66TACD2021

Between/

[redacted]

Appellant

-v-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeals Commission as an appeal against Notices of Assessment to the Domicile Levy for the years ending 31 December 2010 and 31 December 2011 in the amount of €145,036 and €116,005 respectively, which were issued by the Respondent on the 13th of March 2015.

2. In essence, the Appellant contends that he is not liable to the Domicile Levy for the two years under appeal because he was not a "*relevant person*" within the meaning of section 531AA of the Taxes Consolidation Act 1997, as amended (hereinafter referred to as **"TCA 1997"**), for those years. The Appellant says he was not a "*relevant person*" for those years because:-

(a) when the amounts of Income Levy and UK income tax due and payable in respect of the year ending 31 December 2010 are taken into account, the

Appellant's liability to income tax in the State for that year was not less than €200,000;

(b) when the amounts of Universal Social Charge (hereinafter **"USC"**) and UK income tax due and payable in respect of the year ending 31 December 2011 are taken into account, the Appellant's liability to income tax in the State for that year was not less than €200,000; and,

(c) the treatment from a Domicile Levy perspective of income tax paid by the Appellant in an EU country other than the State in a less favourable manner to Irish income tax paid by the Appellant is in breach of the Appellant's rights to freedom of establishment and free movement of capital as enshrined in EU law.

3. The Grounds of Appeal originally advanced by the Appellant included an assertion that his world-wide income, as estimated in accordance with the Tax Acts, for the years under appeal was not more than €1,000,000. However, this line of argument was not pursued by the Appellant in his written submissions or at the hearing before me.

B. Facts relevant to the Appeal

4. The following facts relevant to this appeal are agreed between the parties.

5. The Appellant is an Irish citizen and has at all material times been Irish domiciled and Irish resident.

6. The market value of the Appellant's Irish property was in excess of €5,000,000 on 31 December 2010 and on 31 December 2011.

7. The Appellant's world-wide income, without regard to any amount deductible from or deductible in computing his total income, was more than €1,000,000 for the 2010 and 2011 tax years.

8. For the 2010 tax year, the Appellant was subject to Irish income tax on €248,966 of UK source rental income, on which double taxation relief of €93,982 was claimed in respect of UK income tax paid on that rental income.

9. The Appellant's Irish income tax liability for the 2010 tax year before deducting the credit for double taxation relief referred to in the preceding paragraph was €148,946.

10. The Appellant's Income Levy liability for the 2010 tax year was €83,891.

11. For the 2011 tax year, the Appellant was subject to Irish income tax on €204,182 of UK source rental income, on which double taxation relief of €76,670 was claimed in respect of UK income tax paid on that rental income.

12. The Appellant's Irish income tax liability for the 2011 tax year before deducting the credit for double taxation relief referred to in the preceding paragraph was €160,665.

13. The Appellant's USC liability for the 2011 tax year was €125,126.

14. The Appellant filed Form DL1 Domicile Levy returns for the 2010 and 2011 tax years on the 4th of November 2013. The forms recorded that the Appellant was domiciled in the State for the relevant years, that his world-wide income was more than

€1,000,000 in each of the tax years, and that the market value of his Irish property was greater than €5,000,000 as of the 31st of December in each of the years. However, the Appellant had not ticked the box which would have recorded that his liability to Irish income tax for the two years in question was less than €200,000. Accordingly, the completed Forms did not disclose a liability to the Domicile Levy.

15. The Appellant's Domicile Levy returns were the subject of an audit by the Respondent in 2014. On the 16th of October 2014, the Respondent wrote to the Appellant's agent and requested the submission of revised Domicile Levy returns for the 2010 and 2011 tax years on the basis that Income Levy and USC were being claimed as income tax paid for 2010 and 2011 respectively, neither of which was allowable to be treated as such for Domicile Levy purposes.

16. On the 5th of November 2014, the Appellant filed, on a 'without prejudice' basis, updated Domicile Levy returns for the two years in question. These were prepared on the basis that, in calculating the Appellant's liability to income tax for the 2010 and 2011 tax years, no account was taken of the amount of Income Levy paid by the Appellant for the 2010 tax year, or USC paid by the Appellant for the 2011 tax year. As a result, the returns showed that the Appellant had Domicile Levy liabilities of €51,054 and €39,335 for 2010 and 2011 respectively. On the same date, the Appellant paid the Respondent the sum of €90,389 in discharge of those disclosed liabilities, again on a 'without prejudice' basis. In making the payment, the Appellant reserved his right to seek a repayment of the tax paid in the event that the Respondent's interpretation of the Domicile Levy provisions was successfully challenged at a future date.

17. On the 11th of November 2014, the Respondent wrote to the Appellant's agent requesting the submission of revised Domicile Levy returns for the two years in

question on the basis that double taxation relief was being treated as income tax paid for 2010 and 2011 respectively, and that such treatment was not allowable for Domicile Levy purposes.

18. On the 13th of March 2015, the Respondent issued to the Appellant the Notices of Assessment the subject matter of this appeal. The amounts assessed were as follows:-

2010	**€**
Domicile Levy	200,000
Less:	
Credit for income tax paid	(54,964)
Domicile Levy due	145,036

2011	**€**
Domicile Levy	200,000
Less:	
Credit for income tax paid	(83,995)
Domicile Levy due	116,005

C. Legislation

19. The following legislative provisions were referred to by the parties in their written submissions and in the course of the hearing before me.

Interpretation

20. Section 1(2) of TCA1997 contains *inter alia* the following definitions:-

> *""the Income Tax Acts" means the enactments relating to income tax in this Act and in any other enactment;*
>
> *"the Tax Acts" means the Income Tax Acts and the Corporation Tax Acts."*

21. Section 2(2) of TCA1997 provides:-

> *"Except where the context otherwise requires, in the Tax Acts, and in any enactment passed after this Act which by an express provision is to be construed as one with those Acts, "tax", where neither income tax nor corporation tax is specified, means either of those taxes."*

22. Section 960A of TCA1997 provides *inter alia* that:-

> *""tax due and payable" means tax due and payable under any provision of the Acts."*

23. Section 960C of TCA1997 provides:-

> *"Tax due and payable under the Acts shall be due and payable to the Revenue Commissioners."*

24. Section 960D of TCA1997 then provides:-

> *"Tax due and payable to the Revenue Commissioners shall be treated as a debt due to the Minister for Finance for the benefit of the Central Fund."*

25. Section 2(1) of the Interpretation Act 2005 provides *inter alia*:-

> *""enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument."*

26. Section 5(1) of the 2005 Act provides:-

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition applies, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

27. Section 9 of the 2005 Act provides:-

> *"(1) A reference in an enactment to a Part, Chapter, section, Schedule or other division, by whatever name called, shall be read as a reference to a Part, Chapter, section, Schedule or other division of the enactment in which the reference occurs.*
>
> *(2) A reference in an enactment to a subsection, paragraph, subparagraph, clause, subclause, article, subarticle or other division, by whatever name called, shall be read as a reference to a subsection, paragraph, subparagraph, clause, subclause, article, subarticle or other division of the provision in which the reference occurs."*

Income Tax

28. Section 12 of TCA1997 provides:-

> *"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."*

Income Levy

29. Provisions relating to the Income Levy are contained in Part 18A of TCA1997. Section 531B(1) provides:-

> *"With effect from 1 January 2009, there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as "income levy" in respect of the income specified in paragraphs (a) and (b) of the Table to this subsection…"*

30. This section was inserted by section 2(a) of the Finance Act (No. 2) 2008. Section 102(2) of that Act provides:-

> *"Part 1* [which includes section 2] *shall be construed together with –*
> *(a) in so far as it relates to income tax, income levy and parking levy, the Income Tax Acts…"*

31. Section 531H(1) of TCA1997 provides:-

"Income levy payable for a year of assessment in respect of aggregate income for the year of assessment shall be assessed, charged and paid in all respects as if it were an amount of income tax assessed and charged under the Tax Acts, but without regard to section 1017, and may be stated in one sum (in this section referred to as the "aggregate sum") with the amount of income tax contained in any computation of, or assessment or assessments to, income tax made by or on the individual by whom the income levy is payable for the year of assessment."

Domicile Levy

32. Provisions relating to the Domicile Levy are contained in Part 18C of TCA1997. Section 531AA(1) contains, *inter alia*, the following definitions:-

"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.

"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

33. Section 531AB 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."

34. Section 531AC provides:-

"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."

Universal Social Charge

35. Provisions relating to the USC are contained in Part 18D of TCA1997. Section 531AM(1) provides:-

"With effect from 1 January 2011, there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as "universal social charge" in respect of the income specified in paragraphs (a) and (b) of the Table to this subsection…"

36. This section was inserted by section 3(1)(a) of the Finance Act 2011. Section 84(2) of that Act provides:-

"Part 1 [which includes section 3] *shall be construed together with –*

(b) in so far as it relates to income tax, income levy and Universal Social Charge, the Income Tax Acts…"

37. Section 3(1)(n) of the 2011 Act also amended the definition of "*the Irish taxes"* in Part 1 of Schedule 24 to read:-

""the Irish taxes" means income tax, income levy, universal social charge and corporation tax."

38. Section 531AS provides:-

"(1) Universal social charge payable for a year in respect of an individual's aggregate income for a tax year, being an individual who is a chargeable person (within the meaning of Part 41), shall be due and payable in all respects as if it were an amount of income tax due and payable by the chargeable person under the Income Tax Acts, but without regard to section 1017.

…

(3) Universal social charge may be stated in one sum (in this section referred to as the "aggregated sum") with the amount of income tax contained in any computation of, or any assessment or assessments to, income tax made by or on such an individual as is referred to in subsection (1)."

39. Section 531AX(1) provides:-

"*Universal social charge paid in respect of a tax year is in addition to, and does not reduce, any liability which an individual may have in respect of income tax or other taxes under the Tax Acts."*

Double Taxation Agreements

40. Section 826(1) of TCA1997 provides:-

"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,

(II) corporation tax in respect of income and chargeable gains (or in the case of arrangements made before the enactment of the Corporation Tax Act 1976, corporation profit tax),

(III) capital gains tax,

(IV) any taxes of a similar character,

imposed by the laws of the State or by the laws of that territory, and

(ii) in the case of taxes of any kind or description imposed by the laws of the State or the laws of that territory –

(I) exchanging information for the purposes of the prevention and detection of tax evasion,

(II) granting relief from taxation under the laws of that territory to persons who are resident in the State for the purposes of tax, or

(III) collecting and recovering tax (including interest, penalties and costs in connection with such tax) for the purposes of the prevention of tax evasion,

and that it is expedient that those arrangements should have the force of law, and

(b) the order so made is referred to in Part 1 of Schedule 24A,

then, subject to this section and 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 on and from the date of-

(A) the insertion of Schedule 24A into the Principal Act by paragraph (b), or

(B) the insertion of a reference to the order into Part 1 of Schedule 24A,

whichever is the later."

UK/Ireland Double Taxation Agreement

41. Article 2 of the Convention between the Government of Ireland and the Government of the United Kingdom for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains signed on the 28th of October 1976 (hereinafter referred to as **"the UK/Ireland DTA"**) provides:-

"(1) The taxes which are the subject of this Convention are:

(a) in Ireland:

(i) the income tax;

(ii) the corporation profits tax;

(iii) the corporation tax; and

(iv) the capital gains tax;

(b) in the United Kingdom

(i) the income tax;

(ii) the corporation tax;

(iii) the petroleum revenue tax; and

(iv) the capital gains tax.

(2) The Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention in addition to, or in place of, the existing taxes."

42. Article 21(1) of the DTA provides that:-

"Subject to the provisions of the law of the Republic of Ireland regarding the allowance as a credit against Irish tax of tax payable in a territory outside the Republic of Ireland (which shall not affect the general principle hereof)-

(a) *United Kingdom tax payable under the laws of the United Kingdom and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within the United*

Kingdom (excluding in the case of a dividend tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any Irish tax computed by reference to the same profits, income or chargeable gains by reference to which the United Kingdom tax is computed."

Treaty on the Functioning of the European Union

43. Article 63(1) of the Treaty on the Functioning of the European Union (hereinafter referred as **"the TFEU"**) deals with the right to free movement of capital, and provides as follows:-

"Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

D. Submissions of the Appellant

44. The Appellant argues that he is not liable to the Domicile Levy for the tax years 2010 and 2011 because he is not a '*relevant individual*' as defined in section 531AA of TCA 1997, because his liability to income tax in the State for the relevant years was not less than €200,000. The Appellant accepted that he meets the other criteria in the definition of a relevant individual (namely those in subparagraphs (a), (b) and (d) of the definition).

45. The Appellant submits that there are three main issues which fall for consideration in this appeal, namely:-

(i) the statutory interpretation of domestic legislation;

(ii) the application of the Double Taxation Agreement between Ireland and the UK; and,

(iii) the question of whether the domestic legislation infringes the right to free movement of capital conferred by the TFEU.

46. In relation to the interpretation of domestic legislation, the Appellant submits that the amounts of Income Levy and USC paid by him in the relevant tax years should be taken into account when assessing whether he is a relevant individual. The Appellant makes two distinct and independent arguments in support of this submission.

47. The arguments centre on the extent to which the definition of a liability to income tax in Part 18C of TCA 1997 can be said to encompass USC and the Income Levy. To this point, the Appellant notes that in order for an individual to be considered a relevant individual for Domicile Levy purposes, the individual must have "*…a liability to income tax in the State for the tax year of less than €200,000"* and that a "*liability to income tax*" is expressly defined within section 531AA as:-

> "*…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.*" [emphasis added]

48. The Appellant further pointed out that section 531AC, which provides for a credit against the amount of Domicile Levy to be charged, also makes reference to "*liability to income tax*" as defined by section 531AA.

USC

49. The first argument advanced by the Appellant in relation to USC turns on the wording of section 531AS(1), which provides that:-

> *"Universal social charge payable for a tax year in respect of an individual's aggregate income for tax year, being an individual who is a chargeable person (within the meaning of Part 41A), shall be due and payable in all respects as if it were an amount of income tax due and payable by the chargeable person under the Income Tax Acts, but without regard to section 1017 or 1031C."* [emphasis added]

50. The Appellant placed particular emphasis on the words '*in all respects'* and submitted that the phrase was exceedingly wide and should be construed accordingly. In support of this argument, the Appellant relied upon the decision in ***Ashby –v- Tolhurst*** **[1937] 2 All ER 837**. In that case, which concerned the proper construction of an exception from liability clause in the contract governing the use of a car park, Sir Wilfrid Greene M.R. held that the phrase "*in all respects*" should be given a broad definition and could be regarded as being synonymous with the phrase "*however caused*".

51. The Appellant submitted that the decision was authority for the proposition that "*in all respects*" meant or was equivalent to "*for all purposes*" and therefore the correct interpretation and application of section 531AS(1) meant that the amount of USC due and payable had to be included in the definition of "*liability to income tax*" in section 531AA, because it was to be treated as an amount of income tax due and payable in all respects or for all purposes. Furthermore, the amount of USC paid also had to be allowed as a credit pursuant to section 531AC.

52. The Appellant further submitted that this interpretation was not altered or diminished by the provisions of section 531AS(4) or, if it was so altered or diminished, this only applied to affect the credit afforded by section 531AC, and did not affect the definition of '*liability to income tax*' in section 531AA.

53. The second argument advanced on behalf of the Appellant in relation to USC, which the Appellant stressed was a separate and independent argument, was that USC should be considered income tax for the purposes of the Domicile Levy. The Appellant pointed out that that section 531AM(1) of the TCA 1997 provides that "…*there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as "universal social charge"…*"[emphasis added]

54. The Appellant further pointed out that no definition of income tax was contained in the Domicile Levy provisions. Section 12 of TCA 1997 was the general charging provision in relation to normal income tax and section 2(2) provides that:

> "*Except where the context otherwise requires, in the Tax Acts, and in any enactment passed after this Act which by an express provision is to be construed as one with those Acts, "tax", where neither income tax nor corporation tax is specified, means either of those taxes.*"

55. The Appellant further noted that section 2(1) of the Interpretation Act, 2005 provides that:-

> "*"enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument*"

56. The Appellant pointed out that USC was introduced by Part 1 of the Finance Act 2011, and that section 84(2) of that Act provides that Part 1 thereof:-

> *"… shall be construed together with –*
> *(a) in so far as it relates to income tax, income levy and Universal Social Charge, the Income Tax Acts…*"

57. The Appellant submitted that in any enactment passed after the enactment of section 2(2) of TCA 1997 which by express provision was to be construed as one with the Tax

Acts (*i.e.* the Income Tax Acts and the Corporation Tax Acts, pursuant to section 1(2)), a reference to '*tax*' necessarily means either income tax or corporation tax.

58. The Appellant further submitted that, as USC is not payable by companies, it is clearly not a corporation tax and that consequently, applying the provisions of section 2(2), USC must be an income tax.

59. The Appellant further submitted that because '*the Tax Acts*', as defined in section 1(2), means the Income Tax Acts and the Corporation Tax Acts, the argument in this regard was not contradicted or diminished by the reference to the Income Tax Acts in section 531AS for USC purposes as distinct from the reference to the Tax Acts in section 531AA for Domicile Levy purposes.

60. It was further submitted on behalf of the Appellant that the use of the identical reference to *'income tax due and payable'* in each section clearly supported the argument that USC should be included as income tax due and payable in accordance with the Tax Acts as set out in section 531AA(1) of the TCA1997, and that this was further supported by the provisions of section 531AS(3) of the TCA1997 which states that USC "*…may be stated in one sum (in this section referred to as the "aggregated sum") with the amount of income tax contained in any computation of, or any assessment or assessments to, income tax made by or on such an individual…*".

61. The Appellant further pointed out that nowhere in part 18C or Part 18D of TCA1997 was there an express carve-out from the definitions outlined above which provided a legislative basis to specifically exclude the classification of USC as income tax due and payable for Domicile Levy purposes.

62. The Appellant therefore submitted that as the classification of USC as income tax due and payable fully aligned with the definition of liability to income tax contained in section 531AA, it was clear that in determining whether the Appellant meets criterion (c) of the definition of a '*relevant individual*', full account should be taken of the USC paid by him, as being part of his liability to income tax in the State for a given year.

Income Levy

63. The submissions made on behalf of the Appellant in relation to Income Levy effectively mirrored those made in relation to USC save that the Appellant referred to:

(a) Section 531B(1) of TCA 1997 which provides "*…there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as "income levy" in respect of the income…*" ;

(b) Part 1 of the Finance (No.2) Act 2008 and section 102(2) therein, which provides that Part 1 of the Act "*…shall be construed with – insofar as it relates to… universal social charge, the Income Tax Acts.*"; and,

(c) Section 531H(1) of TCA 1997 which provides that the Income Levy "*… shall be assessed, charged and paid in all respects as if it was an amount of income tax assessed and charged under the Tax Acts*,…". The Appellant submits that this provides unequivocal confirmation that the Income Levy should be considered income tax due and payable by the Appellant for the tax year in accordance with the Tax Acts.

UK Tax paid by the Appellant

64. Turning to the second area in issue, the Appellant submitted that the amounts of UK income tax payable by him for the two years under appeal should be taken into account when assessing whether the Appellant is a relevant individual. The Appellant

advanced two main arguments in support of this submission, namely that the Domicile Levy was "*substantially similar*" to income tax within the meaning of Article 2(2) of the UK/Ireland DTA, and that the Appellant was by virtue of Article 21(1)(a) entitled to a credit for UK income tax paid against his Irish tax liability.

65. The Appellant submitted that as an Irish domiciled, resident and ordinarily resident individual, he is liable to Irish tax on his world-wide income. Consequently, the net rental income derived from the Appellant's UK rental property is within the charge to Irish income tax. Therefore, this income formed part of the Appellant's Schedule D Case III income for the relevant years and appeared on the Appellant's Notice of Assessment as taxable income. The UK rental income was then subjected to income tax at the appropriate rates, such tax being displayed along with tax on Irish source income as "Total Income Tax" on the Appellant's Notice of Assessment. It was submitted that while any UK income tax suffered on the income was then credited against the Appellant's Irish income tax liability, this did not alter the fact that Irish income tax was due and payable on the UK rental income in the first instance.

66. The Appellant pointed out that Article 2 of the UK/Ireland DTA details the taxes which are subject to the DTA and in the context of Ireland these are defined in paragraph 1(a) as "*…(i) the income tax; (ii) the corporation profits tax; (iii) the corporation tax; and (iv) the capital gains tax*". The Appellant further pointed out that Article 2(2) of the DTA further provides that the DTA also applies to "*…any identical or similar taxes which are imposed by either Contracting State… in addition to, or in place of, the existing taxes.*"

67. The Appellant submitted that there was clear and helpful guidance on the correct interpretation of the words "*identical or substantially similar*" to be found in the

judgement of Kelly J in ***Kinsella –v- The Revenue Commissioners*** **[2011] 2 I.R. 417**. In that decision, Kelly J noted at paragraph 44:-

> *"In accordance with what is prescribed by the Vienna Convention, I must therefore interpret the Convention in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Convention's object and purpose. Where such an interpretation leaves the meaning of the Convention ambiguous or obscure or leads to a manifestly absurd or unreasonable result then recourse can be had to supplementary means of interpretation. These means of interpretation could, in an appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon."*

68. I note that Kelly J's conclusions in this regard were subsequently endorsed by Laffoy J in ***O'Brien –v- Quigley*** **[2013] 1 I.R. 790**.

69. Kelly J further noted in paragraph 59 that:-

> *"Article 2* [of the Ireland/Italy DTA] *is largely based on the similarly numbered article of the Model Convention. The commentary on that says that the article is intended to widen as much as possible the field of application of the Convention and to avoid the necessity of concluding a new one whenever the contracting states' domestic laws are modified. Thus, an expansive rather than restrictive interpretation is justified."*

70. Kelly J went on in paragraphs 63 and 64 to state as follows:-

> *"Capital gains tax is, in my view, a substantially similar tax to the Italian taxes listed in article 2.3 and, of course, is specifically covered in article 12. I do not however rest my decision upon that proposition. Rather I take the view that*

capital gains tax is a substantially similar tax to the Irish taxes which are mentioned in article 2.3. I do so for the following reasons.

As I have already pointed out, capital gains tax is a tax on gains or profits rather than a tax on capital wealth. Although introduced in 1975, it is now dealt with by the Taxes Consolidation Act 1997. That Act contains all of the provisions related to other direct taxes such as corporation tax and income tax. The rules for computing capital gains tax are included in that legislation. True it is that the capital gains are taxed in a different way from other forms of income, but the tax legislation regards the two as being very closely related. Section 4 of the Income Tax Act 1967, which is now contained in section 12 of the Act of 1997, provides that income tax is to be charged in respect of all property, profits or gains respectively described in the schedules contained in the sections which are enumerated. Thus, although it is calculated in a different way from income tax, capital gains tax is substantially similar."

71. It was submitted on behalf of the Appellant that the Domicile Levy is a tax on income and not a property tax, and that this was emphasised by the fact that section 531AC gives a credit for income tax paid. Counsel for the Appellant said this view was further strengthened by the fact that the amount of the Domicile Levy was effectively 20% of €1 million which happened to be the standard rate of tax at the time. It was further submitted that both the Domicile Levy and income tax were included in TCA 1997. It was further submitted that if capital gains tax was closely related to income tax then the Domicile Levy had to be even more closely related.

72. Counsel for the Appellant said that, applying the same criteria used by Kelly J, the Domicile Levy was clearly even more similar to income tax than capital gains tax had

been found to be. Accordingly, it was submitted that the Domicile Levy fell within the scope of Article 2.2.

73. Kelly J noted in paragraph 68 of his judgement that his finding appeared to be in keeping with that expressed by Klaus Vogel in his book *Double Taxation Conventions* (3rd ed., 1998), where the latter stated:-

> *"What is necessary is a comprehensive comparison of the tax laws' constituent elements. In such a comparison, the new tax under review, rather than being compared merely with the solitary older one (to which it will always be similar in some respects and different in others), should be considered with reference to all types of taxes historically developed within the State in question - and of States with related legal systems - in order to determine which of such traditional taxes comes closest to the new tax law… Whether a tax is "substantially similar" to another can, consequently, not be decided otherwise than against the background of the entire tax system."*

74. Counsel for the Appellant submitted that, in construing the DTA, I was entitled to have regard to the Model Convention and the commentaries thereon. In particular, Counsel relied upon extracts from the fourth edition of Vogel's work in support of the argument that it wasn't necessary for him to establish that the Domicile Levy was a tax on income; instead, it was merely necessary to show that it was substantially similar to income tax, and even a similarity in a single component of the tax could suffice to establish similarity. Vogel states at paragraph 64:-

> *"The approach requires a comprehensive comparison of the respective taxes' constituent elements. It has to take into account in particular the tax object and the calculation of the tax base, whereas tax rates and the name of the tax are not decisive. The provision applies irrespective of which State levies the taxes in question. Thus, it is also applicable where one Contracting State introduces a tax similar to a tax listed*

in Article 2(3) of the Model Convention levied by the other Contracting State. In contrast, under the macro-approach, a tax is similar not to a single tax, but to a combination of several taxes. Such approach is compatible with the wording of the provision, which requires identity or similarity with respect to the existing taxes and not to an existing tax. The macro-approach requires an overall assessment of the place of the respective tax in the tax system as a whole. The question whether a tax is similar then has to be decided against the background of the entire tax system."

75. Counsel for the Appellant further directed me to a study of Article 2 of the OECD Model Conventions by Dr. Patricia Brandstetter which was supportive of the arguments detailed above. He further opened to me an extract from the speech by the Minister for Finance on the introduction of the Domicile Levy, and submitted that it showed that the Domicile Levy was introduced to capture Irish-domiciled taxpayers who paid little or no income tax, and could therefore be taken as evidence that the Domicile Levy was similar to income tax.

76. Counsel further referred me to a decision of the Tax Appeal Board in Canada in the case of ***Saunders –v- Minister of National Revenue*** **54 DTC 524**, where the Board found *inter alia* that:-

"The accepted principle appears to be that a taxing Act must be construed against either the Crown or the person sought to be charged, with perfect strictness - so far as the intention of Parliament is discoverable. Where a tax convention is involved, however, the situation is different and a liberal interpretation is usual, in the interests of the comity of nations. Tax conventions are negotiated primarily to remedy a subject's tax position by the avoidance of double taxation rather than to make it more burdensome."

77. It was submitted on behalf of the Appellant that the effect of the Domicile Levy was that if a taxpayer is domiciled in Ireland but does not contribute a minimum amount of income tax, the State will impose liability which is effectively equivalent to a minimum rate of tax on €1 million of €200,000. Counsel submitted that it was undeniable that the Domicile Levy was a tax on income and was all about making a contribution of income tax.

78. It was further submitted that, in those circumstances, Article 21(1)(a) of the UK/Ireland DTA encompasses the Domicile Levy and the Appellant was therefore entitled to treat the Domicile Levy as an income tax and to get a credit for the UK income tax which he had paid. Counsel submitted that this approach was consistent with the decision in ***Murphy –v- Asahi Synthetic Fibres (Ireland) Limited*** **[1986] I.R. 777** and with section 826(1) of TCA 1997.

79. A separate argument made by the Appellant in relation to the UK/Ireland DTA was that the effect of the Respondent's interpretation was that his Irish income tax liability in respect of UK rental income had been reduced by relief for UK income tax paid in accordance with the DTA but he was nonetheless liable to additional Irish tax in the form of the Domicile Levy by virtue of the inconsistent treatment by the Respondent of Irish versus UK income. He submitted that this contravened the operation of the DTA as the relief available under the DTA had not operated in the manner intended. In essence, he argued, this was due to the fact that the reduction in his liability to Irish income tax on UK rental income simply had the effect of subjecting the Appellant to additional Irish tax in the form of the Domicile Levy.

80. The Appellant submitted that it is a long-established principle that DTAs do not propose or authorise new charges, but simply relieve existing charges, and that the application of the DTA in the manner proposed by the Respondent had the effect of

creating or increasing the charge to the Domicile Levy. This, the Appellant contended, is in bad faith, is contrary to the proper principles of interpretation, conflicts with section 826 of TCA 1997 and purports to breach international law. In support of the Appellant's arguments in this regard, Counsel referred me to extracts from *Vogel* (4th ed. at paragraphs 30 and 54), ***O'Brien –v- Quigley*** (cited *supra*), ***McGimpsey –v- Ireland*** **[1988] I.R. 567**, ***Crotty –v- An Taoiseach*** **[1987] I.R. 713** and the decisions in ***Saunders*** and ***Asahi*** (cited *supra*).

EU Law

81. The Appellant submitted that the assessments made by the Respondent interfered with his directly effective rights of freedom of establishment and free movement of capital, with particular emphasis on the latter right, and was therefore in breach of the TFEU. The Appellant contended that the treatment, from a Domicile Levy perspective, of income tax payable on UK rental property in a less favourable manner to income tax payable on Irish rental property breached his right to free movement of capital.

82. It was not in dispute between the parties that the right to free movement of capital included the right to invest in real property in another Member State, subject to the restrictions contained in Article 65 of the TFEU. The Appellant argued that none of those restrictions was applicable in the instant appeal.

83. Counsel for the Appellant cited in support of his arguments on this point the decisions in ***Ronny Verest*** **Case C-489/13**, ***Busley and Cibrian Fernandez*** **Case C-35/08**, ***Petri Manninen*** **[2004] STC 1444** and ***Cadbury Schweppes –v- IRC*** **Case C-196/04**.

84. It was submitted on behalf of the Appellant that there was an impermissible difference in the Respondent's treatment for Domicile Levy purposes of a taxpayer

who holds UK property from which he derives an income and an equivalent taxpayer in the same circumstances whose investment property was situate in Ireland. In support of this argument, the Appellant tendered in evidence a detailed schedule showing the tax consequences for the Appellant of the Respondent differentiating between Irish rental income and UK rental income. Those figures showed that the Appellant's tax liability would be substantially lessened if he had received his rents from Irish property alone, and Counsel for the Appellant submitted that this was in clear contravention of the Appellant's right to free movement of capital.

E. Submissions of the Respondent

85. The fundamental submission made on behalf of the Respondent was that the Domicile Levy is not a tax. It was submitted that almost all of the Appellant's arguments were based on the premise that it was a tax and that if I were to make a contrary finding, those arguments would simply fall away.

86. Counsel for the Respondent said it was a key factor that once a taxpayer met the criteria for liability to the Domicile Levy, there was a single charge of €200,000 on that taxpayer, subject to any credit to which the taxpayer might be eligible. The amount of the levy was always the same, irrespective of whether the taxpayer had €5 million or €500 million of property assets in the State, or whether they had a worldwide income of €1 million or €100 million. It was submitted that the fact that the amount of the levy was always the same was strong evidence that the levy was not a tax. There was no tax base and there was no discernible assessment or rate based on income, gains or capital.

87. Turning to the legislation, Counsel for the Respondent pointed out that the provisions relating to the Domicile Levy are to be found in Part 18C of TCA 1997. This was, it was emphasised, a separate and distinct part to the portion of the Act that deals with income tax. Counsel submitted that income tax can only mean income tax charged pursuant to section 12 of TCA 1997. It was the Respondent's position that neither Income Levy nor USC could fall within the definition of "*liability to income tax*" contained in section 531AA and neither could be treated as income tax paid for the purposes of section 531AC.

88. Counsel for the Respondent further submitted that it was clear from the definitions contained in the legislation that the references to tax paid or tax due and payable could only mean tax paid or tax due and payable to the Irish Revenue authorities. The Respondent relied upon the provisions of section 960A, section 960C and section 960D in this regard.

89. It was further submitted on behalf of the Respondent that it was important to note that in order to come within the definition of a "*relevant individual*" for the purposes of section 531AA, a taxpayer did not need to have paid tax in the State; rather it was the amount due and payable which was the relevant criterion for the purposes of that section.

90. Turning to the credit afforded to a taxpayer liable to the Domicile Levy by section 531AC, Counsel for the Respondent emphasised that the section made express reference to the taxpayer's "*liability to income tax*" and submitted that this could not be said to encompass taxes on income, or taxes similar to income tax, or taxes that are treated as income tax for collection purposes. It was further submitted that the fact that the section only allowed a credit to the extent that the individual's liability to income tax had been paid at the same time as or before the Domicile Levy for that year

made it clear that it was only taxes paid to the Irish Revenue authorities which would give rise to an entitlement to a credit.

91. The Respondent further submitted that the provisions of section 531AJ reinforced its position that the Domicile Levy was not income tax. That section provides that the provisions of Chapter 1 of Part 40, Chapter 1 of Part 47 and section 1080 shall apply to the Domicile Levy as they apply to income tax. Section 531AK further provides that the Domicile Levy is under the care and management of the Revenue Commissioners and Part 37 applies to the Domicile Levy as it applies to income tax.

92. Turning to USC, Counsel for the Respondent submitted that was clear from the wording of section 531AM that USC is a tax and that it is a tax on income; however, that did not mean that it was income tax. It was submitted that the wording of section 531AS did not in any way undermine or detract from this argument and in fact confirmed that USC is not income tax. The provisions of that section made it clear that USC could be stated in a single aggregated sum with the amount of income tax contained in any computation of or assessment to income tax; Counsel submitted that two figures could not be aggregated unless they were different in the first place. Counsel also submitted that section 531AX further reinforced the Respondent's argument that USC is something different to income tax.

93. In relation to the Appellant's argument that the use of the phrase "*due and payable in all respects*" in section 531AS(1) meant that USC should be treated as income tax for the purposes of establishing whether a taxpayer was liable to the Domicile Levy, Counsel for the Respondent submitted that the phrase had to be interpreted in the context of the section as a whole and that the remaining subsections made it absolutely clear that USC was something different to income tax. It was further submitted that the decision in ***Ashby –v- Tolhurst*** was clearly distinguishable, both

on its facts and on the basis of what was actually decided, and did not meaningfully advance the Appellant's position.

94. Insofar as the Appellant had sought to rely on the provisions of section 2(2) of TCA 1997 in support of his argument in relation to USC being income tax, Counsel for the Respondent submitted that the provisions had to be understood and construed in the context of the enactment of the Corporation Tax Act in 1976. The wording of section 2(2) was originally contained in section 155 of the 1976 Act and Counsel submitted that was clear in the context of a corporation tax coming into being for the first time that the section simply provided that where there was a reference to the Tax Acts and it was unclear whether it was income tax or corporation tax which was being referred to, the applicable tax was to be determined by the context.

95. Counsel for the Respondent further submitted that the Appellant's argument in relation to section 2(2) of TCA 1997 had no application to the Income Levy. The Income Levy was introduced by the Finance (No. 2) Act 2008 and section 102(2) of that Act provided that Part 1 (which introduced *inter alia* the Income Levy) "*... shall be construed together with ... in so far as it relates to income tax, income levy and parking levy, the Income Tax Acts.*"

96. Counsel further submitted that, similar to USC, it was clear from the wording of section 531B that the Income Levy is a tax and that it is a tax on income. However, that did not mean that it was income tax. Counsel argued that the Appellant's reliance on the wording of section 531H(1), and in particular the words "*charged and paid in all respects as if it was an amount of income tax*", was misplaced. It was submitted on behalf of the Respondent that these words clearly established that the Income Levy was not income tax because such a provision would not have been necessary if it was, in fact, income tax.

97. Counsel for the Respondent submitted that her other arguments in relation to USC were equally applicable to the Income Levy.

98. Turning to the question of whether the Appellant was entitled to take into consideration the tax he paid in the UK on his rental income, Counsel for the Respondent made the preliminary point that even if the Appellant's argument in relation to liability to income tax on his UK rental income were to be accepted for the purposes of the meaning of "*liability to income tax in the State*", it was the Respondent's position that, subject to the USC and Income Levy argument, the Appellant was still a "*relevant individual*".

99. In circumstances where the Appellant is a relevant individual, it was the Respondent's position that credit for UK income tax paid under the double taxation relief provisions had to be excluded when determining the amount which was to be treated as income tax paid in the State for the purposes of section 531AC. The Respondent further submitted that the reference in the legislation to the amount of income tax paid was a reference to Irish income tax actually paid, and that no credit for UK income tax paid under the DTA could be taken into account in determining what had been paid in terms of Irish income tax. The Respondent submitted that if the contrary were to apply, the legislation would have had to have made express provision for it and it clearly did not. In other words, the Respondent submitted that tax paid in the UK did not represent income tax paid to the Irish Exchequer under the Income Tax Acts and was not income tax paid for the purposes of section 531AC. The Respondent submitted that Irish income tax is the tax charged under section 12 of TCA 1997 and cannot mean UK income tax charged under a UK statute.

100. Counsel for the Respondent submitted that the Appellant was in effect seeking a double credit because he was in reality seeking a credit in respect of the UK income

tax which he had paid against his Irish income tax liability (and any liability to USC and the Income Levy) and also against any liability which he might have to the Domicile Levy. It was submitted that this did not make sense and was illogical.

101. More fundamentally, Counsel for the Respondent submitted that this argument could only be made if I was satisfied that the Domicile Levy was an identical or a substantially similar tax to the taxes covered by the DTA. Counsel submitted that it was abundantly clear that the Domicile Levy was a levy and not tax at all. She reiterated that, unlike income tax or capital gains tax, the Domicile Levy was very clearly not an annual tax based on profits or gains; there was no base for taxation, there was no calculation and there was no rate of tax. Counsel further submitted that this argument was supported by the fact that Ireland had notified its treaty partners in relation to USC and in relation to the Income Levy but had not done so in relation to the Domicile Levy.

102. Counsel for the Respondent further submitted that it was only necessary for me to consider the commentaries on the OECD Model Convention if I found that interpreting the DTA in good faith, in accordance with the ordinary meaning to be given to its terms and their context and in the light of the Agreement's objective purpose, left the meaning of the Agreement ambiguous or obscure or led to an absurd or unreasonable result. She said that this approach was to be found at paragraph 44 of Kelly J's decision in the ***Kinsella*** case.

103. Counsel further submitted that even if I did have regard to the commentaries relied upon by the Appellant, those commentaries did no more than establish that something akin to an "*officious bystander*" test should be applied when determining whether the Domicile Levy was identical or substantially similar to income tax. She submitted that not only was the Domicile Levy not identical or substantially similar,

it was of its nature fundamentally different. It was instead based solely on a taxpayer's circumstances, and if the taxpayer met the legislative criteria he was subject to a flat rate levy. She further submitted that the Domicile Levy was based on the fact that a taxpayer was domiciled in the State. The Levy did not affect people domiciled in other countries and was different in this regard to income taxes or capital gains taxes which could arise in different countries. Accordingly, the Respondent submitted that it made absolute sense that the Domicile Levy was not covered by the DTA.

104. Finally, in relation to the Appellant's argument that the Domicile Levy legislation, or the Respondent's interpretation thereof, infringed his right to free movement of capital pursuant to the TFEU, counsel for the Respondent submitted that the starting point for my consideration had to be the fact that the Domicile Levy could only ever apply to persons domiciled in the State and would never be applicable to taxpayers domiciled in other Member States.

105. Counsel further submitted that the Appellant's arguments in relation to the free movement of capital could only succeed if the Domicile Levy was income tax and if USC was income tax. She submitted that they clearly were not income tax but should instead be regarded as being in the same category as council tax, rates on property, PRSI on rental income, national insurance in the UK and similar charges on income. The mere fact that the Appellant would ultimately receive less net income than if he had invested in Irish rental property did not of itself mean that his right to the free movement of capital had been breached.

106. Counsel for the Respondent submitted that the TFEU and the case law referred to by the Appellant established that legislation which sought to tax someone in an unfair and discriminatory way vis-à-vis other taxpayers and other Member States,

might not be justifiable. However, she reiterated that the Domicile Levy was not a tax and therefore the arguments made by the Appellant simply did not arise. She further submitted that, even if I was to find that the Domicile Levy was a tax or was a measure which might impinge on the free movement of capital, it could be justified based on the cohesiveness of the tax system.

F. Analysis and findings

107. I believe that the Appellant's suggestion that I approach the determination of this appeal on the basis that there are three main issues which require consideration, namely the interpretation of the domestic legislation, the interpretation of the UK/Ireland Double Taxation Agreement and the issue of free movement of capital, is logical and convenient and I propose giving my analysis and findings on that basis.

Interpretation of the domestic legislation

108. Accordingly, the first issue which I am required to consider is whether the amounts of Income Levy and USC paid by the Appellant in the tax years under appeal should be taken into account when assessing whether he is a "*relevant individual*" within the meaning of section 531AA.

109. The Appellant has, as stated above, advanced two separate and independent arguments as to why the Income Levy and USC paid by him should be taken into account as aforesaid.

110. The first such argument is premised upon the use of the words "*assessed, charged and paid in all respects as if it was an amount of income tax assessed and charged under the Tax Acts*" in section 531H (in relation to the Income Levy) and the words "*due and payable in all respects as if it were an amount of income tax due and payable by the chargeable person under the Income Tax Acts*" in section 531AS (in relation to USC). The Appellant submits that these words, and in particular the phrase "*in all respects*", mean that the Income Levy which he paid in 2010 and the USC which he paid in 2011 form part of his "*liability to income tax*" (as defined in section 531AA(1)) when determining whether or not he is a "*relevant individual*." The arguments made by the Appellant and the Respondent on this issue have been set forth in some detail above.

111. I believe that the correct approach to the interpretation of taxing statutes generally, and to the correct interpretation of section 531H and 531AS in the instant appeal, was clearly and concisely stated by McKechnie J in the Supreme Court decision in ***Dunnes Stores –v- The Revenue Commissioners*** **[2019] IESC 50**, wherein he stated as follows in paragraphs 63 to 65:-

> *"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 lawmaker*" (*Craies on Statutory Interpretation, *7th ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "*… it is natural to enquire 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.*

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 is 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.

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."

112. I note that the foregoing passage was cited with approval by O'Donnell J giving the Supreme Court decision in ***Bookfinders Ltd. –v- The Revenue Commissioners* [2020] IESC 60**, where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54 as follows:-

> *"However, the rest of the extract from the judgement* [of McKechnie J] *is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute - seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of the statutory provision. It is only if, after the process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."*

113. Applying the foregoing statements of principle, I am satisfied that I should apply the ordinary, basic and natural meaning of the words to be construed and must enquire as to the subject matter with respect to which they are used and their object. I must also have regard to the context in which they are used, both immediate and proximate, and at a minimum their context within the Act as a whole.

114. The Appellant might have succeeded in this first argument if it were permissible or appropriate for me to construe the words "*in all respects*" in isolation or solely within the strict confines of the subsections in which they are used. However, I believe that such an approach would be incorrect and contrary to the guidance given in the Supreme Court decisions quoted above.

115. In the case of USC, I believe that I cannot properly construe the phrase "*due and payable in all respects*" in section 531AS(1) without also having regard to the provisions of subsections (3) and (4) of that section. I accept as correct the argument

made on behalf of the Respondent that the latter two subsections would be otiose or unnecessary if subsection (1) had the meaning or effect contended for by the Appellant. I further accept as correct the Respondent's argument that the latter two subsections actually undermine the argument made by the Appellant in this regard; the "*aggregated sum*" in the ordinary and natural meaning of that phrase can only be an aggregate if the components thereof are separate and distinct in the first place.

116. I also accept as correct the Respondent's argument that the wording of section 531AX(1) further contradicts the assertion by the Appellant that USC paid by him is to be treated as income tax in all respects or for all purposes. I believe that the wording of section 531AAA poses a similar difficulty for the Appellant in this regard.

117. In the case of the Income Levy, the same considerations apply to the interpretation of section 531H(1) and the phrase "*assessed, charged and paid in all respects as if it was an amount of income tax*" used therein. Again, the fact that the subsection goes on to say that the amount of Income Levy payable may be stated in one sum (referred to therein as the "*aggregate sum*") with the amount of income tax contained in any computational or assessment to income tax makes it clear, in my view, that the Income Levy paid by the Appellant in the relevant year does not necessarily or automatically fall to be treated as part of the Appellant's liability to income tax when determining whether or not he is a "*relevant individual*" within the meaning of section 531AA.

118. For these reasons, I find that the Appellant is incorrect in the broad and expansive interpretation of "*in all respects*" which he contends for, and that the said phrase does not have the meaning or effect he ascribes to it. Accordingly, I find that the Appellant has not succeeded in his first argument.

119. The second argument advanced on behalf of the Appellant is that both USC and the Income Levy are income taxes for the purposes of ascertaining his "*liability to income tax*" when determining whether or not he is a relevant person within the meaning of section 531AA. Again, the arguments made by the parties to the appeal on this issue are set forth *supra* and I do not believe it is necessary to repeat them again here.

120. The Respondent accepted, as I believe it had to, that both USC and the Income Levy were taxes, and that they were taxes on income. However, it does not necessarily follow that this means that they are income tax for the purposes of this appeal.

121. It will be recalled that the Appellant placed particular emphasis on section 2(2) of TCA 1997, which provides that:-

> *"Except where the context otherwise requires, in the Tax Acts, and in any enactment passed after this Act which by an express provision is to be construed as one with those Acts, "tax", where neither income tax nor corporation tax is specified, means either of those taxes."*

122. The Appellant pointed out that, in relation to the Income Levy, section 102(2) of the Finance (No. 2) Act, 2008 provides that Part 1 (which provides for the Income Levy) "*... shall be construed together with ... (a) in so far as it relates to income tax, income Levy and parking Levy, the Income Tax Acts."* Similarly, in relation to USC, which was introduced by Part 1 of the Finance Act 2011, section 84(2) provides that *"Part 1 shall be construed together with ... (a) in so far as it relates to income tax, income levy and Universal Social Charge, the Income Tax Acts."*

123. In essence, it was submitted on behalf of the Appellant that section 2(2) of TCA 1997 means that a tax imposed by any enactment passed after the 1997 Act which by

express provision is to be construed as one with the Tax Acts must be either income tax or corporation tax. Both the Income Levy and USC were such taxes and, as they were clearly not corporation tax, they were income tax and consequently a liability thereto fell within the meaning of a "*liability to income tax*" within the meaning of section 531AA.

124. This argument, while attractive in its simplicity, fails in my view to have adequate regard to the context in which section 2(2) was enacted. As the Respondent submitted, the original incarnation of section 2(2) was found in section 155 of the Corporation Tax Act 1976 and I believe, in light of the authorities quoted above, that it has to be considered and interpreted in that context. I accept the submission made on behalf of the Respondent that section 2(2) means simply that where there is a reference to the Tax Acts and it is unclear whether it is income tax or corporation tax which is being referred to, the applicable tax is to be determined by the context. It cannot, in my view, be properly read as operating as a deeming provision.

125. The Appellant's argument also fails, in my view, to have adequate regard to the fact that the legislative provisions governing the Income Levy are contained in Part 18A of TCA 1997 and the legislative provisions governing the USC are contained in Part 18D of that Act; these are clearly separate and distinct parts of TCA 1997..

126. I accept as correct the submission made on behalf of the Respondent that income tax, in the context of a "*liability to income tax*" within the meaning of section 531AA(1), means the tax charged pursuant to section 12 of TCA 1997 in respect of all property, profits or gains described in the Schedules enumerated in that section, and does not encompass or include the Income Levy or USC.

127. In reaching this conclusion, I have had the benefit of reading and considering the Determinations made by my fellow Commissioner reported at **175TACD2020** and **176TACD2020**. While those Determinations are not binding on me, I agree with the reasoning and conclusions therein on the issue of whether liability to USC should be regarded as "*liability to income tax*" within the meaning of section 531AA(1), and respectfully adopt the following conclusion therein:-

> *"In conclusion therefore, Universal Social Charge, having its own Part, its own provisions and its own mechanisms, is its own tax and I am satisfied that Part 18D TCA creates a new taxation code for USC which is separate and distinct from the income tax code. Thus, I find that while USC is a tax on income it is not* 'income tax' *for the purposes of the Tax Acts and is not* 'liability to income tax' *for the purposes of the definition of* 'relevant individual' *in accordance with the Domicile Levy."*

128. I believe that the same reasoning and conclusions are equally applicable to the issue of whether liability to the Income Levy can properly be regarded as "*liability to income tax*" within the meaning of section 531AA(1).

129. Accordingly, I find that the Appellant also fails in his second argument and that the Income Levy which he paid in 2010 and the USC which he paid in 2011 should not be taken into consideration when deciding whether or not his liability to income tax in the State for those tax years was less than €200,000 for the purposes of section 531AA(1).

Interpretation of the UK/Ireland DTA

130. The Appellant made two separate and distinct arguments in relation to the application of the UK/Ireland DTA on the facts of the instant appeal. The first of these

was that, because the Domicile Levy is identical or substantially similar to income tax, the Appellant is entitled to take into account the UK income tax due and payable for the years under appeal when determining whether or not his liability to income tax in the State for those tax years was less than €200,000 and when determining whether or not he was entitled to a credit for the UK income tax paid when ascertaining the amount of his liability to the Domicile Levy.

131. Again, I believe it is unnecessary to repeat *in extenso* the arguments made by the parties on this issue which have already been summarised above.

132. The Appellant submitted in relation to the first aspect of this first argument that, as an Irish domiciled, resident and ordinarily resident individual, he is liable to Irish tax on his worldwide income. Consequently, the net rental income derived from his UK rental properties is within the charge to Irish income tax. This income forms part of the Appellant's Schedule D Case III income and appears on the Appellant's Notice of Assessment as taxable income. The UK rental income is then subjected to income tax at the appropriate rates, such tax being displayed along with tax on Irish source income as "Total Income Tax" on the Appellant's Notice of Assessment. While any UK income tax suffered on the income is then credited against the Appellant's Irish income tax liability, the Appellant submits that this does not alter the fact that Irish income tax is due and payable on the UK rental income in the first instance.

133. I accept as correct this submission made on behalf of the Appellant. I therefore find that UK income tax due and payable by the Appellant during the two years under appeal ought to be taken into account when calculating the Appellant's "*liability to income tax*" for the purposes of determining whether or not he is a "*relevant individual*" within the meaning of section 531AA(1). However, on the facts of this

appeal, this finding does not of itself operate to take the Appellant out of the category of "*relevant individual*".

134. I must next consider whether the Appellant is entitled to a credit against his liability to the Domicile Levy arising from the UK income tax which he has paid in the relevant years. In deciding this issue, I must determine whether the Domicile Levy is, within the meaning, and for the purposes, of Article 2(2) of the DTA, identical or substantially similar to income tax. I am satisfied that the Domicile Levy is manifestly not identical to income tax, nor did I understand Counsel for the Respondent to urge this upon me. Accordingly, the issue which needs to be determined is whether the Domicile Levy is substantially similar to income tax.

135. I accept as correct the submission made on behalf of the Appellant that the correct approach to deciding this issue is that taken by Kelly J in the ***Kinsella*** case. I further accept that the commentaries of Vogel and Brandstetter are supportive of the arguments advanced by the Appellant on this issue, and I note the other materials submitted by the Appellant.

136. However, I believe that the Respondent is correct in its submission that I can only consider whether the Domicile Levy is "*substantially similar*" to income tax if I am first satisfied that the Domicile Levy is itself a tax. I note in this regard that Article 2(2) states clearly and unambiguously that the Convention will also apply to "*identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention…"* [emphasis added].

137. The fact that the Domicile Levy is called a "levy" is clearly not determinative of the question of whether it is a levy or a tax, nor was such an argument advanced by the Respondent. However, I accept as correct the point made by the Respondent that

a key factor of the structure of the Domicile Levy legislation is that once a taxpayer meets the criteria in the definition of a "*relevant person*" contained in section 531AA(1), there is a single, fixed charge of €200,000. There may be a credit afforded to the taxpayer in respect of income tax paid but that does not alter the fact that the amount of the levy initially imposed is always the same. It is clear from the legislation that there is no discernible tax base which is charged by the Domicile Levy; the amount of the levy is not calculated or assessed by reference to the taxpayer's income or profits or gains or property or capital. I believe that the Respondent is correct in its submission that the Domicile Levy bears none of the indicia that would identify or mark it as a tax with a chargeable basis; it is instead a fixed-amount levy charged upon a taxpayer who meets a defined set of criteria.

138. It was urged upon me by Counsel for the Appellant that the Domicile Levy should be considered as a tax on income because the levy amount of €200,000 amounts to 20% (being the standard income tax rate) of €1,000,000 (being the minimum amount of worldwide income necessary to become a "*relevant individual*"). It was further argued that the fact that section 531AC allows a credit in respect of a relevant individual's liability to income tax is supportive of the argument that the Domicile Levy is a tax on income. I am not persuaded by these arguments; they fail, in my view, to overcome the fact that the levy is the same amount for every relevant individual (before any allowance is made for a credit pursuant to section 531AC), irrespective of whether their worldwide income is €1 million or €100 million.

139. Even if I had come to a different conclusion and accepted that the Domicile Levy is a tax, I am not satisfied that it is a tax "*substantially similar*" to income tax within the meaning of Article 2(2) of the DTA. In this regard, I note that Kelly J in ***Kinsella*** concluded in paragraph 64 of his judgment that capital gains tax was substantially similar to income tax on the grounds *inter alia* that capital gains tax is a

tax on gains or profits, rather than a tax on capital wealth, and income tax is a tax on the property, profits or gains respectively described in the Schedules enumerated in section 12. For the reasons set forth in the preceding paragraph, I believe that the Domicile Levy is fundamentally different in this regard. Accordingly, I believe that one of the five criteria identified by Kelly J as requiring to be satisfied in order to find that two taxes are substantially similar is not met when comparing income tax and the Domicile Levy. While the other criteria identified by Kelly J may be satisfied, this is not, in my view, sufficient to warrant a finding that the Domicile Levy is substantially similar to income tax.

140. I agree with the submission by the Respondent that it is only necessary for me to have regard to the commentaries on Double Taxation Agreements and the OECD Model Convention if interpreting the UK/Ireland DTA in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of the DTA's object and purpose, leaves the meaning of the Agreement ambiguous or obscure or gives rise to a manifestly absurd or unreasonable result. This is confirmed by Article 32 of the Vienna Convention.

141. I do not consider that my proposed interpretation of the UK/Ireland DTA gives rise to any obscurity or ambiguity or to an absurd or unreasonable result, and it is therefore not necessary for me to have regard to the commentaries opened to me by Counsel for the Appellant or to the authorities therein referred to, or to the other material called in aid of the argument. However, even if I was to have regard to those materials, I would not come to a different conclusion on the question of whether the Domicile Levy is substantially similar to income tax.

142. Accordingly, I find that the Domicile Levy is not a tax and therefore falls outside the scope of Article 2(2) of the UK/Ireland DTA. Even if I am incorrect in this finding, and the Domicile Levy is a tax, I find that it is not substantially similar to income tax

within the meaning of Article 2(2). Accordingly, the provisions of Article 21(1)(a) of the DTA do not operate to afford the Appellant a credit in respect of the UK income tax which he paid in the two years under appeal against his liability to the Domicile Levy for those years.

143. The second argument advanced on behalf of the Appellant in relation to the DTA was that his Irish income tax liability in respect of UK rental income had been reduced by relief for UK income tax paid in accordance with the DTA but he was nonetheless liable to additional Irish tax in the form of the Domicile Levy by virtue of the inconsistent treatment by the Respondent of Irish versus UK income. He submitted that this contravened the operation of the DTA as the relief available under the DTA had not operated in the manner intended. In essence, he argued, this was due to the fact that the reduction in his liability to Irish income tax on UK rental income simply had the effect of subjecting the Appellant to additional Irish tax in the form of the Domicile Levy.

144. While I fully accept the authorities cited by the Appellant in relation to the fact that taxation treaties will override domestic legislation, and that Double Taxation Agreements do not propose or authorise new charges but instead relieve existing charges, and that treaties should be implemented in good faith, I believe that my finding above that the Domicile Levy is not a tax to which the UK/Ireland DTA applies means that the second argument of the Appellant falls away and cannot succeed.

145. It was argued by Counsel for the Appellant that it was not necessary for him to establish that the Domicile Levy was a tax in order to succeed in this argument; he submitted that, even if it was not, it was still contrary to section 826, contrary to good faith, and contrary to Ireland's obligations for there to be an effective circumvention of the credit which is given by the imposition of a new tax or levy. However, this argument is premised on the assumption that the imposition of the Domicile Levy

does in fact amount to an effective circumvention of the credit given to the Appellant by the UK/Ireland DTA in respect of the UK income tax which he paid during the relevant years. I am satisfied that the Appellant has been afforded double taxation relief in accordance with Schedule 24 of TCA 1997 and the fact that he may also be liable to the Domicile Levy does not amount to a denial or a retraction of this relief. I therefore find that the imposition of the Domicile Levy is not contrary to section 826 and that the Respondent's interpretation and application of the Domicile Levy statutory provisions are not in bad faith or contrary to Ireland's treaty obligations.

TFEU Right to free movement of capital

146. The final argument made on behalf of the Appellant, which was expressly stated to be made without prejudice to the preceding arguments, was that the treatment from the Domicile Levy perspective of income tax payable on UK rental property in a less favourable manner to income tax payable on Irish rental property breached his rights to freedom of establishment and free movement of capital as well as his free movement rights as a citizen and his freedom to provide services. In the course of the hearing before me, Counsel for the Appellant essentially confined his arguments to the question of whether there was a breach of the Appellant's right to free movement of capital.

147. In essence, the Appellant's argument in this regard is that assessing the Appellant to the Domicile Levy as a result of the fact that he has invested in UK rental property, in circumstances where no Domicile Levy charge or a lesser Domicile Levy charge would apply if the Appellant had invested only in Irish rental property, is an unlawful interference with the Appellant's right to the free movement of capital. The Appellant cited in support of this argument the decisions in ***Ronny Verest***, ***Fernandez***, ***Manninen*** and ***Cadbury Schweppes***.

148. I accept as correct the submission of fact by the Appellant that his total liabilities to the Respondent for the years under appeal would be less if he had invested solely in Irish-situate property rather than in UK property. However, this does not in my view necessarily entail a finding that the Domicile Levy provisions of TCA 1997 amount to an unjust interference with his right to the free movement of capital.

149. I believe the Respondent is correct in its submission that the Domicile Levy can only ever apply to a taxpayer with an Irish Domicile and cannot apply to a taxpayer domiciled in another Member State. I also accept as correct the Respondent's submission that the fact that the Domicile Levy is not a tax but is instead a charge imposed upon taxpayers whose circumstances mean they fall within the definition of "*relevant individual*" in section 531AA (which I have found to be correct in the preceding portion of this Determination) means that it falls outside the parameters of the authorities opened to me by Counsel for the Appellant. I agree with Counsel for the Respondent that the Domicile Levy is more properly and accurately categorised with charges such as council tax, rates on property, PRSI or national insurance in the UK. They are all charges which might affect an individual's decision to make an investment in a particular Member State but they cannot, in my view, be said to be measures which impinge upon the right to free movement of capital.

150. I therefore find that the Appellant has not succeeded in his argument that the treatment of his UK rental income for Domicile Levy purposes is in breach of his TFEU right to free movement of capital or the other fundamental freedoms afforded to him as a citizen of the European Union.

Conclusion

151. For the reasons outlined above, I find that:-

(a) The use of the phrase "*due and payable in all respects as if it were an amount of income tax*" in section 531AS(1) of the Taxes Consolidation Act 1997 does not mean that the Universal Social Charge payable by the Appellant must be taken into account when calculating whether the amount of his "*liability to income tax*" is less than €200,000 for the purposes of determining whether or not he is a "*relevant individual*" within the meaning of section 531AA.

(b) The use of the phrase "*assessed, charged and paid in all respects as if it were an amount of income tax*" in section 531H(1) does not mean that the Income Levy payable by the Appellant must be taken into account when calculating whether the amount of his "*liability to income tax*" is less than €200,000 for the purposes of determining whether or not he is a "*relevant individual*" within the meaning of section 531AA.

(c) While the Income Levy and the Universal Social Charge are both taxes, and are both taxes on income, they are not income tax and therefore they should not be taken into account when calculating whether the amount of the Appellant's "*liability to income tax*" is less than €200,000 for the purposes of determining whether or not he is a "*relevant individual*" within the meaning of section 531AA.

(d) UK income tax due and payable by the Appellant during the two years under appeal should be taken into account when calculating the Appellant's "*liability to income tax*" for the purposes of determining whether or not he is a "*relevant individual*" within the meaning of section 531AA(1).

(e) The Domicile Levy is not a tax and therefore the provisions of the UK/Ireland Double Taxation Agreement are not applicable to the Domicile Levy.

(f) Even if the Domicile Levy is a tax, which I do not accept, it is neither identical nor substantially similar to income tax and therefore the provisions of the UK/Ireland Double Taxation Agreement are not applicable to the Domicile Levy.

(g) Accordingly, the provisions of Article 21(1)(a) of the UK/Ireland Double Taxation Agreement do not operate to afford the Appellant a credit in respect of the UK income tax which he paid in the years under appeal against his liability to the Domicile Levy for those years.

(h) The imposition of the Domicile Levy does not amount to a denial or a retraction of the relief against double taxation afforded by the UK/Ireland Double Taxation Agreement and is not contrary to section 826.

(i) The Respondent's interpretation and application of the Domicile Levy statutory provisions are not in bad faith or contrary to Ireland's treaty obligations.

(j) The treatment of the Appellant's UK rental income for Domicile Levy purposes is not in breach of his TFEU right to free movement of capital or the other fundamental freedoms afforded to him as a citizen of the European Union.

(k) On the facts of the instant appeal, the Appellant is a "*relevant individual*" within the meaning of section 531AA and he is therefore liable to the Domicile Levy pursuant to section 531AB.

152. I therefore find that the Appellant has not been overcharged by reason of the Notices of Assessment to the Domicile Levy issued to the Appellant on the 13th of

March 2015 and determine pursuant to section 949 AK(c) that those Notices of Assessment stand.

MARK O'MAHONY
APPEAL COMMISSIONER
4 February 2021