applicable, be regarded as tax resident in the ROI. Accordingly, he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

199[redacted]/9[redacted]

397. I have concluded that the Appellant was domiciled in ROI for this year. I have concluded, based on the facts and evidence before me, that the Appellant was, on the balance of probabilities, tax resident in both ROI and possibly NI (UK). I have concluded that, in any event, under Article 4 of the Ireland / UK DTA, the Appellant would, if applicable, be regarded as tax resident in the ROI. Accordingly, he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

398. The Respondents have satisfied me that they were not precluded from raising amended assessments for the year 199[redacted]/9[redacted], notwithstanding the absence of the original hard copy return filed by the Appellant.

199[redacted]/9[redacted]

399. I have concluded that the Appellant was domiciled in ROI for this year. I have concluded, based on the facts and evidence before me, that the Appellant was, on the balance of probabilities, tax resident in both ROI and possibly NI (UK). I have concluded that, in any event, under Article 4 of the Ireland / UK DTA, the Appellant would, if applicable, be regarded as tax resident in the ROI. Accordingly, he is taxable on his worldwide income in ROI in 199[redacted]/9[redacted].

400. The Respondents have satisfied me that they were not precluded from raising amended assessments for the year 199[redacted]/9[redacted], notwithstanding the absence of the original hard copy return filed by the Appellant.

199[redacted]/9[redacted]

401. I have concluded that the Appellant was domiciled in ROI for this year. I have concluded, based on the facts and evidence before me, that the Appellant was, on the balance of probabilities, tax resident in both ROI and possibly NI (UK). I have concluded that, in any event, under Article 4 of the Ireland / UK DTA, the Appellant would, if applicable, be regarded as tax resident in the ROI. Accordingly, he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

402. The Respondents have satisfied me that they were not precluded from raising amended assessments for the year 199[redacted]/9[redacted], notwithstanding the absence of the original hard copy return filed by the Appellant.

199[redacted]/9[redacted]

403. I have concluded that the Appellant was domicile and tax resident in ROI for this year. As such he is taxable on his worldwide income in ROI for 199[redacted]/9[redacted].

404. The Respondents have satisfied me that they were not precluded from raising amended assessments for the year 199[redacted]/9[redacted], notwithstanding the absence of the original hard copy return filed by the Appellant.

199[redacted]/200[redacted] to 200[redacted]

405. I have concluded that the Appellant was domiciled and tax resident in ROI for each of these tax years. As such he is taxable on his worldwide income in ROI for tax years 199[redacted]/200[redacted] to 200[redacted].

DETERMINATION

406. In accordance with the default position in tax litigation as espoused by Charleton J. stated in *Menolly Homes Ltd. v Appeal Commissioners & Revenue* Commissioners

[2010] IEHC 49, the Appellant is required to provide sufficient evidence to reduce or displace a tax assessment. However, in this appeal the Appellant did not provide sufficient evidence to warrant a reduction or abatement of tax payable. As such, the Appellant failed his own appeal and any prospect that he may have had to have the assessments to tax reduced.

407. As such the additional assessments issued by the Respondent in respect of years of assessment 1987/88 to 2003 inclusive shall stand as follows:

Year	Additional miscellaneous IR£ income	Case III IR£ interest from possessions	Additional IR£ income tax assessment
1987/1988	193,000		110,351
1988/1989	193,000		111,915
1989/1990	193,000		107,652
1990/1991	193,000		105,361
1991/1992	193,000		103,477
1992/1993	441,000	85,541	264,586
1993/1994	54,812	91,762	73,332
1994/1995	495,538	46,648	272,466
1995/1996		50,368	25,335
1996/1997		178,417	90,336
1997/1998		224,628	113,044
1998/1999		149,700	72,396

1999/2000		91,032	45,717
2000/2001		36,374	16,784
2001		194,726	82,728
Total	**1,956,350**	**1,149,196**	**1,595,480**
	Additional miscellaneous € income	**Case III € interest from possessions**	**Additional € income tax**
2002		272,957	115,708
2003		23,951	6,453
Total		**296,908**	**122,161**

408. This appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

PAUL CUMMINS
TAX APPEALS COMMISSIONER

Designated Public Official
6 August 2021

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