THE HIGH COURT

[2024] IEHC 569

High Court Record Number: 2019/133R

BETWEEN/

THE REVENUE COMMISSIONERS

APPELLANT

-AND-

SUSQUEHANNA INTERNATIONAL SECURITIES LIMITED, SUSQUEHANNA INTERNATIONAL GROUP LIMITED AND SUSQUEHANNA ATLANTIC LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 2nd day of October, 2024

1. This is my judgment on an appeal by way of case stated from a determination of the Appeal Commissioners (Commissioner Kennedy) in favour of the taxpayers. By Decision dated the 29th August, 2024, the parties were notified that I would answer the case stated in favour of Revenue. I now explain why I have come to that decision.

2. As recited by Appeal Commissioner Kennedy at paragraph 1 of his determination: -

> "1. The issue in these appeals is whether the Appellants are entitled to group relief pursuant to the Taxes Consolidation Act, 2007 (TCA) section 411."

3. Originally, the Revenue Commissioners had declined to grant group relief. The taxpayers therefore appealed to the Appeal Commissioners, where (as I have noted) they were successful. A wide range of issues were in play before Appeal Commissioner Kennedy. However, in large measure because the Revenue Commissioners have abandoned certain lines of argument, the questions for this court to decide have reduced essentially to two. These are: -

(i) Does the fiscally transparent status of SIH LLC deprive it of the ability to rely on the anti-discrimination provisions of the double tax agreement?

(ii) Independently of the provisions of the DTA, does the fiscally transparent nature of SIH LLC mean that the taxpayers are not entitled to group relief to the provisions of s. 411 of the TCA?

4. With regard to the first of these questions, counsel for Revenue submits that the fiscally transparent nature of SIH LLC affects the ability to claim group relief in two ways. Firstly, it is argued that the fiscally transparent nature of SIH LLC means that the anti-discrimination provisions of the DTA do not apply at all. Secondly it is argued that, even if they do apply, the taxpayers have not established any discrimination within the meaning of Article 25 of the DTA.

5. This is a slightly dense overview of the matters which the court has to decide. It is appropriate at this stage, therefore, to explain the background to this litigation, the relevant legal provisions, and the meaning of certain of the phrases which have been employed in setting out this summary.

6. Susquehanna International Securities Limited, Susquehanna International Group Limited and Susquehanna Atlantic Limited are the three entities involved in the appeal.

They are Irish companies. While there are a number of separate and distinct intermediary companies (which play no part in this appeal) ultimately the three relevant companies ("the taxpayers") are owned by a company known as Susquehanna International Holdings LLC – SIH LLC in the summary of issues set out at paras. 3 and 4 of this judgment. SIH LLC is a limited liability company incorporated under the laws of Delaware. While there was an issue before the Appeal Commissioner as to whether SIH LLC was a *"company"* at all for the purpose of the matters which he had to decide, that important point is now conceded by Revenue. The Appeal Commissioner had evidence from Professor Stephen E. Shay (called on behalf of the Revenue Commissioners) and evidence from Mr. Hering and Mr. Bowers (called on behalf of the taxpayers). Much of this evidence focused on the fact that SIH LLC is what might be described as *"fiscally transparent"* or as a *"disregarded"* or *"pass through"* entity. The factual background is well set out in the submissions to this court made on behalf of Revenue, which read as follows: -

> "3. … [SIH LLC] has a single member, SIH Partners LLLP ("the Partnership"), a Delaware limited partnership. Members of the Partnership are six US 'S Corporations'. The 'S Corporations' are owned by five individuals, all of whom are resident for tax purposes in the US.
>
> 4. The US Internal Revenue Code of 1986 as amended (the 'Code') is the US federal tax law. It imposes income tax on individuals and legal persons, including entities classified as corporations for US tax purposes. The income of individuals is taxed under Section 1 of the Code, in Part 1, the 'Tax on Individuals', of Subchapter A, while the income of corporations is taxed under Section 11 of the Code in Part II, 'Tax on Corporations', of the same Subchapter.

5. Under the Code, a US LLC is classified by default as a ‘pass through’ entity for tax purposes, but may elect to be taxed as a corporation. Absent an election, a single member LLC is a ‘disregarded entity’ for Federal income tax purposes, i.e., it is disregarded as an entity separate from its owner. If an LLC has more than one member it is treated as a partnership. In either case, the income of the LLC is taxed on the hands of its members, not of the LLC.

6. An LLC which elects for a corporate status is subject to Federal income tax in its worldwide taxable income, as is a US domestic corporation. Here, the LLC did not elect to be taxed as a corporation. It is therefore disregarded for Federal income tax purposes. It has no income tax filing obligations. Its income is taxed as the income of its sole member.

7. The US partnership may also elect to be taxed as a US Corporation. Absent such an election it is a transparent or ‘pass through’ entity for Federal income tax purposes. The Partnership in this case did not elect to be taxed as a corporation. Accordingly, its income is taxed as the income of its members.

8. Under Subchapter S of Chapter 1 of the Code, closely held corporations can also elect to be taxed under special pass through rules for Federal income tax purposes. These are known as S Corporations.” The effect of an election is that the S corporation has no liability to tax under Section 11. Its profit or loss is apportioned to its shareholders as if they were members of a partnership, and the shareholders are liable to income tax on their shares of the income (whether or not distributed). A corporation may elect for this treatment only if all of its members are individuals resident in the US (and certain trusts, estates and tax exempt entities). Here, each of the six S Corporations which are members of the Partnership made such an election.

> "9. As a result, Federal income tax on the LLC's income arises only at the level of the ultimate owners i.e., the five US-resident individuals, under the individual income tax imposed by Section 1. No Federal income tax is payable by the LLC, the Partnership, or any of the six S Corporations under the corporate tax imposed by Section 11."

7. At the risk of oversimplifying matters, the truly relevant aspect of this description is that SIH LLC is a disregarded entity for the purpose of US tax law, though the taxes that would have been payable by it (had it elected to be taxed as a corporation) are now paid by the five individuals resident in the United States who are the ultimate owners of SIH LLC.

8. There was a sharp difference in the evidence between Professor Shay and Mr. Bowers as to the consequences of the fact that SIH LLC is a disregarded entity. The importance of this dispute, for the purpose of the issues which I have to decide, requires me now to turn to the provisions of the DTA relevant to this case.

9. The Double Taxation Treaty between Ireland and the USA was entered into in 1997. It is universally referred to as the DTA, and I will apply that acronym here. The full title of the DTA reads: -

> "Convention between the government of Ireland and government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains."

The preamble reads: -

> "The government of Ireland and the government of the United States of America desire and conclude a convention for the avoidance of double taxation and the

prevention of fiscal evasion with respect to taxes on income and capital gains have agreed as follows …"

10. Article 3 of the DTA provides general definitions. These include the following: -

1.a. The term *"Person"* who is an individual, in a State, trust partnership, company, and any other body of person;

b. The term *"Company"* means any body corporate or any entity which is treated as a body corporate for tax purposes;

c. The terms *"enterprise of Contracting State"* and *"enterprise of the other Contracting State"* means respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by resident of the other Contracting State;

i. The term *"National"* in relation to a Contracting State, means any citizen of that State and any legal person, association, or other entity deriving its status as such from the laws enforced in that State.

11. Article 4 is particularly important. It deals with the question of residence. Article 4.1 reads: -

"1. For the purposes of this Convention, the term 'resident of a Contracting State' means:

a. any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature. A United States citizen or an alien lawfully admitted for permanent residence

in the United States is a resident of the United States, but only if such person has a substantial presence, a permanent home or habitual abode in the United States;

…

2. The term 'resident of a Contracting State' does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State."

12. The definition at Art. 4.1.a gave rise to the most significant dispute between the parties at the hearing before this court. In particular, counsel for the taxpayers submitted strongly that SIH LLC was *"liable to tax"* in the United States by reason of its residence and place of incorporation being Delaware, and that therefore it was a resident of the Contracting State within the meaning of Art. 4. Equally forcefully, counsel for Revenue submitted that – because of its status as a disregarded entity – SIH LLC was not liable to tax by reason of its United States place of incorporation *"under the laws of that State"*. Much of the balance of the judgment addresses this core issue. The importance of the issue is stark. Revenue argued that, unless SIH LLC was 'resident' in the United States within the meaning of Article 4.1 then the anti discrimination provisions of the DTA could not be invoked by the taxpayers in the circumstances of tis case, in particular given that group relief is being sought. The taxpayers dispute this, but nonetheless their counsel spent much of their oral submissions on the question of residency. It is common case that, unless the anti discrimination provisions of the DTA apply, the claim for relief under section 411 cannot succeed.

13. Article 25 of the DTA is the non-discrimination provision. Article 25.1 reads: -

> "Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected . This provision shall also apply to persons who are not residents of one or both of the contracting States. However, for the purposes of the tax of a Contracting State, a citizen of that Contracting State who is not a resident of that Contracting State and a citizen of the other Contracting State who is not a resident of the first mentioned Contracting State are not in the same circumstances."

14. While counsel for the taxpayers relied upon the broad scope of the term *"nationals of a Contracting State"* as used in Art. 25.1, the debate before me focused on the argument that, for Art. 25 to apply, SIH LLC had to be a *"resident of a Contracting State"* within the meaning of Art. 4. This also appears to be the way in which the argument developed before the Appeal Commissioner. In the case stated, at paragraph 26 lxvi the Appeal Commissioner notes;

"As such the [taxpayers] accepted that it had an onus to prove, which it was submitted that had been achieved through evidence and submissions, that SIH LLC is firstly a body corporate and, secondly that it is resident of a Contracting State."

15. This acceptance of the onus on the taxpayers was made in the context of the judgment of the Court of Appeal of England and Wales in FCE Bank v HMRC [2013] STC 14, an authority also heavily relied upon by the taxpayers in this appeal. While the Appeal Commissioner does refer to two other submissions by the taxpayers – namely the wide meaning of "nationals of a Contracting State" and the fact that "the five individual ultimate owners…are residents of a Contracting State" - he decides neither of these questions.

Instead, his Determination turns on the very difficult question as to whether SIH LLC is liable to tax in the United States (and therefore resident in that country). There would have been no reason to decide that issue if he had found merit in either of the other submissions. In any event, only one of these (the residence of the individual ultimate owners) was meaningfully argued before me. Neither of these alternative submissions fit easily in the questions of law contained in the case stated. Instead, there are specific questions put about the residence of SIH LLC – at question (b) by reference to section 411, and more relevantly at question (d) by reference to Article 4 and (by extension) to Article 25.4. There is no specific question asked of me in respect of these other two arguments, as they did not ground (or feature in) the Determination of the Appeal Commissioner. The questions put to this court in the case stated are set out at paragraph 33 of this judgment.

16. The text of Art. 25.4 is therefore of great importance. It reads: -

> "Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first mentioned State to any taxation or requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first mentioned State are or may be subjected."
>
> This provision quite clearly imports into the anti discrimination provision the concept of "residents of [a] Contracting State", which in turn brings us back to the definition to be found in Art. 4 |(1).

17. Revenue also relied heavily upon the protocol to the DTA, signed at the same time as the treaty itself was executed. The relevant part of the protocol reads as follows: -

"At the time of signing the Convention between the Government of the United States of America and the Government of Ireland for the avoidance of double taxation as a prevention of fiscal evasion with respect to taxes on income and capital gains, the undersigned have agreed that the following provision shall form an integral part of the Convention:

(1) With reference to income, profit or gain derived by fiscally transparent persons

For the purposes of the Convention, where a resident of a Contracting State is entitled to income, profit or gain in respect of an interest in a person that derives income, profit or gain from the other Contracting State, any income, profit or gain so derived will be considered to be income, profit or gain of that resident to the extent it is treated as such for the purposes of the taxation laws or the first-mentioned Contracting State. The aforementioned reference to 'person' shall not include a resident of a Contracting State within the meaning of subparagraph 1(d) of Article 4 (Residence)."

The rider, I was assured, is of no relevance to the facts of this case.

18. Finally, before I turn to the conclusions of the Appeal Commissioner on the question of Art. 4 of the DTA, I should set out the provisions of s. 411 of the TCA. Section 411(2) provides for trading losses to be surrendered by a company which is a member of a group of companies in favour of another company. Again, at the risk of oversimplifying matters, it allows a member of a group of companies which has sustained losses to make these losses available to another member of the same group of companies so that appropriate tax relief can be claimed by that second company.

19. Section 411(1)(c) provides: -

> "References in this section and in the following sections of this Chapter to accompany shall apply only to a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State …"

20. The Revenue Commissioners therefore make two submissions, both of which arise from the fiscally transparent or disregarded nature of SIH LLC. Firstly, it is not a resident of the United States within the meaning of Art. 4 of the DTA. Secondly, and separately, it is not *"resident for the purposes of tax in…"* the United States within the meaning of s. 411(1)(c) of the TCA.

21. The Appeal Commissioner dealt with the evidence of Mr. Bowers and Professor Shay in his Determination at paragraphs 121 onwards. It should be said that these three paragraphs constitute, in my view, simply the conclusion reached by the Appeal Commissioner on the submissions made to him, and the evidence provided to him, in respect of this issue. The fact that the evidence and the submissions are set out over many pages of the lengthy Determination illustrate the very careful analysis undertaken by the Appeal Commissioner.

22. The relevant paragraphs read as follows: -

> "121. Therefore, in the consideration of the expert evidence, it is relevant that Professor Shay was most definitive in his assertion that SIH LLC was not resident in the US for tax purposes for the years under appeal whereas Mr. Bowers did not make any corresponding assertions. Instead Mr. Bowers highlighted the practical difficulties and the attempts to classify SIH LLC as resident in the US as the US tax code did not address residency issues to the extent that such a concept does not exist under US tax law. As such, Mr. Bowers highlighted the significance of the DTA

protocol which deals with transparent entities and the entitlement of individuals who derive income from flow through entities and their entitlement to treaty benefits.

122. Therefore, based on the evidence adduced, I can only rely on the definitive opinion of Professor Shay in concluding that in the application of Article 4 of the DTA, SIH LLC was not liable to tax in the US in respect of the years under appeal. My conclusion is formed notwithstanding the pragmatic approach suggested by Mr. Bowers that in determining residence one should follow the income all the way up to the five individuals that are subject to US tax as those five individuals are the ones who can claim the treaty benefits because those are ultimately the parties who can include the income on their tax returns and under the laws of the US and are liable to tax thereon.

123. As such, based on a literal interpretation of Article 4 of the DTA and Professor Shay's evidence, I can only conclude that SIH LLC was not resident in the US and therefore not liable to tax in that jurisdiction in the years under appeal. However, this conclusion is not determinative of the matter, as I am required to consider the legal basis for the interpretation and application of an international agreement."

23. Although it would be misleading to describe this view as the starting point of the Appeal Commissioner's analysis, it is a clear and important finding in favour of Revenue to the effect that SIH LLC is not liable to tax in the United States under the Federal laws of that country. I

24. n their written submissions, counsel for the taxpayers refer to the judgments of Kenny J. in *Mara (Inspector of Taxes) v Hummingbird Limited* [1982] ILRM 421, D.*A MacCarthaigh, (Inspector of Taxes) v Cablelink Limited* [2003] 4 IR 510, and Blayney J. in

O'Chulachain v McMullen Brothers Limited [1995] IR 217 to conclude that there is *"a heavy burden on the appellant in requesting this court to overturn the determination of the Commissioner"*. However, it is also clear from these authorities that a legal determination on the part of the Appeal Commissioner does not attract such a level of deference.

25. Having made the finding which I have set out, the Appeal Commissioner goes on to interpret the meaning of Article 4 and its application to the facts of this case. In interpreting the Treaty provisions, the Appeal Commissioner is determining a question of law. Any facts relevant to the construction of the Treaty has already been found by him, when he decided (as a matter of fact) whether SIH LLC was liable to tax as a matter of US tax law. In accordance with the line of authorities referred to both in the written and oral submissions by counsel for the taxpayers, I should (if I come to the view that the Appeal Commissioner has *"adopted a wrong view of the law"*) set aside such legal conclusions.

26. In interpreting the provisions of the DTA, the Appeal Commissioner referred to the judgment of Laffoy J. in *O'Brien v Quigley (Inspector of Taxes)* [2013] IEHC 398 setting out the principles to be applied in carrying out this exercise. He referred to two Canadian decisions: - *Crown Forest Industries Limited v Canada* [1995] 2 SCR 802, and the earlier judgment in *TD Securities (USA) LLC v R.* 12 ITLR 783. At para. 142, the Appeal Commissioner observed: -

> "Therefore, while the evidence of Professor Shay and the clear wording of the Treaty determines that SIH LLC is not resident in the US, the international and domestic jurisprudence on the interpretation of international agreements clearly endorses an approach that attempts to facilitate an understanding of the purpose of the DTA".

27. The Appeal Commissioner then referred to the DTA protocol, certain publications by Revenue itself, and evidence given by Mr. Hering (on behalf of the taxpayers) summarised as follows (at para. 147): -

> "147. As confirmed by Mr. Hering, LLC's are now the most predominant entity in Deleware outnumbering corporations by a factor of 3 to 1. His evidence was that in 2017 there were 930,000 LLC's registered in Delaware and estimated that in 2019 there could be over one million such entities. To this extent, I have considered that the application of a purpose of approach, as espoused by the Irish Superior Courts, to the interpretation of the DTA is not only to avoid double taxation, prevent the evasion of tax and encourage trade but also to mitigate the administrative complexities arising from having to comply with two uncoordinated taxation systems."

28. Critically, the Appeal Commissioner then went on:-

> *"*148. As such, while economic policy does not fall within the jurisdiction of the Tax Appeals Commission, I have concluded that to deny the Appellants' claim for group relief pursuant to TCA, Section 411 would fail to mitigate the administrative complexities of the US and Irish domestic tax policies and therefore (sic) contrary to a purposive interpretation of the DTA.
>
> 149. Therefore and notwithstanding, that on a literal interpretation of the DTA, and the fact that SIH LLC is not in itself liable to tax in the US, I consider that the technical nuances of the Irish group relief provisions and the apparent disconnect between the US tax code and the DTA, that on a purposive interpretation of an international treaty and in line with the decision of the Canadian Tax Court in *TD Securities*, that SIH LLC should be considered to be and as a consequence is liable

> to tax in the US 'which corresponds to corporation tax in the State' by virtue of all of its income is fully and comprehensively taxed to Federal Income Tax under the US Tax Code albeit at the member level. Therefore, and in addition to the above, in light of my determination that SIH LLC is a *body corporate*, the appellants are entitled to avail of group relief pursuant to TCA, Section 411."

29. In other words, having decided that on the *"clear wording"* of the DTA, SIH LLC does not qualify as a *"resident of a Contracting State"* within the meaning of Art. 4.1, the Appeal Commissioner nonetheless determined that it should be treated as such in order to address the *"apparent disconnect between the US Tax Code and the DTA.."*. It is of some significance that, in his oral submissions to the court, counsel for the taxpayers did not attempt in any meaningful way to stand over this analysis on the part of the Appeal Commissioner. Instead, counsel advanced a cogent argument on behalf of the taxpayers to the effect that SIH LLC was in fact liable to tax in the United States because, notwithstanding the fact it was a disregarded entity, it was *"within the tax net"* of the United States. In as much as any real emphasis was placed by counsel for the taxpayers on the provisions of the DTA, this was in the context of the need to ensure an absence of discrimination rather than *"the apparent disconnect between the US Tax Code and the DTA"* as the Appeal Commissioner finds at para. 149 of his determination.

30. In her oral submissions, counsel for the Revenue Commissioners observed (at p. 113 of Day 1): -

> "[The Appeal Commissioner] simply hasn't explained what these administrative complexities are, what the lack of coordination between the tax systems are or how that principle can be elevated from being at most an ancillary purpose to the avoidance of double taxation to being a main purpose and a standalone purpose of

> the Treaty so as to justify this really very radical departure from the authority of the OECD and the various commentaries and indeed the Canadian case law in the form of *Crown Forest* which took a relatively strict approach to what a resident was."

31. This pointed criticism of a central part of the reasoning of the Appeal Commissioner was not really met in the submissions of the taxpayers. I do not find convincing the rationale given by the Appeal Commissioner for his finding that Art. 4.1 is satisfied by SIH LLC, given his findings as to the legal position in the United States and his view about the clear meaning of the wording of Art. 4.1.

32. In fact, the Appeal Commissioner did refer to Art. 25 of the DTA, but not in the context of the proper construction of Art. 4. Instead, at para. 150 of his Determination, he found: -

> "150. The Respondent acknowledged that if SIH LLC was a US resident company it would have allowed the relief. Therefore, in light of that acknowledgment my conclusion that SIH LLC is a *body corporate* liable to tax in the US and as such is considered to resident (*sic*) in the US for treaty purposes, there is no requirement to consider the non-discrimination provision contained in Art. 25 of the DTA."

33. In other words, Art. 25 was entirely irrelevant to the Appeal Commissioner's analysis of the scope of Art. 4 and whether or not its requirements were met in this case by SIH LLC.

34. At the request of Revenue, eight questions were posed by the Appeal Commissioner. They are: -

> "The questions of law for the opinion of the High Court are whether I erred in law:

(a) in holding that SIH LLC, a limited liability company established under the laws of the State of Delaware, was a *'company'* within the meaning of TCA, Section 411;

(b) in holding that the SIH LLC was a company resident for the purposes of tax in the United States within the meaning of TCA, Section 411;

(c) in holding that the SIH LLC was liable to tax in the US which corresponds to corporation tax and the State;

(d) in holding that the SIH LLC was a resident to the United States within the meaning of Article 4 of the … DTA;

(e) in concluding that the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems was an appropriate reason for departing from the ordinary meaning of the terms of the DTA in favour of a *"purposive interpretation"* of the DTA;

(f) in failing to give due weight to the Preamble and the Protocol to the DTA;

(g) in holding that there was no requirement to consider the Non-Discrimination provision contained in Article 25 of the DTA;

(h) in holding that the Appellants were entitled to group relief under TCA, Section 411."

35. As I have noted at the start of the judgment, by the time the High Court hearing had come on these eight questions had simplified considerably. As it is the point upon which I

have decided to set aside the decision of the Appeal Commissioner, I will focus the balance of this judgment on the submissions and authorities relevant to the Article 4 issue. In the event that SIH LLC is not a resident of a Contracting State within the meaning of the DTA, the basis for the Determination of the Appeal Commissioner that Article 25 applies cannot stand.

The Submissions on behalf of the Revenue Commissioners

36. In their written submissions, counsel for the Revenue Commissioners rely upon the wording of Art. 4(1), which I have set out earlier in the judgment. Revenue stress that, to meet the requirements of Art. 4.1, the LLC must be liable to tax, and the liability to tax must arise by reason of its domicile, residence, place of incorporation or other criterion of a similar nature. An essential part of this submission is that, again to refer back to the wording of Art. 4(1), the liability to tax must be one that arises under the laws of the Contracting State – in this case the United States of America.

37. In interpreting the meaning of the Treaty, Revenue accept the authority of *O'Brien v Quigley (Inspector of Taxes)* [2013] 1 IR 790, where Laffoy J. approved the dictum of Kelly J. (as he then was) in *Kinsella v Revenue Commissioners* [2007] IEHC 250 where he stated (at para. 44): -

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

with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon."

38. In terms of the object and purposes of the DTA, Revenue submitted that these are confined to the avoidance of double taxation and the prevention of fiscal evasion, as set out in the subtitle to the Treaty. In their written submissions (at para. 52) counsel for the Revenue submit: -

> "52. Insofar as the Appeal Commissioner attributed further objects and purposes to the DTA, he erred in law."

39. This position was moderated somewhat when counsel for Revenue, in her oral submissions, appeared to accept that the existence of Art. 25 suggests that the avoidance of discrimination (in appropriate cases) is also something that the Treaty is seeking to achieve. At Day 1, page 50 – 51, counsel observed: -

> "I think that's important here, judge, because clearly the preamble doesn't actually mention non-discrimination as the object and purpose of the Treaty. But at the same time, the inclusion of a non-discrimination Article indicates that it is also an object and purpose of the Treaty to avoid discrimination, at least within the terms set out in the Article and I would say just within those very specific terms. But clearly that is also an object of the Treaty."

40. With regard to the phrase *"liable to tax"*, Revenue submit that as the LLC is a disregarded entity it is not liable to tax even at an abstract level. Revenue accept, nonetheless, that there is a difference between the expressions *"liable to tax"* and *"subject to tax"*. Notwithstanding this, it is argued that the income of SIH LLC could become subject

to tax as income of the ultimate members (in this case, the five US based individuals) but the LLC itself is not liable for tax under the Code.

41. Revenue also relies upon the type of supplementary materials referred to by Kelly J. in *Kinsella*. In particular, Revenue relies upon the OECD commentaries which, it is suggested, are consistent with the meaning that Revenue place on the phrase *"liable to tax"* and its application in the current situation.

42. With regard to the case of *TD Securities*, which featured significantly in the determination of the Appeal Commissioner, Revenue suggests an entire range of grounds upon which it can be distinguished. I will return to the judgment of Boyle J. in that case.

43. Finally, on this topic, it is submitted on behalf of Revenue that the Appeal Commissioner should have considered in greater detail the test required by Article 25 and in particular whether or not SIH LLC was a *"similar entity"* as Art. 25(4) (it is argued) stipulates.

Submissions of the taxpayers

44. At the outset, it should be noted that counsel for the taxpayers disputes that they must show that SIH LLC was a resident of the United States for the purpose of the DTA. At para. 11.2 of the written submissions, it is argued: -

> "11.2 We submit that we are not required to do so in order to succeed in this case. However, we further submit that if the Court considers that we must show the LLC is a resident of the US for the purpose of the DTA, the Commissioner Kennedy is correct in holding that the LLC was liable to tax in the US which corresponds to corporation tax by virtue of all of its income being fully and comprehensively taxed to Federal Income Tax under the US Tax Code at member level."

45. At paragraph 15 of this judgment, I have described the alternative bases upon which the taxpayers suggest that the anti discrimination provisions of the DTA are engaged, even if SIH LLC is not liable to tax in the United States. One of these is described in section 13 of the written submissions of the taxpayers, which has the heading *"Resident in the US for the purposes of the DTA"*, where reliance is placed upon Art. 3(1)(i) of the DTA to the effect that SIH LLC is a *"national"* of the United States. That definition, as set out in para. 10 of this judgment, would (it is suggested) capture SIH LLC as it is a body corporate.

46. With regard to Article 4, the taxpayers rely strongly on the phrase *"liable to tax"*, and in particular the discussion on that topic in *Wieser v Revenue and Customs* [2012] SFTD 1381. Counsel for the taxpayers also rejects the proposition that the Protocol has any relevance to the issues which were before the Appeal Commissioner.

47. At section 14 of their submissions, headed *"Treaty Interpretation"*, counsel for the taxpayers rely upon dicta from *Crown Forest Industries v Canada* [1995] SCR 802 at para. 22 and para. 44, the judgment in *Kinsella* by Kelly J. (to which counsel for the Revenue also refer), the judgment of McKechnie J. in *Dunnes Stores v The Revenue Commissioners and Ors.* [2019] IESC 50 and the judgment of O'Donnell J. (as he then was) in *Bookfinders Limited v Revenue Commissioners* [2020] IESC 60. In truth, at the hearing of the appeal the judgments of Kelly J. McKechnie J, and O'Donnell J., were in effect accepted by both sides as setting out the approach to be followed in construing an international agreement.

48. Finally, counsel for the taxpayers relied upon the Canadian decision of *TD Securities*, to which I have referred on a number of occasions and to which I will return.

49. Tellingly, the mitigation of administrative complexities (while referred to in the written submissions) is not elaborated upon by reference to the actual administrative complexities which are to be mitigated. In addition, at para. 14.23 of their written submissions, counsel for the taxpayers argue: -

> "Further, the Respondents argue that, in any event, there are other purposes of the DTA which are furthered by the Commissioner's Determination. Most significant in this context is that the DTA was entered into in part for the purpose of preventing discrimination of the type specifically at issue in this case."

50. As I have noted earlier, the approach understandably taken by counsel for the taxpayers was to interpret Art. 4 by reference, in particular, to the anti-discrimination purpose of the DTA rather than the administrative complexities which it is suggested would be addressed by the interpretation which the Appeal Commissioner imposed on the Article. The decision of the Appeal Commissioner was also to be supported, according to counsel for the taxpayers, for the following reason: -

> "14.25. Furthermore, to take an approach other than to treat SIH LLC as being resident in the US for the purposes of the DTA would lead *'to a result which is manifestly absurd or unreasonable'* in circumstances where:
>
> (i) It is a body corporate and therefore a company within Section 411;
>
> (ii) Its closest comparator is an Irish resident company;
>
> (iii) It is liable to tax on the basis that it is within the scope of tax in the US, albeit that its profits are taxed at the member level;

(iv) No international tax policy imperative has been identified or arises which would render it reasonable to discriminate against SIH LLC purely on the basis that it is elected to be treated as a transparent entity for US taxation purposes."

51. This section concludes with the contention that the ordinary meaning of the words *"viewed in light of the objective and purpose of the DTA establish that SIH LLC is liable to tax."*

52. I now propose to go, in sequence, through the various issues which must be considered in coming to a proper construction of the DTA.

IS SIH LLC LIABLE TO TAX IN THE UNITED STATES?

53. Both parties referred me to *Weiser v HMRC* [2012] SFTD 1381. That case concerned the UK/ Israel double taxation convention, which required a distinction to be drawn between *"subject to tax"* and *"liable to tax"*. This is a case in which the taxpayer represented himself, and in which the eventual outcome is not relied upon by the parties before me. However, there is a helpful dissertation on the difference between the two phrases beginning at para. 22 of the judgment. Referring to the submission of counsel for HMRC, Judge Berner noted: -

"22. Ms. McCarthy submitted that Mr. Weiser's case confuses the expressions *'subject to tax'* and *'liable to tax'* as employed in double tax treaties. There is, she submitted, an internationally recognised distinction between the two which gives the expression *'liable to tax'* a broader meaning than the expression *'subject to tax'*. She argued that liable to tax is understood to require only an abstract liability to taxation

> on income in the sense that a contracting state may exercise the right to tax the income in question (whether or not the exercise of that right actually results in an amount of tax becoming payable). *'Subject to tax'* on the other hand, requires income actually to be within the charge to tax in the sense that a contracting state must include the income in question in the computation of the individual's taxable income with the result that tax will ordinarily be payable subject to deductions for allowances or reliefs etc."

54. The judgment then refers to case law from Australia, India and to academic commentaries. It is unnecessary to go into these in detail, though I will return to one of them shortly - General Electric Pension Trust v Director of Income Tax (2005) 8 ITLR 1053. The parties agree that there is difference between the phrase *"liable to tax"* and the phrase *"subject to tax"*. They go further. They broadly agree that the formulation at para. 22 of the judgment in *Weiser* (which I have just set out) accurately describes the difference. One can be liable to tax even where there is only an abstract liability to taxation. This arises if the Contracting State *"may exercise its right to tax the income in question"*. Applying only this description of the difference between the two phrases, I would come to the view that SIH LLC does not even have this abstract liability to tax. Article 41(a) stipulates that a person must be liable to tax *"under the laws of that State"*. Under the laws of the United States SIH LLC is a disregarded entity. Unless it chooses to have its income taxed, it is completely outside the *"tax net"*. Here, the Contracting State has (as far as the relevant years are concerned) eschewed its ability to exercise any entitlement or right to tax the entity in question. While counsel for the taxpayers referred to the "box ticking" exercise involved in transforming an LLC from an entity which does not pay tax to one that does, the simplicity of the process does not in any way undermine the fact that the LLC is quite disregarded by the US tax system unless the relevant box is ticked. By the same token, while at first blush

an attractive argument, I am not persuaded by the submission by counsel for the taxpayers that SIH LLC must be treated as being liable to tax in the United States as its status as a disregarded entity is one provided for by United States tax law. Article 4.1, in its own terms, requires one to consider whether an entity is liable to tax "under the laws of[the relevant] State…" Under the laws of the United States, SIH LLC is not liable to tax and cannot be so designated simply because it is US tax law that stipulates this.

55. Equally, the parties do not dispute that the words of Syed Shah Mohammed Quadrij J. in the General Electric judgment give a good description of the difference between the two phrases. The judge talked of *"subject to tax"* as involving *"actual taxation"*, whereas *"liable to tax … speaks of being in the tax net …"*.

56. For the reasons I have given, a disregarded entity under the laws of the United States is not in the tax net.

57. The academic papers described in *Weiser* are equivocal. As Judge Berner himself commented, the analysis in one of the papers: -

> "… arguably brought the requirements of *'liable to tax'* closer to those considered appropriate for *'subject to tax'*. But in their discussion, the authors draw the same distinction between *'liable to tax'* and *'subject to tax'* as it was later described in *General Electric*."

58. The article which appears to bring the two concepts closer together is a commentary on the decision of the Supreme Court of Canada in *Crown Forest Industries Limited v Canada* [1995] 2 SCR 802, which I have already mentioned. On the other hand, at para. 28 of his judgment, Judge Berner notes an earlier academic paper – reflecting a seminar

conducted in 1985 by the International Fiscal Association – which suggests that there is widespread international support for the proposition that: -

> "… if a person's connecting characteristics with a state are the same as those of persons who are fully liable and actually subject to tax, that person can be said to be liable to tax even though he is not subject to tax on part or all of his income by virtue of special provisions of the state of his residence: see page 419 and footnote 32."

59. However in the deliberations of the later congress of the International Fiscal Association (in 2004) the phrase *"liable to tax"* is stated to refer *"simply to an abstract liability to tax on a person's worldwide income…"* – see para. 29 of the judgment in *Weiser*.

60. Ultimately, Judge Berner found that it was *"not necessary to place any reliance on the international cases and academic writings I have referred to, nor on the OECD commentary…"* as to the meaning of the expression *"subject to tax"*. Certainly, for the purposes of the current case the academic studies quoted in part by Judge Berner (including the conclusions of the International Fiscal Association) do not appear to me to advance the position hugely. The phrase *"in the tax net"* and the concept of *"an abstract liability to taxation"* are helpful in understanding what the phrase *"liable to tax"* means. As I have indicated, taking into account these phrases I agree with Revenue's view that the arrangements applicable to SIH LLC mean that it is not liable to tax. In that regard, it is of some note that this view accords with the conclusion of the Commissioner on the basis of the evidence put before him about the position under United States law.

61. As a first step, therefore, I have tried to understand the meaning of the phrase *"liable to tax"* before considering it in the context of the DTA.

<u>The construction of treaties</u>

62. As I have already set out, there was not a significant difference between the parties on the proper approach to be taken towards the construction of the DTA, given that it is an international treaty. Both parties accepted that Articles 31 and 32 of the Vienna Convention on the Law of Treaties set out the general and supplementary means of interpretation of such documents. Both parties accepted the approach set out by Kelly J. in *Kinsella*, particularly with regard to Article 32 of the Vienna Convention enabling the use of supplementary means of interpretation. Ultimately, counsel for the taxpayers did not go so far as asking me to give *"a liberal interpretation…"* of the DTA as suggested by Addy J. in *JN Gladden Estate v The Queen* [1985] 1 CTC, as quoted with approval by Iacobucci J. in the *Crown Forest* case, at para. 43 of his judgment. Accordingly, the approach set out in *Kinsella*, and in *Bookfinders* by O'Donnell J. (referring back, in turn, to the judgment of McKechnie J. in *Dunnes Stores v The Revenue Commissioners*) is the approach which I will adopt.

The proper construction of the DTA

63. The objects and purposes of the DTA are primarily the avoidance of double taxation and the prevention of fiscal evasion with regard to taxes on income and capital gains. No party has submitted that, by reason of those purposes alone, the phrase *"liable to tax"* or any part of the DTA assumes any specific meaning. I am prepared to accept, for the purpose of this appeal, that a secondary purpose or object of the DTA may be *"to mitigate the administrative complexities occasioned by having to file simultaneous tax returns in two uncoordinated taxation systems"*: see para. 46 of the judgment of Iacobucci J. in *Crown Forest Industries v Canada [1995] SCR 802t.* However, to give a particular meaning to the language employed in the DTA by reference to this *"ancillary goal"* (as Iacobucci J. puts

it) meaningful submissions and evidence about the relevant administrative complexities must be provided. As noted earlier in this judgment, this was not done in the hearing of this case stated.

64. I also find that prevention of discrimination is one of the purposes of the Treaty. However, the aim of non-discrimination is as set out in Art. 25. In particular, while Art. 25.1 is framed in general terms by referring to *"nationals of a Contracting State"* not being subjected to taxation requirements which are *"other or more burdensome…"* than those which would apply to nationals of another Contracting State, Art. 25.4 (the specific provision upon which the taxpayers rely) refers to enterprises wholly or partly owned or controlled *"directly or indirectly" "by one or more residents of the other Contracting State…"*. The discrimination prohibited by Article 25.4 is discrimination against such enterprises. The cohort of persons who are not to be discriminated against is confined to such enterprises, namely those owned or controlled (however remotely or partially) by entities which are liable to tax in another contracting state.

65. There is no case law which directly addresses the construction of Article 4 of the DTA having regard to the non-discrimination provisions. *TD Securities*, a Canadian decision by Boyle J., does deal with the question of whether a *"fiscally transparent"* Delaware company (such as SIH LLC) is *"liable to tax"* as that phrase is used in a specific Article of a Canada-US Treaty, which appears to be in material terms very similar to the DTA at issue here. However, the interpretation placed by Boyle J. on the phrase *"liable to tax"* is by reference to the achieving of other objects and purposes of the Canada-US Treaty, and not any anti-discrimination objective.

66. In *TD Securities*, Boyle J. decided that such fiscally transparent entities were to be treated as liable to tax and therefore fell within the equivalent of Art. 4 of the DTA. The judgment is a remarkably thorough one. At para. 96 onwards, Boyle J. concludes: -

> "96. The US Code comprehensively taxes the worldwide income of TD LLC as fully as if it had been earned by any other entity including the US domestic corporation. The only problem arises because it is not TD LLC that is taxed on the income. The US Code provides that the income of TD LLC is fully and comprehensively taxed to its members, Holdings II. This income is consolidated in the TD USA tax return and tax thereon is charged back by TD USA to TD LLC.
>
> 97. In such a case, it seems clear that the income of TD LLC should enjoy the benefits of the US Treaty. The evidence is overwhelming that the object and purpose of the US Treaty read in the context of all of the evidence and authorities would not be achieved and would be frustrated if the Canadian-sourced income of TD LLC that is fully taxed in the US under the US Code does not enjoy the benefits of the US Treaty including Art. X(6). The appeal must therefore be allowed and the assessment to be sent back to the Minister for reconsideration and reassessment on the basis that the Canadian branch profits of TD LLC enjoy the favourable reduced Part XIV branch tax rate reduction provided for in art. X(6) of the US Treaty."

67. This was, classically, a double taxation case. The conclusion is that, for the purpose of achieving those objects of the US-Canada Treaty, the income of the LLC should be treated as being liable to tax. At para. 100, Boyle J. states: -

> "That is sufficient to dispose of this appeal and is a tempting place to conclude. However, there are certain further conclusions which can and must be drawn from this as a matter of logic and reason as well as law."

68. While what follows is, necessarily, obiter the observations are worth considering. At para. 101, the court states: -

> "101. The OECD Commentaries on this issue are clear from a substantive point of view but appear to be walking a fine semantic line. On more than one occasion they state in a principled fashion that the fiscally transparent entity is not liable to tax. However, each time they go on to conclude in a pragmatic fashion that, interpreted and applied correctly having regard to the treaty's intended object and purpose, treaty benefits should apply to the income of the entity based on the member's entitlement. The Commentaries then go on to say that the relief can nonetheless be delivered at the entity level. The OECD Commentary may have a good reason for not wanting to conclude one way or the other of whether the treaty so applies because the entity is resident for treaty purposes or because the income is that of the member for treaty purposes. Given the vastly different legal and tax regimes presented by the OECD, this court cannot guess what the motivating reasons for this diplomatic ambiguity are and no representative of Canada testified at this trial. However, this court finds it easier to discern how Canada and the US can be presumed to have the US Treaty so apply given that they subsequently addressed the issue in the Fifth Protocol Amendments and the Technical Explanation thereto. While Canada and the US tried to walk both lines – in the treaty text not treating the entity as a resident because it is not liable to tax yet acknowledging their intention of applying the text as if the LLC was a resident -, having forced this matter to court, Canada can perhaps no longer leave it ambiguous."

69. The court then goes on to find the clear intention of the OECD countries to be that Treaty benefits are to be enjoyed by the United States LLC *"in the present circumstances"*,

and comes to three conclusions. I will consider those in a moment. However, notwithstanding the equivocation which the judge describes the OECD Commentaries as possessing, it appears in this section of his judgment that *"the treaty text"* is found by him as *"not treating the (LLC) as a resident because it is not liable to tax…"* The judge also notes the OECD Commentaries on several occasions stating *"…in a principled fashion that the fiscally transparent entity is not liable to tax."* Boyle J's three conclusions, then, are as follows: -

> "(i) TD LLC must be considered to be a resident of the US for purposes of the US treaty otherwise the treaty cannot apply;
>
> (ii) TD LLC must be considered to be liable to tax in the US by virtue of all of its income being fully and comprehensively taxed under the US Code albeit at the member level; and
>
> (iii) the income of TD LLC must be considered to be subject to full and comprehensive taxation under the US Code by reason of a criterion similar in nature to the enumerated grounds in Article IV, namely the place of incorporation of its member which is the very reason that TD LLC's income is subject to full taxation in the US."

70. With very real respect for the erudition and analysis of the judge, I would not agree with certain of these conclusions. The reasoning at (i) is not especially forceful; the mere fact that the treaty would not apply unless the phrase *"liable to tax"* is interpreted in a particular way is not necessarily a reason for construing that phrase in a way that robs it of its natural meaning. The reasoning at (ii) conflates the taxation of the LLC with the taxation of the members of that company. Indeed, this a point picked up on by Angelo Nikolakakis

(in the commentary on the judgment published at page 800 of the International Tax Law Reports) where he says: -

> "These contexts are no more or less analogous as a matter of law in relation to the interpretation and application of a treaty than they are in relation to the interpretation and application of any other fiscal measure. They are analogous if one ignores the legal separation between the entity and its members, and not analogous if one gives effect to the separation. And this, perhaps, is the most difficult aspect of the reasons in *TD Securities* – that the court seems to equate the taxation of the members with the taxation of the entity, thereby effectively ignoring this rather fundamental separation."

71. A similar observation might be made in respect of (iii). It is of course the case that the income of TD LLC is subject to full and comprehensive taxation, but TD LLC is not.

72. Counsel for Revenue emphasised the portion of the law reporter's commentary which reads: -

> "The decision surprised many observers, and the reasons for judgment may be even more surprising to some, as was the Crown's decision to not file an appeal."

73. However, I have paid no heed to this. I have tried to consider the extent to which the judgment in *TD Securities* should persuade me that in the current case SIH LLC is "liable to tax" in the United States. I have come to the view that the judgment is not particularly persuasive notably because (a) it does not deal with the anti-discrimination objects of the DTA, (b) for the reasons I have given, I differ with some of the central reasoning set out in the judgment and (c) the judgment in its own terms does not even purport to set out a general rule that LLC's are *"liable to tax"* within the meaning of arrangements similar to the DTA.

This last point is reflected in the judgment itself, and further noted in the decision of McDonnell J. in the Federal Court of Canada in *CGI Holding LLC v National Revenue* 19 ITLR 692, at para. 35 where the judge finds: -

> "The Court in *TD Securities* noted that the decision did not stand for the proposition that every US LLC is entitled to Treaty benefits (paragraph 104)."

74. It is of some interest that, at para. 36 of the judgment in *CGI Holding*, the position both of the Canadian revenue authorities and of the United States tax authorities – in the aftermath of *TD Securities* – was that fiscally transparent entities were *"not a resident of the United States for the purpose of the Treaty"*. Notwithstanding that, in the light of the decision of Boyle J, relief would be provided under the Treaty by the Canadian tax authorities in certain defined circumstances. As it happens, the subsequent protocol to the Canada-United States Treaty – the Fifth Protocol – had dealt comprehensively with the position of fiscally transparent entities in the particular circumstances of TD Securities, so the issue was not one which was going to continue to arise on an indefinite basis.

75. While I differ with certain of the reasoning in *TD Securities*, and I do not find it is a persuasive authority in the circumstances of the current case, I do not accept the submission of counsel for the Revenue Commissioners that the judgment is an *"outlier"*. It is a comprehensive and reasoned judgment with which I happen to disagree.

76. In my view, SIH LLC is not *"liable to tax"* within the meaning of Art. 4.1. The clear and plain meaning of the words suggest that SIH LLC does not come within the scope of the Article. I respectfully disagree with the Commissioner that any objective of the DTA (whether ancillary or otherwise) designed to avoid administrative complexities has been shown in the circumstances of this case to lead to a view that SIH LLC is liable to tax within the meaning of the Treaty. A stronger argument is the one currently made by counsel for

the taxpayers, namely that the very broad use of language in Article 3 and Article 25 (in particular the definition of nationals, as well as persons, companies, and enterprises in Article 3 and the prohibition in Article 25.1 of discrimination of nationals) suggests that non-discrimination is one of the purposes of the DTA. However, in framing the particular prohibition on discrimination upon which the taxpayers rely (that at Article 25.4) the parties to the DTA refer specifically to the concept of residence of Contracting States. As counsel for the taxpayer said in his oral submissions – albeit by reference to a different issue: -

> "And it must be presumed, Judge, that the authors of tax treaties and those who negotiate and re-negotiate them are well aware of this distinction."

77. The reference is at page 23 of Day 2, and related to the difference between *"subject to tax"* and *"liable to tax"*. By the same token, in construing the DTA the court must take it that the authors of this Treaty are aware of the difference between *"nationals of a Contracting State"* and *"residents of a Contracting State"*. I do not think that this is an excessively legalistic approach. It simply reflects the fact that, in the very Article relating to discrimination which is central to this case, the parties negotiating a tax treaty have chosen to refer specifically to the concept of residence of a Contracting State, a form of words which the negotiators have already specifically defined in very careful and detailed terms at an earlier stage in the same document (at Art. 4). For that reason, I do not believe that the objective of non-discrimination suggests (still less requires) that *"liable to tax"* should be construed in a way other than its ordinary, clear meaning.

78. As I have already noted, the written submissions of the taxpayers suggest that this construction would lead to an outcome which was *"manifestly absurd or unreasonable"*. The four reasons why this is stated to be the case are set out at para. 50 of this judgment. While they are persuasively put, this are not arguments with which I would agree. Going

through them in sequence, the fact that SIH LLC is a body corporate does not mean that *"liable to tax"* should be interpreted in a particular way. Even if the closest comparator to SIH LLC is an Irish resident company, again this goes to the question of discrimination and not to the proper construction of Art. 4.1. With regard to the third argument, namely the suggestion that SIH LLC is liable to tax *"on the basis that it is within the scope of tax in the US, albeit that its profits are taxed at the member level"*, this ignores the fundamental legal difference between the taxation of a company and the taxation of its members. Finally, the fourth argument inverts the proper considerations which the court must take into account in interpreting the Treaty and applying it to the facts in this case. The question is not whether there is an *"international tax policy imperative"* that renders it reasonable to discriminate against a US company. It is whether or not the imperatives, aims and objectives set out in the DTA support a particular interpretation of the residence requirements as set out in Art. 4.1, specifically, whether or not the requirements for residency under Article 4.1 are to be construed in an expansive fashion at odds with the ordinary meaning of its wording

79. However, even if the interpretation of the wording of the relevant Articles in the DTA gave rise to ambiguity, it is clear that the court can have regard to other documents such as the OECD Commentaries. These commentaries are especially relevant as treaties such as the DTA are negotiated by reference to an OECD model. The commentary on Article 4 reads (under the heading *"Preliminary Remarks"* at para. 1): -

> "1. The concept of resident of a Contracting State has various functions and is of importance in three cases:
>
> (a) In determining the Convention's personal scope of application…"

80. The commentary proceeds (at para. 4): -

"4. Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as *"resident"* and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on *'residence'* have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws."

81. At paragraph 8.6, the commentary continues: -

"8.6 Paragraph 1 [of Article 4] refers to persons who are *'liable to tax'* in a Contracting State under its laws by reason of various criteria. In many States, a person is considered liable to comprehensive taxation even if the Contracting State does not in fact impose tax. For example, pension funds, charities and other organisations may be exempted from tax, but they are exempt only if they meet all the requirements for exemption specified in the tax laws. They are, thus, subject to the tax laws of a Contracting State. Furthermore, if they do not meet the standards specified, they are also required to pay tax. Most States will view such entities as residents for purposes of the Convention …

8.7 In some States, however, these entities are not considered liable to tax if they are exempt from tax under domestic tax laws. These States may not regard such entities as residents for purposes of a Convention unless these entities are expressly covered by the Convention. Contracting States taking this view are free to address the issue in their bilateral negotiations."

82. This commentary is significant. In fact, it echoes the comments by the court in *TD Securities* to the effect that the OECD Commentaries appear to take a principled view that fiscally transparent entities are not liable to tax. In the DTA, there is no special treatment provided for fiscally transparent or disregarded entities. Instead, 4.1 refers back to whether or not under the laws of the Contracting State the entity is liable to tax. The commentary at 8.7 suggests, in my view, that being exempt from tax under the tax law of the United States supports the view that SIH LLC is not liable to tax.

83. By analogy, and only by analogy, the commentary at 8.8 provides: -

> "8.8 Where a State disregards a partnership for tax purposes and treats it as fiscally transparent, taxing the partners on their share of the partnership income, the partnership itself is not liable to tax and may not, therefore, be considered to be a resident of that State. In such a case, as the income of the partnership *'flows through'* to the partners under the domestic law of that State, the partners are the persons who are liable to tax on that income and are thus the appropriate persons to claim the benefits of the Conventions concluded by the States of which they are residents. This latter result would be achieved even if, under the domestic law of the State of source, the income is attributed to a partnership which is treated as a separate taxable entity. For States which could not agree on this interpretation of the Article, it would be possible to provide for this result in a special provision which would avoid the resulting potential double taxation where the income of the partnership is differently allocated by the two States."

84. The form of partnership described in the earlier part of para. 8.8 is fiscally similar to the circumstances of SIH LLC. SIH LLC can be described as fiscally transparent, the tax in

respect of its earnings are paid by its members, and therefore (viewed by analogy to the partnership described in 8.8) the company itself is not liable to tax.

85. In as much as there is ambiguity, therefore, about entities such as SIH LLC being liable to tax, the OECD Commentary suggests that it is not so liable.

86. Counsel for Revenue have also invited the court to consider the Protocol, the relevant provisions of which I have set out earlier in this judgment. It will be remembered that the Protocol stipulates that income, profit or gain derived by fiscally transparent persons is to be considered as income, profit or gain of the resident of a Contracting State who is entitled to that income. The Commentary on the Protocol puts the matter somewhat more clearly.

It states: -

> "Paragraph 1 of the Protocol addresses special problems presented by fiscally transparent entities such as partnerships and certain estates and trusts that are not subject to tax at the entity level. This subparagraph applies to any resident of a Contracting State who is entitled to income derived through an entity that is treated as fiscally transparent under the laws of either Contracting State. Entities falling under this description in the United States would include partnerships, common investment trusts under Section 584 and grantor trusts. This paragraph also applies to US limited liability corporations ('LLC's') that are treated as partnerships for US Tax purposes."

87. The terms of the Protocol are by no means decisive in deciding this appeal. The furthest it goes, in my opinion, is to suggest that the negotiators of the DTA operated on the basis that (for the purpose of the arrangements between Ireland and the United States) fiscally transparent entities were to be disregarded and the income of those entities treated as the income of the controlling persons who received it. The fact that the Protocol was entered into in or around the same time as the DTA itself suggests that this was a consistent approach on the part of Ireland and the United States. However, this view of the Protocol does no more than provide an element of confirmation of the view that I have already reached about the phrase *"liable to tax"* considering all of the objectives and aims of the DTA with a fair and open mind. It has not led to that conclusion.

Conclusions

88. I have decided that SIH LLC is not a resident of the United States for the purpose of Article 4. I have come to this view because SIH LLC was not, under the laws of the United States, liable to tax in the United States by reason of its residence or place of incorporation in Delaware. I have come to this view taking into account fully the aims and objectives of the DTA. While I do not think that the provisions of the Treaty, interpreted correctly, give rise to an anomalous result (and are still less manifestly absurd or unreasonable) I have gone on to consider the materials which one would take into account in the event that the original interpretive exercise produced such an anomaly. These are the OECD Commentaries. The Commentaries support the view that an entity such as SIH LLC is not *"liable to tax"*. I have also considered the Protocol. While the relevance of this is disputed by counsel for the taxpayers, it is appropriate at least to look at the Protocol in order to assess whether there is a consistent approach by the parties to the DTA towards fiscally transparent entities.

89. At para 15 of this judgment, I have described the alternative submissions of the taxpayers as to the engagement of the anti discrimination provisions even if SIH LLC is not liable to tax. The first of these is that the wording of Article 25.1 is extremely broad, notably by reference to "nationals of a Contracting State…" This argument was not really pressed before me, and as already observed is not a question raised by the Commissioner in the case stated. The second line of argument is that Article 25.4 applies in this case as the five individual ultimate owners of the taxpayers are certainly liable to tax in the United States, Thus contention was met by the following submission by counsel for Revenue (at pages 91 and 92 of Day 1);

"I was also going to go back to the Respondents' suggestion in their submissions that they didn't necessarily need the LLC to be a resident of the US in order to ground their case, that they could rely on the membership, or the residence of the ultimate members. And what I would say about that is that while that gets them past the first hurdle in Article 25 (4), it doesn't really get them any further…it doesn't enable them to satisfy the similar enterprises test.

"I think if you think about it, if you think about a parent company which is resident in a different country from the US, it'll become apparent why this is the case. And I was going to suggest that if you had, for instance, two Irish subsidiaries with a parent company resident in Brazil, which is a country with which we don't happen to have a Double Taxation Treaty, and you had five shareholders in that particular Brazilian company who were resident of the US, clearly you would not then have a claim for discrimination under the US Treaty, or not in the context of group relief at any rate, because you would not have a similar enterprise, you would not have a similar parent company to an Irish company which was resident in the US."

90. The key phrase in this extract is "not in the context of group relief at any rate…" The submission, made in the opening of the appeal, was disputed in the taxpayers' response but not by reference to the specific example put forward by Revenue's counsel. Thus does not mean that Revenue's position on the point is necessarily correct. However, on considering the submission I have decided that (for the reasons advanced by counsel for Revenue) the taxpayers must establish that SIH LLC is resident in the United States for the purpose of showing that the refusal of group relief is discriminatory within the meaning of Article 25.4. Were the taxpayers not to do so, then they could not establish a "similar enterprise" to the structure required to obtain group tax relief pursuant to section 411.

91. Finally, I should note an associated argument made on behalf of the taxpayers, namely that the effect on the individual ultimate owners constitutes discriminatory treatment contrary to the provisions of Article 25.4. While this was very much a subsidiary submission, it should be decided. I accept the submissions on behalf of Revenue, to the effect that the discriminatory measure is to be judged by reference to the direct effect on the taxpayer and not on persons such as the ultimate shareholders. I do so on the authority of Vogel on Double Taxation Conventions (4th Edition, 2015);

"Article 24 (5) OECD and UN MC protects the enterprise against discrimination by the residence State…The shareholders resident in the other Contracting State, however, are not protected by [the Article]. The ownership non-discrimination provision does not prevent a Contracting State from taxing the income accruing to the non-resident shareholders in a different way than income accruing to domestic shareholders…The ownership non-discrimination provision only prevents 'other or more burdensome taxation' at the level of the enterprise, a mere indirect discrimination is not prohibited by Article 24 (5)…"

92. I therefore decide the appeal by way of case stated by answering question (d) in the affirmative. The Appeal Commissioner erred in law in holding that SIH LLC was a resident of the United States within the meaning of Article 4 of the DTA. As the claim by the taxpayers (to the effect that the refusal of group relief is discriminatory) requires SIH LLC to be resident in the United States, it follows that the answer to question (h) is also to be answered in the affirmative; the Appeal Commissioner erred in law in holding that the taxpayers were entitled to group relief under section 411 of the TCA. Accordingly, the Determination of the Appeal Commissioner in favour of the taxpayers will be set aside.

93. As this judgment is being delivered electronically, I will give my preliminary view on the question of costs. Revenue has succeeded, and appears to be entitled to its costs of the appeal. If either party wishes to argue for a different or more extensive costs order, they should notify the High Court registrar before 5 pm on the 18th of October 2024. On receipt of such notification, directions will be given as to the delivery of submissions and (if appropriate) the holding of a brief oral hearing.