BETWEEN/

[redacted] 138TACD2022

Appellant

V

REVENUE COMMISSIONERS

Respondents

DETERMINATION

Introduction

1. This is an appeal against a P21 Balancing Statement in respect of 2013. The issue in dispute is whether the Respondent is correct in assessing to income tax, the Appellant's Australian sourced employment income in 2013 and whether the liability of €4,554.77 in respect of 2013 is correct.

Background

2. The Appellant is an Irish citizen who was, at all material times, resident, ordinarily resident and domiciled in Ireland. The Appellant departed Ireland on 2 May, 2013, and travelled to Australia on a working holiday visa. The Appellant was employed by [redacted] Ltd. and he worked for his employer remotely while in Australia for a period of time. He took a leave of absence from his Irish employer and subsequently worked for an Australian company from 5 November, 2013, until 28 January 2014. The Appellant resided in [redacted] Australia, from May 2013 to

January 2014. He returned to Ireland on 27 March, 2014, and recommenced working for [redacted] in April 2014.

3. In November 2016, the Appellant contacted the Respondent and informed the Respondent of his Australian employment income in respect of the tax year of assessment, 2013. He submitted a copy of his Australian tax return for the year 1 July, 2013, to 30 June, 2014, which showed Australian sourced employment income of $21,357 and Australian self-employed income of $2,237. A balancing statement subsequently issued on 5 April 2018. The Appellant's self-employed income was not liable to tax, in accordance with Article 15 of the double taxation treaty between Ireland and Australia and this was not in dispute.

4. The Appellant's Irish employer stated on the P35 end of year employer return that the Appellant had been employed for 49 insurable weeks in 2013. The Appellant disputed this figure as in his view there were 33-35 weeks of insurable employment in 2013. The Respondent accepted that the non-issue of a P45 to the Appellant was an error on the part of his Irish employer. [The number of weeks of insurable employment does not alter the Appellant's tax resident status in Ireland and while the difference is noted, nothing material turns on this point.]

5. The Appellant did not accept that his Australian employment income was subject to Irish tax. The Appellant relied on the habitual abode test (Article 4.3) and income not expressly mentioned (Article 23) in support of this submission. The Respondent's position was that the Appellant's habitual abode was in Ireland and that he was treaty resident in Ireland under the double taxation treaty between Ireland and Australia. Accordingly, the Respondent taxed the Appellant to income tax on his Australian employment income and provided a credit in respect of the Australian tax paid.

Legislation/Conventions

- Section 819 TCA 1997
- Section 820 TCA 1997
- Double Taxation Treaty between Ireland and Australia

Submissions in brief

Appellant's submissions

6. The Appellant accepted that he was Irish tax resident for the tax years of assessment 2013 and 2014. The Appellant submitted that he was tax resident in Ireland and in Australia at the same time and in view of the Appellant, the Australian income should not have been subject to Irish tax. The Appellant submitted that his habitual abode under Article 4 of the Treaty was Australia. The Appellant submitted that Australia had primary taxing rights under the DTA, in 2013. The Appellant also submitted that the Australian income should not have been subject to Irish tax but that it should have been exempt under Article 23.

Respondents' submissions

7. The Respondent submitted that the Appellant was treaty resident in Ireland under the DTA and that the Appellant's Australian sourced employment income was taxable in Ireland accordingly. The Respondent submitted that the Appellant's trip to Australia was a once off absence from Ireland of less than one year, that there was no pattern of returning to Australia or of making repeated trips to Australia, that the Appellant's connections to Ireland were established and continuous and that the Appellant's habitual abode was Ireland and not Australia.

ANALYSIS

8. In 2012 the Appellant was resident in Ireland for the entire tax year, approximately 365 days. In 2013 the Appellant was resident in Ireland for 121 days. In 2012 and 2013 the Appellant was resident in Ireland for approximately 486 days. Thus, the Appellant was resident in Ireland in 2013 in accordance with the provisions of section 819(1)(b) TCA 1997, commonly referred to as the *look back* rule. The Appellant left Ireland for Australia on 2 May, 2013 and returned to Ireland on 27 March 2014. There was no dispute in relation to the application of the Irish tax residency rules as the Appellant accepted that he was Irish tax resident for the tax years of assessment 2012, 2013 and 2014.

9. The Appellant was tax resident in Australia for the Australian tax year 2013-2014 and he paid Australian tax on his income in Australia.

10. In the P21 balancing statement issued by the Respondent on 5 April, 2018, in respect of the tax year of assessment 2013, the Respondent subjected to Irish income tax, the Appellant's Irish employment income and the Appellant's Australian employment income and allowed a credit in respect of the tax paid in Australia in respect of the Australian employment income.

Treaty Residence

11. Where an individual is resident in two countries based on respective domestic residence rules, the Double Taxation Treaty between those two countries will determine which country the individual is a resident of for the purposes of the Treaty (treaty residence). The country in which the individual is treaty resident, has primary taxing rights. As the Appellant was tax resident under the domestic laws of both Ireland and Australia, treaty residence fell to be determined in accordance with Article 4(3) of the Double Taxation Treaty between Ireland and Australia.

12. Article 4(3) provides;

Where by reason of the preceding provisions 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 solely of the Contracting State in which he has a permanent home available to him;*
>
> *b. if he has a permanent home available to him in both Contracting States, or if he does not have a permanent home available to him in either of them, he shall be deemed to be a resident solely of the Contracting State in which he has an habitual abode;*
>
> *c. if he has an habitual abode in both Contracting States, or if he does not have an habitual abode in either of them, he shall be deemed to be a resident solely of the Contracting State with which his personal and economic relations are the closer.*

Permanent home available

13. For a home to be a '*permanent home available'* for DTA purposes, an individual must have retained it for his permanent use as opposed to staying there for periods of limited duration. The permanence of the home is essential. This means that the individual must have arranged to have the dwelling available to him at all times continuously and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration.

14. In this appeal, the parties were in agreement (in written submissions) that the Appellant did not have a permanent home available to him in either Ireland or Australia. The Appellant reasoned that his sub-let occupancy of an Australian property would not qualify as permanent (correspondence dated 23 February, 2019) and that at that time he had no leasehold interest in any Irish property.

15. In 2013, prior to his departure to Australia, the Appellant leased a property in Ireland and also stayed with his parents for a period of time. When he returned to Ireland from Australia, the Appellant stayed with his parents for a period and subsequently leased a property. While he was resident in Australia, the Appellant sub-let a property in Sydney.

16. However, there was insufficient evidence in support of the retention by the Appellant of any of these properties for permanent use or evidence that these dwellings were available to the Appellant at all times continuously. In my view, based on the evidence presented, the properties lacked the requisite permanence to meet this test and accordingly, it is necessary to proceed to consider the '*habitual abode'* test.

Habitual abode

17. The OECD model commentary on Article 4 does not stipulate the length of time for an abode to be considered habitual. It simply states that the comparison must cover a sufficient length of time to determine whether the residence in each of the two States is

habitual and to determine the intervals at which the stays take place. Vogel on *Double Taxation Conventions* (4th edition, pages 278-279) states that a quantitative approach is reasonable as regards the habitual abode test but that '*Though a quantitative measurement, the habitual abode is supposed to reflect a certain connection between the taxpayer and the residence State. It is, by contrast, not a criterion based on some single days randomly passed in one or the other State.'*

18. The Appellant submitted that his habitual abode was in Australia on the basis that he spent approximately 260 days at this address in Sydney between May 2013 and January 2014. He emphasised that he did not move around but stayed at the same address. In addition, he submitted that he accepted a six month contract in Australia commencing 5 November, 2013. The Respondent submitted that the Appellant's trip to Australia was a once off absence from Ireland of less than one year, that there was no pattern of returning to Australia or of making repeated trips to Australia, that the Appellant's connections to Ireland were established and continuous and that the Appellant's habitual abode was Ireland and not Australia.

19. In this appeal the Appellant departed Ireland on 2 May, 2013, and travelled to Australia on a working holiday visa. The Appellant worked for his Irish employer remotely while in Australia. He took a leave of absence from his Irish employer and subsequently worked for an Australian company from 5 November, 2013, until 28 January, 2014. He returned to Ireland on 27 March, 2014 and recommenced working for [redacted] in Ireland, in April 2014.

20. While the Appellant spent 121 days in Ireland in 2013 and 244 days in Australia, the habitual abode test is not purely quantitative in nature as is clear from. Vogel on *Double Taxation Conventions* (4th edition, pages 278-279), but the habitual abode should reflect a certain connection between the taxpayer and the residence State.

21. The Appellant travelled to Australia on a working holiday visa. He stated that he was considering alternatives to a life outside Ireland. He submitted that his time in Australia and the fact he worked there reflected the possibility of remaining, that he had found permanent employment and an offer of sponsorship and could have stayed on had he not decided to return to Ireland. He did not extend his stay in Australia beyond his visa nor did he obtain an additional or further visa. His connection with Australia is reflected in

the experience he had while there on his working holiday visa. He returned to Ireland on 27 March, 2014, and resided and worked in Ireland in the years that followed. The Appellant is an Irish citizen, and is domiciled and resident in Ireland. He commenced working for his Irish employer in 2005 and after he returned from Australia in 2014, he recommenced employment in Ireland. His occupational ties are in Ireland and his family are Irish citizens and reside in Ireland. His connections to Australia were confined to the time spent working there on the working holiday visa.

22. Based on the facts and circumstances, I am satisfied that the Appellant's habitual abode is Ireland and not Australia.

Personal and economic relations

23. The parties made submissions in relation to the test at Article 4(3)(c) (personal and economic relations) and although it is not necessary to make a determination on this point, I am satisfied that the Appellant's personal and economic relations are closer to Ireland than Australia. The reasons in support of this view include the fact that the Appellant is an Irish citizen, has an Irish domicile of origin and is resident in Ireland. Since 2005, he has been employed in Ireland by an Irish employer and once he returned from Australia in 2014, he recommenced employment in Ireland. His personal, occupational and social ties are in Ireland and his family are Irish citizens and reside in Ireland.

Article 16 - Dependent personal services

24. Article 16 of the Treaty provides:

> *(1)Subject to the provisions of Articles 17, 19, 20 and 21, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.*

(2)Notwithstanding the provisions of paragraph (1) of this Article, remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if –

(a) The recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in the year of income or year of assessment, as the case may be, of that other State; and
(b) The remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
(c) …..

25. On the basis that Ireland has primary taxing rights under Article 4(3) of the Treaty, the Respondent submitted correctly, that the Appellant's Australian employment income would be taxable only in Ireland if all three conditions set out in Article 16 (2) of the Double Taxation Treaty were met. However, as the Appellant was resident in Australia for more than 183 days in the year in 2013, he did not meet the first condition, namely Article 16.2.a. Accordingly, the Appellant's employment income was taxed both in Ireland and in Australia with credit allowed in Ireland respect of the Australian tax paid.

Article 23 – Income not expressly mentioned

26. The Appellant submitted that the Australian income should not have been subject to Irish tax but that it should have been exempt under Article 23. However, Article 23(1) provides that '*Items of income of a resident of one of the Contracting States which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that Contracting State.'* The income at issue, employment income, is covered by Article 16 of the Treaty. Thus the income does not fall within Article 23 and Article 23 does not apply.

Determination

27. The question to be addressed in this appeal is whether the Respondent is correct in assessing to income tax, the Appellant's Australian sourced employment income in 2013

and whether the liability of €4,554.77 in respect of 2013 is correct. For the reasons set out above I am satisfied that the Australian employment income is subject to Irish tax and that liability of €4,554.77 in respect of 2013 is correct. Accordingly, I determine that the P21 Balancing Statement in respect of 2013 shall stand.

COMMISSIONER LORNA GALLAGHER

9th day of August 2022

This determination has not been appealed