



84TACD2023

Between

██████████

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by Dr ██████████ (“the Appellant”) pursuant to section 933 of the Taxes Consolidation Act 1997, as amended (“TCA 1997”) against assessments raised by the Revenue Commissioners to income tax for the years 2016 – 2019 (“the relevant time period”) in the total amount of €263,178.59.
2. The appeal proceeded by way of an oral hearing on 13 and 14 March 2023.

**Background**

3. The Appellant is a consultant ██████████ and a ██████████ national. In 2016 he commenced work in Ireland as a locum ██████████. He ceased working in Ireland in 2020.
4. The Respondent raised the following notices of assessment to income tax against the Appellant in respect of the work carried out by him in Ireland:

Date of assessment	Applicable year	Amount €
19 June 2019	2016	57,172.71
19 June 2019	2017	86,233.89
22 October 2020	2018	75,768.91
26 February 2021	2019	44,003.08

5. The Appellant appealed against the assessments for 2016 and 2017 on 3 July 2019, against the 2018 assessment on 6 November 2020, and against the 2020 assessment on 22 March 2021. He contended that his income was not assessable in Ireland. He claimed that he was a resident of ██████ for all relevant years and did not have a permanent establishment or fixed place of business in Ireland. Therefore, he contended that under the Double Taxation Agreement between ██████ and Ireland, he was liable to income tax in ██████
6. The appeal proceeded by way of a remote oral hearing on 13 and 14 March 2023.

### **Legislation and Guidelines**

7. Section 18 (Schedule D) of the TCA 1997 provides *inter alia* that

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

(a) the annual profits or gains arising or accruing to –

[...]

(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,

[...]

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

[...]

*Case II – Tax in respect of any profession not contained in any other Schedule”.*

8. Section 52 of the TCA 1997 states that

*“Income tax under Schedule D shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under that Schedule is directed in the Income Tax Acts to be charged.”*

9. Section 65(1) of the TCA 1997 states that

*“Subject to this Chapter, income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment.”*

10. Section 819(1) of the TCA 1997 provides *inter alia* that

*“For the purposes of the Acts, an individual shall be resident in the State for a year of assessment if the individual is present in the State-*

*(a) at any one time or several times in the year of assessment for a period in the whole amounting to 183 days or more...”*

11. Section 826(1) of the TCA 1997 provides *inter alia* that

*“Where (a) the Government by order declare that arrangements specified in the order have been made with the government of any territory outside the State in relation to (i) affording relief from double taxation in respect of (I) income tax... then, subject to this section and to the extent provided for in this section, the arrangements shall, notwithstanding any enactment, have the force of law as if each such order were an Act of the Oireachtas...”*

12. The Double Taxation Relief (Taxes on Income) [REDACTED] Order [REDACTED] [REDACTED] declared that the Double Taxation Agreement between [REDACTED] and Ireland (“DTA”) should have the force of law in the State.

13. Article 1 of the DTA states that

*“This Agreement shall apply to persons who are residents of one or both of the Contracting States.”*

14. Article 2 of the DTA states *inter alia* that

*“1. This Agreement shall apply to taxes on income imposed by each Contracting State, irrespective of the manner in which they are levied.*

[...]

3. *The existing taxes to which the Agreement shall apply are: (a) in the case of Ireland: (i) the income tax...*

15. Article 4 of the DTA states that

*"1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State.*

*2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:*

*(a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);*

*(b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;*

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

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

*3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated."*

16. Article 5 of the DTA states *inter alia* that

*"1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on."*

17. Article 7 of the DTA states *inter alia* that

*"1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as*

*aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”*

18. Article 14 of the DTA states that

*“1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other State but only so much of it as is attributable to that fixed base.*

*2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.”*

## **Evidence and Submissions**

### *Appellant's Evidence*

██████████

19. The Appellant gave oral evidence ██████████. He stated that he was married with █████ children. He runs his medical practice from his private home in █████ where he has had an office since █████. He has owned his house since █████. His wife is a █████ teacher.

20. The Appellant came to Ireland on █████ 2016. His wife took unpaid leave from her job from █████ 2016 until █████ 2020, and she stayed with him in Ireland. His daughter █████ finished her schooling in █████ and then came to Ireland in █████ to study in ████████████████████. During the relevant time period (2016-2019), his eldest son █████ was in university in █████ and lived in the family home. His son was financially supported by the Appellant during this time.

21. The Appellant's █████ youngest children, ████████████████████, came with him and his wife to Ireland and studied ████████████████████. He stated that he had no intention to stay in Ireland for a significant amount of time. He always regarded █████ as his permanent home. He is a █████ citizen and stated that █████ is the centre of his economic and family interests.

22. The Appellant left Ireland around █████ 2020. He continued to pay the mortgage and home insurance on his house in █████ while he was in Ireland. He did not rent the house

out and stayed in it when he travelled back to [REDACTED]. He also continued to pay premiums on life insurance policies, the beneficiaries of which were his children. He continued to pay [REDACTED] social insurance contributions while in Ireland.

23. He continued to pay other utility bills and expenses for his [REDACTED] home while in Ireland, including home heating oil, water, sewage, electricity and property tax. He remained a patient of his [REDACTED] General Practitioner, and submitted a certificate from that GP dated 19 August 2022 that stated he had had twenty eight medical consultations since 2016. He did not have an Irish GP. He also produced certificates in [REDACTED] for [REDACTED] of his children and his wife that stated they were also patients of the same practice in [REDACTED].

24. The Appellant continued to pay into a private pension fund in [REDACTED] during his time in Ireland. He did not take out a pension or life insurance in Ireland. He produced invoices for his [REDACTED] mobile phone that he continued to pay while in Ireland. He also produced [REDACTED] tax returns which included his income "as a sole trader". He produced a [REDACTED] tax clearance certificate dated 4 February 2022. He also produced a certificate of fiscal residence from the [REDACTED] authorities dated 17 March 2017.

25. In 2015 he was appointed president of the Commune Committee [REDACTED] [REDACTED], in which position he continued when in Ireland. He remained on the board of his local parish and his son [REDACTED] was confirmed in his [REDACTED] parish church in [REDACTED].

26. When in Ireland he did not have an Irish personal mobile phone. He did take out a contract for broadband internet. [REDACTED] [REDACTED] When asked by his counsel if he bought or leased any cars in Ireland, he answered "no". He brought over his [REDACTED] car to Ireland, and was granted a temporary exemption from VRT for two years.

27. The Appellant stated that he was approached by [REDACTED] in 2015 with an offer to work in Ireland. He was not interested at the time. He was approached again in 2016 and he discussed the offer with his [REDACTED] employer. They agreed that it would be useful for him to gain experience of the Irish [REDACTED] [REDACTED] system which could then be applied in [REDACTED]. The intention was always that he would return to [REDACTED].

28. The contract was entered into between the Appellant's [REDACTED] company and [REDACTED] [REDACTED]. The contract provided *inter alia*

"9.1. This Agreement shall commence on [REDACTED]/2016 and shall continue until completion of the Contractor Services to the reasonable satisfaction of the Client at

which time this Agreement shall expire automatically, the anticipated completion date is [REDACTED]/2018.

[...]

10.1 The Contractor acknowledges to the Employment Business that its services are supplied to the Employment Business as an independent contractor and that accordingly the responsibility of complying with all statutory and legal requirements relating to the staff of the Contractor (including the payment of taxation) shall fall upon and be discharged wholly and exclusively by the Contractor...”

29. The contract also stated that the Appellant’s hours of work would be Monday to Thursday 9am to 5pm, and Friday 9am to 4pm, together with on calls as per rota. While the contract stated that it would expire in [REDACTED] 2018, the Appellant stated that it was extended on an ad hoc basis.
30. The Appellant stated that he travelled to Ireland in [REDACTED] 2016 and stayed in a hotel for a week before renting a house. He purchased a television for the house. He was sent to work in [REDACTED] (and not [REDACTED] as stated on the contract), and worked in the community [REDACTED] centre in [REDACTED] as well as [REDACTED] [REDACTED]. He also did house and nursing home visits as required.
31. His typical working arrangements were that he would go to [REDACTED] at 9am on Mondays, when he would be given the list of patients for the day by the head nurse. The nurse would find a room for him to see the patients, but this room would regularly change: “*Sometimes it was a patient’s room, sometimes it was doctor’s office, sometimes it was social or family room, sometimes it was the social room where people meet, sometimes it was procedure room.*”
32. At 2pm he would go to [REDACTED] where he was given the list of his patients for the day. Again, there was no set place for him to see them: “*Sometimes it was a group therapy room, sometimes it was one of the nurses office room, sometimes it was a social room and always I was given directions where to see the patient.*”
33. On Tuesdays, Wednesdays and Thursdays he would go to [REDACTED] at 9am and the same procedure would apply. At 3pm he went to [REDACTED]. On Fridays he reported to the [REDACTED] at 9am, and went to [REDACTED] at 2pm. He did not have a room or office in the [REDACTED]. The patients he saw were solely HSE patients and he did not carry out any private work in Ireland.

34. He continued his private practice in [REDACTED] and travelled from time to time to see his private patients there. He produced a copy of his diary for [REDACTED] 2016 to [REDACTED] 2017, as well as letters from three of his [REDACTED] patients stating that he treated them between 2016 and 2019. He also produced a number of travel documents showing travel between Ireland and [REDACTED] during the relevant time period.

35. The Appellant became an employee of [REDACTED] from [REDACTED] 2019 and from then on tax and PRSI were deducted at source. He stated that he was made an employee because the HSE was not happy with him travelling to [REDACTED] so regularly. Prior to this he paid his income into his [REDACTED] bank account. After he was made an employee, his salary was paid into his Irish bank account.

36. The Appellant received a ruling in August 2019 from the [REDACTED] [REDACTED] which stated that his tax residence was [REDACTED]. He stated that prior to coming to Ireland he received a verbal confirmation that he would continue to pay taxes in [REDACTED].

37. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

38. The Appellant agreed that he rented a house at [REDACTED] when he stayed in Ireland. He stated that it had five bedrooms, two bathrooms, one toilet, a living room and a kitchen. The house was fully furnished and had just been renovated prior to him moving in. He bought a television and took out a licence, and also paid the utility bills (electricity, gas, internet) while he lived in the house.

39. When asked why he had not provided copies of the bills paid by him on the Irish house, the Appellant stated that he "*did not think this is crucial.*" He did not have a personal mobile phone in Ireland but was provided with a mobile phone by the agency/HSE, which paid the bills.

40. The Appellant stated that he had an Irish bank account. He had not provided copy statements for it as "*it was not my permanent bank account, and I did not think this is relevant if it was just temporary.*" He confirmed he had a notification of audit from the Respondent in May 2019 which requested copies of all bank statements. He stated he



was not made aware that he should provide copy bank statements for the hearing of his appeal.

41. He confirmed that he received a temporary exemption from VRT for 2017 and 2018 in respect of his car that he brought to Ireland from [REDACTED]. He accepted that in the applications (dated 24 October 2016 and 13 July 2017) for the exemption he stated that he was working in [REDACTED] and [REDACTED]. He agreed that he also stated he was normally resident in Ireland for the purpose of VRT.
42. He further agreed that he emailed the Respondent on 15 August 2018 to state that his car had been removed from the State as of 20 July 2018, but that he was found by the Respondent in his car on 7 November 2019. The car was seized and he had to pay a fine to have it released. He agreed that he subsequently purchased a [REDACTED] and his wife purchased a [REDACTED]. He stated that they were "*purchased temporarily only until we were in Ireland and I did not plan to stay in Ireland in a long-run.*" When it was put to him that he was being selective about the information provided, and that he had not made reference to the two newer cars during his evidence in chief when asked about the cars that he owned, he stated "*The cars in Ireland were purchased for a very short period of time so I did not feel this is relevant.*"
43. The Appellant agreed that he only provided diary entries until [REDACTED] 2017. He accepted counsel's calculation that, including days of travel, he spent at most 106 days in [REDACTED] in 2016, which meant he spent 260 days in Ireland. He accepted that he spent 31 days in [REDACTED] in 2017, and therefore 334 days in Ireland. He accepted that he spent 52 days in [REDACTED] in 2018, and that therefore spent 312 days in Ireland. He accepted that he spent 29 days in [REDACTED] in 2019, and therefore 336 days in Ireland.
44. He confirmed that he registered with the Medical Council in Ireland and received a HSE identity card. He also received a PPS number. He agreed that he participated in the professional competence scheme with the [REDACTED] between [REDACTED] 2018 and [REDACTED] 2019. [REDACTED]  
[REDACTED] [REDACTED] [REDACTED]
45. He was asked about a letter from his Irish tax agent to the Respondent dated 5 March 2019 which stated that he wished to make an unprompted qualifying disclosure. When it was put to him that no such disclosure was received by the Respondent, he stated that he did not know because it was dealt with by his agent.
46. He agreed that he requested an interpretation of his tax residence from the [REDACTED] [REDACTED] in June 2019, which was after the Respondent's audit had commenced.

He agreed that he provided all the information relied upon by the [REDACTED] centre. He agreed that he did not inform the centre of the number of days he spent in Ireland. When it was put to him that the interpretation was based on incomplete information, he stated *“From your point of view this is yes.”*

47. The Commissioner asked the Appellant why he stayed in Ireland for four years, when the reason given by him for coming to Ireland was to learn how the Irish health system worked. He stated that it took a significant amount of time to see how the system works. He further stated that *“when the children started their [REDACTED] we really wanted for them to finish that. We didn't want to drop in the middle. So we decided to stay until they finished so that they had the [REDACTED] and the moment they finish we leave.”*

#### *Appellant's Submissions*

48. The Appellant submitted that he held and retained his permanent home in [REDACTED] and lived in temporary rented accommodation while carrying out his locum activities in Ireland. His locum activities were not carried out from a fixed base or a fixed place of business, and were performed in whatever space or conditions were available at the time.
49. The Appellant had appealed against the assessments raised by the Respondent because for all relevant tax years, he (i) was resident in and a resident of [REDACTED] for [REDACTED] tax purposes; (ii) maintained his permanent home and centre of vital interests in [REDACTED] (iii) was not tax resident in Ireland under the provisions of the DTA; and (iv) did not have a permanent establishment and/or fixed base in Ireland.
50. It was submitted that the Appellant retained his permanent home in [REDACTED] and had no permanent home in Ireland. He maintained his centre of vital interests in [REDACTED] and as the time spent by him in Ireland was limited, he maintained his habitual abode in [REDACTED] as well. Therefore, he should be considered a resident of [REDACTED] for the purposes of the DTA.
51. The DTA makes it clear that a non-Irish resident individual is not exposed to Irish tax except where they carry on a business through a permanent establishment/fixed base in Ireland. The Appellant was not tax resident in Ireland and did not carry on his profession in Ireland through a permanent establishment and/or a fixed base; therefore he was not assessable in Ireland for the relevant years.
52. The Appellant did not have an office or a branch in Ireland. He did not have any premises at his disposal to carry out his profession in Ireland, and he carried out his duties wherever

space was available. Consequently, he did not have a permanent establishment / fixed base in Ireland.

53. In oral submissions, counsel submitted that the Appellant made arrangements to maintain his private practice in [REDACTED] with third party doctors when he was unavailable, and referred to a letter from another doctor who stated he was part of this arrangement. This was indicative of the fact that the Appellant's stay in Ireland was a temporary arrangement, and that his centre of vital interests was maintained in [REDACTED]
54. It was submitted that his house in Ireland was not a permanent home but was temporary. Even if the Commissioner disagreed, there was more than enough evidence to show that his centre of vital interests was maintained in [REDACTED]. Therefore, it was submitted that the Commissioner should determine that the Appellant was resident in [REDACTED] for the purposes of the DTA.
55. If he was not resident in Ireland, he was not taxable here unless he had a permanent establishment (Article 7) / fixed base (Article 14). The evidence was clear that in any of the venues he worked, he did not have an office or workspace available to him. He was shuttled around wherever there was space available on an ad hoc basis.
56. Counsel opened a number of authorities, including *inter alia* TAC Determination 36TACD2019, *R v Dudley* 2 ITLR 627 and *Director of Income Tax v e-Funds IT Solution* 16 ITLR 686.

#### *Respondent's Submissions*

57. In written submissions, the Respondent stated that it held a meeting with the Appellant in 2017, during which it advised him that he needed to register his company in Ireland for tax. The Respondent stated that the Appellant did not register for tax in Ireland and subsequently advised the Respondent that he wanted to pay tax in [REDACTED] as the tax rate was [REDACTED]. He was compulsorily registered for tax in 2019, and the Respondent was advised by the Appellant's agent that the Appellant's [REDACTED] company was merely a business name used by him. Consequently, the [REDACTED] company was deregistered for tax, and the charge to tax fell under the Appellant's income tax. The Respondent was advised in October 2019 that the Appellant became an employee of [REDACTED] with effect from 12 August 2019.
58. The Respondent submitted that the Appellant had an office/clinic with [REDACTED] [REDACTED] [REDACTED] (HSE) during 40 months as a consultant [REDACTED] and that this constituted a fixed base for the purposes of the DTA. While 'fixed base' was not defined in

the DTA, the definition of 'permanent establishment' could be considered as equivalent to a person carrying out a profession. It was clear that an office satisfied the meaning of a permanent establishment, and it was sufficient for the enterprise to be partly carried on from such an office.

59. In oral submissions, counsel submitted that the Appellant was tax resident and ordinarily resident in Ireland for the years in question. However, because he had asserted that the DTA applies, it was necessary to look at its provisions. It was submitted that the Appellant had a permanent home in both [REDACTED] and Ireland. The next question was where his centre of vital interests lay, and it was submitted that the evidence elicited in cross-examination showed that for the period of 2016 to 2019 his centre of vital interests was Ireland. If the Commissioner could not determine where the centre of vital interests lay, it was submitted that the Appellant's habitual abode for the relevant years was clearly Ireland.
60. However, if it was not accepted that the Appellant was resident in Ireland, then the question of his fixed base had to be considered. It was stated that, while the contract with [REDACTED] was in the name of the Appellant's [REDACTED] company, his agent subsequently clarified that this was merely a trading name that he had registered in [REDACTED] and that therefore there was no company interposed between the Appellant and [REDACTED]. It was submitted that the Appellant clearly had a fixed base from which he operated when working in Ireland.
61. It was submitted that it had not been established the extent to which the Appellant was earning in [REDACTED] during the relevant years, and the Respondent did not have a breakdown of what his [REDACTED] tax returns pertained to. Counsel stated that it was striking that a huge amount of documentation had been provided in respect of [REDACTED] but very little had been provided in respect of the Irish position. There were no Irish bank statements, the lease had not been provided, no bills had been provided. In direct examination the Appellant had said he had not purchased a car here, and it was only after the Respondent checked its records and the Appellant was cross examined that it was established that he and his wife had purchased cars in one of the relevant years. The Appellant had not stated in his direct evidence that his wife had worked in the [REDACTED] school. It was also submitted that no certificate of fiscal residence in [REDACTED] had been provided for 2018 or 2019.
62. Regarding the assistance that could be gleaned from case law, it was submitted that questions regarding residency and centre of vital interests were case-specific and had to be determined on the facts.

## Material Facts

63. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

63.1. The Appellant is a [REDACTED] national and a consultant [REDACTED]. The Appellant's wife is a [REDACTED] teacher. He has [REDACTED] children: [REDACTED].

63.2. The Appellant travelled to Ireland on [REDACTED] 2016 and commenced working in Ireland as a locum [REDACTED] on [REDACTED] 2016. His contract was entered into between his [REDACTED] company and [REDACTED]. However, his [REDACTED] company was in fact merely a trading name used by him and not a separate legal entity.

63.3. The contract provided that the Appellant's hours of work would be Monday to Thursday 9am to 5pm, and Friday 9am to 4pm, together with on calls as per rota. It also provided that the anticipated completion date was [REDACTED] 2018; however it was continued on an *ad hoc* basis after that date. On [REDACTED] 2019, the Appellant became an employee of [REDACTED] and was registered for PAYE. He finished working in Ireland and returned to [REDACTED] in [REDACTED] 2020.

63.4. The Appellant never intended to move permanently to Ireland and it was always his intention to return to [REDACTED] following the completion of his employment here.

63.5. The Appellant worked in the community [REDACTED] centre [REDACTED] as well as [REDACTED]. He also did house and nursing home visits as required.

63.6. The Appellant kept his [REDACTED] home while in Ireland. He continued to make mortgage and house insurance payments in relation to his [REDACTED] home. He continued to pay utility bills on the [REDACTED] home. He did not rent the house out and stayed in it when he travelled back to [REDACTED]. He continued to pay [REDACTED] life insurance policy premiums and social insurance contributions while in Ireland.

63.7. The Appellant remained a patient of his [REDACTED] General Practitioner, and did not have an Irish GP. He continued to pay into a private pension fund in [REDACTED] and submitted [REDACTED] tax returns. He received a certificate of fiscal residence from the [REDACTED] authorities dated 17 March 2017. He continued as president of the Commune Committee [REDACTED], and continued on the board of his local parish in [REDACTED]. [REDACTED] was confirmed in his [REDACTED] parish church in [REDACTED].

- 63.8. The Appellant did not have a personal mobile phone in Ireland, although he was provided one through his work. He brought his [REDACTED] car to Ireland and was granted a temporary exemption from VRT for two years.
- 63.9. The Appellant continued his private practice in [REDACTED], which he ran from his home there, and travelled from time to time to see his patients. He produced letters from three of his patients stating that he treated them between 2016 and 2019.
- 63.10. The Appellant's wife lived with him in Ireland from [REDACTED] 2016. His [REDACTED] younger children, [REDACTED], also lived with him in Ireland and studied for the [REDACTED]. [REDACTED] finished her schooling in [REDACTED] and in [REDACTED] came to Ireland to study in [REDACTED]. [REDACTED] remained in [REDACTED] and lived in the family home, and was financially supported by the Appellant.
- 63.11. The Appellant's wife was employed by the [REDACTED] School [REDACTED] from 2016 to 2020. [REDACTED]
- 63.12. The Appellant rented a house at [REDACTED] during his time in Ireland. The house had five bedrooms, two bathrooms, one toilet, a living room and a kitchen. The Appellant purchased a television and took out a television licence. He also took out a broadband contract and paid the utility bills on the house.
- 63.13. The Appellant did not provide a copy of the lease on the rental property, copy utility bills or copies of his Irish bank statements. He had been notified by the Respondent, in the context of its audit of him, to provide bank statements but this had not been done.
- 63.14. The Appellant emailed the Respondent in August 2018 to state that his [REDACTED] car had been removed from the State. In November 2019 he was found by the Respondent in the car, which was seized.
- 63.15. The Appellant agreed that in 2016 he spent at most 106 days in [REDACTED] and therefore he spent 260 days in Ireland; in 2017 he spent 31 days in [REDACTED] and therefore 334 days in Ireland; in 2018, he spent 52 days in [REDACTED] and therefore spent 312 days in Ireland; and in 2019, he spent 29 days in [REDACTED] in 2019, and therefore 336 days in Ireland

## Analysis

64. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J. stated at para. 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 Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.”*
65. The Commissioner did not understand the Respondent to have formally conceded that the Appellant was tax resident in [REDACTED] under [REDACTED] domestic law for the relevant time period. However, the hearing of the appeal was focused on the applicability of the DTA between Ireland and [REDACTED] to the Appellant. It was not in dispute that the income in question was earned by the Appellant while working in Ireland. Therefore the Commissioner considers that it is first necessary to determine whether the Appellant was resident in Ireland under the DTA from 2016 to 2019. If the Appellant was resident in Ireland, the Commissioner considers that that will determine the matter. However, if he was not resident in Ireland, it will then be necessary to consider whether he had a fixed base / permanent establishment in this jurisdiction during the relevant time period.

*Was the Appellant resident in Ireland?*

66. The test for determining residency is set out in Article 4 of the DTA. Article 4.1 provides that

*“For the purposes of this Agreement, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State.”*

67. The Commissioner is satisfied that the Appellant was a resident of Ireland under Irish law for the relevant time period. Section 819(1) of the TCA 1997 provides *inter alia* that *“an individual shall be resident in the State for a year of assessment if the individual is present in the State - (a) at any one time or several times in the year of assessment for a period in the whole amounting to 183 days or more...”* The Appellant accepted in cross-examination that he spent 260 days in Ireland in 2016, 334 days in 2017, 312 days in 2018 and 336 days in 2019. Consequently, he was present in Ireland for more than 183 days in each of the years during the relevant time period.

68. It goes without saying that the Commissioner has no jurisdiction to make findings or determinations based on ██████ law. In any event, while it was not formally conceded by the Respondent that the Appellant was also tax resident in ██████ for the relevant time period, the Commissioner will assume that he was for the purposes of this Determination. Consequently, it is necessary to consider the “tie-breaker provisions” set out in Article 4.2.

69. Maguire on Irish Income Tax 2022 (“Maguire”), at 14.105, states

*“The application of each contracting state’s own tax laws (the main test of residence) may sometimes result in an individual being regarded as resident in each of the two states. If so, the ‘fiscal domicile’ article in the later treaties goes on to provide a series of supplementary tests to determine the residence of the individual for purposes of the relevant treaty (his ‘treaty residence’). There are four supplementary tests to enable the individual to be classified either as a resident of Ireland or as a resident of the other contracting state (whichever is the case), so that the treaty articles may be applied accordingly. The four tests, which must be applied in the order they appear, until the ‘double resident’ is regarded as a resident of one of the states only, are:*

*Test A:*

*(a) if he has a permanent home available to him in one of the states only, he is deemed to be a resident of that state (and not of the other state), but*

*(b) if he has a permanent home available to him in both the states, he is deemed to be a resident of the state with which his personal and economic relations are closer (ie the state in which he has his ‘centre of vital interests’);*

*Test B:*

*if the individual’s treaty residence cannot be determined under test A, he is deemed to be a resident of the state in which he has an habitual abode;*

*Test C:*

*if he has an habitual abode in both states, or in neither of them, he is deemed to be a resident of the state of which he is a national; and*

*Test D:*

*if he is a national of both states, or of neither of them, the competent authorities of these two states must settle the question by mutual agreement.*

*Once the individual’s treaty residence has been determined, it is not necessary (or permitted) to apply any of the tests further down in the order. For example, if an*



*individual has a permanent home in both states, it may well be possible to decide the matter on the grounds that his centre of vital interests is clearly in one of the states. If so, the location of the individual's habitual abode or the question of his nationality (generally identified with citizenship) is irrelevant."*

70. It is necessary to firstly consider Test A. There are two limbs to this test. The first limb provides that *"he shall be deemed to be a resident of the State in which he has a permanent home available to him."* The Commissioner is satisfied that the Appellant demonstrated that he had a permanent home in [REDACTED] during the relevant time period, which was the house he had bought in [REDACTED]

71. Regarding whether he had a permanent home available to him in Ireland, Maguire states that

*"The commentary to art 4 of the Model Convention states that in the case of Test A, any form of home may be taken into account (ie including a house, apartment or furnished room owned or rented by the individual). However, it adds that the home must be available on a continuous basis..."*

The Commissioner notes that the OECD Commentary on Article 4 of the Model Convention<sup>1</sup> states at page 87 that

*"But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.)"*

72. The Commissioner is satisfied that the evidence demonstrated that the Appellant had a permanent home in Ireland during the relevant time period. He rented a house at [REDACTED] [REDACTED] which had five bedrooms, two bathrooms, one toilet, a living room and a kitchen. The house was fully furnished and had just been renovated prior to him moving in. The Commissioner is satisfied that this house was available to him on a continuous basis during the relevant time period. Therefore, the Commissioner finds that the Appellant had both a permanent home in [REDACTED] and a permanent home in Ireland during the relevant time period.

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<sup>1</sup> <https://www.oecd.org/berlin/publikationen/43324465.pdf>

73. Consequently, it is necessary to consider the second limb of Test A: *“if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests).”*

74. The Commissioner considers that a substantial amount of evidence was provided by the Appellant that sought to demonstrate that his centre of vital interests remained in ██████ during the relevant time period. The Commissioner was provided with, *inter alia*, leasing documents for his ██████ car, certification of graduation for ██████ in ██████ and confirmation that ██████ completed her Leaving Certificate in ██████ in ██████ ██████ medical certificate, ██████ tax returns, house insurance policies, life insurance policies, bank statements, appointment letter to the Commune Committee ██████ ██████, utility bills for the ██████ house, ██████ mobile phone bills, ██████ pension plan details, confirmation of property tax payments, correspondence from patients of the Appellant in ██████ confirmation that he remained a patient of his ██████ GP, documentation regarding the Appellant’s travel to and from ██████ confirmation that ██████ was confirmed in his ██████ parish in ██████ and certificates of fiscal residence dated 6 April 2016 and 17 March 2017.

75. However, against this, the Commissioner agrees with the contention of the Respondent’s counsel at the hearing that very little was provided by the Appellant regarding his time in Ireland during the relevant time period. The Commissioner notes that he has not been provided with a copy of the lease on the Irish rental property, any utility bills or any Irish bank statements. No documentation regarding the Appellant’s wife’s employment in Ireland was provided.

76. Maguire states the following regarding centre of vital interests:

*“The commentary also suggests that in determining an individual’s ‘centre of vital interests’, regard should be had to his family and social relations, his occupations, his political, cultural and other activities, his place of business and the place from which he administers his assets, etc.”*

The OECD Commentary also adds that

*“If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.”*

77. Furthermore, counsel for the Appellant drew attention to the following quotation from Vogel on *Double Taxation Conventions*, 4<sup>th</sup> edition, as quoted in 36TACD2019:

*“It should be noted that there is some degree of inertia with respect to a taxpayer’s centre of vital interests. Thus, a person who establishes and maintains a home in one State but then sets up a second in the other State can be presumed to maintain his centre of vital interests in the first State unless the circumstances have changed so that the centre of vital interests have demonstrably changed.”*

78. The Commissioner considers that the following evidence goes towards demonstrating that the Appellant’s centre of vital interests remained in [REDACTED] during the relevant time period: his retention of his [REDACTED] house, for which he continued to pay mortgage, utility bills and insurance policies; his maintenance of life insurance and pension policies/plans in [REDACTED] the making of tax returns and payment of social insurance contributions in [REDACTED] that his eldest son [REDACTED] lived in the [REDACTED] house and was financially supported by the Appellant; the Appellant remaining a patient with his [REDACTED] GP; his continuation on the committee regarding [REDACTED]; remaining on the board of his local parish, where his son [REDACTED] was confirmed in [REDACTED] and his maintenance of his private practice in [REDACTED] (albeit it was not clear to the Commissioner the extent to which this maintained throughout the relevant time period). Overall, the Commissioner accepts that the Appellant never intended to move permanently to Ireland and that it was always his intention to return to [REDACTED] following the completion of his employment here.

79. However, the Commissioner also considers that the following evidence proffered or elicited during the hearing goes towards demonstrating that the Appellant’s centre of vital interests changed to Ireland during the relevant time period: he was employed full-time (Mon – Thurs 9am – 5pm, Fri 9am – 4pm, plus on calls per rota) in Ireland; his wife came to live with him in Ireland; his [REDACTED] younger children, [REDACTED], also came with him to Ireland and went to school in [REDACTED]; his daughter [REDACTED] came to Ireland in [REDACTED] to study in [REDACTED]; he rented a substantial-sized house (five bedrooms) in [REDACTED] for which he purchased a television and paid utility bills; [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] his wife was employed by the school from 2016 to the end of 2019. Furthermore the Commissioner considers that the Appellant’s evidence that

*“when the children started their [REDACTED] we really wanted for them to finish that. We didn’t want to drop in the middle. So we decided to stay until they finished so that they had the [REDACTED] and the moment they finish we leave”*

suggests that his centre of vital interests lay in Ireland during the relevant time period.

80. Consequently, the Commissioner finds it difficult to conclude either way where the Appellant's centre of vital interests lay from 2016 to 2019. Given the various factors to be considered, and given the conflicting *indicia* set out above, the Commissioner considers the lack of documentary evidence provided by the Appellant regarding his activities in Ireland to be very unhelpful. A substantial amount of documentation was produced relating to ██████ (including, as pointed out by the Respondent's counsel, evidence of the purchase of two stamps) but little of comparative relevance was provided relating to Ireland which could have assisted in determining whether his personal and economic relations were closer to Ireland or ██████ during the relevant time period. The Commissioner considers this lack of documentary evidence to be surprising given that the burden of proof rests on the Appellant to demonstrate that the Respondent's assessments are incorrect.

81. In all the circumstances, therefore, given the conflicting evidence set out above, and the lack of documentary evidence regarding the Appellant's activities in Ireland during the relevant time period, the Commissioner concludes that it is not possible to determine the Appellant's centre of vital interests for 2016 to 2019.

82. It is therefore necessary to proceed to consider Test B under Article 4.2 of the DTA: "*if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode.*"

83. Maguire states in respect of Test B that

*"The commentary states that Test B tips the balance in favour of the state where the individual spends most time (including time spent elsewhere than in his permanent home (if any)). The comparison between his length of stays in the states must cover a sufficient length of time to decide whether his 'abode' is 'habitual'."*

Additionally, the OECD Commentary states that

*"In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State."*

84. In this regard, the Commissioner considers that the most pertinent evidence was elicited from the Appellant on cross-examination, wherein he agreed with counsel for the

Respondent that: in 2016 he spent at most 106 days in [REDACTED] and therefore he spent 260 days in Ireland; in 2017 he spent 31 days in [REDACTED] and therefore 334 days in Ireland; in 2018, he spent 52 days in [REDACTED] and therefore spent 312 days in Ireland; and in 2019, he spent 29 days in [REDACTED] in 2019, and therefore 336 days in Ireland.

85. Consequently, the Commissioner is satisfied that the Appellant's habitual abode during the relevant time period was clearly in Ireland, as he spent substantially more time in Ireland than [REDACTED] during each of the years in question. Indeed, the only year in which he spent less than 300 days in Ireland was 2016, and he did not travel here until the [REDACTED] of that year.

86. Therefore, the Commissioner determines that the Appellant's residence under the DTA for the years 2016 to 2019 was Ireland. Consequently, as the income that gave rise to the notice of assessment was earned in Ireland, it follows that the Commissioner determines that the Appellant has failed to demonstrate that the assessments are incorrect, and his appeal is unsuccessful. As a result, the Commissioner does not consider it necessary to proceed to consider the question of fixed base / permanent establishment, as this would only have been relevant if it had been found that the Appellant was resident in [REDACTED]

87. The Commissioner notes that, under Article [REDACTED] of the DTA, the Appellant is entitled to an exemption/credit in [REDACTED] in respect of the tax due under the Notices of Assessment issued by the Respondent against him.

88. Finally, for the avoidance of doubt, the Commissioner has taken no cognisance of the interpretation of the Appellant's tax residence from the [REDACTED] dated 23 August 2019. The Commissioner is satisfied that, as a matter of law, this interpretation is not binding on him in any way. Furthermore, while the interpretation stated that the Appellant was tax resident in [REDACTED] during cross examination the Appellant accepted that he provided all the information relied upon by the [REDACTED] body in making its finding, and when it was put to him that the interpretation was based on incomplete information, he stated, "*From your point of view this is yes.*" In the circumstances, the Commissioner considers that the interpretation is of no assistance to him in reaching the determination herein.

### **Determination**

89. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising assessments to income tax in the total amount of €263,178.59 for 2016 – 2019. Therefore, the assessments stand.

90. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Simon Noone  
Appeal Commissioner  
19 April 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**