AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

125TACD2023

Between

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction 3
Background 3
Legislation and Guidelines 5
Preliminary Matter – Intervening Jurisprudence 17
Documentation Presented to the Commission 18
Witness Evidence 19
The Appellant 19
Submissions 20
Appellant 20
Respondent 23
Material Facts 26
Analysis 27
Determination 36

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as appeals against Notices of Assessment to Domicile Levy raised by the Revenue Commissioners (hereinafter "the Respondent") on 4th October 2019.

2. The total amount of Domicile Levy under appeal is €172,117 for 2015 and €166,024 for 2016. The Appellant makes his appeal under the provisions of section 949I Taxes Consolidation Act 1997 ("TCA 1997").

3. The hearing of the appeal took place on 31st January 2023. The Appellant was represented by Senior Counsel and his agents and the Respondent was represented by Senior and Junior Counsel, its solicitor and members of its staff.

Background

4. The Appellant, who at all material times was Irish domiciled, was in receipt of the following Case V ("rental") Income:

	Summary of Case V Income	**2015**	**2016**
	Gross Rents Receivable	2,677,850	2,663,679
Less:	Repairs	102,461	4,106
	Interest	1,297,140	1,168,002
	Other Expenses	309,617	549,736
		1,709,218	1,721,844
	Rental Profit (before capital allowances)	968,632	941,835

5. The Appellant is a member of a partnership in which he holds a 47.5% share. The partnership's activities is the rental of commercial units and the above rental income and expenses represents the Appellant's *pro rata* share of the income and expenditure of the partnership. In addition, as the partnership owns certain capital assets in the rental units, including fixtures and fittings, equipment and industrial buildings, it is entitled to claim capital allowances on those items. As with the share of income and expenditure, the Appellant is entitled to claim 47.5% of the partnership's available capital allowances when calculating his liability to income tax.

6. Those available capital allowances (which consist of industrial building allowances under sections 272 and 278 TCA 1997 and machinery or plant wear and tear allowances under

sections 298, 284 and 300 TCA 1997) reduced the rental income for both 2015 and 2016 to nil and therefore the Appellant is only liable to income tax on his non-rental income in both of those years.

7. However, for reasons that will become evident it is necessary to look at the Appellant's total income before the deduction of the available rental capital allowances in both of the years under appeal. Thus, in 2015 this total income was €1,055,222 (consisting of adjusted rental income of €969,307, €76,299 in respect of employment income and €9,616 in respect of dividend income) and in 2016 it was €1,043,666 (which consisted of adjusted rental income of €942,166 and €101,500 in respect of employment income).

8. Therefore, it is evident and undisputed between the Appellant and the Respondent ("the parties"), that the Appellant's "world-wide income" before the deduction of capital allowances in both 2015 and 2016 exceeded €1 million in each of those years.

9. In addition, it is undisputed between the parties that the Appellant's Irish property was valued in excess of €5m on 31st December 2015 and 31st December 2016.

10. Following an initial enquiry into the Appellant's tax returns for 2015 and 2016, which escalated into a Revenue Audit, the Respondent assessed the Appellant to Domicile Levy pursuant to section 531AB TCA 1997 and raised Notices of Assessments as follows:

Year	**Domicile Levy €**	**Tax Paid (Credit) €**	**Domicile Levy Due €**
2015	200,000	27,883	172,117
2016	200,000	33,976	166,024
Total	400,000	61,859	338,141

11. By way of Notice of Appeal dated 1st November 2019, the Appellant appealed the above Notices of Assessment to Domicile Levy. The grounds of appeal may be summarised as follows:

    11.1. By virtue of available capital allowances, the Appellant's "world-wide income", as defined by section 531AA TCA 1997 was not more than €1,000,000 in each of the years 2015 and 2016. As such, the Appellant submitted as his income was below €1 million in each of the years 2015 and 2016, he was not a "relevant individual" within the meaning of section 531AA (1) TCA 1997 for either of those years and given this position, he was not liable to pay the Domicile Levy assessed by the Respondent.

11.2. Strictly without prejudice to the above submission, that the assessments raised by the Respondent were excessive by reason of the failure of the Respondent to allow as a credit the amount of Universal Social Charge ("USC") paid by the Appellant in the sum of €109,155 for 2015 and €106,264 for 2016.

Legislation and Guidelines

12. The following legislation is relevant to this appeal.

<u>*Section 2 TCA 1997 - Interpretation of Tax Acts*</u>*.*

(1) In the Tax Acts, except where otherwise provided or the context otherwise requires –

…

"capital allowance" means any allowance (other than an allowance or deduction to be made in computing profits or gains) under—

(a) Part 9,

(b) Part 23,

(c) Chapter 1 of Part 24, or

(d) Part 29,

and "capital allowances" shall be construed accordingly;

<u>*Section 3 TCA 1997 – Interpretation of Income Tax Acts*</u>*.*

(1) In the Income Tax Acts, except where otherwise provided or the context otherwise requires—

"chargeable tax", in relation to an individual for a year of assessment, means the amount of income tax to which that individual is chargeable for that year of assessment under section 15 in respect of his or her total income for that year including, in the case of an individual assessed to tax in accordance with the provisions of section 1017 or 1031C, the total income, if any, of the individual's spouse or civil partner, as the case may be;

…

"tax" means income tax;

"taxable income" has the meaning assigned to it by section 458;

"total income" means total income from all sources as estimated in accordance with the Income Tax Acts;

…

<u>*Section 12 TCA 1997 – The charge to income tax*</u>*.*

Income tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the sections enumerated below—

Schedule C — Section 17;

Schedule D — Section 18;

Schedule E — Section 19;

Schedule F — Section 20;

and in accordance with the provisions of the Income Tax Acts applicable to those Schedules.

<u>*Section 18 TCA 1997 – Schedule D*</u>*.*

(1) The Schedule referred to as Schedule D is as follows:

SCHEDULE D

1. Tax under this Schedule shall be charged in respect of—

2. (a) the annual profits or gains arising or accruing to—

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

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

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

…

(2) Tax under Schedule D shall be charged under the following Cases:

…

Case V — Tax in respect of any rent in respect of any premises or any receipts in respect of any easement;

and subject to and in accordance with the provisions of the Income Tax Acts applicable to those Cases respectively.

Section 75 TCA 1997 –Case V: basis of assessment.

(1) *Without prejudice to any other provision of the Income Tax Acts, the profits or gains arising from—*

(a) *any rent in respect of any premises, and*

(b) *any receipts in respect of any easement,*

shall, subject to and in accordance with the provisions of the Income Tax Acts, be deemed for the purposes of those Acts to be annual profits or gains within Schedule D, and the person entitled to such profits or gains shall be chargeable in respect of such profits or gains under Case V of that Schedule; but such rent or such receipts shall not include any payments to which section 104 applies.

(2) *Profits or gains chargeable under Case V of Schedule D shall, for the purposes of ascertaining liability to income tax, be deemed to issue from a single source, and subsection (3) shall apply accordingly.*

(3) *Tax under Case V of Schedule D shall be computed on the full amount of the profits or gains arising within the year of assessment.*

Section 97 TCA 1997 – Computational rules and allowable deductions.

(1) *Subject to this Chapter, the amount of the profits or gains arising in any year shall for the purposes of Case V of Schedule D be computed as follows:*

(a) *the amount of any rent shall be taken to be the gross amount of that rent before any deduction for income tax;*

(b) *the amount of the profits or gains arising in any year shall be the aggregate of the surpluses computed in accordance with paragraph (c), reduced by the aggregate of the deficiencies as so computed;*

(c) *the amount of the surplus or deficiency in respect of each rent or in respect of the total receipts from easements shall be computed by making the deductions*

authorised by subsection (2) from the rent or total receipts from easements, as the case may be, to which the person chargeable becomes entitled in any year.

(2) The deductions authorised by this subsection shall be deductions by reference to any or all of the following matters -

(a) the amount of any rent payable by the person chargeable in respect of the premises or in respect of a part of the premises;

(b) any sums borne by the person chargeable -

(i) in the case of a rent under a lease, in accordance with the conditions of the lease, and

(ii) in any other case, relating to and constituting an expense of the transaction or transactions under which the rents or receipts were received,

in respect of any rate levied by a local authority, whether such sums are by law chargeable on such person or on some other person;

(c) the cost to the person chargeable of any services rendered or goods provided by such person, otherwise than as maintenance or repairs, being services or goods which -

(i) in the case of a rent under a lease, such person is legally bound under the lease to render or provide but in respect of which such person receives no separate consideration, and

(ii) in any other case, relate to and constitute an expense of the transaction or transactions under which the rents or receipts were received, not being an expense of a capital nature;

(d) the cost of maintenance, repairs, insurance and management of the premises borne by the person chargeable and relating to and constituting an expense of the transaction or transactions under which the rents or receipts were received, not being an expense of a capital nature;

(e) interest on borrowed money employed in the purchase, improvement or repair of the premises.

…

Section 278 TCA 1997 – Manner of making allowances and charges.

(1) *Except in the cases mentioned in this section, any allowance or charge made to or on a person under the preceding provisions of this Part shall be made to or on such person in taxing such person's trade or, as the case may require, in charging such person's income under Case V of Schedule D.*

(2) *An industrial building allowance shall be made to a person by discharge or repayment of tax if such person's interest in the building or structure is subject to any lease when the expenditure is incurred or becomes subject to any lease before the building or structure is first used for any purpose; but this subsection shall not apply as respects income chargeable under Case V of Schedule D.*

(3) *A writing-down allowance shall be made to a person for a chargeable period by means of discharge or repayment of tax if such person's interest is subject to any lease at the end of that chargeable period or its basis period; but this subsection shall not apply as respects income chargeable under Case V of Schedule D.*

(4) *A balancing allowance shall be made to a person by means of discharge or repayment of tax if such person's interest is subject to any lease immediately before the event giving rise to the allowance; but this subsection shall not apply as respects income chargeable under Case V of Schedule D*

(5) *A balancing charge shall be made on a person under Case IV of Schedule D if such person's interest is subject to any lease immediately before the event giving rise to the charge and the corresponding income is chargeable under that Case.*

(6) *Any allowance which under subsections (1) to (4) is to be made otherwise than in taxing a trade shall be available primarily against the following income –*

(a) where the income (whether arising by means of rent or receipts in respect of premises or easements or otherwise) from the industrial building or structure in respect of the capital expenditure on which the allowance is given is chargeable under Case V of Schedule D, against income chargeable under that Case,

(b) where the income (whether arising by means of rent or receipts in respect of premises or easements or otherwise) from the industrial building or structure in respect of the capital expenditure on which the allowance is given is chargeable under Case IV of Schedule D, against income chargeable under that Case, or

(c) income chargeable under Case IV or V of Schedule D respectively which is the subject of a balancing charge.

Section 298. Allowances to lessors.

(1) Where machinery or plant is let on such terms that the burden of the wear and tear of the machinery or plant falls directly on the lessor, the lessor shall be entitled, on making a claim to the inspector within 24 months after the end of the chargeable period, to –

(a) an initial allowance under section 283, and

(b) a wear and tear allowance under section 284,

in relation to the machinery or plant, equal to the amount which might have been allowed if during the period of the letting the machinery or plant were in use for the purposes of a trade carried on by the lessor.

(2) Where machinery or plant is let on such terms as are referred to in subsection (1), the preceding provisions of this Chapter, in so far as they relate to balancing allowances and balancing charges, shall apply in relation to the lessor as if the machinery or plant were, during the term of the letting, in use for the purposes of a trade carried on by the lessor.

Section 300. Manner of making allowances and charges.

(1) Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall, unless it is made under or by virtue of section 284(6) or 298, be made to or on that person in taxing such person's trade.

(2) Any initial allowance or wear and tear allowance made under or by virtue of section 298(1) or any balancing allowance made under or by virtue of section 298(2) shall be made by means of discharge or repayment of tax, and shall be available primarily against income from the letting of machinery or plant.

(3) Any balancing charge made under or by virtue of section 298(2) shall be made under Case IV of Schedule D.

(4) Any wear and tear allowance made to any person under or by virtue of section 284(6) shall be made in charging that person's income under Case V of Schedule D.

Section 305 TCA 1997 – Income Tax: manner of granting, and effect of, allowances made by means of discharge or repayment of tax.

(1) (a) Where under this Part an allowance is to be made to a person for any year of assessment which is to be given by means of discharge or repayment of tax, or in charging income under Case V of Schedule D and is to be available or available primarily against a specified class of income, the amount of the allowance shall be deducted from or set off against the person's income of that class for that year of assessment and, if the amount to be allowed is greater than the amount of the person's income of that class for that year of assessment, the balance shall be deducted from or set off against the person's income of that class for the next year of assessment, and so on for subsequent years of assessment, and tax shall be discharged or repaid accordingly.

Section 403 TCA 1997 – Restriction on use of capital allowances for certain leased assets

(1) (a) In this section—

"chargeable period or its basis period" has the same meaning as in section 321(2);

"lessee" and "lessor", in relation to machinery or plant provided for leasing, mean respectively the person to whom the machinery or plant is or is to be leased and the person providing the machinery or plant for leasing, and "lessee" and "lessor" include respectively the successors in title of a lessee or a lessor;

"the relevant period" has the meaning assigned to it by subsection (9) (b);

"the specified capital allowances" means capital allowances in respect of—

(i) expenditure incurred on machinery or plant provided on or after the 25th day of January, 1984, for leasing in the course of a trade of leasing, or

(ii) the diminished value of such machinery or plant by reason of wear and tear,

other than capital allowances in respect of machinery or plant to which subsection (6), (7), (8) or (9) applies;

"trade of leasing" means—

(i) a trade which consists wholly of the leasing of machinery or plant, or

(ii) any part of a trade treated as a separate trade by virtue of subsection (2).

(b) For the purposes of this section—

…

(ii) letting any item of machinery or plant on hire,

shall be regarded as leasing of machinery or plant if apart from this paragraph it would not be so regarded.

…

(2) Where in any chargeable period or its basis period a person carries on as part of a trade any leasing of machinery or plant, that leasing shall be treated for the purposes of the Tax Acts, other than any provision of those Acts relating to the commencement or cessation of a trade, as a separate trade distinct from all other activities carried on by such person as part of the trade, and any necessary apportionment shall be made of receipts or expenses.

(3) (a) Notwithstanding section 381, where relief is claimed under that section in respect of a loss sustained in a trade of leasing, the amount of that loss, in so far as by virtue of section 392 it is referable to the specified capital allowances, shall be treated for the purposes of subsections (1) and (3) (b) of section 381 as reducing profits or gains of that trade of leasing only and shall not be treated as reducing any other income.

(b) Where paragraph (a) applies in the case of any claimant to relief under section 381—

(i) any limitation imposed by section 393 on the amount of capital allowances which may be taken into account under section 392 shall be referred, as far as may be, to the specified capital allowances rather than to any other capital allowances, and

(ii) notwithstanding section 392(2) (but without prejudice to paragraph (a) and to the order in which income is to be treated as reduced under section 381(3)(b)), the claimant may specify the extent to which any reduction of income treated as occurring by virtue of section 381 is to be referred to so much of the loss as is attributable to the loss, if any, actually sustained in the trade of leasing, the specified capital allowances or any other capital allowances, and, where the claimant so specifies, section 394 shall apply in accordance with the claimant's specification and not in accordance with section 392(2).

…

(5) References in this section to machinery or plant to which this subsection applies are references to machinery or plant provided on or after the 25th day of January, 1984, for leasing where the expenditure incurred on the provision of the machinery or plant was incurred under an obligation entered into by the lessor and the lessee before—

(a) the 25th day of January, 1984, or

(b) the 1st day of March, 1984, pursuant to negotiations which were in progress between the lessor and the lessee before the 25th day of January, 1984.

…

(7) The reference in the definition of "the specified capital allowances" to machinery or plant to which this subsection applies is a reference to machinery or plant provided for leasing by a lessor to a lessee in the course of the carrying on by the lessor of relevant trading operations within the meaning of section 445 or 446, and—

(a) in respect of the expenditure on which no allowance has been or will be made under section 283, or

(b) in respect of which no allowance on account of wear and tear to be made under section 284 has been or will be increased under section 285.

…

Section 531A TCA 1997 – Definitions.

(1) In this Part -

"aggregate income for the year of assessment", in relation to an individual and a year of assessment, means the aggregate of the individual's relevant emoluments in the year of assessment, including relevant emoluments that are paid in whole or in part for a year of assessment other than the year of assessment during which the payment is made, and relevant income for the year of assessment;

…

"year of assessment" means a year of assessment within the meaning of the Tax Acts.

(2) Words and expressions used in this Part have, except where otherwise provided or where the context otherwise requires, the same meaning as in the Tax Acts.

Section 531AA TCA 1997 – PART 18C Domicile Levy – Interpretation.

(1) In this Part -

…

'domicile levy' has the meaning assigned to it by section 531AB;

…

'Irish property', in relation to an individual and a valuation date, means all property, situate in the State, to which the individual is beneficially entitled in possession on the valuation date, but does not include –

…

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

'market value', in relation to property, means the price which such property would fetch if sold on the open market on the valuation date in such manner and subject to such conditions as might reasonably be calculated to obtain for the vendor the best price for the property;

…

'property' includes rights and interests of every description;

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

(a) who is domiciled in, and is a citizen of, the State in the tax year,

(b) whose world-wide income for the tax year is more than €1,000,000,

(c) whose liability to income tax in the State for the tax year is less than €200,000, and

(d) the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000;

'return' means such a return as is referred to in section 531AF;

'tax year' means a year of assessment for income tax purposes;

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

(a) without regard to any deduction -

(i) in respect of double rent allowance under section 324(2), 333(2), 345(3) or 354(3),

(ii) under section 372AP, in computing the amount of a surplus or deficiency in respect of rent from any premises,

(iii) under section 372AU, in computing the amount of a surplus or deficiency in respect of rent from any premises,

…

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

'valuation date', in relation to a tax year, means 31 December in that year.

…

Section 531AB TCA 1997 – Charge to Domicile Levy.

Subject to this Part, with effect from 1 January 2010 a levy, to be known as "domicile levy", shall be charged, levied and paid annually by every relevant individual and the amount of such levy shall be €200,000.

Section 531AC TCA 1997 – Credit for Income Tax Paid.

A relevant individual's liability to income tax for a tax year shall be allowable as a credit in arriving at the amount of domicile levy chargeable for that year, but only to the extent that such income tax has been paid at the same time as, or before, domicile levy for that year is paid.

Section 531AF TCA 1997 - Delivery of returns.

(1) *A relevant individual shall, as respects a tax year, on or before 31 October in the year after the valuation date, prepare and deliver to the Revenue Commissioners a full and true return, together with the payment of domicile levy, of all such matters and particulars in relation to the determination of liability to domicile levy as the Revenue Commissioners may require.*

(1A) Where the Revenue Commissioners have reason to believe that an individual is chargeable to domicile levy for any year on the basis that he or she is a relevant individual for that year, the Revenue Commissioners may, by notice in writing, request the individual to deliver, within 30 days of the date of the notice, a full and true return, together with the payment of domicile levy, of all such matters and particulars in relation to the determination of liability to domicile levy as the Revenue Commissioners may require.

(2) *A return under this section shall -*

(a) *be in such form as the Revenue Commissioners may require,*

(b) *be signed by the relevant individual, and*

(c) *include a declaration by the individual who signed the return that the return is, to the best of that individual's knowledge, information and belief, correct and complete.*

Section 531AH TCA 1997- Making and amending of assessments by Revenue Commissioners.

(1) *Where -*

(a) *a return under section 531AF(1) is not delivered to the Revenue Commissioners by an individual on or before 31 October in the year following the valuation date, or*

(b) *the Revenue Commissioners are dissatisfied with a return delivered to them under section 531AF(1),*

the Revenue Commissioners may make an assessment or an amending assessment upon an individual who they have reason to believe is chargeable to domicile levy on the basis that the individual is a relevant individual.

(2) The Revenue Commissioners may withdraw an assessment made under subsection (1) and make an assessment of the amount of domicile levy payable on the basis of a return which, in their opinion, represents reasonable compliance with their requirements and which is delivered to them within 30 days after the date of the assessment made by them pursuant to subsection (1).

(3) A person aggrieved by an assessment or an amended assessment, as the case may be, made on that person may appeal the assessment or the amended assessment to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of assessment.

Section 531AI TCA 1997- Right of Revenue Commissioners to make enquiries and amend assessments.

(1) Section 959Z shall apply, with any necessary modifications, for the purposes of this Part as it applies for the purposes of income tax.

(2) For the purposes of making an enquiry or taking such actions, as referred to in section 959Z or for the purposes of making, amending or further amending an assessment on an individual in relation to domicile levy, the Revenue Commissioners shall have all such powers as an inspector would have under that section in relation to making enquiries or taking such actions as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of any statement or particular contained in a return delivered for the purposes of income tax.

Preliminary Matter – Intervening Jurisprudence

13. In the period between the date the Appellant submitted his appeal and the hearing of the appeal by the Commission, the Court of Appeal published its judgment in *Louis Fitzgerald v Revenue Commissioners* [2022] IECA 255 ("*Fitzgerald*").

14. In *Fitzgerald,* the Court of Appeal upheld the High Court's findings that for the purpose of calculating a taxpayer's liability to Domicile Levy, USC paid in a relevant year of assessment is not deductible as a credit in calculating the quantum payable.

15. Arising from *Fitzgerald*, the Appellant's Counsel instructed the Commission that the Appellant was no longer pursuing the ground of appeal in which he sought to have the USC paid by him in 2015 and 2016 offset against the amount of Domicile Levy due by him in the event that he was held to be liable to such charge.

16. Given this position which is acknowledged by the Commissioner, the Commission are required to solely adjudicate upon whether the Appellant is entitled to deduct his available rental capital allowances, or a portion thereof, from his rental income for the years of assessment 2015 and 2016 in order to establish if his income exceeded €1 million for those years and as such whether he is a "relevant individual" for the purpose of assessment to Domicile Levy.

Documentation Presented to the Commission

17. The following documentation was presented to the Commission:

    17.1. A copy of the Appellant's share of the partnership's rental income computation for the years ended 31st December 2015 and 31st December 2016. Within this document it disclosed an apportionment of the amount of rental income received by the Appellant split between "pure rent" and the amount attributable to Plant and Machinery as follows:

	2015 €	2016 €
Rental Profit relating to buildings with integral Plant & Machinery ("P & M"), before Capital Allowances	968,632	895,035
25% profit attributable to Plant & Machinery (Note 1)	244,189	225,635
P & M Allowances strictly available under section section 300 (2) TCA 1997	244,189	225,635
Industrial Building Allowance ("IBA") Capital Allowances	15,589	-
Note 1 - Cost of Rental Profits		
Qualifying Cost for Capital Allowances - P & M	21,978,259	21,978,259
Qualifying Cost for Capital Allowances - IBA	820,474	820,474
Non-Qualifying Costs	64,383,274	64,383,274
Total Cost - Previously reviewed as part of extensive Revenue review during 2018 and 2019	87,182,007	87,182,007
% Total Cost Attributable to qualifying P & M	25%	25%

    17.2. A letter from the Appellant's taxation advisors to the Respondent dated 6th March 2019. This provided a breakdown of rental capital allowances claimed by the partnership for each of the years 2015, 2016 and 2017. Within that correspondence it stated:

"…*We attach at Appendix II a breakdown per property of the amounts qualifying for capital allowances. This is based on an independent ████ ██████████████████████ review of the amounts qualifying for capital allowances which was commissioned by our clients during 2017. This resulted in an adjustment to the capital allowances claimed prior to that date, details of which are set out in Appendix 1. This adjustment only impacted the unused capital allowance balance carried forward.*"

17.3. The Appendix II annexed referred to schedules of capital allowances claimed by the partnership for the periods 2015 – 2017 inclusive. Those allowances were split on a "per-property basis" between "plant and machinery allowances" and "industrial building allowances" and provided the backup to the figures shown in the table above.

17.4. A copy of the partnership's financial statements for the years ended 31st December 2015 and 2016.

17.5. A number of photographs of the properties owned by the partnership. These contained both interior and exterior photographs and showed that the premises were of modern design and extensively fitted out with modern amenities such as suspended ceilings, air conditioning units and similar.

Witness Evidence

The Appellant

18. The Appellant gave evidence on his own behalf during the course of the appeal. He explained that he had a degree in ████████████████████████████ and was highly experienced in the property sector having spent some █████ years working within it. He advised that he was in partnership with his ██████ and █████. As such the rental income he received in the periods under appeal arose from that partnership. This partnership was involved in the business of letting commercial premises. He further advised that he was entitled to a 47.5% share of the partnership's income and capital allowances and confirmed that the figures entered in his 2015 and 2016 tax returns for both rental income and rental capital allowances were a true reflection of those figures.

19. The Appellant advised that the commercial properties held by the partnership were a mix of office buildings and "light" industrial units. He explained that the office buildings were similar to the Commission's premises in that they were modern buildings with new or relatively new fixtures and fittings such as heating, air conditioning, ventilation systems

and suspended ceilings. He further explained that the light industrial units had similar fixtures and fittings within them with the addition of industrial items such as roller shutter doors.

20. The Appellant advised that the partnership's tenants included a ██████████ ██████████████████████████ and given the calibre of tenant they were required to be "*well kitted out*". He confirmed that the partnership had engaged the services of ███. ███ had prepared a report splitting the cost of the properties held by the partnership into the "allowable building element", the "non-allowable building element" and the "plant and machinery element" component. He confirmed that the extract provided to the Commission at 17.1 above was derived from this Report.

21. In response to a question from the Respondent's Counsel, the Appellant confirmed when submitting his 2015 and 2016 income tax returns, he availed of an administrative practice permitted by the Respondent which allowed him to offset capital allowances in respect of plant and machinery against his total rental income rather than confining such allowances to being offset against his rental income received in respect of the letting of that plant and machinery.

Submissions

Appellant

22. The Appellant's Counsel opened his submissions by distinguishing the Appellant's appeal from the recent High Court judgment of *Ann Corcoran & Joseph Corcoran v The Revenue Commissioners* [2022] IEHC 199 ("*Corcoran").*

23. In *Corcoran*, which considered the imposition of Domicile Levy, the High Court found that trading wear and tear allowances ("trading capital allowances") under section 284 TCA 1997 could not be taken into account as a deduction in computing world-wide income.

24. The Appellant's Counsel advised that the Appellant was entitled to avail of capital allowances in respect of his rental activities and submitted that as a portion of these allowances were ring-fenced against Case V income only (meaning that they can only be offset against that subset of income rather than total income) then they were quite different to the type of allowances considered in *Corcoran* (as trading capital allowances are generally not ring-fenced and as such can be offset against a taxpayer's total income).

25. The Appellant's Counsel submitted that the rental income received by the Appellant consisted of two separate and distinct streams of income. The first of which was he

termed "pure" or ordinary rental income which represented payment to occupy the rented space and the second was a payment in respect of the available use by the tenant of the fixtures and fittings and equipment supplied within the units.

26. Counsel for the Appellant submitted that the provided table at paragraph 17.1 above was not disputed by the Respondent and evidenced that 25% of the rental profit received was in respect of payments for the supplied fixtures and fittings and equipment integrated into the rented buildings ("the leased assets").

27. The Appellant's Counsel noted that it was a practice of the Respondent not to restrict the available capital allowances on the leased assets to the portion of the rental income referable to those assets[1]. However, the Appellant's Counsel submitted that as practices of the Respondent are not binding, then the correct position was that outlined in the TCA 1997.

28. The Appellant's Counsel submitted that the correct position was provided for under section 300(2) and section 403 TCA 1997. As these sections provide that any allowance in respect of leased assets is only available against income receivable from that subset of income (rather than total income), the Appellant's Counsel further submitted that this was the distinguishing feature from the facts in dispute in *Corcoran.*

29. Furthermore, the Appellant's Counsel submitted that *Fitzgerald* which considered the offset of trading losses (which included a portion of capital allowances within them) under section 381 TCA 1997 against income from other sources for the purposes of calculating world-wide income for domicile levy purposes was further distinguished from the Appellant's appeal.

30. The Appellant's Counsel noted that the definition of world-wide income in section 531AA TCA 1997 ("...*the individual's income, without regard to any amount deductible from or deductible in computing <u>total income</u> [emphasis added],…*"), is mirrored in section 381(5) TCA 1997 (which provides that trading losses are to be "*regarded as a deduction… in computing the person's <u>total income</u> [emphasis added] for the year*"). Thus, the Appellant's Counsel submitted as both *Corcoran* and *Fitzgerald* considered deductions

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[1] See paragraph 4.1 of the Respondent's document "Plant in Leased Buildings – Treatment of leasing income and capital allowances" (April 2022) which provides that a taxpayer may elect to treat expenditure on plant that is an integral part of an industrial or commercial building as part of the construction cost of the building instead of expenditure on plant. The advantage of availing of this election is that capital allowances (Industrial Building Allowance) may be claimed on the total expenditure incurred and those capital allowances are not ring-fenced – see, for further: https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-09/09-02-03.pdf

or allowances which were available against total income, by virtue of an element of the allowances claimed by the Appellant being restricted against a particular class of income, then in calculating world-wide income a deduction ought to be allowed in respect of that portion of restricted allowances.

31. The Appellant's Counsel submitted the ability to offset allowances against total income was emphasised by the Court in *Fitzgerald* in finding (at paragraph 43 of its judgment) that trading losses *"may be applied to reduce the charge to tax of profits or gains of any description; it is not applied to any particular case or schedular source of income*".

32. Counsel for the Appellant opened paragraph 65 of *Fitzgerald* in which the Court noted that section 381(5) (b) TCA 1997 was "*predicated on the notional reduction of an individual's income (as if the income had been reduced) not on a recalculation based upon an actual reduction of their income*".

33. The Appellant's Counsel emphasised as the restricted Case V capital allowances claimed by the Appellant are a subset of the computation of Schedule D, Case V profits (part of the "schedular system" in which different sources of income are assessed by the Respondent under various "schedules"), they are very different to deductions available in computing total income. Furthermore, Counsel submitted that in contrast to *Fitzgerald*, the plant and machinery allowances in the Appellant's appeal are not made under section 304(2) TCA 1997 "*in charging profits or gains of any description"*, but rather under s. 305(1) (a) TCA 1997 "*against a specific class of income*" and only against that class; i.e., they are applied to a particular case and schedular source of income. Counsel submitted that as section 403(5) TCA 1997 expressly restricts the application of section 305(1) (b) TCA 1997, those allowances are specifically and expressly ring-fenced and are not available against any income other than income of the class in question, and not against total income.

34. Counsel submitted that as the Appellant's restricted Case V capital allowances can be set off only against a component of Schedule D, Case V income they must therefore be taken into account before the total Case V income can be calculated. Thus, the Appellant's Counsel submitted that the capital allowances claimed by the Appellant come into the tax computation as part of the computation of Case V profits, and not as part of the computation of total income.

35. In other words, as Counsel put it, in the case of section 305(1) (a) TCA 1997 and to adopt the language in paragraph 43 of the *Fitzgerald* judgment, the allowance claimed by the Appellant is one which is deducted in arriving at a schedular source of income in the first

instance (being the relevant component of Schedule D, Case V income), which income would previously have been calculated in accordance with section 305(1) (a) TCA 1997. Counsel submitted that this is so because s. 305(1) (a) TCA 1997 expressly states that "*the amount of the allowance shall be deducted from or set off against the person's income of that class*" and as such the specified income itself is calculated net of the deducted allowance. Given this position, the Appellant's Counsel submitted that it is not, as is the *Fitzgerald case,* an "*allowance [to] be made as a deduction in charging those profits or gains [of any description]*" and unlike *Fitzgerald*, there is no question of a "notional reduction"; rather there is a specific and explicit actual deduction under section 305(1) (a) TCA 1997.

36. The Appellant's Counsel noted that the provisions of section 531AA TCA 1997 were amended by the implementation of section 79 (1) of the Finance Act 2017 which inserts subsection 1A as "*for the purposes of the definition of 'world-wide income' in subsection (1), an individual's income means the income of an individual before deducting capital allowances and losses"*. Counsel submitted as section 79(2) of the Finance Act 2017 provides that "*Subsection (1) applies to domicile levy chargeable for the year 2018 and subsequent years*", then those provisions do not apply to the Appellant's appeal and furthermore were implemented to avoid the type of reduction in the calculation of worldwide income as is sought by the Appellant.

37. In summation, the Appellant's Counsel submitted that arising from the restricted Case V capital allowances available to the Appellant, his rental income for 2015 and 2016 should be reduced by the amount of these restricted allowances in advance of calculating his world-wide income. In so doing, the effect of the reduced rental income in both years under appeal when combined with his other income for those years results in the Appellant's world-wide income being below the quantum of €1 million. By virtue of the Appellant's world-wide income being below that sum, the Appellant's Counsel submits that the Appellant is not a "relevant individual" as defined under section 531AA TCA 1997 and as such is not liable to the payment of Domicile Levy for either of the years under appeal.

Respondent

38. The Respondent's Counsel submitted it was evident from *Fitzgerald* that capital allowances are to be disregarded in calculating world-wide income since the definition of world-wide income makes it clear that there is to be no regard to deductions from or in computing total income. The Respondent's Counsel submitted in coming to this finding,

the Court adopted a literal interpretation on the basis there was no doubt or ambiguity in the legislation and also observed (at paras 36 and 37);

> "*However, if there were a doubt, it seems clear than the purpose of the domicile levy is to ensure that wealthy individuals do not use tax shelters and tax avoidance schemes to pay little or no income tax relative to their income – this is because the definition of world-wide income makes it clear that it is, to use a general term, the 'gross income', and not a person's income after various deductions for the purposes of calculating her tax bill, which is to be used in calculating her 'world-wide income'. It would appear to defeat this purpose, if a person with a gross income of say €5 million could reduce her tax bill below €200,000 by the use of tax shelters and could avoid the domicile levy by claiming that these same tax shelters meant that her world-wide income was below €1 million.*
>
> *Interpreting s. 531AA in a manner which disregards such tax shelters (in this case capital allowances) in determining the individual's world-wide income would appear to this Court to be consistent with that purpose.*"

39. Without prejudice to the forgoing, the Respondent's Counsel submitted that the correct approach in establishing worldwide income is to look at the main stages in the calculation and charging of income from various sources in accordance with the TCA 1997 and to distinguish (and disallow) any amounts that are deductible from or deductible in computing total income.

40. Counsel submitted that there is no definition in the tax code for "income" as observed by Wilberforce LJ in *Lord Chetwode v IRC* [1977] 1 All ER 638 ("*Chetwode*"). However, Counsel submitted that *Chetwode* clearly identified the income tax charge as that imposed by the Schedular or source system in what is now our s.12 TCA 1997 by Wilberforce LJ holding (at page 641):

> "*It is notorious that there is not and never has been any definition of income in the UK tax code. What, as income is chargeable with income tax is left to be determined according to particular heads of charge under the Schedules*".

41. Counsel continued that while there is no definition of "income" in the TCA 1997, both of the terms 'total income' and 'taxable income' are so defined and contain important distinctions. Counsel submitted that these are important definitions as they are the fundamental concepts in the computational structure of the income tax charge. "Total income" is defined in section 3 TCA 1997 as "*total income from all sources as estimated in accordance with the Income Tax Acts*" while "taxable income" is defined by reference

to section 458 TCA 1997 which sets out how to get from total income to taxable income for income tax purposes.

42. Counsel submitted that, In the case of rental income, it is assessed on the full amount of the profits or gains for a year and without deduction other than the specified statutory deductions set out in sections 75 and 97 TCA 1997. Counsel noted that section 97 (2) (d) TCA 1997 expressly prohibits the deduction of expenditure which is capital in nature.

43. The Respondent's Counsel noted that the Appellant's capital allowance claims consisted of two separate and distinct claims. The first of these claims was under section 272 TCA 1997 and was in respect of the Industrial Buildings. Counsel opened section 278 (1) TCA 1997 which deals with the manner of granting industrial building allowances ("IBAs") which states:

   "*Except in the cases mentioned in this section, any allowance or charge made to or on a person under the preceding provisions of this Part shall be made to or on such person in taxing such person's trade or, as the case may require, in charging such person's income under Case V of Schedule D.*"

44. Counsel for the Respondent submitted that it was evident from the foregoing that IBAs are to be made in "*taxing the trade*" or "*in charging the person's income under Case V or Schedule D*". Counsel submitted stemming from the wording "*in charging the income*", it is clear that there is a difference between computing income or estimating income, on the one hand, and then charging the income. Counsel submitted that as "charging the income" was the equivalent to "taxing the income", it was first necessary to estimate the Case V income and then make the allowance for that definition to have meaning.

45. Thus, the Respondent's Counsel submitted that the Appellant could not deduct the charges (the capital allowances) without establishing the income. Counsel submitted that this was evident from the definition of total income in section 3 TCA 1997, which provides that for the purposes of interpreting the Income Tax Acts 'total income' means total income from all sources as estimated in accordance with the Income Tax Acts.

46. Counsel submitted that only when total income is established, can regard be had to capital allowances. Counsel stated that while section 2 TCA 1997 provides that capital allowances for the purposes of the Tax Acts excludes an allowance or deduction to be made in computing profits or gains, such expenditure (whether claimed as a capital allowance or as a loss relief) is not used to reduce income estimated in accordance with the schedular system.

47. Further, the Respondent's Counsel submitted that the submissions of the Appellant are contrary to the wording of the section 381(4) TCA 1997 which states that the amount of loss is to be computed 'in the like manner' as profits or gains would be computed under the relevant provisions of the Income Tax Acts. Counsel submitted that these provisions include section 304 TCA 1997 which provides that a capital allowance, if claimed, shall be made as a deduction in charging the profits or gains in question – not in arriving at the profits or gains.

48. Counsel further submitted that the provisions of section 79 Finance Act 2017 merely clarified the Respondent's prevailing position that capital allowances (or losses forward) are not allowed as a deduction in computing an individual's world-wide income and the Appellant's reliance on this clarification of the law was misconceived.

49. In summation, the Respondent's Counsel submitted that both *Fitzgerald* and *Corcoran*, which are binding on the Commission, are authority for the position that there is no deduction for capital allowances or losses in computing world-wide income for the purpose of domicile levy and as such it was incumbent on the Commission to refuse the Appellant's appeal. Thus, Counsel for the Respondent submitted that as the Appellant was domiciled in Ireland, as his income was more than €1 million and as the value of his Irish property exceeded €5 million euros in both of the years under appeal, then the assessments should be upheld by the Commission.

Material Facts

50. The Commissioner finds the following material facts:

    50.1. The Appellant had rental income after expenses, before the deduction of capital allowances of €968,632 in 2015 and €941,835 in 2016.

    50.2. In 2015, €244,189 and in 2016 €225,635 of that income related to payments received in respect of the fixtures and fittings and equipment ("plant") integrated into the buildings rented by the Appellant. This income is referred to as "leasing income" henceforth.

    50.3. The Appellant had available plant capital allowances in both 2015 and 2016 which when offset against the leasing income reduced that income to nil. The capital allowances referable to the leasing business are ring-fenced under section 403 (5) TCA 1997 to profits or gains arising from the operation of the leasing business.

50.4. In addition, the Appellant had sufficient rental capital allowances, which when offset against his rental income (i.e. excluding the leasing income) reduced that rental income to nil in both 2015 and 2016.

50.5. When submitting his income tax returns for 2015 and 2016, the Appellant availed of a concession offered by the Respondent which permitted him to treat the leasing capital allowances as "ordinary" Case V allowances.

50.6. As part of his appeal, the Appellant submits that the concession afforded by the Respondent (and availed of by him) does have not have legislative force. As such the Appellant submits that the correct treatment of leasing capital allowances is set out in the provisions of sections 300 (2) and 403 TCA 1997.

50.7. The effect of the Appellant adapting this course of action is that he is deemed to carry on a separate trade of leasing in accordance with the provisions of section 403 (2) TCA 1997.

50.8. When the Appellant's rental income after expenses but before the deduction of capital allowances is combined with other income he received, his income in both 2015 and 2016 exceeds €1 million euros in each of those years.

50.9. The Appellant's Irish situate property exceeded €5 million in value in both of the years 2015 and 2016.

50.10. The Appellant was Irish domiciled in both of the years 2015 and 2016.

50.11. The Appellant paid income tax in the sum of €27,883 for 2015 and €33,976 for 2016.

Analysis

51. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners and ors.* 2020 IEHC 552 ("*Perrigo*") where he summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

"*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 Ltd v. The Revenue Commissioner [2020] IESC 60. 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."

52. The Domicile Levy was introduced by section 150 of the Finance Act 2010 which inserted a new Part 18C (sections 531AA to 531AK) into the TCA 1997. Section 531AB TCA 1997 provides:

"*Subject to this Part, with effect from 1 January 2010 a levy, to be known as "domicile levy", shall be charged, levied and paid annually by every relevant individual and the amount of such levy shall be €200,000*."

53. Section 531AA of the TCA1997 defines a "relevant individual" as meaning an individual, in relation to a tax year:

(i) who is domiciled in the State in the tax year;

(ii) whose world-wide income for the tax year is more than €1,000,000;

(iii) whose liability to income tax in the State for the tax year is less than €200,000; and

(iv) the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000.

54. "World-wide income" is defined in section 531AA TCA 1997 as follows:

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

(a) without regard to any deduction—

(i) in respect of double rent allowance under section 324(2), 333(2), 345(3) or 354(3),

(ii) under section 372AP, in computing the amount of a surplus or deficiency in respect of rent from any premises,

(iii) under section 372AU, in computing the amount of a surplus or deficiency in respect of rent from any premises,

(iv) under section 847A, in respect of a relevant donation (within the meaning of that section), (v) under section 848A, in respect of a relevant donation (within the meaning of that section),"

55. The Commissioner has already accepted and found as material facts that the Appellant was domiciled in the State for the relevant tax years and that the market value of his Irish property on the valuation date in the relevant tax years was in excess of €5,000,000. As stated above, both Parties agreed on these material facts.

56. This appeal presented to the Commission with the central issue as to what stage in the tax computation the deduction for Case V capital allowances is taken. That is whether it is taken at the first stage, which is the estimation of income in accordance with the provisions of the TCA 1997, or whether it is taken at the next stage which is the taking of deductions from income for the purposes of arriving at taxable income.

57. Before examining the central issue, the Commissioner notes that the Appellant availed of a concession allowed by the Respondent when submitting his tax returns (the "pooling" of the plant capital allowances with the rental capital allowances) but for the purposes of the appeal wishes to adapt a different stance by availing of the strict statutory provisions. As noted above, those provisions are sections 300 (2) and 403 TCA 1997.

58. Section 403 (2) TCA 1997 provides "…*that leasing shall be treated for the purposes of the Tax Acts, as a separate trade distinct from all other activities carried on by such person as part of the trade, and any necessary apportionment shall be made of receipts or expenses*". As that section refers to a "trade", rather than "rental" income, it follows that the Commissioner, in applying the literal approach promulgated in *Perrigo*, is required to consider the submissions of both parties under the scheduler system applicable to trading income that is Schedule Case I ("Case I"), in place of the Schedule D Case V ("Case V") submissions from the parties.

59. The Commissioner notes that the Appellant, while wishing to avail of those strict statutory provisions, did not comply with the provisions of section 403 (2) TCA 1997. While correctly apportioning the leasing income, the Appellant did not apportion the expenditure referable to the leased plant (which presumably would have included as a minimum an element of the insurance charge) and in place chose to exclusively claim plant capital allowances which have the effect of reducing the leasing income to nil. Absent the statutory authority to refuse the Appellant's submission to replace the concessionary treatment originally

availed of by him with the "correct" statutory provisions, the Commissioner can merely express his dissatisfaction with this submission which confirms his view that this course of action was adapted after the Domicile Levy provisions were considered.

60. As noted at paragraph 58 above, the effect of availing of the strict statutory provisions is that the leasing income, expenditure and capital allowances are removed from assessment under Case V and assessed under Case I.

61. Although this is the case and while a full analysis of the tax treatment of Case V capital allowances is not required for the purpose of this determination and arguably is not necessary in any event[2], for the purpose of interpretation the Commissioner deems it necessary to provide an overview of certain aspects of Case V capital allowances.

62. While Case V losses can only be offset against Case V income, Case V capital allowances are firstly deducted against Case V income and any excess allowances can ordinarily be offset against the Appellant's non-rental income for the year[3]. In addition, excess capital allowances may generally be offset between jointly assessed spouses or civil partners subject to an annual limit of €31,750[4].

63. As the Appellant's capital allowances consist of "ordinary capital allowances" (i.e. in respect of the rental of the buildings) and "leasing capital allowances", as noted the Appellant does not wish to avail of the concession put in place by the Respondent which permits him to treat the leasing capital allowances as ordinary capital allowances (which would entitle all of his capital allowances i.e. both the plant and ordinary capital allowances to be offset against his total income).

64. Adapting the strict statutory provisions results in the income and capital allowances referable to deemed leasing trade being treated as a separate trade and any loss or in this case any capital allowances referable to that trade may not be offset against the Appellant's total income (i.e. it is ring-fenced as section 403 (5) TCA 1997 disapplies the section 305 (1) (b) TCA 1997 provisions for sideways set off where expenditure is incurred on plant).

65. In his submissions, the Appellant appears to accept that as the "ordinary" Case V capital allowances are capable of being offset against "total income", then in line with *Fitzgerald*

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[2] The Respondent's publication "Case V excess capital allowances and Case V losses..." (updated May 2022) provides comprehensive guidance on Case V capital allowances and is available at https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-04/04-08-08.pdf

[3] Section 305 (b) (i) TCA 1997.

[4] Section 305 (1) (b) TCA 1997.

and *Corcoran*, those “ordinary allowances” are not available as a deduction in computing world-wide income for the purpose of section 531AA TCA 1997 (as “ordinary” Case V capital allowances are capable of being offset against a taxpayer’s total income and the Superior Courts findings held that such allowances are not so deductible).

66. If the Commissioner is mistaken in this regard, he finds that those “ordinary” Case V capital allowances are not deductible for the purpose of calculating world-wide income under section 531AA TCA 1997 as those allowances are available for offset against the Appellant’s total income.

67. However, the Appellant submits as the portion of the capital allowances referable to the leasing trade are ring-fenced against income from that activity only, when computing his world-wide income (“total income”) he is firstly required to calculate the sub-components of his total income having regard to the rules associated with the schedular system.

68. As such, the Appellant submits in computing his total income, he is firstly required to calculate his total Case I income (under the rules applicable to Schedule D, Case I). In accordance with those rules, the Appellant submits that he is required to take the income and expenditure (in this case the plant capital allowances) of the leasing trade to arrive at the total Case I income (which in the Appellant’s case is nil) since the plant capital allowances are only allowed against that subset of income.

69. Only on completion of this exercise, the Appellant submits, is it possible to then calculate his total income and this is achieved by taking the nil income from the leasing trade and then adding his other sources of income (the rental, employment and dividend income for 2015 and the rental and employment income for 2016). By application of this methodology, the Appellant submits that his total income is below the €1m threshold required for the Domicile Levy to be payable and as such, he is not liable to such charge.

70. In considering this submission, the Commissioner has the benefit of the Superior Courts findings in *Fitzgerald* and *Corcoran* as both of these cases similarly examined Case I deductions in ascertaining the charge to Domicile Levy, albeit that they did not consider ring-fenced capital allowances.

71. In *Fitzgerald*, Twomey J examined the offset of capital allowances and trading losses against the Appellant’s world-wide income for the purpose of assessment to Domicile Levy. While interpreting section 531AA TCA 1997 in accordance with the principles promulgated in *Bookfinders v Revenue Commissioners* [2020] IESC 60 and giving the words used in the legislation their “plain meaning”, he held that the Appellant’s world-wide income should not be reduced by the amount of capital allowances and losses. The

Commissioner is required to undertake the same exercise and give words their "plain meaning".

72. In coming to this finding, the Court observed at paragraphs 31 and 32 and 34 of that judgement:

"*Mr. Fitzpatrick argues that under s. 381 the capital allowances are deductions at this first stage of the assessment of income tax (and so are not a deduction at the total income stage). However, this Court does not agree, since it seems to this Court that the income under each Schedule must be determined before loss relief under s. 381 is considered. Section 381 is in this sense therefore a recalculation of income tax. The deduction or use of the capital allowances are then done under its own statutory terms and those statutory terms make clear that the capital allowances (or other losses) are to be regarded as a 'deduction to be made from … total income'.*

It is true to say that an argument can be made that if one viewed s. 381(5) in isolation, when a tax payer is considering his tax liability, capital allowances constitute a deduction in estimating income from all sources and thus they are not deductions in computing total income.

…this Court cannot get away from the express wording of s. 381(5) which on a literal interpretation makes it clear that these capital allowances/losses are to be 'regarded as a deduction to be made from … total income'. On this basis, it seems to this Court that they are to be disregarded in calculating worldwide income since the definition of world-wide income makes it clear that there is to be no regard to deductions from or in computing total income. On this basis, it must conclude that the Commissioner was correct in her determination that a loss under section 381 of the Taxes Consolidation Act 1997, does not constitute a deduction in estimating income from all sources but constitutes a deduction in computing total income."

73. In his submissions, the Appellant's Counsel submits that as *Fitzgerald* references "total income" several times as illustrated from the above extract and as the Court held that "*the income under each Schedule must be determined before*..", then this is proposition that in the first instance, income (after the deduction of any ring-fenced allowances) must be calculated under each of the applicable schedules and secondly each of those individual schedules (that is the Case I income, the Case V income, the Schedule F (dividend) income and the Schedule E (employment) income) are only added together on completion of that exercise to derive total income.

74. The Commissioner does not agree with these submissions. Firstly, there is nothing contained in the provisions of the TCA 1997 which stipulates that for the purpose of calculating world-wide income under section 531AA TCA 1997 that the mode of calculation should be done in the manner proposed by the Appellant. Secondly, as "capital allowance" is defined by section 2 TCA 1997 as "*any allowance (other than an allowance or deduction to be made in computing profits or gains…*", by definition capital allowances are treated differently "t*o deductions to be made in computing profits and gains*" i.e. "ordinary" trade expenses.

75. As both *Fitzgerald* and *Corcoran* held that "ordinary" trade expenses are deductible in computing world-wide income but capital allowances are not, this signifies to the Commissioner that all capital allowances, regardless of whether they are ring-fenced or not, are not deductible in computing world-wide income for the purpose of assessment to Domicile Levy.

76. Furthermore, the definition of world-wide income in section 531AA TCA 1997 ("*in relation to an individual, means the individual's income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts…)* does not support the Appellant's proposed computational methodology.

77. The Commissioner considers in calculating total income, it is irrelevant at what stage those deductions are taken as regardless of what stage they are so taken they are either deductible "from" or "in" calculating the Appellant's world-wide income. This finding is in line with the principles of income being a receivable amount, which is consistent with section 3 TCA 1997 which defines *"total income"* as *"total income from all sources as estimated in accordance with the Income Tax Acts"* while the deductions of a type sought by the Appellant are "deductions" from that income. For the Appellant's submissions to succeed, it would be necessary for the definition of world-wide income to read "the total income from each assessable schedule" or such like rather than "total income from all sources..."

78. The Commissioner therefore finds that the Appellant is not entitled to deduct the leasing capital allowances for the purposes of establishing his world-wide income under section 531AA and therefore the Respondent's assessments for 2015 and 2016 are upheld.

79. The Commissioner's findings are supported by Egan J's judgement in *Corcoran* in which she addressed the definition of world-wide income in section 531AA TCA1997 as being broken into two parts and examined the treatment of deductions therein "without regard

to deductions" and "having regard to deductions". At paragraphs 35 to 38 of that judgment Egan J looked at the issues to be decided by the Court as follows:

"Pursuant to the definition of "world-wide income" in s. 531 AA, one has to determine whether each respondents' "income… from all sources as estimated in accordance with the Tax Acts" exceeds €1 million.

Slightly unpacking this definition, one sees that "world-wide income" is defined as (A) "income ... from all sources as estimated in accordance with the Tax Acts", and (B) "without regard to any amount deductible from or deductible in computing total income". Where convenient, I will distinguish between parts (A) and (B) of the definition of "world-wide income".

The part of the definition at (A) is, effectively the definition of "total income" as per s. 3 TCA. This defines "total income" as "income from all sources as estimated in accordance with the Income Tax Acts".

As the part of the definition at (B) makes clear, in arriving at this estimation of total income for the purposes of the "world-wide income" definition, regard is not to be had "to any amount deductible from or deductible in computing total income."

80. At paragraph 76, Egan J held:

"*…The definition of "world-wide income" requires the identification of an individual's trading income from all sources as estimated in accordance with the Tax Acts and this is effectively an individual's profit or gain. I reject the respondents' contention that what is required to be identified is not profit or gain but taxable income. Thereafter, once such profit or gain has been estimated, the provision under examination means that no regard is to be had to amounts deductible <u>from</u> that profit or gain (in other words, amounts deductible pursuant to s. 458 of the Act such as tax credits and personal allowance) and, furthermore that no regard is to be had to amounts deductible <u>in</u> computing taxable income (such as pension contributions, trading losses and, in particular, capital allowances)…*"

81. It therefore follows that the Commissioner's findings are in agreement with *Corcoran* and in particular with paragraph 71 of that judgement in which Egan J held "… *the income under each schedule must be determined, before capital allowances are considered*".

82. Finally, the Appellant is reminded of the purpose of the Domicile Levy which was set out in paragraph 73 of *Corcoran*, as follows:

"*Bearing in mind that the purpose of the domicile levy is to ensure that wealthy individuals pay a minimum of €200,000 tax, the definition of "world-wide income" is more akin to a person's gross income (after deduction of expenses) and less akin to a person's income after making various deductions for the purposes of calculating his or her tax bill. To interpret it otherwise, would be to defeat the purpose of the domicile levy because a person with a gross income of say €5 million could potentially reduce their tax bill below €200,000 by the use of capital allowances, losses, pension contributions etc. This is what the section is designed to prevent*".

Determination

83. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, is on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

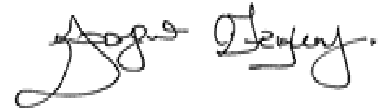
    "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the relevant tax is not payable.*"

84. The Commissioner determines that the Appellant has not discharged the burden of proof in his appeal and that he has not succeeded in showing that the relevant tax was not payable.

85. The Commissioner therefore determines that the Notices of Assessment to Domicile Levy raised by the Respondent on 4th October 2019 in the sum of €172,117 for 2015 and €166,024 for 2016 must stand.

86. 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 and duties. The Appellant was correct to check to see whether his legal rights were correctly applied.

87. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Andrew Feighery

Appeal Commissioner

27th July 2023

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