



Between

97TACD2022

[REDACTED]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [REDACTED] ("the Appellant") against a Notice of Amended Assessment to Capital Acquisitions Tax ("CAT") raised by the Revenue Commissioners ("the Respondent") in relation to the period 1 September 2014 to 31 August 2015 in the amount of €314,351.
2. On 8 June 2015, the Appellant received a gift of a residential property at [REDACTED] [REDACTED] ("the property") with a market value of [REDACTED] from [REDACTED] ("the Disponers"). The Appellant is the adult son of the Disponers.
3. This appeal relates to the question of the availability of an exemption in accordance with section 86 of the Capital Acquisitions Tax Consolidation Act 2003 ("CATCA 2003") commonly referred to as "*dwelling-house exemption*".
4. The matters at issue in this appeal are twofold and relate to whether (i) the Appellant has met the requirements of section 86(3)(a) and (c) CATCA 2003, in relation to continuous

occupation of the dwelling house as the only or main residence throughout the period of 3 years immediately preceding the date of the gift and continued occupation of the dwelling house as the only or main residence throughout the relevant period being, 6 years after the date of the gift and (ii) the Appellant was, at the date of the gift of the dwelling-house, beneficially entitled to any other dwelling-house or to any interest in any other dwelling-house in accordance with section 86(3)(b) CATCA 2003.

5. The Appellant's Tax Agent filed an IT38 form claiming a dwelling house exemption in respect of the gift of the property. The Respondent, in disallowing the claim for an exemption, raised a Notice of Amended Assessment to CAT on 11 August 2017, in the sum of €314,351, in respect of the period 1 September 2014 to 31 August 2015.

Background

6. On 8 June 2015, the Appellant was gifted the property by the disporers and the Appellant claimed a dwelling house exemption pursuant to section 86(3) CATCA 2003. A Deed of Conveyance, Declaration of Solvency, Property Valuation and Land Registry Documentation have been submitted in relation to the transfer of the property to the Appellant by the disporers.
7. The Appellant maintains that he continuously occupied the property as his only and main residence in the 3 year period ending 8 June 2015, and whilst he was not resident in Ireland for tax purposes, from first occupation, he returned frequently to the property and did not maintain any other residence during this period. Various documentation *inter alia* utility bills, domestic alarm agreements, television licence, sample travel documents, building works expenditure documents, planning application, school fees and motor tax document have been submitted by the Appellant in support of his appeal, in addition to a schedule detailing the Appellant's presence in Ireland, for the period [REDACTED]
[REDACTED].
8. Further, the Appellant maintains that he does not hold a beneficial interest in any other property, specifically the apartment at [REDACTED] which was gifted by the Appellant to his daughter on [REDACTED] and currently held in trust by the disporers ("the trustees") for his daughter. He maintains that the rental income was returned on his income tax return, as the beneficiary is a minor. However, the Appellant maintains that he has neither access nor entitlement to the rental income, which is paid to a bank account in his mother's name, for the benefit of his daughter and her mother.

9. By letter dated 18 May 2017, the Respondent wrote the Appellant's Agent in relation to the Appellant's claim for a dwelling house exemption on the gift of the property from the dispersons. The Respondent states that the Appellant does not meet the criteria necessary to claim a dwelling house exemption, on the basis that the Appellant has for the period 2012-2015 declared on each income tax return that he is "non-resident".
10. Thereafter, by letter dated 11 August 2017, the Respondent again confirmed that the Appellant does not meet the criteria necessary to claim a dwelling house exemption in accordance with section 86(3) CATCA 2003 and that pursuant to Section 49(2) CATCA 2003, an amended assessment withdrawing the claim for a dwelling house exemption would be raised.
11. On 11 August 2017 a Notice of Amended Assessment was raised by the Respondent showing a liability to CAT of €314,351. On 8 September 2017, the Appellant duly appealed to the Commission.

Legislation and Guidelines

12. The legislation relevant to this appeal is as follows:
13. Section 49(2) Capital Acquisitions Tax Consolidation Act 2003, Assessment of tax, provides:-

(2) *If at any time it appears that for any reason an assessment was incorrect, the Commissioners may make a correcting assessment, which shall be substituted for the first-mentioned assessment.*
14. Section 86 of the Capital Acquisitions Tax Consolidation Act 2003, Exemption relating to certain dwellings, provides:-

(1) *In this section—*

"dwelling house" means—

(a) a building or part (including an appropriate part within the meaning of section 5(5)) of a building which was used or was suitable for use as a dwelling, and

(b) the curtilage of the dwelling house up to an area (exclusive of the site of the dwelling house) of one acre, but if the area of that curtilage (exclusive of the site of the dwelling house) exceeds one acre, then the part which comes within this definition is the part which, if the remainder were separately occupied,

would be the most suitable for occupation and enjoyment with the dwelling house;

“relevant period”, in relation to a dwelling-house comprised in a gift or inheritance, means the period of 6 years commencing on the date of the gift or the date of the inheritance.

(3) *Subject to subsections (4), (5), (6) and (7), a dwelling-house comprised in a gift or inheritance which is taken by a donee or successor who-*

- (a) *has continuously occupied as that donee or successor's only or main residence–*
 - (i) *that dwelling-house throughout the period of 3 years immediately preceding the date of the gift or the date of the inheritance, or*
 - (ii) *where that dwelling-house has directly or indirectly replaced other property, that dwelling-house and that other property for periods which together comprised at least 3 years falling within the period of 4 years immediately preceding the date of the gift or the date of the inheritance*
- (b) *is not, at the date of the gift or at the date of the inheritance, beneficially entitled to any other dwelling-house or to any interest in any other dwelling-house, and*
- (c) *continues to occupy that dwelling-house as that donee or successor's only or main residence throughout the relevant period*

is exempt from tax in relation to that gift or inheritance, and the value of that dwelling-house is not to be taken into account in computing tax on any gift or inheritance taken by that person unless the exemption ceases to apply under subsection (6) or (7).

Submissions

15. Counsel for the Appellant raised a preliminary argument in relation to the Respondent's ability to raise a Notice of Amended Assessment under section 49(2) CATCA 2003. Counsel for the Appellant argued that section 49(2) CATCA 2003 nor any other section in CATCA 2003, does not provide the Respondent with the power to create a return on behalf of a taxpayer, in order to raise a Notice of Amended Assessment. Thus, by creating an amended return, the Respondent was acting *ultra vires* its powers and the Notice of Amended Assessment dated 11 August 2017, raised by the Respondent is the “*fruit of the poisoned tree*”, which cannot be allowed to stand.

16. Counsel argued that the Commissioner cannot be satisfied that there is a valid Notice of Assessment and the appeal cannot therefore proceed on that basis. Counsel confirmed that the Appellant is challenging the vires of the Notice of Amended Assessment dated 11 August 2017 and argued that it should be struck down and declared void.
17. Counsel for the Respondent submitted that the Commissioner does not have jurisdiction to assess and determine the validity of a Notice of Assessment and reference was made to decisions of the Court of Appeal in *Stanley v The Revenue Commissioners* [2017] IECA 279 ("the *Stanley* decision") and *Lee v Revenue Commissioners* [IECA] 2021 18 ("the *Lee* decision").
18. The Commissioner noted the Appellant's arguments in relation to the Notice of Amended Assessment being invalid and that it should be declared void. However, the scope of the jurisdiction of an Appeal Commissioner, as discussed in a number of cases, namely; the *Lee* decision, the *Stanley* decision, *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577 is confined to the determination of the amount of tax owing by a taxpayer, in accordance with relevant legislation and based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be.
19. In the *Lee* decision, Murray J. considered the dicta of Charlton J. in *Menolly Holmes* at para.52

“..in analysing this decision it seems to me to be important to observe that while Charlton J. speaks at points of powers to “strike down” the assessment, I do not understand the argument as advanced by the taxpayer in that case to have suggested that the supervisory jurisdiction vested in the High Court over statutory bodies had been transferred in the case of assessments to tax to the Appeal Commissioners. Whatever the correct analysis of the jurisdiction of the latter, there is no question of it extending to enable the Commissioners to issue declarations of invalidity of any kind. That is a function vested in the Courts”.
20. The jurisdiction of the Commission does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings. Insofar as the Appellant seeks that the Commissioner set aside a decision of the Respondent based on an assessment having been compromised or otherwise vitiated in law, such grounds of appeal do not fall within the jurisdiction of the Commissioner and thus, do not fall to be determined as part of this appeal. Accordingly, the Commissioner made no determination

in relation to the validity or not of the Notice of Amended Assessment dated 11 August 2017.

21. In the circumstances, the Commissioner afforded Counsel for the Appellant an opportunity to make an application for an adjournment to consider whether this argument should be made before a more appropriate venue namely, the High Court. As no application was forthcoming and in circumstances where the Commissioner does not have jurisdiction to determine the argument, the hearing of the appeal proceeded.

Appellant

22. The Appellant gave the following evidence in relation to his appeal:

- (i) He worked as a [REDACTED] until [REDACTED], when he lost his job [REDACTED] [REDACTED]. After a holiday in [REDACTED], he developed his passion for surfing. For over a decade, he has been travelling to different places, namely [REDACTED] [REDACTED] and has travelled to over 40 or 50 locations to surf. When travelling he resides in various hotels, hostels or Air B&Bs.
- (ii) He got married last year and now has a young child. He is reassessing whether or not he and his family should give up this lifestyle and concentrate on a life in this jurisdiction. He has a record of everywhere he has stayed in addition to receipts. In fact, there is a bag of receipts and diaries, of which a sample only has been submitted in support of this appeal.
- (iii) He pays for his lifestyle with whatever he earns on his investments and pays by card or other means. He made a planning application to build the dwelling in 2008 and he oversaw the build of the house with his father, acting as engineer and quality controller, as he lives next door. It was a joint effort between him and his father in terms of the construction. Reference was made to various invoices and costs associated with the building of the dwelling.
- (iv) He moved into the dwelling in or around Christmas 2010, and he furnished the dwelling. All of his belongings are kept in the dwelling, he and his wife receive all of their bills and correspondence at the dwelling, it is their home. He has had no other residence since 2010 and he confirmed that this was his only residence. All his worldly goods are kept at the dwelling. He is originally from [REDACTED] and his friends come to the dwelling, as they know it to be his home.
- (v) Under cross-examination, he confirmed that he marked non-residence on his income tax return for 2012 and the following years, and that while his home is in Ireland, he

is non-resident for tax purposes. He accepted that there is "None" marked on his income tax return for worldwide income. When asked why no evidence of staying in different locations and the diaries referenced were not adduced in evidence, he stated that he relies on his Agent to prepare his tax returns on his behalf and that all receipts have been provided to him. He confirmed that the schedule reflects the dates he was away surfing and dates when he would return home, sporadically. He stated that he was always in residence at the dwelling, but accepted that he was not physically there when he was away surfing. He accepted that he was only physically present in the dwelling for 387 days over the three year period. It was put to him that he has only provided evidence of where he was for 34 nights in the year, 2013. He stated that his Agent has all of the details in relation to his whereabouts during the requisite period.

- (vi) In relation to the period subsequent to receipt of the gift namely 9 June 2015 onwards, he spent less time in the dwelling in the last two years, as he was in [REDACTED] when the pandemic struck and was stuck there. He has all the documentation to support his movements, but that it was probably about the same amount of time as previous years.
- (vii) He purchased the apartment at [REDACTED] in or around 2005 and lived there for a short time. Following that, the apartment was let to tenants and currently remains let to tenants. The apartment is now held on trust by the dispersons ("the trustees") for his daughter ("the beneficiary"). The rent goes to the mother of his daughter as maintenance for his daughter, with the remaining rent being accrued for the benefit of his daughter. He has no access to the bank account where the rent is paid into. When asked why the rental agreement for the apartment was not provided for when requested, he said that he is not involved in the letting of the apartment.

23. Mr [REDACTED] gave evidence on behalf of the Appellant as follows:-

- (i) He travelled with the Appellant to various locations, all over the world, while he was surfing. When they travelled, the Appellant would have his [REDACTED] [REDACTED], as he did not need an office. They stayed in hotels, hostels or with friends. For in or around 10 years, he travelled with the Appellant, until he met his wife and he now no longer travels with the Appellant.

- (ii) Planning permission was granted for the dwelling and it was finished in or around 2010. He assisted with the construction of the dwelling but it was mostly the Appellant that was involved in it. The Appellant then vacated his dwelling he shares with his wife (the Appellant's mother) and went to live in the dwelling. No one else lived in the dwelling but the Appellant and his daughter on occasion. He confirmed that he lives next door and he would have been aware if there was someone residing in the dwelling, apart from the Appellant.
- (iii) Under cross-examination, he confirmed that the apartment at [REDACTED] [REDACTED] was transferred into a trust for the benefit of the Appellant's daughter. He and his wife are trustees and that a bank account was set up for the benefit of the Appellant's daughter and her mother. He confirmed that the Appellant has no access to the funds in the bank account. He also confirmed that part of the rental funds in the bank account, are provided to the mother of the Appellant's daughter, with the remaining amount accumulating for the benefit of the Appellant's daughter. He confirmed that there is a lease in existence and that a tenant, who has resided in the apartment for a long period of time, manages the apartment. He accepted that the Appellant is discharging the local property tax on the apartment. He is unaware of the rent per month or any increases applied. He confirmed that it is his understanding that the Appellant did not have ownership of another dwelling throughout the requisite period.

24. [REDACTED], Tax Agent gave evidence on behalf of the Appellant as follows:-

- (i) He advised the Appellant that he should keep a diary. Each year, the Appellant furnishes a diary with a note of the time that the Appellant spent in Ireland and the time that the Appellant was in the countries listed. He would then use those diaries to calculate the number of days for residency.
- (ii) He confirmed that this was standard procedure for somebody who is non-resident and good advice that you would keep a diary so that you would know where you were at particular times. He confirmed that he drew up the spreadsheet/schedule that has been referred to.
- (iii) He confirmed that the diaries were never furnished to the Respondent. Reference was made to the Respondent making requests for credit card statements on 8 September 2017, for documentary proof of dates the Appellant was in Ireland on 1 September 2017 and for flight details from the Appellant on 8 September 2017. He confirmed that none of the documentation requested by the Respondent was submitted on foot of the requests received.

25. Counsel for the Appellant made the following legal submissions:-

- (i) That the Appellant occupied the dwelling from 2010 onwards and continues to occupy it, as he has the keys in his pocket, it is his house and he comes and goes as he likes. The evidence is that this house is his residence and that he has no other residence.
- (ii) That absences from the dwelling does not mean that it is not the Appellant's residence. In fact, the legislation is designed in such a manner to allow for that as it states his only or main residence. The fact that he pursues his passion and his hobby of travelling around the world surfing does not change that. He has resided in the same dwelling for 12 years and the dwelling is his usual abode. When the Appellant is away he is not "residing" anywhere else, such that he stays in hotels and guesthouses, the kind of occupation that does not mean to reside.
- (iii) He has provided the required evidence in the form of electricity bills, gas bills, security bills, television licence and his driving licence. He has furnished all the evidence that he could muster to show that this was his residence.
- (iv) The Respondent was misguided in determining that he was not entitled to the relief because he was non-resident. This has no relevance to his claim for a Dwelling House exemption and looking for flights, bookings and hotels had nothing to do with Section 86 CATCA 2003. The Appellant has shown beyond all doubt that he resides in the dwelling and that it is his only residence. There is no requirement to show what the Appellant does in the periods he is not there, except to the extent that he is required to provide evidence that he does not have another residence.
- (v) Reference was made to a number of decisions including the decision of *Mark Campbell v the Commissioners for her Majesty's Revenue and Customs* [2022] UKFTT 46(TC) in particular page 98, *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463 in particular to page 13 and the dicta of Lord Denning M.R., *Kerry County Council v. Kerins* [1996] 3 I.R. 493 at para 5 and to the decision of *Shareen Booth v the Commissioners for her Majesty's Revenue and Customs* [2018] UKFTT 0770 at page 9.

Respondent

26. Counsel for the Respondent made the following legal submissions:-

- (i) Reference was made to the decision of *Menolly Homes*. That the onus of proof is very important in this particular case, as the legislative provisions need to be interpreted in light of the factual matters at play, as opposed to purely matters of law or legislative interpretation. Reference was made to section 86 CATCA 2003 and the relevant sections. Reference was also made to the decision of *Bookfinders Ltd v. The Revenue Commissioner* [2020] IESC 60, as it relates to statutory interpretation, in particular, to paragraphs 39, 42, 46, 47, 51 and 53 and to the decision of *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 at paragraph 74, in particular to paragraph (g).
- (ii) The ordinary literal meaning of the words will be sufficient in this case, but in terms of the purpose of the legislation, it originated back in 1991 in relation to inheritance tax between elderly brothers and sisters living in a property together. It was expanded in the Finance Act 2000 to apply to gifts and inheritances and the conditions were less restrictive. But the purpose of the relief was principally to cater for situations where a family home might have to be sold in order to meet the CAT liability, and particularly in times of rising prices, particularly in the Dublin area if a child was living with a parent and the parent died or the property was gifted, the idea was that the property could be transferred from one generation to the other without having to be sold.
- (iii) Reference was made to the word "continuous" and the meaning as provided for in the Oxford Dictionary and that requirement has not been met in this case. There is a spreadsheet for the three years, none for the six years, which illustrates occupation from time to time or occasionally. The Appellant was residing somewhere else, as he was not in the dwelling for 730 days out of 1,095.
- (iv) The Appellant has an interest in the apartment at [REDACTED]
[REDACTED] pursuant to Subsection 86 (3)(b) CATCA 2003. Reference was made to the decision of Costello J. in *Deane v The Revenue Commissioners* [2018] IEHC 519, in particular to the judgment of Costello J. at page 12. As per the bank accounts in question, the rental income has effectively been paid to discharge whatever onus was on the Appellant to pay maintenance to the mother of his child.
- (v) Reference was made to previous decisions of the Commission namely, 15TACD2017 and 17TACD2018. The UK decisions can be distinguished as they relate to two houses, one is the principal or main residence and there is a question

of whether the occupation is of a temporary or a permanent nature. Here we have the addition of the words "continuous" in both subsections.

- (vi) Reference was made to the decision of *Frost v Feltham* [1981] STC 115 55 TC 10, to the interpretation of "reside" and the principles as enunciated by Viscount Cave LC in *Levene v IR Commissioners* [1928] AC 215. The Appellant has not satisfied those requirements. While we have a list of dates, there was absolutely no evidence produced of, for example, flights in and out of Ireland or evidence of staying in guesthouses, hotels or hostels, but for approximately five weeks residence in the Canary Islands, out of the total of nine years. There is no proof that the Appellant ever continuously occupied the dwelling as his only or main residence.
- (vii) Whilst there are utility bills, they could never be sufficient to satisfy the requirements of continuous occupation as per the provisions of section 86(3)(a)(1) CATCA 2003, as you must look at the nature, quality, length and circumstances of the purported residence. Residence for tax purposes is highly relevant in the circumstances of this appeal and the Respondent was entitled to consider the income tax returns when carrying out its audit into the CAT return.

Material Facts

27. The Commissioner makes the following material findings of fact:-

- (i) On 8 June 2015, the Appellant was gifted the dwelling by the dispersons.
- (ii) The Appellant's Agent filed form IT38 in relation to the gift of the property and sought a dwelling house exemption to CAT, in accordance with section 86 CATCA 2003.
- (iii) The Appellant is a person who is non-resident in Ireland for the purposes of income tax. Accordingly, the Appellant is a person who is not present in the jurisdiction for 183 days or more per annum (or 280 days or more in total, taking the current tax year plus the preceding tax year together).
- (iv) A person is not disentitled to claim a dwelling house exemption under section 86(3) CATCA 2003, on the basis of being non-resident for tax purposes.
- (v) The Appellant does not have a beneficial interest in the property at [REDACTED]
[REDACTED].

Analysis

28. Section 86(3) CATCA 2003 provides for an exemption from a charge to CAT in relation to a gift or inheritance of a dwelling house, commonly referred to as a dwelling house exemption. It applies where a person receives a gift or inheritance of a dwelling house in which he or she has lived for three years prior to the gift or inheritance, where he or she is not beneficially entitled to any other house, or any interest in any other house, in which he or she remains in for a period of six years after the date of the gift or inheritance and occupies the house as his or her only or main residence.
29. This appeal relates to the question of the availability of an exemption in accordance with section 86 CATCA 2003. The Appellant has been denied the exemption by the Respondent on the grounds that he does not meet the criteria as provided for in section 86(3) CATCA 2003.

Statutory Interpretation

30. Before addressing the competing arguments in relation to whether the criteria have been met, the appropriate starting point is to consider section 86 CATCA 2003 and to identify the approach which the Commissioner is required to take in relation to the interpretation of taxation statutes. The principles are well settled and the Commissioner had the benefit of eloquent and learned submissions from both Counsel, on how the Commissioner should read, understand and apply the various authorities that were opened.
31. The Commissioner is cognisant of the recent decision of McDonald J. in *Perrigo* wherein he reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at page 74

“The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

- (a) *If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
- (b) *Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that:*

“... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that”;

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

“Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible”.

32. The Commissioner is satisfied that Section 86 CATCA 2003 is clear and unambiguous and that in order for a dwelling house exemption to apply, the requirements set out in subsections 86(3) CATCA 2003 must be met. The Commissioner has had regard to the principles set out in *Perrigo*, in particular principle (g) that states “*....if it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes...*”

33. The Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning. In addition, section 86 CATCA 2003 provides an exemption to the liability to pay that tax. Therefore, the exemption must be strictly construed. Thus, in order to come within the exemption the Appellant must take the dwelling by way of a gift or inheritance and must satisfy the occupational requirements.

34. With the aforementioned approach in mind, the Commissioner has considered the clear and cogent arguments of both parties. The critical questions in this appeal are

- (i) Whether the Appellant was in continuous occupation of the dwelling-house as his only or main residence throughout the period of 3 years immediately preceding the date of the gift and for the relevant period thereafter and
- (ii) Whether the Appellant was beneficially entitled to another dwelling-house and/or had a beneficial interest in any other dwelling-house at the date of the gift.

Continuous occupation of the dwelling-house as only or main residence

35. The first question that arises is whether the Appellant was in continuous occupation of the dwelling-house as his only or main residence throughout the period of 3 years immediately preceding the date of the gift. Having regard to the approach to be taken to statutory interpretation, the Commissioner is of the view that each word must be given its ordinary and plain meaning and as this relates to an exemption, the applicant must fall squarely within the meaning of such requirements namely, that an applicant is in (i) continuous occupation, (ii) of a dwelling house and (iii) as only or main residence.

36. Dwelling house is defined in section 86(1) CATCA 2003. However, there is no definition of “*only or main residence*” and no jurisprudence from the Irish Courts as to the interpretation of the phrase. The degree and quality of occupation and what evidence is necessary to establish whether a residence is an individual’s only or main residence has been considered in a number of decisions of the Courts and the First-tier Tribunal in the United Kingdom (“UK”). The Commissioner is grateful to the parties for their submissions

and for providing such a fulsome and consolidated review of the jurisprudence. In the absence of a statutory definition of “*only or main residence*” and any judicial interpretation by the Irish courts, recourse can be made to influential but non-binding English jurisprudence. The Commissioner has considered in detail the totality of the cases submitted by the parties in support of the arguments made. In addition, the Commissioner has considered previous decisions of the Appeal Commissioners in 15TACD2017, 17TACD2018 and 09TACD2019. Whilst the Commissioner has not referenced in detail all of the cases submitted and/or referred to, the Commissioner is of the view that it is important to make reference to the following decisions.

37. In *Frost v Feltham*, the High Court in England and Wales considered which of two residences constituted a taxpayer’s sole or main residence for the purposes of determining the entitlement to mortgage interest relief. Nourse J. observed that the question of “main” residence is not necessarily the residence where the individual spends the majority of their time, although it commonly will be and he sets out a useful summary of the criteria to be applied.

“If someone lives in two houses the question, which does he use as the principal or more important one, cannot be determined solely by reference to the way in which he divides his time between the two....

The question is essentially one of fact and degree for the Tribunal of first instance, in this case the General Commissioners....

The matter must be decided objectively”.

38. It is submitted that this decision is authority for the proposition that it does not suffice for the taxpayer to decide, which is the “principal” or “more important” residence, rather the matter must be decided objectively. The Commissioner agrees with this proposition.

39. In *Goodwin v Curtis* [1998] 70 TC 478; STC 475, Millett LJ quoted with approval the words of Viscount Cave LC in *Levene* at page 222-223 where he states

“....the word ‘reside’ is a familiar English word and is defined in the Oxford English Dictionary as meaning “to dwell permanently or for a considerable time, to have ones settled or usual abode, to live in or at a particular place”.

Millet LJ concluded that

“Temporary occupation at an address does not make a man a resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the commissioners to decide...”

The substance of the commissioners finding taken as a whole, in my judgement, is that the nature, quality, length and circumstances of the taxpayer's occupation of the farmhouse did not make his occupation qualify as residence. This conclusion was, in my judgement, clearly open to him".

40. In *Lam v Revenue and Customs Commissioners* [2018] UK FTT 310 TC, Connell J. at paragraph 54, made the following observations in relation to "occupation" of a principal private residence

*"the Court of Appeal judgement in *Goodwin v Curtis* and later cases have established that to determine whether a property qualifies as a principal private residence, the following factors must be considered:*

- *whether the property was actually occupied as a residence;*
- *the nature quality, length and circumstances of a taxpayer's occupation of the property;*
- *whether the occupation was intended to be permanent or merely temporary;*
- *whether there was a degree of continuity or some expectation of continuity to turn mere occupation into residence. The need for permanence continuity should not be overstated as is only one of the factors to be taken into account in weighing up all of the evidence.*

The question of when occupation becomes residence is one of fact and degree for the Tribunal to decide and the word "reside" and "residence" are ordinary words of the English language to be interpreted as such. Residence is usually defined as "the dwelling in which a person habitually lives; in other words, his or her home. The test of residence is considered to be one of quality rather than quantity."

41. In an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd* at para. 22, Charleton J. stated

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

42. In approaching the task of asserting the meaning of the words in section 82 CATCA 2003, the Commissioner must apply the principles of construction are set out above. The statute

is directed to the public at large and so the expression should be given its ordinary or natural meaning. The expression is used in a section in a tax act conferring an exemption to tax and should therefore be construed strictly.

43. To assist with interpreting the meaning of this particular section in particular the word "*continuous*" given that it is not defined in section 86 CATCA 2003, Counsel for the Appellant submitted a definition of "*unoccupied*" from Words and Phrases Legally Defined, Butterworths, 3rd Edition. Counsel for the Respondent submitted the definition of "*continuous*" as provided for in the Oxford English Dictionary. The Commissioner is grateful for the definitions and has considered same.
44. The Appellant is a person who is non-resident in this jurisdiction for tax purposes. In order to be classified as non-resident, a person must not be resident in the jurisdiction for 183 days or more (or 280 days or more over two consecutive tax years). The Appellant argues that despite his non residency for tax purposes, the property has been continuously occupied as his only or main residence throughout the requisite period and remains so.
45. The Commissioner accepts the Appellant's argument that a person can be non-resident for tax purposes but satisfies the criteria as set out in section 86(3)(a), that there is continuous occupation of a dwelling as an only or main residence. Having regard to the principles enunciated in the case law referred to by the parties, the Commissioner is satisfied that continuous occupation as an only or main residence should be assessed having regard to the nature, quality, length and circumstances of any occupation and that the test is an objective one, with each case being determined on its own merits. There is no set formula.
46. As stated above, the burden of proof lies on the Appellant to establish that the dwelling was continuously occupied as a main residence. The Commissioner is not satisfied that the burden has been discharged in this appeal. The Appellant has submitted what he described as "*a sample*" of the documentary evidence to support his arguments. Numerous references were made to a "*personal diary*" and "*a bag of documents*". However, such items were not submitted in the course of the Appellant's appeal to support his arguments. In addition, the oral evidence of the Appellant was limited as to his specific movements and locations throughout the period at issue. In circumstances where the burden is on the Appellant to show continuous occupation as his only or main residence, the Commissioner would have expected the testimony of the Appellant to be far more detailed as to the precise locations, dates, and periods of time spent travelling and then returning to the dwelling. The Commissioner notes that the Respondent made a number

of requests of the Appellant for supporting documentation such as flights and/or hotel bookings for the period 2012-2015. However, this was not forthcoming.

47. In particular, the Commissioner notes that the Appellant has submitted a “*yearly schedule of days in Ireland 1 June 2012 to 20 June 2015*”. However, no other documentary evidence has been submitted to corroborate the contents of that schedule. It is noteworthy that the Appellant has submitted documents to show travel on only 2 occasions during the requisite period. Whilst the testimony of the Appellant’s Tax Agent was that the schedule was created by reference to diaries, no diaries have not been submitted in this appeal to substantiate that evidence. The Commissioner is not satisfied that the documentary evidence submitted *inter alia* various utility bills, the Appellant’s drivers licence dated March 2013, domestic alarm agreements for the period December 2010 to December 2011 and December 2012 to December 2013 and a television licence for the period October 2014 to September 2015, on balance support a finding that there was any degree of continuity or expectation of continuity in relation to the property for the 3 years prior to the gift, in circumstances where the Appellant spent a considerable proportion of the year outside the jurisdiction. In fact, the Commissioner is of the view that there is no evidence, but for the limited travel documents referenced above, of the Appellant travelling to and from this jurisdiction, to illustrate any residence in the dwelling.

48. Residence is usually defined as the dwelling in which the person habitually lives, in other words his/her home. The Commissioner reiterates that when looking at whether a dwelling is a sole or main residence it’s the nature, quality, length and circumstances of the time that spent there that must be considered. The test of residence is considered to be one of quality rather than quantity. Whilst the decision of UKs First Tier Tribunal in *Booth* at para. 54 states that “*we have considered.....what other evidence she might, but has not adduced*” and reference is made to the fact that items such as utility bills, home insurance and other official documentation, such as a television licence were not produced as evidence, the Commissioner does not accept that the items submitted in this appeal, are persuasive in the particular circumstances of this appeal.

49. For the period 2012-2015, utility bills and other items of official documentation have been produced by the Appellant. However, the Commissioner is of the view that the Appellant has submitted limited documentation in that regard and the Commissioner does not accept that this is evidence that on balance supports that contention that the Appellant continuously resided in the dwelling during the requisite period to satisfy the requirements of section 86(3) CATCA 2003. Periods spent in the dwelling must be sufficiently documented or there must be other evidence to support a claim that the property was continuously occupied as the taxpayers only or main residence.

50. Accordingly, in all the circumstances, the Commissioner determines that on balance the Appellant has not shown that the Respondent was incorrect to refuse to apply the provisions of section 86(3) CATCA 2003.

51. In circumstances where the Appellant has not shown that he has satisfied the provisions of section 86(3)(a) CATCA 2003, it is not necessary to consider in any detail whether the Appellant has satisfied the provisions of section 86(3)(b) CATCA 2003. However for the sake of completeness, the Commissioner has reviewed the evidence submitted including the Deed of Assignment and the Trust Document dated [REDACTED] [REDACTED], in addition to considering the oral evidence adduced. The Commissioner is satisfied that the Appellant does not have an interest in the property at [REDACTED] [REDACTED] and that the interest in the property was transferred for the Trustees to hold on trust for the Beneficiary, namely the Appellant's daughter. The Commissioner does not accept the Respondent's argument that paragraph 2.3, in relation to the income of the trust which may be applied by the Appellant in lieu of his obligation to provide monthly allowance for the beneficiary, equates to an interest in the property for the purposes of section 86(3)(b) CATCA 2003.

52. Finally, section 86(3)(a)(ii) relates to residing in the dwelling for the requisite period after the gift and/or inheritance is taken. However, in circumstances where it is determined that the Appellant is not entitled to a dwelling house exemption, consideration of this period does not arise. This section is pertinent in circumstances where a dwelling house exemption has been afforded to a taxpayer and the Respondent seeks to clawback the exemption. Accordingly, section 86(3)(a)(ii) does not apply to the circumstances of this appeal and the Commissioner makes no determination in respect of the period, subsequent to the Appellant taking the gift.

Determination

53. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and has not succeeded in showing that the tax is not payable.

54. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax.

55. This appeal is hereby determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal

on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine
Appeal Commissioner
15 June 2022

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.