THE COURT OF APPEAL

CIVIL

Court of Appeal Record Number: 2021/211

Costello J.
Pilkington J.
Allen J.

Neutral Citation Number [2022] IECA 255

IN THE MATTER A CASE STATED PURSUANT TO SECTION 949AQ TAXES CONSOLIDATION ACT 1997

BETWEEN

LOUIS FITZGERALD

APPELLANT

- AND –

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 7th day of November 2022

Introduction

1. This is an appeal from the judgment of the High Court (Twomey J.) delivered on 9th July, 2021 on a case stated for the opinion of the High Court pursuant to s.949AQ of the Taxes Consolidation Act, 1997, as amended *("the TCA")* in relation to the determination of Commissioner Gallagher of an appeal brought by Mr. FitzGerald, the appellant, on 4th August, 2020. The appeal concerns the determination of the Appeal Commissioner that the appellant is liable to the annual domicile levy of €200,000 for the tax years 2010 and 2011

in accordance with the provisions of Part 18C of the TCA. By way of case stated, the matter came before Twomey J. in the High Court who dismissed the appellant's appeal and confirmed that the determination of the Appeal Commissioner was correct in law.

2. Briefly, the domicile levy of €200,000 is payable by a relevant individual, that is a person who, for the tax year, is domiciled in Ireland, whose worldwide income exceeds €1,000,000, whose Irish property is greater in value than €5,000,000, and whose liability to income tax in the State for the tax year was less than €200,000. The issues arising in this appeal are: -

(1) whether the appellant was a *"relevant individual"* in 2010 and 2011. This in turn depends upon whether his worldwide income exceeded €1,000,000 (issue 1); and

(2) in 2011, whether his payment of Universal Social Charge *("USC")* in that year (which exceeded €200,000) is *"income tax"* within the meaning of the definition of a relevant individual, so that, in the event the appellant were otherwise a relevant individual, he would not be liable to the domicile levy (issue 2).

<u>The Facts</u>

3. The facts as found by the Tax Appeal Commissioner, which were not in dispute, were as follows. The appellant is a hotelier and the owner and operator of the Louis FitzGerald Hotel in Newlands Cross, Naas Road, Dublin 22. He is Irish tax resident and Irish domiciled. He incurred capital expenditure of €25,239,082 on the construction of the hotel and €14, 613,390 on plant and machinery in respect of the hotel. In 2010 and in 2011 the hotel was loss making (Case I of Schedule D losses).

4. In addition to operating the hotel, the appellant was in receipt of income from other sources. This income consisted of salary from numerous companies of which he was an indirect shareholder (Schedule E income), dividend income (Schedule F income), rental

income (Case V of Schedule D income) and interest income (Case III/IV of Schedule D income). The appellant availed of Case 1 losses in respect of his hotel trade and applied for an income tax refund for €361,346 in respect of 2010 and €919,557 in respect of 2011. In 2013 the Revenue Commissioners, the respondent, processed the claims but retained the sum of €200,000 in respect of 2010 and €200,00 in respect of 2011 on the basis that the appellant was subject to the domicile levy in relation to those years of assessment. On 29th May, 2015 the respondent raised notices of assessment in respect of the tax years 2010 and 2011, assessing the appellant to the domicile levy in respect of those tax years in the sums of €200,000 and €200,000 respectively. The appellant duly appealed.

Appeal to Tax Appeals Commission

5. The appellant's case in relation to the tax years of assessment 2010 and 2011 was that he has was not liable to the domicile levy as his *"worldwide income"* within the meaning of s.531AA was nil and accordingly, he was not a *"relevant individual"* for the purposes of the domicile levy. This, it was said, was because his worldwide income did not exceed €1,000,000 in each of the years 2010 and 2011. His argument was that the losses (as augmented by capital allowances) that he incurred in his hotel trade *reduced the level of the income under each of his other sources of income*.

6. *"World-wide income"* as defined by s. 531AA(1) in relation to an individual is: -

> *"… the individual's income, without regard to any amount deductible from or deductible in a computing total income, from all sources as estimated in accordance with the Tax Acts and [excluding certain specified matters]."*

7. The appellant contended that the losses (as augmented by capital allowances) were not an *"amount deductible from or deductible in computing total income"* within the definition of *"world-wide income"*. Specifically, he submitted that they were not an amount *"deductible in computing total income"*. Thus, the contention was, they were permitted

deductions which were not to be disregarded in calculating worldwide income for the purposes of the domicile levy.

8. The Commissioner rejected this argument and found at para. 45 of her determination:-

"... in accordance with the ordinary and natural meaning of the words and expressions contained in the expressions contained in the definition of 'world-wide income' in section 531AA TCA 1997, that the individual's income from all sources is to be computed for the purposes of the domicile levy 'without regard to any amount deductible from or deductible in computing total income' as clearly set out in the definition contained in s. 531AA. Thus 'world-wide income' for the purposes of the domicile levy is to be calculated without regard to deductions pursuant to section 381 TCA 1997. It follows that the Appellant satisfies criterion (b) of the definition of 'relevant individual' in section 531AA on the basis that the Appellant's worldwide income for each relevant tax year for assessment, is in excess of €1,000,000."

9. In relation to the second issue, the appellant submitted that if, in a tax year, the liability of an individual *"to income tax in the State"* is €200,000 or more, there is no domicile levy charged. He argued that his liability for USC is a *"liability to income tax"*, as it is a charge upon his income. In 2011 he paid €209,281 in respect of USC and if USC is regarded as income tax, then his liability to income tax in respect of 2011 was not less than €200,000 and accordingly, he was not a relevant individual and was therefore outside the charge to domicile levy for the year 2011.

10. The Commissioner, at para. 88 of her determination concluded that:-

"*... 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."

The case stated

11. Following a request from the appellant, the Commissioner signed a case dated 19th November, 2020 requesting the opinion of the High Court on six questions as follows:-

"I. Whether, upon the facts proved or admitted, I was incorrect in law in my determination that a loss pursuant to section 381 of the Taxes Consolidation Act 1997, is deductible from or in computing total income for the purposes of the domicile levy and is thereby disregarded for the purposes of the calculation of 'world-wide income' contained in section 531AA(1) TCA 1997.

II. Whether, in so determining, I was incorrect in law in my determination that a loss under section 381 of the Taxes Consolidation Act 1997, does not constitute a deduction in estimating income from all sources but constitutes a deduction in computing total income.

III. Whether, in so determining, I was incorrect in my determination that the Appellant's worldwide income for the tax years of assessment 2010 and 2011, exceeded €1,000,000 in each of those tax years of assessment.

IV. Whether on the facts proved or admitted, I was incorrect in my determination that the Appellant's liability to income tax in the State for the tax year of assessment 2011, was less than €200,000.

V. Whether, in so determining, I was incorrect in construing the expression 'income tax' in sub-paragraph (c) of the definition of 'relevant individual' in section 531AA of the Taxes Consolidation Act 1997, to exclude Universal Social Charge levied and by reference to Part 18D of the Taxes Consolidation Act 1997.

VI. Whether, in so determining, I was incorrect in law in my determination that the Appellant was within the charge to domicile levy in section 531AB of the Taxes Consolidation Act 1997, in respect of the tax years of assessment 2010 and 2011 and whether as a result, I was incorrect in law in my determination that the Appellant was unable to succeed in his appeal against the assessments."

Decision of the High Court

12. The trial judge considered the argument in relation to the first issue and concluded as follows:-

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

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

33. Equally, it is arguable that what is involved in s. 381(5) is a recalculation of income tax liability for the purpose of a taxpayer who seeks a repayment of tax, and is not the use of capital allowances/trading losses at each stage of the assessment. Accordingly, it can be argued that is <u>not</u> a stage in the assessment of tax at which a deduction for loss relief is taken (as it is a deduction by reference to its own statutory terms). On this

basis it is arguable that one cannot say that it is *<u>not</u>* *a deduction in computing total income.*

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

35. As this Court does not believe there is any ambiguity about this interpretation since this is the plain meaning of the words, the matter ends there."

13. In relation to the second issue, the trial judge considered the definition of the USC and the basis upon which it is charged. He noted that the USC is treated very differently under the TCA to income tax. He therefore held that one cannot conclude that the payment of €200,000 in USC is the equivalent of paying €200,000 in income tax for the purposes of the definition of a relevant individual in s.531AA of TCA.

<u>Principles of construction of tax statutes and tax appeals</u>

14. In appeals before the Tax Appeals Commission the burden of proof rests on the appellant who must prove on the balance of probabilities that the assessments to tax are incorrect. As was stated in *Menolly Homes Limited v. Appeal Commissioners & Anor.* [2010] IEHC 49 at para. 22 – the burden of proof in taxation appeals is on the taxpayer. It

is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the relevant tax is not payable.

15. The courts have frequently grappled with the principles to be applied in interpreting statutes and in particular in interpreting taxation statutes. In *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50 McKechnie J. stated the following:-

> *"62. In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation involved, those provisions, when construed and interpreted appropriately, are still capable of giving rise to the liability sought, then such should be so declared.*
>
> *63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. 'The words themselves alone do in such cases best declare the intention of the law maker' (Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach '...it is natural to inquire what is the subject matter with respect to which they are used and the object in view' Direct United States Cable Company v. Anglo –American Telegraph Company [1877] 2 App. Cs. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context*

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

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

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

66. Another general proposition is that each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. Therefore, every word or phrase, if possible, should be given effect to. (Cork County Council v. Whillock [1993] 1 I.R. 231). This however, like many other approaches may have to yield in certain circumstances, where notwithstanding a word or phrase which is unnecessary, the overall meaning is relatively clear-cut. However, it is abundantly clear that a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate:

therefore if, on the only interpretation available the provision in question is ineffectual, then subject to the Interpretation Act 2005, that consequence must prevail." (Emphasis added).

16. McKechnie J. continued at para. 71 as follows:-

"71. Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected."

17. These passages were cited with approval by O'Donnell J. (as he then was) the following year in *Bookfinders Limited v. Revenue Commissioners* [2020] IESC 60. O'Donnell J. rejected the argument that s.5 of the Interpretation Act 2005 allowed a *"purposive interpretation"* of taxation statues. He held at para. 52:-

"It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed 'strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language'."

18. In para. 54, having cited with approval lengthy extracts from the decision of McKechnie J. in *Dunnes Stores*, O'Donnell J. continued:-

> *"…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 a statutory provision. It is only if, after that 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."*

He concluded by observing in para. 56 that:- *"A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision."*

19. There was no dispute between the parties concerning these principles and they are the principles which I shall apply in the task of statutory construction required in this appeal.

Submissions of the appellant

20. There was agreement between the parties on the facts and the applicable legal principles, and it was accepted that the appellant bore the burden of establishing that the relevant tax was not payable. The issues related to the proper construction of the disputed statutory provisions.

21. The appellant submits that the estimation of an individual's income from all sources to determine the amounts within the charge to income tax requires several statutory stages. The first stage is to ascertain the amount of profits or gains brought into charge. The scheme of the legislation is to bring into charge the profits or gains described or comprised in the

Schedules and Cases to TCA. These identify the sources of income. In ascertaining the profits, gains or losses of a trade, account is taken of certain expenses which may be deducted in computing those profits, gains or losses of the trade from the gross income (Section 81). *"Total income"* means *"total income from all sources as estimated in accordance with the Income Tax Acts."* (s.3(1)). The appellant submits that then all the profits or gains ascertained in accordance with the rules in the Schedules are added up. From the resultant total, charges, if any, are deducted to arrive at *"total income"*. The legislation, it is said, permits specific deductions, not otherwise allowed to be taken into account in ascertaining the profits or gains of any of the sources in the Schedules, to be made at this stage in ascertaining *"total income"*. The appellant submits that it is these deductions that are referred to in the definition of *"worldwide income"* for the domicile levy in s.531AA(1) in the phrase *"any amount…deductible in computing total income."* The appellant submits that these are allowable deductions in the income tax computation of *"total income"* but are ignored in ascertaining *"world-wide income"* for the domicile levy.

22. The appellant sought to illustrate his point by reference to the treatment of maintenance payments where spouses have separated or divorced. A maintenance payment would not be an allowable deduction in ascertaining the profits or gains of the sources of income set out in the Schedules. However, it would be an *"amount deductible in computing total income"* by reason of s.1025(3)(c) because where *"the party to the marriage by whom the payment is made, having made a claim in that behalf in the manner prescribed by the Income Tax Acts, shall be entitled for the purposes of the Income Tax Acts to deduct the payment in computing his or her total income for the year of assessment in which the payment is made"* As an amount *"deductible in computing total income"* it would be ignored in ascertaining *"world-wide income"* for the domicile levy were it not for the fact that the statutory

definition of world-wide income specifically provides that regard is to be had for such a maintenance payment (s.531AA(1)(b)(i)(ii)).

23. The appellant submits that there is then a third stage in the statutory process of ascertaining how much income tax is to be paid. This involves computing *"taxable income"*. This is the amount of income on which an individual is to be charged to income tax (s. 3(1), and s. 458(1)(a)). Section 458 provides for a number of deductions which are allowed in ascertaining *"taxable income"*. The appellant submits that these deductions are referred to in the definition of *"world-wide income"* and these are deductions which are to be disregarded in ascertaining *"world-wide income"* for the purposes of assessing whether a person is liable to pay the domicile levy. They include deductions such as a housekeepers' allowance where an employed person is taking care of an incapacitated individual (s. 467), qualifying nursing home fees (s. 469), and permanent health benefit contributions (s. 471).

24. The appellant submits that the Appeals Commissioner erred in deciding that the Schedule D Case 1 losses were specifically deductible in computing the individual's total income. The appellant says that *"... both allowable deductions and capital allowances are part of the process in estimating profits and gains brought into charge to tax under Case 1 of Schedule D. They are not a deduction in computing 'total income' as 'total income' is arrived at by adding the income from each source and deducting from that total the specific items, if any, that are deductible in computing 'total income'"*.

25. Section 381 TCA provides for a right to repayment of tax by reference to losses. Section 381, sub-s. (1) provides that:-

> *"Subject to this section, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person ... that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately*

borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss."

26. Where a claim is made by a taxpayer for repayment of tax by offsetting a trading loss against other sources of income pursuant to s. 381,*"the amount of the loss sustained in an activity shall ... be computed in the like manner as profits or gains arising or accruing from the activity would be computed under the relevant provisions of the Income Tax Acts"* (s.381(4)).

27. The appellant says that this means that there is an adjustment to recalculate the amount of income from each source to determine the final tax liability and to ascertain the amount of the tax repayment due. The appellant argues that the method adopted to calculate the repayment in s. 381(1) is to recalculate what happened in the first stage of the tax computation. It is said that in the original computation the allowable expenses exceeded the turnover and gave rise to a trading loss. The appellant's argument is that in determining the amount of any repayment claim, s. 381 permits the trading loss to be offset against the other sources of income, thereby reducing the income under each source. The appellant submits that it is only then the second stage arises, which is to calculate the *"total income"*. This, it is said, is done by adding the income from each source (as reduced by the trading loss) and from the resultant revised total, charges, if any, are deducted to arrive at *"total income"*.

28. The appellant submits that the deduction allowable under s. 381(3) is a deduction to be made from each separate source of income because s. 381(5)(b) provides that where repayment has been made to a person under the section:-

"so much of the loss as was required by subsection (3) to be treated as reducing income of a particular class or income from a particular source shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that

class or from income from that source, as the case may be, in computing the person's total income for the year."

29. The trading loss therefore, it is said, operates to adjust the income from each of the schedular sources referred to in s. 381(3)(b) to determine the amount of the repayment claim. The essential point made by the appellant is that the loss is to be a deduction, not in computing *"total income",* but in computing the amount of income from each source.

30. The appellant therefore submits that both the Appeal Commissioner and the High Court in upholding the determination of the Appeal Commissioner, incorrectly construed the provisions of s. 381(5)(b) and thus misconstrued world-wide income in section 531AA.

31. In relation to the second issue, the appellant argues that an individual will not be a *"relevant individual"* within the meaning of s. 531AA if their liability to *"income tax in the State"* is €200,000 or more in a tax year (s.531AA(1)). The issue is what is *"income tax"*? The appellant notes that the phrase is not defined, and that the appellant paid the sum of €209,281 in USC in the year 2010. He submits that the USC is a *"tax…in respect of the incomes specified in paras. (a) and (b) in the table to [s. 531AM]."* In s. 3 TCA the word *"tax"* means *"income tax"* and in s. 1(2*) "the Income Tax Acts"* are defined as the enactments *"relating to income tax in this Act and in any other enactment"* and *"'the Tax Acts' means the Income Tax Acts and the Corporation Tax Acts."*

32. The appellant argues that the ordinary meaning of the term *"income tax"* is of a tax on income and USC is expressly a tax on income. He submits that it is an additional tax on income to the tax arising under the Schedules. The appellant submits that the intention of the legislature in introducing the domicile levy is to ensure that certain individuals contribute to the State a fixed sum of €200,000 where their contribution to the State through tax on income falls below a statutory threshold, having regard to specified financial criteria applicable. It ensures a minimum contribution to the State by those persons with the income

and wealth to do so. In using the words *"income tax"* the legislature was looking at the contribution to the State through tax on income and was not confining itself to the standard and higher rates primarily applied to income arising under the sources identified in the schedular system contained within s.12 of TCA.

33. The appellant accepts that the TCA provides that USC *"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"* (s. 531AS(1)). He argues that the provision is to be construed as applying the <u>machinery</u> of Income Tax Acts already in existence to the further tax on income that is USC. The provision, it is said, does not indicate that it is not an *"income tax"* for the purposes of domicile levy or even generally. The appellant argues that both the Appeal Commissioner and the High Court erred in failing to construe the words *"income tax"* in the domicile levy as being the legislature seeking a contribution to the State through tax on income rather than confining itself to the standard and higher rates primarily applied to income arising under the sources identified in the schedular system contained within section 12.

<u>Relevant statutory provisions for the first issue</u>

Computing profits or gains

34. The arguments of the parties involve the construction of two statutory provisions, but these must be construed in the context of the wider statutory code, as was stated in *Dunnes Stores* and confirmed in *Bookfinders*.

35. Section 12 of the TCA establishes the charge to income tax:-

> *"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… and <u>in accordance with the provisions of the Income Tax Acts applicable to those Schedules.</u>"* (Emphasis added)

36. Thus, in Ireland income tax is chargeable by reference to the various Schedules in accordance with the provisions of the Income Tax Acts. Schedule D is set out in section 18. Tax under Schedule D is charged in respect of five cases. Case I is tax in respect of any trade and Case II in respect of any profession. The charge is in respect of annual profits or gains arising or accruing. The basis for assessment of Case I and Case II income is set out the section 65. Section 65, sub-s. (1) provides:- *"Subject to this Chapter, income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment".*

37. Section 81, sub-s. (1) provides that:- *"The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts."* Sub-section (2) then sets out a number of deductions which are not permitted. In particular, no sum may be deducted in respect of *"(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession"***.** Section 81 expressly excludes any capital payments in computing the amount of profits or gains to be charged to tax under Case I or Case II of Schedule D. Sub-section (2)(g) excludes from the computation: *"any capital employed in improvements of premises occupied for the purposes of the trade or profession."*

38. Section 1088 reinforces the restrictions on deductions in computing profits and gains. It provides:-

> *"(1) In determining the amount of profits or gains for the purpose of income tax—*
>
> > *(a) no deductions shall be made other than those expressly provided for by the Income Tax Acts, ...*
>
> *(2) In determining the amount of profits or gains from any property described in the Income Tax Acts or from any office or employment of profit, no deduction shall*

be made on account of diminution of capital employed, or of loss sustained, in any trade or in any profession or employment." (Emphasis added)

39. Thus, in computing the profits or gains in respect of each of the cases in Schedule D (or the other Schedules) the taxpayer must compute his or her profits or gains in accordance with the relevant statutory provisions which are Case/Schedule specific. If the taxpayer has incurred significant losses, then his return for the relevant Case or Schedule is nil. Capital expenditure is not an allowable expense to be deducted in computing the profits or gains of a trade under Class 1 of Schedule D.

40. Section 284 provides for wear and tear allowance. Sub-section (1) provides:-

"Subject to the Tax Acts, where a person carrying on a trade in any chargeable period has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as a 'wear and tear allowance'*) shall be made to such person for that chargeable period on account of the wear and tear of any of the machinery or plant which belongs to such person and is in use for the purposes of the trade at the end of that chargeable period or its basis period and which, while used for the purposes of the trade, is wholly and exclusively so used."*

41. This is a special allowance provided under Part 9 of the TCA. It is not an expense of the trade. This is clear from the treatment of capital allowances in the TCA. Section 2, sub-s. (1) TCA provides that:- *"in the Tax Acts, except where otherwise provided or the context otherwise requires … 'capital allowance' means an allowance (other than an allowance or deduction to be made in computing profits or gains) under…Part 9… and capital allowances shall be construed accordingly;"*

42. Section 304, sub-s. (2) provides:-

"Any claim by a person for an allowance under [Part 9] in charging profits or gains of any description shall be included in the annual statement required to be delivered

under the Income Tax Acts of those profits or gains, and the allowance shall be made as a deduction in charging those profits or gains." (Emphasis added)

43. Thus, the allowance is treated as a *deduction in charging* to tax profits or gains. It is not an expense which may be deducted in arriving at the profits and gains in the first instance. They have previously been calculated in accordance with the sections referred to above. It is an allowance which may be applied to reduce the charge to tax of profits or gains of any description; it is not applied to any particular case or schedular source of income.

44. Part 15 of TCA provides for deductions from total income which an individual may claim in order to establish their income to be charged to tax, that is, their taxable income. Examples of such deductions are an allowance for an employed person taking care of an incapacitated relative (s. 467); relief for health expenses (s. 469); and relief for contributions to permanent health benefit schemes (s.471).

Loss relief: s. 381 TCA

45. Part 12 of TCA 1997 sets out the provisions relating to loss relief, treatment of certain losses and capital allowances and group relief. Loss relief in respect of income tax is dealt with in Chapter 1. Section 381, the first section in the Chapter, provides as follows:-

"(1) Subject to this section..., where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person..., that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.

...

(3) (a) ...

> (b) *For the purposes of subsection (1), the amount of income tax which would have been borne if income had been reduced by the amount of a loss shall be computed –*
>
> *(i) where the loss has been sustained by an individual, on the basis of treating the loss as reducing [the income of the individual or his or her spouse]*
>
> *…*
>
> (4) *The amount of a loss sustained in an activity shall for the purposes of this section be computed in the like manner as profits or gains arising or accruing from the activity would be computed under the relevant provisions of the Income Tax Acts.*
>
> (5) *Where repayment has been made to a person for any year under this section –*
>
> (a) *no portion of the loss which in the computing of the repayment was treated as reducing the person's income shall be taken into account in computing the amount of an assessment for any subsequent year, and*
>
> (b) *so much of the loss as was required by subsection (3) to be treated as reducing income of a particular class or income from a particular source shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year.*

(Emphasis added.)

46. Section 381 permits a taxpayer to make a claim in respect of losses he or she has sustained. Section 382 permits a taxpayer to carry forward losses into future years and s. 392 permits a taxpayer to opt to treat capital allowances as creating or augmenting a loss.

47. The taxpayer may choose to claim a repayment of his or her liability to income tax in the given tax year or may carry the losses forward. If a taxpayer elects to claim a repayment

of his or her income tax, the amount of the repayment must be calculated. This is done by first calculating the amount of income tax which *would* have been borne *if* the income of the person *had* been reduced by the amount of the loss. The sum repayable is then calculated to ensure that the aggregate amount of income tax for the year ultimately borne by the taxpayer does not exceed this. The excess sum is repaid to the taxpayer.

48. The amount of the loss sustained is computed in the "*like manner as profits or gains arising or accruing from the activity would be computed under the relevant provisions of the Income Tax Acts.*" The computation of the loss sustained is a separate exercise to the computation of the profits or gains arising from the activity in question. It is not a recalculation of the original calculation: it is a separate calculation. The result of the second calculation identifies the loss. It is then necessary to calculate the amount of the repayment which may be due to the taxpayer. This requires the calculation of the income tax payable by the taxpayer on the basis of what would have been payable *if* his or her income *had* been reduced by the amount of the loss. It is not a recalculation on the basis that the income of the taxpayer *has* been reduced by that amount. This is reinforced by sub-s. (3) which says that for the purposes of sub-s. (1) "*the amount of income tax which would have been borne <u>if</u> income had been reduced....shall be computed....on the <u>basis of treating</u> the loss as reducing*" the income of the taxpayer. It is not in fact reducing the income of the taxpayer. Sub-section (5)(a) refers to the loss in the computation of the repayment as being <u>treated as</u> reducing the person's income; not actually reducing it.

49. The meaning of s. 381(5)(b) is at the heart of the dispute between the parties and will be considered below.

Domicile levy

50. Part 18C of TCA was inserted by the Finance Act, 2010, section 150(1). The section applies to the year of assessment 2010 and subsequent years and introduced the domicile

levy into the tax code. Section 531AA is the interpretation section for Part 18C. and provides as far as material as follows:-

"'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 who 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.

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

(a) without regard to [certain deductions in respect of allowances otherwise available in the computation of profits or gains]

(b) having regard to [permitted deductions for maintenance payments] ...

determined on the basis that the individual, if not otherwise resident in the State for the year, was resident in the State for the tax year." (Emphasis added.)

51. Section 531AB establishes the charge to domicile levy as follows: -

> *"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 on every relevant individual and the amount of such levy shall be €200,000"*

52. The answer to first issue in the appeal depends on whether the appellant is a relevant individual. This in turn depends upon whether the loss relief claimed by the appellant pursuant to s. 381(5)(b) is a deduction which is deductible from or deductible in computing total income and in turn whether it is to be regarded as a deduction to be made from income of the particular class or from a particular source in computing the person's total income for the year. The second issue turns upon whether the liability to pay USC, which is a charge on income, is a liability to *"income tax"* within the meaning of the definition of *"relevant individual"* for the purposes of the domicile levy.

Discussion

The first issue

53. The first issue for resolution is whether the appellant was liable to pay the domicile levy for the years 2010 and 2011. The levy is charged on every relevant individual. The amount of the levy is €200,000. A relevant individual for the purposes of the domicile levy is defined in s.531AA by reference to four cumulative criteria quoted above. It is addressed to wealthy individuals (whose worldwide income for the tax year is more than €1,000,000 and the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000) and who have paid comparatively little or no tax (whose liability to income tax in the State for the tax year is less than €200,000). The debate in this case turns upon the construction of worldwide income in the definition of a relevant individual.

54. Worldwide income means *"the individual's income ... from all sources as estimated in accordance with the Tax Acts."* The Tax Acts are the Income Tax Acts and the Corporation Tax Acts (s. 1(2) TCA). They require that income be estimated by reference to

the particular source of income as set out in Schedules and Cases in the Tax Acts. A taxpayer first establishes the gross income in respect of each Schedule/Case and deducts those expenses which he or she is permitted to deduct under the Acts. For the purposes of this exercise, capital expenditure is not a deductible expense. If a taxpayer has made a loss in a particular schedule/case, his or her profit or gain from that schedule or case is nil: it is not a negative figure.

55. Section 304, sub-s. (2) permits a taxpayer to claim an allowance in "*charging profits or gains of any description*" in respect of allowances provided for under TCA Part 9. The definition of capital allowance in s. 2(1) TCA is of an allowance "*other than an allowance or deduction to be made in computing profits or gains*". The allowances claimable under s. 304(2) are to be made as *"a deduction in charging those profits or gains"* – not in computing those profits or gains. Capital allowances (wear and tear) are permitted under Part 9 and are therefore set off against the charge to tax on profits or gains of any kind. Another example is the allowance in respect of maintenance payments made to a former spouse or civil partner or in respect of certain pension contributions. These are not expenses arising under the individual schedules or cases. They are deductions in computing total income.

56. In addition, under separate provisions, a taxpayer is entitled to make deductions from total income in respect of various payments such as health expenses (s. 469), permanent health contributions (s. 471), and film relief (s. 481), before arriving at taxable income.

57. The definition of the worldwide income in relation to an individual means the individual's income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts. The dispute between the parties concerns whether or not the appellant's losses (as augmented by his capital allowances) are sums which were deductible from or deductible in computing his total income. In essence the dispute between the parties is the stage at which the losses are

deducted in computing income chargeable to tax as it is accepted that they are legitimate deductions to be made and he was entitled to a tax repayment. The appellant says this happens at the first stage in the process as a deduction in estimating income from all sources and the respondent says that this happens at the second stage as a deduction in computing total income. The respondent submits that, as it is a deduction in computing total income, it is to be disregarded in assessing the appellant's worldwide income.

58. The provisions relating to loss relief are to be found in Part 12 of TCA , specifically s. 381, set out above. In ease of the reader the section 381(5) (b) is reproduced again:-

> *"(5) Where repayment has been made to a person for any year under this section – ...*
>
> *(b) so much of the loss as was required by subsection (3) to be treated as reducing income of a particular class or income from a particular source shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year."*

59. The appellant argues that on a plain reading the section provides that losses shall for the purposes of the Income Tax Acts be regarded as a deduction to be made from income <u>of that class or from income of that source</u> in computing the person's total income for the year. He submits, therefore, that the deduction must be made in arriving at a person's total income for the year. It is accepted that this will require that the previous figure for total income be recalculated to allow for the loss claimed, but it is submitted that the claim to loss relief results, not merely in a repayment of tax, if sought, but in a recalculation of the person's total income for the relevant tax year. This means that it is a deduction in estimating income from all sources (the first stage) and it necessarily occurs prior to ascertaining total income. Accordingly, so the argument goes, the deduction in respect of the losses is neither a

deduction from nor in computing total income within the meaning of the definition of worldwide income.

60. I am not persuaded that this is correct. There is a fundamental difference between expenses which are allowable in computing income from all sources in accordance with the schedular system, on the one hand, and subsequent allowances or reliefs which may be deducted either from or in computing total income, on the other. As was held by Egan J. in *Corcoran v. Revenue Commissioners* [2022] IEHC 199, allowances are not an expense of a trade. Capital allowances and loss relief may be offset against a liability to tax but not in deriving the income from the individual's sources of income. This is clear from the definition of total income in s. 3 TCA, which provides that for the purposes of interpreting the Income Tax Acts *"total income"* means total income from all sources as estimated in accordance with the Income Tax Acts, while s. 2 TCA provides that capital allowances for the purposes of the Tax Acts (which includes the Income Tax Acts) excludes an allowance or deduction to be made in computing profits or gains. Such expenditure (whether claimed as a capital allowance or as a loss relief) is not used to reduce income estimated in accordance with the schedular system. If the appellant was correct, once he applied for loss relief, the substantial income which he received from salaries from companies under Schedule E and dividends under Schedule F would be classified as nil, despite the fact that he actually was in receipt of a substantial income and that the losses sustained in relation to his hotel trade were irrelevant to that income.

61. For loss relief to arise at all, an individual must make a claim to that relief and he or she may fail to do so or may decide not to make a claim in the year in which the loss is suffered. If no claim is made, then their income remains as calculated in accordance with the allowable expenses deducted from gross profits or gains, i.e. the losses do not come into the computation. A taxpayer may claim loss relief both in the year of assessment and up to two

years from the year of assessment. However, a taxpayer is required to assess his or her income each year in accordance with the TCA and to make a declaration of income from each of the Schedules each year. So, the individual may have filed his or her tax return, declaring his or her income under each Schedule, before deciding whether to claim loss relief under s. 381, and then may subsequently make a claim for repayment of tax under section 381. The claim for a repayment of tax arises after the process of assessing liability to tax has concluded, albeit that it may be sought at the time the income tax return is made. I do not accept that s. 381, which provides for the repayment of tax in respect of a claim to loss relief, results in a re-estimation of income from all sources, for the purpose of deriving actual (revised) income from each source. It is, in my judgment, a separate and subsequent step to the calculation of income from all sources. It is concerned with calculating the amount of tax to be repaid, not with calculating the individual's total income.

62. Further, the submissions of the appellant are contrary to the wording of the relevant sections. Section 381(4) says that the amount of loss is to be computed *"in the like manner"* as profits or gains would be computed under the relevant provisions of the Income Tax Acts. This includes s. 304 of TCA. Section 304 provides that a capital allowance, if claimed, shall be made as a deduction in *charging* the profits or gains in question – not in arriving at the profits or gains. In effect, the appellant is seeking to treat loss relief as an expense of his trade on the basis that when he claims a repayment of tax under s. 381(5)(b) the losses should be spread across the Schedules to reduce the income from the Schedules or sources. I agree with the submission of the respondent that this is inconsistent with the scheme of the Tax Acts and is incorrect.

63. As I have discussed in paras. 45 to 48, s. 381 governs the repayment of tax by an individual who elects to claim such relief. It treats the loss as reducing the individual's income, not as in fact reducing it. The respondent submits that any trading losses allowable

under s. 381 do not impact on the level of the amount of income that actually arises from each separate source. That income is established by reference to the rules applicable to each source of income, which are different for each Schedule. The exercise under s. 381 TCA, it is submitted, is to establish what the taxpayer's liability to income tax *"would have been"*. This requires a recalculation of the income tax *liability*, not the total income. I agree.

64. Where a taxpayer elects to treat his or her losses in a given year as reducing his or her income, sub-s. (5) provides that the reduction is to *"be regarded as a deduction to be made from income of that class or from income from that source, as the case may be, in computing the person's total income for the year."* The loss is to be regarded as a deduction in computing the person's total income for the year. The appellant submits that this reading of the section ignores the words *"from income of that class or from income from that source"*. It is suggested that these words fundamentally change the proper construction of the section and mean that the losses must be deducted from the income from the class or source, that this must occur at the first stage of the process (the calculation of income from all sources in accordance with the schedular system) and therefore cannot take place later in the process (as a deduction in computing total income). The appellant contrasts the wording of sub-s. (5) with the language in s. 1025 in relation to maintenance payments. That section provides that an individual *"shall be entitled for the purposes of the Income Tax Acts to deduct the payment in computing his or her income"*. The appellant argues that in the case of maintenance payments, the Oireachtas clearly stated that the payment is a deduction in computing total income, but, because it used very difference language in s. 381 (5) (b), that the intention and effect necessarily was different as a result.

65. It is of course true to state that the language in s. 1025 is not reproduced in s. 381, though that is by no means the end of the analysis. Section 381(5)(b) states that *"so much of the loss as was required by subsection (3) to be treated as reducing…"* The paragraph is

predicated on the notional reduction of an individual's income (as if the income had been reduced) not on a recalculation based upon an actual reduction of their income, whereas the maintenance relief is expressly a deduction in computing a taxpayer's income. In summary, I am not persuaded that because s. 381(5)(b) refers to treating a loss as reducing income of a particular class or income from a particular source as a deduction to be made from income of that class or income from that source in computing the person's total income for the year, that this necessarily means that it must be done at source in respect of each Case or Schedule. That is not what the section directs. The section provides that the loss is to be regarded as a deduction in computing the person's total income for the year. It would require the clearest of language for the section to have the effect contended for by the appellant as the construction runs counter to so many fundamentals of the TCA. I am not satisfied that the words *"from income of that class or from income from that source, as the case may be"* effects that fundamental change to the section. Simply put, the construction advanced by the respondent is consistent with the Income Tax Acts as a whole, whereas that advanced by the appellant involves treating losses in respect of which an individual *may* claim relief as an expense under each of the Schedules, contrary to the express provisions of TCA, concerning allowable expenses. All other deductions permitted under TCA are either deductions from, or deductions in, computing total income. The appellant's submission, based solely on the phrase *"from income of that class or from income from that source, as the case may be"* in sub-s. (5), results in a new category of deduction which appears nowhere else in the TCA. I am not persuaded that the words bear this weight.

66. In reaching this conclusion I have in mind the statements of principle of O'Donnell and McKechnie JJ. in *Dunnes Stores* and *Bookfinders*. In my judgement this is an instance where the phrase is unnecessary to the section and the overall meaning is clear-cut when viewed in the overall statutory context and not taken in isolation. The literal meaning

advocated on behalf of the appellant does not seek to discern the will of Parliament but is closer to the obdurate resistance to the statutory object disguised as adherence to grammatical precision which O'Donnell J. cautioned against.

67. The definition of worldwide income directs that it be calculated without regard to any amount deductible in computing total income. On a plain reading of the section, the sum referred to in s. 381(5)(b) is – at best – a deduction in computing the person's total income for the year, though, more properly, it is to be regarded as such. It follows that if relief for trading losses is claimed by a taxpayer under s. 381, the losses are a deduction in computing total income and are not therefore deductible in arriving at worldwide income for domicile levy purposes. As a deduction in computing total income they are to be disregarded in calculating worldwide income.

68. It follows that the appellant was a relevant individual for the years 2010 and 2011; he was liable to pay the full domicile levy for each of the years; that Revenue acted correctly in withholding the total sum of €400,000 in respect of the total charge to domicile levy; that the Tax Commissioner did not err in her determination of the first issue; and the High Court was correct to answer the first four questions in the case stated as it did. For these reasons, I would reject the appeal in relation to the first issue.

The second issue

69. The USC was introduced by the Finance Act 2011 in Part 18D of TCA. The charge to USC is in section 531AM. It is charged on relevant income without regard to any amount deductible from or deductible in computing total income from all sources as estimated in accordance with the Tax Acts, other than certain specified matters which are not in contention in this case. Section 531AN sets the rate of charge to USC. Section 531AS provides the USC is payable by chargeable persons *"in respect of an individual's aggregate*

income for a tax year….as if it were an amount of income tax due and payable by the chargeable person under the Income Tax Acts…"

70. Sub-section (3) provides:-

> *"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 …"*
>
> Section 531AX provides that USC *"… 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."*

71. The appellant argues that there is no definition of income tax provided in the TCA or the Tax Acts, that USC is chargeable on an individual's income, and that therefore USC is income tax within the meaning of the definition of a relevant individual in section 531AA. Section 3 TCA says that *"tax"* means *"income tax".* The ordinary meaning of income tax is a tax on income and USC is expressly a tax on income. The appellant submits that it is an additional levy of income tax. The appellant paid more than €200,000 USC in 2010, so, for the purposes of considering whether he was a relevant individual for the purposes of the domicile levy for 2011, he argues that his *"liability to income tax in the State for the tax year"* was not less than €200,000.

72. The appellant says that this interpretation reflects the purpose of the charge which, he says, was to ensure a minimum contribution to the State by those persons with the income and wealth to do so. He submits that *"in using the words 'income tax' the legislature was looking at the contribution to the State through tax on income and not confining itself to the standard and higher rates primarily applied to income arising under the sources identified in the Schedular system"*. Thus, it is said, USC is a contribution to the State by reference to

income and it operates as an income tax charge on individuals; it is a tax on income, not income tax specifically defined to the schedular system.

73. In my judgment this construction of the statute is untenable. The definition of a relevant individual refers to an individual whose *"liability to income tax in the State"* is less than €200,000 – not whose liability to tax on income in the State is less than €200,000. Had the Oireachtas wished to provide for the latter, it was open to it to do so in the clearest of terms. It chose not to.

74. On the contrary, the phrase *"liability to income tax"* is defined for the purposes of the domicile levy as follows:-

> *"'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".*

Income tax is that which is payable in accordance with the Tax Acts, not otherwise. USC is not a tax charged by the Tax Acts as it is charged neither by the Income Tax Acts nor the Corporation Tax Acts. Therefore, a straight forward reading of the definition of *"liability to income tax"* excludes the USC. This conclusion cannot be circumvented by seeking to interrogate the meaning of *"income tax"* while ignoring the definition of *"liability to income tax"*, the relevant phrase in the statutory provision under consideration. This means USC cannot come within para. (c) of the definition of relevant individual.

75. While the plain reading of the section is sufficient to dispose of the issue, it is worth observing that this conclusion is reinforced by the context in which the section occurs. Part 18D of the TCA, which establishes the USC, is consistent in treating it as different to income tax. It is charged on sources of income, some of which are exempt from income tax; it is payable by individuals who otherwise do not come within the income tax net; and the rate of charge is different to income tax rates. The reference to aggregating the USC with the

liability to income tax in s. 351AS is simply meaningless if USC is income tax. The two taxes are utterly distinct: there is a statutory framework for income tax and a separate code for USC and the mere fact that income tax and USC are each taxed on income does not make USC *"income tax"* within the meaning of the definition of a relevant individual for the purposes of the domicile levy, or otherwise.

76. For these reasons I am of the view that the Appeals Commissioner did not err in her determination and the High Court was correct to uphold her decision on the second issue also. I would reject the appeal on the second issue.

<u>Conclusions</u>

77. There are two issues for resolution in this appeal concerning the domicile levy chargeable pursuant to Part 18C of the TCA.

78. The first concerns the construction of the definition of world-wide income for a relevant individual. This is the individual's income from all sources as estimated in accordance with the Tax Acts without regard to any amount deductible from or deductible in computing total income and subject to certain express exclusions and allowances. The allowance under s. 381 for loss relief is an amount deductible in computing total income within the definition of world-wide income. As such, the estimate of the appellant's world-wide income may not take into account the losses in respect of which he claimed a refund of tax pursuant to section 381. This means that his world-wide income was in excess of €1,000,000 and he was a relevant individual and liable to the domicile levy for the years 2010 and 2011.

79. The second issue is whether, for the purposes of the definition of a relevant individual who is liable to pay the domicile levy, the payment of USC constitutes the payment of *"income tax"* within the meaning of the definition, i.e. to an individual *"whose liability to income tax"* is less than €200,000. The interpretation section for Part 18C provides that

"liability to income tax" means the amount of income tax due and payable by the individual in accordance with the Tax Acts. This means income tax as charged by the Tax Acts and does not include USC, which is not payable under the Tax Acts. The USC is a tax on income, but it is not and does not thereby become, income tax and the liability to pay USC is not a liability to income tax. It follows that the appellant was a relevant individual for the year 2011 as his liability to income tax was less than €200,000 and thus he came within the definition. His payment of USC in excess of €200,000 did not take him outside the definition and it was not a payment of income tax.

80. In my judgment the appeal should be dismissed and the order of the High Court affirmed. Each of the questions in the case stated should be answered in the negative.

81. This judgment is being delivered electronically. My preliminary view is that the respondent has been entirely successful on the appeal and accordingly it should be awarded its costs against the appellant, to be adjudicated in default of agreement. If the appellant wishes to contend for a different order as to costs he may request a short hearing within fourteen days of the delivery of this judgment, in the knowledge that if the indicative order is confirmed as the order of the court that he may be required to pay the additional costs thereby incurred. In the event that such a hearing is requested, the appellant should submit written submissions of no more than 1500 words within ten days and the respondent to have ten days to file any replying submissions of no more than 1500 words.

82. Pilkington and Allen JJ. have read this judgment in draft and authorised me to indicate their agreement with it.