TAX APPEALS COMMISSION

28TACD2023

BETWEEN/

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against the refusal of a claim for repayment of income tax and USC in the aggregate sum of €259,243.52 in relation to the tax year of assessment, 2017. The Appellant claims that he is entitled to the repayment following a distribution of €527,000 received from his approved retirement fund ('ARF') on 15 December, 2017

2. On 10 November, 2018, the Respondent issued a P21 statement of liability taxing the ARF distribution and showing an underpayment by the Appellant of €11,261.74. The Appellant duly appealed.

Background

3. The Appellant has been tax resident in Portugal from 2009 to 2017, inclusive. On reaching age [redacted] in [redacted] he transferred funds accumulated in a number of Irish retirement annuity contracts to an ARF.

4. The Appellant was a self-employed [redacted] subject to Irish income tax on his [redacted] earnings prior to his retirement. During his working life, the Appellant made retirement annuity contributions ('RACs') from his self-employed [redacted] earnings up to 2007. Having retired [redacted] the Appellant transferred his accumulated RACs to an ARF administered by [redacted]

5. In 2013-2016, the Appellant received distributions from his ARF from which PAYE and USC were deducted. On application to the Respondent, this tax was refunded. The taxpayer reported these distributions as retirement income in his Portuguese tax return under Portuguese tax legislation.

6. On 15 December, 2017, the taxpayer received a distribution from his ARF of €527.000 from which PAYE of €202,389.96 and USC of €39,349.12 were deducted.

7. On 22 December, 2017, the Respondent published a revised wording of Chapter 23 of the pensions manual in relation to repayment claims by non-resident taxpayers in respect of income tax and USC deducted on distributions from their ARFs.

8. The Appellant's distributions were subject to income tax by deduction under the PAYE system in accordance with section 784A.

9. On 6 September, 2018, the Appellant submitted a refund claim in respect of a repayment of PAYE and USC deducted from the ARF distribution in respect of the year 2017, in the sums of €259,243.52 comprising income tax of €219,984.40 and USC of €39,349.12.

10. The claim and related documentation were returned to the Appellant on 10 September, 2018, and the Respondent informed the Appellant that the Respondent would be applying the treatment set out in the revised wording of chapter 23 of the pension's manual.

11. On 10 November, 2018, the Respondent issued a P21 statement of liability taxing the ARF income and showing an underpayment by the Appellant of €11,261.74. On 10 December, 2018, the Appellant appealed to the Tax Appeals Commission ('TAC').

Legislation

- Section 784A TCA 1997
- Section 784B TCA 1997

- Section 3(3) TCA 1997
- Double Taxation Treaty between Ireland and Portuguese Republic ('DTA')

12. Relevant excerpts in relation to the applicable statutory provisions are set out below.

Submissions *in brief*

13. The Appellant submitted *inter alia*, that the distribution from the ARF was income in nature, that section 784A(3)(a) TCA 1997 taxed the distribution as income and/or deemed it to be income and/or that the ARF distribution constituted '*earned income*' in accordance with section 3(3) TCA 1997. The Appellant submitted that Portugal had exclusive taxing rights in relation to the ARF distribution. The Appellant relied on Article 22 of the DTA and submitted that he was entitled to the repayment of tax withheld.

14. The Respondent submitted that the Appellant's ARF distribution was capital in nature and was taxable in accordance with the provisions of section 784A(3)(a) TCA 1997. The Respondent submitted that the application of section 784A(3)(a) TCA 1997 did not convert the ARF distribution to income by virtue of its application nor did it deem the distribution to be income. The Respondent submitted that the provision treated the distribution as equivalent to an emolument to which tax is chargeable under Schedule E. The Respondent submitted that the ARF distribution did not fall within the scope of the Ireland/Portugal DTA because the distribution was not income in nature and that Article 22 of the DTA upon which the Appellant relied, did not apply to capital receipts nor did it extend the scope of the Convention to capital receipts.

Evidence

Mr. [redacted] witness on behalf of the Appellant

15. Mr. [redacted] tax qualified former partner in a Portuguese tax firm and more recently, principal of his own firm specialising in personal income tax in Portugal, provided evidence on behalf of the Appellant. Mr. [redacted] furnished a report dated 4 January, 2022, to which he referred throughout his evidence.

16. Mr. [redacted] described the ARF as *'a self-administered post retirement fund'.* He stated in evidence that '*any distribution of an ARF would always be seen as income under Portuguese tax law…'*

17. Mr. [redacted] in his evidence stated that he was in agreement with the Respondent's expert witness, Professor [redacted] that all of the distributions from the ARF qualify as income in Portugal.

18. His evidence was that Portuguese personal income tax is imposed on income under various schedules and he listed these at A-H in his report. He stated that the characterisation of the distribution from an ARF in his opinion fell within the scope of 'Category H' pensions.

19. In his report, Mr. [redacted] concluded that distributions from an Irish ARF to a resident of Portugal is considered pension income in Portugal under subparagraph 1 a) or 1 c) of Article 11 of the Income Tax Code on the ground that the distributions are payments consequent on retirement of the taxpayer.

20. During cross-examination, Mr. [redacted] confirmed that he differed from Professor [redacted] the Respondent's witness, in relation to Professor [redacted] view that the income and gains accruing during the subsistence of the investment from 2013 to 2017 would have been treated as income from investments and would have been subject to return under Category E investment income.

<u>Professor [redacted] witness on behalf of the Respondent</u>

21. Professor [redacted] lawyer and specialist in tax law, [redacted] provided evidence on behalf of the Respondent and furnished a detailed report dated 26 May, 2022, to which he referred throughout his evidence.

22. Professor [redacted] confirmed that the Appellant had non-habitual tax residence ('NHR') status in Portugal in 2017. He confirmed the content of paragraphs 36 and 37 of his report and stated that foreign sourced pension income was exempt for NHRs prior to 2020. For the exemption to apply, the income was required to be from a non-Portuguese source and that criterion was fulfilled in the Appellant's case, he stated.

23. Professor [redacted] confirmed his view as stated in his report (paragraphs 64-65) that under Portuguese domestic law, tax will be payable not at the point of distribution but at the point the income is generated within the ARF.

24. Professor [redacted] in his evidence confirmed the conclusions of his report, paragraphs 72-76, which provide:

> *'From the above, it is our opinion that distributions arising from an ARF should not be considered as pension income (category H) from the outset, without first analysing the moment at which the income is actually generated, paid or made available to the taxpayer and without considering the underlying asset of that income.*
> *This means that although the contributions made by the taxpayer to the ARF account (aimed at his retirement age) are at stake, and they are initially classified under category H of the PIT Code as soon as they are paid, the fact that they are reinvested by the Qualified Fund Manager in other assets .... means that the classification of the income in question should be based on the asset that gave rise to it and not on the contributions made prior to reaching retirement age.*
> *By way of example, dividends paid by a company which shares are acquired through contributions made by the owner of the ARF during his lifetime through the investment made by the Qualified Fund Manager, should not be considered as pension income, but rather as investment income (category E) and determined in the ARF owner's sphere as soon as they are paid or made available to him.*
> *Only in the situation where the contributions managed by the Qualified Fund Manager have not been reinvested and have been paid to the owner of the ARF by way of a distribution, should they be considered as pension income (category H) as explained above.*
> *The basis for this understanding is the fact that there are not two distinct legal spheres involved (that of the owner of the ARF/Appellant and that of the ARF/Qualified Fund Manager) and, for this reason, the income generated in the meantime, as a result of the investment of the contributions, is directly received by the owner of the ARF and not only at the time of its distribution.'*

25. During cross-examination, Professor [redacted] accepted that the only difference between he and Mr. [redacted] was the issue of the income generated during the subsistence of the ARF which he classified as category E investment income but which Mr. [redacted] classified as pension income under category H.

Analysis

26. There is no specific article within the DTA governing taxing rights in relation to ARF distributions under the articles of the applicable DTA. As the Appellant is the beneficial owner of the underlying assets within the ARF, the distribution must be divided into its constituent parts for the purposes of determining the taxing rights under the articles of the applicable DTA.

27. The issue of the Appellant's tax resident status is not in dispute in this appeal. It is accepted that the Appellant was tax resident in Portugal since 2009, in the intervening years and for the relevant tax year of assessment, 2017.

28. On 15 December, 2017, the Appellant received a distribution from his ARF of €527.000 from which PAYE of €202,389.96 was deducted and USC of €39,349.12 was deducted. On 9 October, 2018, the Appellant submitted a refund claim in relation to PAYE and USC deducted from the ARF distribution, in respect of the tax year of assessment, 2017.

29. This repayment claim was refused by the Respondent and on 10 November, 2018, the Respondent issued a P21 statement of liability taxing the ARF income and showing an underpayment by the Appellant of €11,261.74.

30. The Appellant submitted that the fund contained in the ARF was income on the basis that it comprised pre-tax income by way of pension contributions with the applicable tax relief, which the Appellant availed of and paid into up to the age of [redacted]

31. The Appellant submitted that the distribution was income in nature which fell to be taxed under Article 22 of the DTA. The Appellant submitted that section 784A(3)(a) TCA 1997 taxed the distribution as income and/or deemed it to be income and/or that the ARF distribution constituted '*earned income'* in accordance with section 3(3) TCA 1997.

32. The Respondent's position was that while the provisions of section 784A TCA 1997, treated the distribution as an emolument to be taxed by reference to Schedule E, the distribution in nature and character, was capital and in the Appellant's hands, the distribution was a capital receipt.

Approved Retirement Fund

33. An approved retirement fund ('ARF') is a creature of statute, brought into existence through the enactment of the provisions of the Finance Act, 1999. It is governed by section 784A TCA 1997, subject to compliance with the conditions prescribed in section 784B TCA 1997. These provisions provide the taxpayer with an option to invest the taxpayer's pension funds in an investment vehicle, the ARF, as opposed to investing the fund in a standard pension product that will pay an annuity and terminate on death. The assets in the ARF, unlike any other pension product, vest in the beneficial ownership of the taxpayer. The ARF fund manager holds as bare trustee and is in effect, the nominee of the taxpayer. The taxpayer directs the extent to which any distributions are made from the ARF to provide for the taxpayer in retirement.

34. It is not possible for an individual or for an employer to make direct contributions to an ARF. An ARF can only arise post the maturation of retirement benefits. In this case, the Appellant, on reaching age [redacted] in [redacted] transferred funds accumulated in a number of Irish retirement annuity contracts to an ARF.

35. The most significant feature of an ARF as compared with a pension, is that the lump sum contained in the fund is beneficially owned by the taxpayer. The unused balance of the ARF fund may be bequeathed to the taxpayer's spouse or to the next generation on the death of the taxpayer, the ARF holder. This is distinct from a traditional pension such as a pension annuity, which terminates on the death of the pension holder.

36. Sub-section 783(1)(a) of section 783 TCA 1997 (Interpretation and general) provides:

> *'"approved retirement fund" has the meaning assigned to it by section 784A.'*

37. Section 784A(1)(a) provides:

> *'"approved retirement fund" means a fund which is managed by a qualifying fund manager and which complies with the conditions of section 784B'*

38. Section 784A(1)(b) provides:

*'For the purposes of this Chapter, references to an approved retirement fund shall be construed as a reference to **assets** in an approved retirement fund which are managed for an individual by a qualifying fund manager and which are beneficially owned by the individual.'* [emphasis added]

39. Subsection (d) of section 784A provides:

*'Any reference in this section to a distribution in relation to an approved retirement fund shall be construed as including any payment or transfer of **assets** out of the fund or any assignment of the fund or of **assets** out of the fund by any person, including a payment, transfer or assignment to the individual beneficially entitled to the **assets**, other than a payment, transfer or assignment to another approved retirement fund the beneficial owner of the **assets** in which is the individual who is beneficially entitled to the **assets** in the first-mentioned approved retirement fund, whether or not the payment, transfer or assignment is made to the said individual.'* [emphasis added]

40. The Respondent submitted that the ARF comprises '*assets'* beneficially owned by the taxpayer, that the distribution is defined as a transfer of those assets beneficially owned by the taxpayer and that based on the provisions of section 784A, what is invested in the approved retirement fund is capital and that it follows that distributions from that capital fund are distributions and payments of capital. The Respondent submitted that the reference to '*assets'* in subsection 784(1)(b) grounded the Respondent's argument that the quality and character in the investment in the ARF is capital and not income.

41. The Appellant submitted that an '*asset'* was not confined to capital but could connote sums of income. In view of the Appellant the ARF fund was income as the fund comprised an accumulation of contributions of income made by the Appellant between 1995 and 2007 and prior to reaching age [redacted] The Appellant did not regard references to '*assets'* or '*asset'* in the legislation as determinative of the capital versus income question. The Appellant did not accept that references to 'assets' in the legislation were references to the capital character of the fund.

42. Section 784A(1A) provides;

'Without prejudice to the generality of subsection (1)(d), where assets of an approved retirement fund are used in connection with any of the transactions referred to in subsection (1B), the transaction shall be regarded as a distribution for the purposes of this section of the amount specified in that subsection.'

43. Subsection (1B) sets out a series of transactions that constitute distributions. Then subsection (2) provides;

'Subject to subsection (3) and (4), exemption from income tax and capital gains tax shall be allowed in respect of the income and chargeable gains arising in respect of assets held in an approved retirement fund.'

44. Thus, during the subsistence and operation of the ARF, any income or gains generated from the assets in the ARF are exempted from income tax and capital gains tax.

45. The origin of contributions to an ARF is a matured pension fund or a pension product. Neither an employer nor an individual may make direct contributions to an ARF in the manner of contributions to a standard pension product. This means that the source of the ARF fund is already itself a fund which has accumulated over years or decades and which is transferred in lump sum form to the ARF. While the pension fund may have had as its source, payments from income such as from wages and salaries, the fund when transferred to an ARF is transferred in its accumulated lump sum form.

46. The ARF legislation confers an option on a taxpayer to have direct control over the pension fund that has been accumulated during their lifetime and to convert that into capital. This option becomes available only when a taxpayer reaches retirement age. At that point the taxpayer is under no obligation to convert their pension to an ARF. However, if the taxpayer chooses to establish an ARF and to transfer their pension fund(s) to it, the funds will be held by the ARF investment vehicle registered in the name of the taxpayer retiree with all of the benefits that then accrue in terms of beneficial ownership and preservation of the fund.

47. While I accept the submission of the Appellant that one cannot categorically state that the word 'asset' or 'assets' can never refer to income, I take the view the use of the word 'assets' in section 784A was and is a reference to the transfer into the ARF of an accumulated fund of a capital nature. A fund that is transferred into an ARF starts its

life in the ARF as a capital fund to which the owner of the ARF is fully beneficially entitled. While income can be generated by the fund over the continuance of the ARF, the underlying fund is a capital fund. Distributions or disbursements of that fund are capital in nature.

Taxation of ARF distributions

48. Section 784A(3)(a) provides;

'Subject to subsections (3A) and (4) –

(a) The amount or value of any distribution by a qualifying fund manager in respect of assets held in an approved retirement fund shall, notwithstanding anything in section 18 or 19, be treated as a payment to the person beneficially entitled to the assets in the fund of emoluments to which Schedule E applies and, accordingly, the provisions of Chapter 4 of Part 42 shall apply to any such distribution, and

(b) The qualifying fund manager shall deduct tax from the distribution at the higher rate for the year of assessment in which the distribution is made unless the qualifying fund manager has received from the Revenue Commissioners a certificate of tax free allowances or a tax deduction card for that year in respect of the person referred to in paragraph (a).

49. Subsection (3)(a) provides that a distribution in respect of assets in an ARF '*shall'* be '*treated as a payment to the person beneficially entitled to the assets in the fund of emoluments to which Schedule E applies*'

50. Section 983 of the TCA 1997 (Interpretation) provides: *"emoluments" means anything assessable to income tax under Schedule E, and references to payments of emoluments include references to payments on account of emoluments.'*

51. Thus an emolument is not defined as income but as anything assessable to income tax under Schedule E and the word '*emolument'* is not an income equivalent, but a term used to describe any matter which is subject to tax under Schedule E.

Earned income – 3(3) TCA 1997

52. The Appellant submitted that section 784A(3)(a) TCA 1997, by means of the statutory words and expressions used, deemed the distribution to be income. Further, the Appellant submitted that the distribution from the ARF constituted 'earned income' pursuant to section 3(3) TCA 1997.

53. Section 3(3) TCA 1997, provides;

'Without prejudice to the generality of subsection (2), in the Income Tax Acts, except where otherwise expressly provided, "earned income" includes –

(a) Any annuity made payable to an individual under the terms of an annuity contract or trust scheme for the time being approved by the Revenue Commissioners for the purposes of Chapter 2 of Part 30 to the extent to which such annuity is payable in return for any amount on which relief is given under section 787, and
(b) Any payment or other sum which is or is deemed to be income chargeable to tax under Schedule E for any purpose of the Income Tax Acts

54. The Appellant contended that because section 784A(3)(a) specifies that a distribution from an ARF '*shall'* be '*treated as a payment to the person beneficially entitled to the assets in the fund of emoluments to which Schedule E applies*' that the distribution comes within the meaning of '*earned income'* in section 3(3) TCA 1997.

55. The Appellant submitted that as the distribution is taxed in accordance with Schedule E, that it is income in nature and not capital. The Respondent submitted that section 784A(3)(a), while subjecting the ARF distribution to income tax under Schedule E, does not convert its nature from capital to income.

56. I am satisfied that the distribution does not come within the definition of '*earned income'* in section 3(3) TCA 1997. Section 784A(3)(a) does not deem the distribution to be income chargeable to tax under Schedule E. The drawdown from the ARF is *'treated as'* an emolument to which Schedule E applies pursuant to section 784A(3)(a) TCA 1997. The application of 784A(3)(a) TCA 1997 does not convert the ARF

distribution to income by virtue of its application and does not deem the distribution to be income. It simply treats the distribution as equivalent to an emolument to which tax is chargeable under Schedule E. An interpretation of the provision that concludes that the provision deemed the distribution to be income would be at odds with the express statutory wording of the provision. I cannot accept the Appellant's submission that subsection (3)(a) is in the nature of a deeming provision. It does not deem the distribution to be income nor does it convert the distribution into income. It creates no statutory fiction, it is simply a tax treatment which directs that the distribution be *'treated as ….. emoluments to which Schedule E applies.'*. As the provision does not deem the distribution to be income, it follows that the distribution does not constitute '*earned income'* for the purposes of section 3(3) TCA 1997.

Statutory Interpretation

57. In the recent Supreme Court case of *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60, the principles governing statutory interpretation were comprehensively reviewed. Leading the judgment of the Court, O'Donnell J. as he then was, stated at paragraph 39: *'It is worth emphasising that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation*.'

58. The Court at paragraph 53 of the judgment quoted and approved the judgment of McKechnie J. in the Supreme Court case of *Dunnes Stores v the Revenue Commissioners* [2019] IESC 50 including *inter alia*, the following paragraphs:

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

immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.

64. Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

65. When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.'

59. On the authority of *Bookfinders*, I am satisfied that the approach to be taken in relation to the interpretation of the meaning of the words contained in sections 784A(3)(a) TCA 1997, is one which affords the words their ordinary, basic and natural meaning.

60. Section 784A provides the taxpayer with an option to, instead of drawing down an annuity from their pension fund, to invest it in an ARF, whereupon the fund becomes an asset to which the taxpayer is beneficially entitled, can drawdown at will and can bequeath to his/her next of kin. Section 784B TCA 1997, contains a series of strict conditions which must be complied with before a fund can qualify as an ARF.

61. I am satisfied that there are no compelling reasons to depart from the ordinary and natural meaning of the words and expressions contained within section 784A (3)(a) which are clearly and plainly expressed. The subsection does not deem, it simply directs that the distribution be *'treated as'* emoluments to which Schedule E applies.

Double Taxation Treaty between Ireland and the Portuguese Republic

62. For the reasons set out above I am satisfied that the distribution of €527,000 received by the Appellant from his ARF on 15 December, 2017, is capital in nature and it follows therefore that the distribution does not fall within the scope of the Portugal/Ireland

Tax Treaty because the distribution was not of an income character and was not income.

63. The Appellant submitted that the distribution was income and that as there is no express article in the DTA allocating taxing rights as between Ireland and Portugal in respect of an ARF distribution, that the distribution falls within Article 22 of the Portuguese Tax Treaty. The Appellant submitted that any income within the catch-all provision of Article 22 must be defined in accordance with domestic law.

64. The parties cited the authorities of *O'Brien v Quigley [2013] 1 IR 790* and *Kinsella v Revenue Commissioners [2011] 2 IR 417* and were in agreement as regards the approach to be taken in relation to the interpretation of treaties namely, that interpretation must accord with Article 31 of the Vienna Convention in good faith and in accordance with the ordinary meaning of the words used.

65. In this appeal there was no double taxation suffered by the Appellant because the entire amount of the distribution was tax exempt in Portugal.

66. Article 2 of the DTA between Ireland and Portugal provides;

> *'Article 2 Taxes Covered*
>
> *This Convention shall apply to taxes on income imposed on behalf of a Contracting State or of its political or administrative subdivisions or local authorities, irrespective of the manner in which they are levied.*
>
> *There shall be regarded as taxes on income all taxes imposed on total income or on elements of income, including taxes on gains from the alienation of moveable or immovable property, as well as taxes on capital appreciation.'*

67. The Appellant relied on article 3(2) of the Convention which provides;

> *'As regards the application of the Convention by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that State concerning the taxes to which this Convention applies.'*

68. The Appellant did not pursue an argument in relation to Article 18 (Pensions and annuities) however, had the Appellant done so, I would have concluded that Article 18 had no application as an ARF is not a pension but an investment vehicle into which

the proceeds of certain pension arrangements may be invested, on retirement. It follows that the distribution to the Appellant from his ARF is not a pension or other similar remuneration paid to the Appellant in consideration of past employment.

69. The principal provision upon which the Appellant relied was Article 22 of the Convention which provides;

'Article 22 Other Income

Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing articles of this Convention, shall be taxable only in that State.

The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such a case the provisions of Article 7 or Article 14, as the case may be, shall apply.

70. Article 22 applies to income only and in circumstances where the preceding distributive rules do not apply. Article 22 does not apply to capital receipts and does not extend the scope of the Convention to capital receipts.

71. For the reasons set out above I am satisfied that the distribution from the ARF is capital in nature and it follows therefore that the distribution does not fall within the scope of the Double Taxation Treaty between Ireland and the Portugeuse Republic because the distribution is not of an income character and is not income.

Concessionary treatment

72. There was a change in Revenue practice in 2017. The concessionary administrative practice that preceded that date and from which the Appellant benefitted between 2013 and 2016 was discontinued. The Respondents submitted that the prior concessionary practice had no basis in the legislation. I am satisfied that the change in

practice correctly reflects the legislative provisions of the Taxes Consolidation Act 1997, in particular, section 784A(3)(a). The Respondent submitted that practice and guidelines are not the law and cited the decision of Mr. Justice Clarke, as he then was, in the case of *Crawford (Inspector of Taxes) v Centime Limited* [2005] IEHC 328 where Mr. Justice Clarke stated at paragraph 10.3:

> *'….. I would wish to make clear that it is entirely appropriate for the Revenue Commissioners to issue guidelines which make clear to taxpayers the way in which the Revenue will exercise any discretion which the law confers as to the manner in which the Taxes Acts may be applied. Such guidelines have the merit of informing taxpayers as to how Revenue discretion is likely to be exercised and achieve the desirable end of making it more likely that any discretion which the Revenue may enjoy will be exercised in a similar manner in like cases. It is, however, the elevation of any such guidelines to matters which are applied as if they have the force of law that is open to serious question. That is particularly so where, as here, and for the reasons which I have analysed above, the criteria appear, in many respects, to be inconsistent with the law.'*

73. The Appellant complained of the withdrawal of the concessionary administrative practice from which he had availed in prior years and of the change in the Respondent's practice. The Appellant raised a number of complaints in his grounds of appeal which do not fall within the jurisdiction of the TAC in particular, the Appellant submitted that he sought to challenge '*the legality of this change of refund practice'* and the Respondents' alleged '*non-conformity with the Taxes Acts, international law and applicable Irish jurisprudence regarding legitimate expectation'.* The Appellant also submitted that the withdrawal of the administrative concession was discriminatory and unfair and that it '*went beyond the powers of Revenue in imposing conditions not imposed by national law or tax treaty.*'

74. As the parties are aware, claims in relation to the legality of the withdrawal of the administrative concessions, of alleged discriminatory treatment or of legitimate expectation are not matters which fall within the jurisdiction of the TAC. The jurisdiction of the TAC is confined to that as prescribed by Part 40A of the Taxes Consolidation Act 1997, as amended, as is clear from the established authorities including; and *Lee v the Revenue Commissioners* [2021] IECA 18, *Stanley v the Revenue Commissioners [2017] IECA 279* and *Menolly Homes v the Revenue Commissioners* [2010] IEHC 49.

Determination

75. For the reasons set out above I determine that section 784A TCA 1997 applies to subject the Appellant's ARF distribution to income tax for the tax year of assessment, 2017, and that the Appellant is not entitled to a refund of PAYE and USC withheld in the aggregate sum of €259,243.52 following the distribution of €527,000 received from his ARF on 15 December, 2017.

76. This Appeal is determined in accordance with Section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

15th day of December 2022