74TACD2021

Between/

[redacted]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. These three appeals come before the Tax Appeals Commission as appeals against Notices of Assessment raised by the Respondent for the tax years 2012, 2013 and 2014 in relation to the amount of Universal Social Charge (hereinafter "**USC**")

Property Relief Surcharge payable by the Appellant. The same issue arises in relation to all three of the years under appeal.

2. The appeals proceeded by way of oral hearing before me during which I heard legal submissions from Counsel for the Appellant and Counsel for the Respondent, the facts relevant to the appeals not being in issue before me.

B. Facts relevant to the Appeal

3. As the material facts necessary to a determination of these appeals were essentially the same in relation to all three years under appeal, I propose setting forth the evidence before me in relation to 2012 only, that being the first of the three years covered by the appeals.

4. The Appellant's principal business activity is the operation of a nursing home and he was jointly assessed with his wife for income tax purposes in the relevant years.

5. The Appellant was subject to the High Income Earner Restriction (hereinafter "**the HIER**") in 2012 on the basis that:-

(a) he had adjusted income in excess of €125,000;

(b) he used Specified Reliefs in excess of €80,000, and

(c) the aggregate of the Specified Reliefs was greater than 20% of his adjusted income.

6. The Specified Reliefs that were used by the Appellant in 2012 totalled €1,517,112 and comprised the following:-

(a) Nursing Home building relief pursuant to section 268(1)(g) of the Taxes Consolidation Act, 1997 (hereinafter "**TCA 1997**") of €1,497,094; and,

(b) Carry forward of excess relief pursuant to section 485F of TCA 1997 of €20,018.

7. The Appellant's adjusted income was agreed by the parties as being €1,500,882 in 2012, having taken into account €16,230 of ring-fenced income, and was calculated as follows:-

Adjusted Income = (T+S)-R

Where:

T = the Appellant's taxable income, before the HIER, for the relevant year

S = the aggregate amount of Specified Reliefs used by the Appellant for the relevant year

R = Ring-fenced Income

8. This resulted in the Appellant's adjusted income being calculated as follows:-

Adjusted income for 2012 = (€0 + €1,517,112) - €16,230 = €1,500,882

9. In calculating the HIER for the relevant years, the Appellant used the following formula:-

Taxable income = T + (S – Y)

Where:

T = the Appellant's taxable income, before the HIER, for the relevant year

S = the aggregate amount of Specified Reliefs used by the Appellant for the relevant year

Y = 20% of the Appellant's adjusted income for the relevant year

10. 20% of the Appellant's adjusted income (as set out at paragraph 8 *supra*) was €300,178.

11. This resulted in the Appellant's recalculated taxable income being as follows:-

Taxable income for 2012 = €0 + (1,517,112 - €300,178) = €1,216,934

12. The Appellant's calculation of USC Property Relief Surcharge payable for 2012 as submitted in his Form 11 return to the Respondent was based on using the aforesaid figure of €300,178, that being 20% of his adjusted income, and was calculated by the Appellant as follows:-

USC Property Relief Surcharge: €300,178 @ 5% = €15,008

13. The Respondent raised a Notice of Assessment on the Appellant on the 22nd of November 2013 which assessed the USC Property Relief Surcharge payable by the Appellant for 2012 as being €75,044, based on the Appellant's adjusted income figure of €1,500,882 and calculated as follows:-

USC Property Relief Surcharge: €1,500,882 @ 5% = €75,044

14. The Appellant appealed the said Notice of Assessment in so far as it relates to the USC Property Relief Surcharge and contends that the basis of the Respondent's calculation of same is incorrect.

15. The amounts in dispute between the parties in respect of the three years under appeal are as follows:-

Year	Amount calculated by Appellant €	Amount calculated by Respondent €	Difference €
2012	15,008	75,044	60,035
2013	15,912	79,547	63,635
2014	8,000	33,419	25,419

C. Grounds of Appeal

16. The Appellant appealed against the Notices of Assessment raised by the Respondent for the tax years 2012, 2013 and 2014 on the grounds that the USC charged under section 3 of the Finance Act 2012 was incorrect as a surcharge had been applied to capital allowances not used due to the high income restriction.

D. Relevant Legislation

17. Chapter 2A of Part 15 was inserted in TCA 1997 by section 17 of the Finance Act 2006 and governs the HIER. Section 485C provided as follows in 2012:-

(1) In this Chapter and in Schedules 25B and 25C, except where the context otherwise requires—

"adjusted income", in relation to a tax year and an individual, means the amount determined by the formula—

(T + S) – R

where—

T is the amount of the individual's taxable income for the tax year determined on the basis that—

(a) this Chapter, other than section 485F, does not apply to the individual for the tax year, and

(b) (i) if the individual, being a married person, is assessable to tax for the tax year otherwise than under section 1016, the provisions under which the individual is assessable are modified in accordance with paragraphs (i) to (vi), but excluding paragraph (iia) of section 485FA,

(ii) if the individual, being a civil partner, is assessable to tax for the tax year otherwise than under section 1031B, the provisions under which the individual is assessable are modified in accordance with paragraphs (i), (iia) and (vi) of section 485FA,

S is the aggregate of the specified reliefs for the tax year, and

R is the amount of the individual's ring-fenced income, if any, for the tax year;

"aggregate of the specified reliefs", in relation to a tax year and an individual, means the aggregate of the amounts of specified reliefs used by the individual in respect of the tax year;

"amount of specified relief", in relation to a specified relief used by an individual in respect of a tax year, means the amount of the specified

relief used by the individual in respect of the tax year determined by reference to the entry in column (3) of Schedule 25B opposite the reference to the specified relief concerned in column (2) of that Schedule;

"excess relief", in relation to a tax year and an individual, means the amount by which the individual's taxable income for the tax year determined in accordance with section 485E exceeds the amount that the individual's taxable income for the tax year would have been had this Chapter, other than section 485F, not applied to that individual for that year;

"income threshold amount", in relation to a tax year and an individual, means—

(a) €125,000, or

(b) in a case where the individual's income for the tax year includes ring-fenced income and his or her adjusted income for the tax year is less than €400,000, the amount determined by the formula—

$$€125{,}000 \times \frac{A}{B}$$

where—

A is the individual's adjusted income for the year, and

B is an amount determined by the formula—

$$T + S$$

where T and S have the same meanings respectively as they have in the definition of "adjusted income";

"relief threshold amount", in relation to a tax year and an individual, means €80,000;

"Revenue officer" means an officer of the Revenue Commissioners;

"ring-fenced income", in relation to a tax year and an individual, means the aggregate of the following amounts, if any, charged to tax on the individual for the tax year—

(a) income chargeable to tax in accordance with subparagraph (i) of paragraph (c) of section 261 where clause (II) of that subparagraph applies to the income concerned,

(b) income referred to in section 261B or 267M,

(c) income charged to tax in accordance with clause (I) or (II)(B) of section 730J(1)(a)(i) or section 730K(1)(b), and

(d) income charged to tax in accordance with section 747D(a)(i) or section 747E(1)(b);

"specified relief", in relation to a tax year and an individual, means any relief arising under, or by virtue of, any of the provisions set out in column (2) of Schedule 25B;

"tax year" means a year of assessment;

(2) (a) For the purposes of this Chapter, references in this Chapter to specified reliefs used by the individual in respect of the tax year include references in the Tax Acts to—

(i) an allowance having been made to the individual for the year, in respect of which allowance, effect has been given, in full or in part, for that year,

(ii) a deduction having been given or allowed to the individual for the year, in respect of which deduction, effect has been given, in full or in part, for that year,

(iii) a deduction from or set off against income of whatever description being allowed to the individual for the year, in respect of which deduction or set off, effect has been given, in full or in part, for that year,

(iv) relief given to the individual for the year by way of repayment or discharge of tax in respect of which repayment or discharge effect has been given, in full or in part, for that year,

(v) income, profits or gains arising to the individual in the year being exempt from income tax for the year,

(vi) income, profits or gains arising to the individual in the year being disregarded or not reckoned for the purposes of the Income Tax Acts or, as the case may be, for the purposes of income tax for the year,

and other references in the Tax Acts to methods of affording relief from tax, however expressed, and in respect of which effect, in full or in part, has been given in the tax year shall likewise be construed as included in any reference in this Chapter to specified reliefs used by the individual in respect of the tax year.

(b) For the purposes of the definition of the "amount of specified relief", in relation to a specified relief which is of a kind referred to in subparagraph (v) or (vi) of paragraph (a), the amount of any income, profits or gains, as the case may be, shall be computed in accordance with the Tax Acts as if the specified relief concerned had not been enacted.

(3) Notwithstanding any other provision of the Tax Acts, the following provisions shall apply for the purposes of those Acts—

(a) where, in relation to any tax year and the capital allowances to be given effect to in that year, any provision of the Tax Acts requires allowances (in this paragraph referred to as the "first-mentioned allowances") for one period to be given effect to, or to be deemed to be given effect to, in priority to allowances for another period (in this paragraph referred to as the "second-mentioned allowances"), then—

(i) as respects the first-mentioned allowances, effect shall be given, or be deemed to be given, as the case may be, for an allowance which is not a specified relief in priority to any such allowance which is a specified relief and in priority to the second-mentioned allowances, and

(ii) as respects the second-mentioned allowances, effect shall be given, or be deemed to be given, as the case may be, for an allowance which is not a specified relief in priority to any such allowance which is a specified relief,

(ab) a deduction authorised by subsection (2) of section 97 shall be allowed in respect of a matter which is specifically referred to in that subsection in priority to a deduction authorised to be made under that subsection by virtue of a specified relief,

(ac) a deduction from total income shall be made in respect of a relief due for a tax year which is not a specified relief in priority to any such deduction due for the tax year which is a specified relief,

(b) loss relief for any tax year shall be given in respect of a loss which is not referable to a specified relief in priority to relief being given for a loss which is referable to a specified relief,

(c) a further deduction due under section 324, 333, 345, 354 or paragraph 13 of Schedule 32 for a tax year shall only be given effect for that year after effect is given to any other deduction the individual is entitled to for that year in computing the amount of the individual's profits or gains to be charged to tax for that year under Case I or II of Schedule D.

(4) Schedules 25B and 25C shall have effect for the purposes of this Chapter.

18. Section 485D then provided that:-

This Chapter shall apply to an individual for a tax year where—

(a) the individual's adjusted income for the tax year is equal to or greater than the income threshold amount, and

(b) the aggregate of the specified reliefs used by the individual in respect of the tax year is equal to or greater than the relief threshold amount,

but this Chapter, other than section 485F, shall not apply for the tax year where 20 per cent of the individual's adjusted income for the tax year is equal to or greater than the aggregate of the specified reliefs used by the individual in respect of the tax year.

19. Section 485E, which is entitled "*Recalculation of taxable income for the purposes of limiting reliefs*", then provided that:-

Where this Chapter applies to an individual for a tax year, notwithstanding anything in any provision of the Tax Acts other than this Chapter, the individual's taxable income for the tax year shall, instead of being the amount it would have been had this Chapter not applied to the individual for the tax year, be the amount determined by the formula—

$$T + (S - Y)$$

where—

T is the amount of the individual's taxable income for the tax year determined on the basis that this Chapter, other than sections 485F and 485FA, does not apply to the individual for the tax year,

S is the aggregate of the specified reliefs for the tax year, and

Y is the greater of—

(i) the relief threshold amount, and

(ii) 20 per cent of the individual's adjusted income for the tax year.

20. Section 485F then provided that:-

(1) Where in any tax year section 485E applies to an individual, the excess relief shall be carried forward to the next tax year and, subject to sections 485E and 485G(2)(a)(iii), the individual shall, in computing the amount of his or her taxable income before the application of section 485E in that next tax year, be entitled to a deduction from his or her total income of an amount equal to the amount of the excess relief.

(2) If and so far as an amount equal to the excess relief once carried forward to a tax year under subsection (1) is not deducted or is not fully deducted from the individual's total income for that year, the amount or the balance of the amount not deducted under subsection (1) shall be carried forward again to the next following tax year and, subject to section 485E, the individual shall, in that next following tax year, in computing the amount of his or her taxable income before the application of section 485E in that next following year, be entitled to a deduction from his or her total income of an amount equal to the amount so carried forward and so on for each succeeding tax year until the full amount of the excess relief has been deducted from the individual's total income for the tax years concerned.

(3) Where subsection (1) or (2) applies for any tax year, relief shall be given to the individual for the tax year in the following order—

(a) in the first instance, in respect of any other tax relief apart from the relief provided for by this section,

(b) only thereafter, in respect of an amount carried forward from an earlier year in accordance with subsection (1) or (2), and in respect of such an amount carried forward from an earlier tax year in priority to a later tax year.

21. The legislative provisions governing the application and effect of the USC Property Relief Surcharge are contained in section 531AAE of TCA 1997 and provide as follows:-

(1) In this section—

"aggregate of the specified property reliefs", in relation to a tax year and an individual, means the aggregate of the amounts of specified property reliefs used by the individual in respect of the tax year;

"amount of specified property relief", in relation to a specified relief used by an individual in respect of a tax year, means the amount of the specified property relief used by the individual in respect of the tax year, determined by reference to the entry in column (3) of Schedule 25B opposite the reference to the specified relief concerned in column (2) of that Schedule;

"area-based capital allowance", in relation to a tax year and an individual, means any allowance, or part of such allowance, made under Chapter 1 of Part 9 as that Chapter is applied—

(a) by section 323, 331, 332, 341, 342, 343, 344, 352, 353, 372C, 372D, 372M, 372N, 372V, 372W, 372AC, 371AD or 372AAC, or

(b) by virtue of paragraph 11 of Schedule 32,

for the tax year, including any such allowance, or part of any such allowance, made for a previous tax year and carried forward from that previous tax year in accordance with Part 9;

"balancing allowance" means any allowance made under section 274;

"specified capital allowance", in relation to a tax year and an individual, means any specified relief that is—

(a) a writing down allowance or a balancing allowance made for the tax year, or

(b) an allowance, or part of such allowance, made under Chapter 1 of Part 9 as that Chapter is applied by section 372AX, 372AY, 843 or 843A for the tax year,

including any such allowance or part of such allowance made for a previous tax year and carried forward from that tax year in accordance with Part 9;

"specified individual", in relation to a tax year, means an individual whose aggregate income for the tax year is €100,000 or more;

"specified property relief", in relation to a tax year and an individual, means—

(a) any allowance, or part of any allowance, specified in the definition of 'area-based capital allowance' or 'specified capital allowance', as the case may be, or

(b) any eligible expenditure within the meaning of Chapter 11 of Part 10, to which section 372AP applies, which is to be taken into account in computing under section 91(1) a deficiency in respect of any rent from a qualifying premises or a special qualifying premises, within the meaning of section 372AK;

"specified relief", in relation to a tax year and an individual, means any relief arising under, or by virtue of, any of the provisions set out in column (2) of Schedule 25B;

"writing down allowance" means any allowance made under section 272 and includes any such allowance as increased under section 273.

(2) Any reference in this section to any specified property relief being used in respect of any tax year shall be a reference to that part of that specified property relief to which full effect has been given for that tax year.

(3) The amount of universal social charge which is to be charged on the aggregate income for the tax year concerned of a specified individual under this Part shall be increased by an amount equal to 5 per cent of that part of that aggregate income in relation to which an amount of specified property relief or, as the case may be, the aggregate of the specified property reliefs, has been used by the specified individual in that tax year.

(4) For the purposes of this section—

(a) section 485C(3) and Schedule 25C (as if the references to the tax years 2006 and 2007 in that Schedule were references to the tax years 2011 and 2012,

respectively) shall apply in determining the amount of any specified property relief to be carried forward from any tax year to each subsequent tax year, and

(b) any specified relief, which is a specified property relief, shall be treated as used in any tax year in priority to a specified relief which is not a specified property relief.

(5) Where universal social charge is payable for the tax year 2012 in respect of a specified individual's aggregate income for a tax year, being an individual who is a chargeable person (within the meaning of Part 41), section 958 shall apply and have effect as if, in accordance with this section, universal social charge had been payable for the tax year 2011.

22. *"Aggregate income for the tax year*" is defined by section 531AL as meaning, for the purposes of Part 18D:-

…in relation to an individual and a tax year … the aggregate of the individual's –

(a) relevant emoluments in the tax year, including relevant emoluments that are paid in whole or in part for a tax year other than the tax year during which the payment is made, and

(b) relevant income for the tax year.

23. "*Relevant emoluments*" and "*relevant income*" are in turn to be construed in accordance with paragraphs (a) and (b), respectively, of the Table to section 531AM(1).

E. Submissions of the Appellant

24. The Appellant submits that the amount of USC Property Relief Surcharge which the Respondent has assessed he should pay is incorrect.

25. The Appellant submits that the relevant legislation applicable in calculating the amount of USC Property Relief Surcharge which he should pay is section 531AAE of TCA1997.

26. It is the Appellant's submission that the USC Property Relief Surcharge was introduced as part of the then Government's determination to develop a fairer tax code and to reduce the cost to the State of the 'legacy' property-based tax incentive scheme. In support of this contention, the Appellant pointed to the speech made to the Dáil at the time the legislation was introduced by the then Minister for Finance, wherein he stated:

> "*Therefore, in the interest of fairness, a property relief surcharge of 5 per cent will be imposed on investors with an annual gross income over €100,000. This will apply on the amount of income sheltered by property relief in a given year.*"

27. The Appellant accepts that the interaction of the USC Property Relief Surcharge and the HIER is not explicitly set out in section 531AAE, but he contends that it is clear that the legislation was intended for the purpose of applying USC Property Relief Surcharge to the amount of income actually sheltered by property reliefs in any given tax year.

28. The Appellant submits that there is no doubt what the Minister for Finance meant by the term "*sheltered*" and that the purpose for which section 531AAE was enacted is clear and obvious. In that regard, the Appellant submits that I should

have regard to the Dail debates in relation to section 3 of the Finance Act, 2012, which introduced section 521AAE, when interpreting the legislation. He submits that I am entitled to do so and his written submissions cited the decision in ***Pepper –v- Hart*** **[1993] AC 593** in support of this proposition.

29. The Appellant submits that the HIER does not operate to reduce the amount of any of the Specified Reliefs claimed by a taxpayer, but instead it limits the effect of the Specified Reliefs by restricting the taxpayers' ability to reduce their taxable income below a certain amount. The Appellant therefore submits that due to the application of the HIER, the effect of the Specified Reliefs claimed by him in 2012 (that is to say, the amount of income actually sheltered) was a reduction of €300,178 in his taxable income for 2012.

30. The Appellant contends that the HIER operated so as to reduce the full effect of the Specified Reliefs and that, but for the operation of the HIER, the full effect of the Specified Reliefs would have been a further reduction of €1,216,934. Therefore, the Appellant contends, it cannot be argued that full effect was given to the Specified Reliefs.

31. In support of this submission, the Appellant referred me to paragraphs 1 and 2 of Part 15.02A.05 of the Respondent's Tax and Duty Manual, which stated *inter alia*:-

> *"The 2006 and 2007 Finance Acts introduced, with effect from 1 January 2007, measures to limit the use of certain tax reliefs and exemptions (known as Specified Reliefs) by high-income individuals.*
>
> *…*
>
> *The measure works by limiting the total amount of specified reliefs that can be used by a high-income individual to a maximum amount each year.*
>
> *…*

Relief that is disallowed for a tax year is added-back to the individual's taxable income for the year to give a ***recalculated taxable income figure****."* [emphasis added]

32. I also note at this juncture that, although the commentary was not referred to in written submissions or opened to me during the hearing, the Appellant's interpretation of the legislation derives further support in *Irish Income Tax*, Maguire, 2020 edition at paragraph 3.404.

33. The Appellant further contends that the Respondent's view that the USC Property Relief Surcharge does not take account of any restriction imposed by the HIER is incorrect and punitive.

34. Similarly, the Appellant contends that the Respondent's view that the application of the HIER does not affect the amount of reliefs to which "*full effect*" has been given, on the basis that "*full effect*" has been given to a property relief if there is sufficient income to absorb the claim for relief, is incorrect and punitive.

F. Submissions of the Respondent

35. The Respondent submits that USC operates as a tax on income but that it is not an "income tax" within the meaning of TCA 1997. It submits that USC is applied in accordance with the provisions of Part 18D of TCA1997, with the supporting regulations as provided for in that Part, and the application of relevant parts of income tax legislation where appropriate.

36. The Respondent submits that section 531AAE provides for an additional rate of USC Property Relief Surcharge of 5% on that part of an individual's income which is sheltered by any of the property or area based incentive reliefs, including all of the property-based capital allowances and the relief for residential lessors, commonly known as section 23-type relief. This, the Respondent submits, applies to capital allowances made in or carried forward into a relevant tax year and any subsequent tax year or to any losses carried forward into a relevant tax year or a subsequent year, which are attributable to section 23-type relief.

37. The Respondent further submits that the USC Property Relief Surcharge applies to any form of income against which any of the reliefs can ordinarily be set, such as rental income and trading income, and that no distinction is drawn between passive, as distinct from active, partners or traders. The Respondent submits that the only property relief that is outside the ambit of the USC property relief surcharge is residential owner/occupier relief.

38. The Respondent submits that the threshold income limit is the "*aggregate income*" for the tax year, as defined in Part 18D of TCA1997. This, it contends, does not necessarily equate with "*taxable income*", as it may not include certain reliefs, pension contributions and/or certain losses carried forward.

39. The Respondent submits that the first step in determining how much, if any, USC property relief surcharge is due to be paid is to quantify the income for USC purposes. It is only where this amount is €100,000 or more that the possibility of the USC Property Relief Surcharge being applied arises.

40. The Respondent submits that the USC property relief surcharge amounts to 5% on that part of the aggregate income of the individual against which "*specified property reliefs*" have been used.

41. As stated above, "*specified property relief*" is defined in section 531AAE as meaning:

> ***(a)*** *any allowance, or part of any allowance, specified in the definition of 'area-based capital allowance' or 'specified capital allowance', as the case may be, or*
>
> ***(b)*** *any eligible expenditure within the meaning of Chapter 11 of Part 10, to which section 372AP applies, which is to be taken into account in computing under section 91(1) a deficiency in respect of any rent from a qualifying premises or a special qualifying premises, within the meaning of section 372AK.*

42. The Respondent further submitted that I had to have particular regard to the definition of "*amount of specified property relief*" contained in section 531AAE(1), because that definition showed how the amount of specified property relief used by a taxpayer was to be calculated. That definition is as follows:-

> *"amount of specified property relief", in relation to a specified relief used by an individual in respect of a tax year, means the amount of the specified property relief used by the individual in respect of the tax year, determined by reference to the entry in column (3) of Schedule 25B opposite the reference to the specified relief concerned in column (2) of that Schedule.*

43. This definition, the Respondent submits, when read together with the provisions of Schedule 25B and section 304 (which are considered in greater detail later in this Determination), establishes that "*full effect*" has been given to a specified

property relief if the taxpayer claiming those reliefs has sufficient income to absorb the claim.

44. A further part of the Respondent's position in this appeal is its submission that the HIER does not reduce the amount of any of the specified reliefs claimed by a tax payer but instead restricts the taxpayer's ability to reduce their taxable income below a certain amount. This is done by increasing the taxable income rather than by adjusting the amount of the reliefs claimed. Therefore, in the Respondent's view, the application of the HIER does not affect the amount of reliefs to which "*full effect*" has been given – "*full effect*" has been given to a property relief if there is sufficient income to absorb the claim.

45. As an example of this, the Respondent Submitted that a person subject to the HIER whose aggregate income, for USC purposes, is €150,000 and against which they can set €160,000 of specified property reliefs, will pay a USC property relief surcharge of €7,500 (that is to say 5% of €150,000). The surcharge is based on €150,000, and not on €80,000, the latter being the amount to which the use of specified reliefs is restricted in the case that high earner.

46. Counsel for the Respondent further submitted that, while it ought not to affect my interpretation of the legislation, it was worth noting that the position taken by the Respondent in the appeal was consistent with paragraph 10 of the relevant Part of the Respondent's Tax and Duty Manual, which stated:-

> *"The focus of the* [High Income Earner] *restriction is on the recalculation of taxable income and does not affect the calculation of PRSI, health contributions and income levy for the tax year 2010 or the calculation of PRSI and Universal Social Charge for the tax year 2011 and later years. In the year that a restriction applies, these calculations are based on the original income assessable. Where*

excess relief is carried forward to 2010 or a later year for deduction from total income in that year, the excess relief is not deductible in calculating (as applicable) PRSI, health contributions, income levy or the Universal Social Charge for that year."

G. ***Analysis and findings***

47. I agree with the view of the parties to these appeals that the core issue for determination is the interaction between the legislation governing the HIER and the legislation imposing the USC Property Relief Surcharge. In order to decide how the two areas of legislation interact, I must determine the proper construction of the word "*used*" in section 531AAE(3) and the words "*full effect*" in section 531AAE(2).

48. There was substantial agreement between the parties in relation to the general approach I ought to take when interpreting the legislation, and it is appropriate to record that Counsel for the Appellant indicated in the course of the hearing that he was no longer seeking to rely upon the House of Lords decision in ***Pepper –v- Hart***.

49. I believe that the correct approach to the interpretation of taxing statutes generally, and in particular to the correct interpretation of section 531AAE in the instant appeals, 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."

50. 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."*

51. I believe that the foregoing extracts are consistent with the approach which was urged on me by both parties in the course of the hearing. Accordingly, accepting and applying the foregoing statements as the approach I ought to take, I now turn to the wording of section 531AAE.

52. Section 531AAE(3) of the TCA1997 states that:-

> *The amount of universal social charge which is to be charged on the aggregate income for the tax year concerned of a specified individual under this Part shall be increased by an amount equal to 5 per cent of that part of* ***that aggregate income in relation to which an amount of specified property relief or, as the case may be, the aggregate of the specified property reliefs, has been used*** *by the specified individual in that tax year.* [emphasis added]

53. This subsection cannot be read in isolation, however; rather, it must be read in the light of the preceding subsection, section 531AAE(2), which provides that:-

> *Any reference in this section to any specified property relief being used in respect of any tax year shall be a reference to that part of that specified property relief* ***to which full effect has been given*** *for that tax year.* [emphasis added]

54. If the words "*full effect*" are taken in isolation and given their ordinary, basic and natural meaning, it is not difficult to see why the Appellant is aggrieved by the stance taken by the Respondent. In circumstances where the amount of income the Appellant was able to shelter from tax by the use of specified reliefs was reduced by the application of the HIER, I suspect the average person would likely share the Appellant's view that full effect had not been given to those reliefs.

55. However, it is clear from the judgment of McKechnie J *supra* that a statutory phrase must be given its ordinary, basic and natural meaning "*save for compelling reasons to be found within the instrument as a whole*." In other words, a departure from the ordinary, basic and natural meaning may be warranted where some other provision of the legislative instrument states or indicates that a different

interpretation should be applied. I must therefore consider whether any other provision of section 531AAE, or Part 18D, or TCA 1997 as a whole requires or suggests an interpretation which departs from the ordinary and natural interpretation contended for by the Appellant.

56. I accept as correct the submission by Counsel for the Respondent that such a departure is warranted in the instant appeals. I agree that, when construing subsections (2) and (3) of section 531AAE, I must of course have regard to the definitions contained in subsection (1), and in particular the definition therein of "*amount of specified property relief*" which is defined as follows:-

> *"amount of specified property relief", in relation to a specified relief used by an individual in respect of a tax year, means* ***the amount of the specified property relief used by the individual*** *in respect of the tax year,* ***determined by reference to the entry in column (3) of Schedule 25B*** *opposite the reference to the specified relief concerned in column (2) of that Schedule.* [emphasis added]

57. It is, in my view, absolutely clear from the foregoing definition that when calculating the amount of specified property relief that has been used by an individual, the amount is to be determined by reference to the relevant provisions contained in Column (3) of Schedule 25B.

58. Turning to Schedule 25B, the reference which is relevant to these appeals is entry 13, which concerns section 272 writing down allowances. Column (3) is headed "*Amount of Specified Relief used in a Tax Year*" and in relation to entry 13 states as follows:-

> *An amount equal to –*
>
> *(a) the aggregate amount of writing-down allowances (within the meaning of section 272) made to the individual for the tax year*

under section 272, including any such allowances or part of any such allowances made to the individual for a previous tax year and carried forward from that previous year in accordance with Part 9 in respect of the following buildings or structures:

…

(iii) a building or structure which is deemed to be a building or structure in use for the purposes of a trade referred to in section 268(1)(g) by virtue of section 268(3B) [*i.e.* nursing home relief], *but there shall not be included in the aggregate any allowance referred to in section 272(3)(c)(iii),*

or

(b) where full effect has not been given in respect of the aggregate for that tax year, the part of that aggregate in respect of which full effect has been given for that tax year in accordance with section 278 and section 304 or 305, as the case may be, or any of those sections as applied or modified by any other provision of the Tax Acts.

59. I believe that it is clear from the foregoing that in deciding whether "*full effect*" has been given in respect of the aggregate amount of any writing-down allowances for a given tax year, the Schedule provides that "*full effect*" means full effect in accordance with section 278, section 304 and section 305.

60. Turning to sections 278, 304 and 305, I note that the only reference therein to "*full effect*" is contained in section 304(4) and I accept as correct the Respondent's submission that that is the relevant provision in the context of these appeals. Section 304(4) provides as follows:-

> **[W]*here full effect cannot be given in any year to any allowance*** *to be made under this Part in taxing a trade, or in charging profits or gains of any description, as the case may be,* ***owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance****, then, the allowance or part of the allowance to which effect has not been given, as the case may be, shall, for the purpose of making the assessment to income tax for the following year, be added to the amount of the allowances to be made under this Part in taxing the trade or in charging the profits or gains, as the case may be, for that following year, and be deemed to be part of those allowances, or, if there is no such allowance for that following year, be deemed to be the allowance for that following year, and so on for succeeding years.* [emphasis added]

61. I believe it is clear from the wording of section 304(4) that "*full effect*" is given to an allowance unless (a) there are no profits or gains chargeable for that year, or (b) the chargeable profits and gains for that year are less than the allowance. If such full effect is not given to the allowance, so much of the allowance as has not been given full effect is carried over to the previous year.

62. Having carefully considered subsections (2) and (3) of section 531AAE in the context of that section as a whole, I am satisfied that the charging provision, being subsection (3), calculates the amount of USC Property Relief Surcharge chargeable by reference to the amount of the aggregate income in relation to which an "*amount of specified property relief*" has "*been used*". Subsection (2) then clarifies that "*been used*" means has been given "*full effect*." The definition of "*amount of specified property relief*" contained in subsection (1) expressly provides that it is to be determined in accordance with Column (3) of Schedule 25B. The entry in

Column 3 of Schedule 25B relevant to this appeal, being entry 13, provides *inter alia* that "*full effect*", for the purposes of ascertaining the amount of specified relief used in a year, means full effect in accordance with sections 278 and 304 or 305. Section 304(4) then says that full effect has been given to an allowance unless there are no profits or gains chargeable for that year or, alternatively, the chargeable profits and gains for that year are less than the allowance.

63. I am satisfied that the cumulative effect of the foregoing provisions is that "*full effect*", for the purposes of section 531AAE(2), is to be given the specific meaning contained in section 304(4), and not the more general or extensive meaning contended for by the Appellant.

64. Accordingly, I find that the Respondent is correct in its submission that for the purposes of section 531AAE, an amount of specified property relief will have been given full effect and will have been used by a taxpayer in a tax year if that taxpayer has sufficient chargeable gains or profits to absorb the reliefs as claimed.

65. I am satisfied that this conclusion follows from a literal approach to the interpretation of the relevant legislative provisions. I do not find an ambiguity in the words under consideration which would require me to adopt a purposive approach or to apply the principle against doubtful penalisation.

66. I believe that the Respondent is correct in its submission that my finding in relation to the correct interpretation of "*been used*" and "*full effect*" means it is unnecessary to consider whether the provisions of Chapter 2A of Part 15, which provides for the HIER, operate to deny the Appellant the "*full effect*" of the specified property relief which he claimed for the years under appeal.

67. Nonetheless, for the sake of completeness, I should record that I accept as correct the submission made by the Respondent that the effect of the HIER provisions does not reduce the amount of any specified reliefs claimed by a taxpayer. Instead, the provisions restrict the taxpayer's ability to reduce their taxable income below a certain amount. Section 485E operates by increasing a taxpayer's taxable income, and not by adjusting the amount of relief claimed by the taxpayer.

68. I also believe that Counsel for the Respondent was correct in her submission that in determining whether an individual is subject to the HIER in the first instance, the applicable criteria require a consideration of **(a)** whether the individual's adjusted income, which in turn requires an assessment of the aggregate of the specified property reliefs used by the individual in respect of the tax year, exceeds the income threshold amount and **(b)** whether the aggregate of the specified property reliefs used by the individual in respect of the tax year equals or exceeds the relief threshold amount. The definitions contained in section 485C(1) make clear that the aggregate of the specified property reliefs used is to be determined, as it is for the purposes of section 531AAE, by reference to the entry in Column (3) of Schedule 25B opposite the reference to the specified relief concerned in Column (2).

69. In the instant appeals, the Appellant only became subject to the HIER because of his use of specified property reliefs.

70. The Appellant had further argued that the provisions of section 485F, which govern the carrying forward of excess relief, support his interpretation of the legislation and submitted that any specified relief (within the meaning of the HIER) which had been restricted in a tax year and carried forward into a subsequent year was not classified as a Specified Property Relief for the purposes of the USC Property Relief Surcharge.

71. I do not accept this argument as correct. It is clear, in my view, from the definition of "*excess relief*" in section 485C(1) that excess relief is the difference between a taxpayer's taxable income after a section 485E recalculation and the amount the taxpayer's taxable income would have been had that recalculation not been carried out. It is the difference between those two amounts which can be carried forward to a subsequent tax year and, if it is, it will not come into the computation for the HIER in that subsequent tax year. The operation of this section does not affect the question of whether or not capital allowances are used or given full effect and so it does not, in my opinion, assist the Appellant's argument in these appeals.

72. I therefore find that the Appellant has not succeeded in these appeals.

H. Conclusion

73. For the reasons outlines above, I find that:-

(a) for the purposes of section 531AAE of the Taxes Consolidation Act 1997, an amount of specified property relief will have been given full effect and will have been used by a taxpayer in a tax year if that taxpayer has sufficient chargeable gains or profits to absorb the reliefs as claimed.

(b) on the facts of the appeals before me, the Appellant had sufficient chargeable gains or profits to absorb the specified property reliefs claimed by him during the three years under appeal;

(c) on the facts of the appeals before me, the specified property reliefs claimed by the Appellant for the three years under appeal were used by him and given full effect within the meaning of section 531AAE; and,

(d) these findings are not affected by the fact that the Appellant is subject to the High Income Earner Restriction provisions contained in Chapter 2A of Part 15 of the Taxes Consolidation Act 1997 or by the operation of those provisions during the years under appeal.

74. I am satisfied that the Appellant has not been overcharged by the Notices of Assessment the subject of these appeals and therefore determine in accordance with section 949AK(1) of the Taxes Consolidation Act 1997 that those assessments stand.

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MARK O'MAHONY
APPEAL COMMISSIONER
9 February 2021