THE HIGH COURT

[2021] IEHC 487

[2020 No. 98 R]

BETWEEN

LOUIS FITZGERALD

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 9th day of July, 2021

SUMMARY

1. This is a challenge to a decision of a Tax Appeal Commissioner regarding the domicile levy of €200,000 per annum. The challenge is brought by the appellant ("Mr. Fitzgerald"), who is the owner of the Louis Fitzgerald Hotel in Newlands Cross, Dublin.

2. The domicile levy is a levy which was introduced in 2010, it seems with a view to ensuring that wealthy individuals who were domiciled in Ireland paid a levy of €200,000, if they were not already paying income tax of at least €200,000. The concern behind its introduction appears to have been that certain wealthy individuals were able to benefit from the use of tax shelters and other tax avoidance schemes whereby they were paying little or no tax and hence the domicile levy was introduced to require them to pay at least €200,000 to the Revenue. The provisions setting out the domicile levy are to be found in Part 18C (s. 531AA – s. 531AK) of the Taxes Consolidation Act, 1997 (as amended).

3. In brief, the domicile levy applies to an individual who is domiciled in Ireland, whose worldwide income exceeds €1 million, whose properties are greater in value than €5 million, but who pays income tax in the relevant year of less than €200,000. Such a person is obliged to pay the domicile levy of €200,000.

4. In this case Mr. Fitzgerald had several sources of income for the relevant years in issue, 2010 and 2011. As the owner of a hotel, he also had capital expenditure/capital allowances of €25 million in 2010 and €14 million in 2011. The sources of his income included shareholder income (Schedule E), rental income (Case V), dividend income (Schedule F) and interest income (Case III/IV).

5. Indeed, the extent of this income was such that in 2011, he paid over €200,000 in respect of the Universal Social Charge ('USC').

6. However, as regards his non-USC tax, he set off his capital allowances/trading losses in his hotel business against these other sources of income and this resulted in him receiving repayments of tax in the sum of €361,346 in 2010 and €919,557 in 2011. Thus, if his payment of USC is ignored, he paid no income tax in 2010 and 2011. Revenue claim that if (as they claim is the case) no account is taken of these deductions of capital allowances, his worldwide income is in excess of €1 million, such that the domicile levy applies.

7. There are two reasons why Mr. Fitzgerald says that he is not liable to pay the domicile levy in 2010 and 2011.

8. The first reason is Mr. Fitzgerald's claim that he did not have a 'world-wide income' in excess of €1 million. In essence, the difference between the parties is that Mr. Fitzgerald says that the legislation is clear and that in calculating his 'world-wide income', account must be taken of the capital allowances/losses from his hotel business, which reduced his income from other sources. On the other hand, the Revenue claim that the calculation of his world-wide income is done, without having regard to Mr. Fitzgerald's use of tax shelters such as these capital allowances/losses. The first question therefore is whether Mr. Fitzgerald had a world-wide income of in excess of €1 million in the relevant years.

9. The second reason relates to 2011, as in that year Mr. Fitzgerald paid USC of over €200,000, which he claims means that he is not subject to the domicile levy, as he claims that for the purposes of determining whether an individual has paid €200,000 or more in 'income tax', his payment of USC amounts to a payment of 'income tax'. The Revenue argue that USC is very different from income tax and accordingly it claims that Mr. Fitzgerald is subject to the domicile levy, as he did not pay 'income tax' of €200,000 or more in 2011. The second question therefore is whether Mr. Fitzgerald paid income tax of €200,000 or more by paying USC in 2011.

10. Both questions are answered by interpreting the relevant legislation and when this Court does so, it concludes that Mr. Fitzgerald is subject to the domicile levy as his world-wide income exceeded €1 million (since account is not to be taken of the capital allowances/losses) and his payment of USC did not amount to a payment of 'income tax'.

BACKGROUND

11. While these are the two key issues in this case, the case comes before the High Court by way of a case stated from a determination of a Tax Appeal Commissioner and the Commissioner has asked this Court to consider the following six questions, all of which can be decided in the affirmative or negative, depending on the answer to the foregoing two questions.

    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.

ANALYSIS

12. The first question to be addressed is whether Mr. Fitzgerald is subject to the domicile levy, or in the words of the legislation, whether he is a relevant individual for the purposes of the domicile levy, i.e. whether he had a world-wide income of more than €1 million. Section 531AA(1) of the Taxes Consolidation Act, 1997 (as amended) (the "1997 Act") defines relevant individual as:

> "[A]n individual—
>
> (a) who is domiciled in, and is a citizen of, the State in the tax year,
> (b) whose world-wide income for the tax year is more than €1,000,000,
> (c) whose liability to income tax in the State for the tax year is less than €200,000, and
> (d) the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000."

Did Mr. Fitzgerald have a worldwide income of in excess of €1 million?

13. Worldwide income is defined in s. 531AA(1) of the 1997 Act as follows:

> "'world-wide income', in relation to an individual, means the individual's income, without regard to any amount deductible in computing total income, from all sources as estimated in accordance with the Tax Acts and as if any provision of those Acts providing 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 any deduction—

(i) in respect of double rent allowance under section 324(2), 333(2), 345(3) or 354(3),

(ii) under section 372AP, in computing the amount of a surplus or deficiency in respect of rent from any premises,

(iii) under section 372AU, in computing the amount of a surplus or deficiency in respect of rent from any premises,

(iv) under section 847A, in respect of a relevant donation (within the meaning of that section),

(v) under section 848A, in respect of a relevant donation (within the meaning of that section),

and

(b) having regard to a deduction for—

(i) any payment to which section 1025 applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) relating to the marriage for the benefit of the other party to the marriage, unless section 1026 applies in respect of such payment, or

(ii) a payment of a similar nature to a payment referred to in subparagraph (i) pursuant to a maintenance arrangement (within the meaning of section 1025) relating to the marriage for the benefit of the other party to the marriage which attracts substantially the same tax treatment as such a payment,

(iii) any payment to which section 1031J applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) relating to the civil partnership for the benefit of the other party to the civil partnership, unless section 1031K applies in respect of such payment,

(iv) a payment of a similar nature to a payment referred to in subparagraph (iii), pursuant to an order of a court under the law of another territory that, had it been made by a court in the State, would be a maintenance arrangement (within the meaning of section 1031J), relating to the civil partnership for the benefit of the other party to the civil partnership which attracts substantially the same tax treatment as such a payment, or

(v) any payment to which section 1031Q applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) where a relationship between cohabitants ends,

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."

14. In very broad terms, and purely by means of hypothetical example, this definition means that in determining the world-wide income of a person, no account is taken of various deductions which a person might normally make when calculating her tax bill. So for

example if a person had an income of €1 million, but she made various contributions to her pension which had the effect of reducing her taxable income below €1 million, this deduction in relation to her pension was to be disregarded in considering what their world-wide income was for the purposes of the domicile levy and so she was to be regarded as having an income of €1 million.

15. In this case, we are not dealing with pension deductions, but rather with the fact that Mr. Fitzgerald's capital allowances/losses led to Mr. Fitzgerald not just having an income of below €1 million, but rather entitled him to a repayment of tax. He claims that Revenue is not entitled to disregard this deduction of his capital allowances/trading losses in his hotel business, in calculating his worldwide income as this is not a '*deduction from total income'* like say a pension payment, but rather this capital allowance/loss is a deduction which is taken in estimating income from all sources and thus not at the end of the assessment process, as a '*deduction from total income'*.

16. Thus, Mr Fitzgerald argues that the expression

> *"without regard to any amount deductible from or deductible in computing total income"*

in the definition of 'world-wide income' does not refer to these capital allowances. If this is the case, then regard has to be had to these capital allowances, in which case his income is reduced below the €1 million level and he is not subject to the domicile levy.

17. In interpreting the foregoing definition of 'world-wide income', both parties referenced s. 381 of the 1997 Act, which deals with the use of the hotel trading losses, since that section sets out the right to repayment of tax by reference to those losses.

18. Section 381(4) states that:

> "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."

19. Section 381(5) states:

> "Where repayment has been made to a person for any year under this section—
>
> (a) no portion of the loss which in the computation 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."

20. In particular it is to be noted that s. 381(5) provides that the loss which is being used to reduce the income of an individual:

> "shall for the purposes of the Income Tax Acts be regarded as a deduction to be made […] in computing the person's total income for the year."

21. On a literal reading of this section it is argued by Revenue that the losses/capital allowances used by Mr. Fitzgerald to reduce his income in 2010 and 2011 are to be regarded as deductions made in computing the person's total income. At the same time, Revenue point out that s. 531AA provides that in calculating an individual's world-wide income no regard is to be had to any amount which is '*deductible from or deductible in computing total income'*.

Interpretation of the legislation

22. There was no dispute between the parties regarding the correct approach to interpreting the legislation. Both relied on *Bookfinders Limited v. Revenue Commissioners* [2020] IESC 60 to the effect that if the words in legislation are plain and their meaning is self-evident, then save for compelling reasons to be found within the legislation as a whole, the ordinary, basic and natural meaning of the words should prevail. However, the *Bookfinders* case also makes clear that even in this approach, context can be critical. That case also makes clear that where recourse to the literal approach is not sufficient, then regard must be had to the purpose of the legislation to aid in its interpretation.

23. In this case, both parties argue that the plain meaning of the words supports their interpretation.

24. Mr. Fitzgerald argues that capital allowances are in fact part of the process in estimating the profits and gains brought into charge to tax under Case I of Schedule D. Thus, he says that these deductions are deductions in estimating income from all sources and not *'a deduction in computing total income'*.

25. Mr. Fitzgerald therefore argues that, when you look at the calculation of income in the various steps under the Schedules for the purposes of s. 381, and then go on and calculate 'total income', the capital allowances/losses is not one of the 'deductions from total income' when one does this exercise, since these capital allowances/losses have already been accounted for under Schedule D, Case I and/or spread out among the other scheduled income to come up with a tax repayment pursuant to s. 381.

26. He makes the point that specific deductions are referenced in the definition of worldwide income and it is these deductions to which the phrase '*any amount deductible in computing total income'* refers e.g. a gift for certain public purposes is deductible in computing total income. Accordingly, such a gift is ignored when calculating world-wide income.

27. On this basis, he argues that these capital allowances are not encompassed by the expression '*without regard to any amount deductible in computing total income'* in the

definition of 'world-wide income' and so his capital allowances/trading losses cannot be ignored when calculating world-wide income.

28. However, it is also the case that if a loss arises for a year of assessment under Schedule D, Case I income, then income is nil under this Schedule. This is the end of the matter and there is no provision to use those losses at this stage of the assessment.

29. Separately however, there is a separate statutory provisions, s. 381 of the 1997 Act, which allows trading losses from Schedule D, Case I to shelter other income in the same year from other Schedules and Cases. However, this is on a repayment basis (in the sense that s. 381 provides for a right to repayment of income tax by making a claim not later than 2 years after the end of the period of assessment).

30. Under the terms of s. 381, there is a recalculation which takes places which is based on the amount of tax liability which 'would have been borne' for the relevant year '*if the income of that person had been reduced by the loss'*. On this basis, the Revenue argue that the capital allowances under s. 381 do not impact upon the level of income that actually arises from each Schedule or Case, as it involves a recalculation of the income tax liability. To put the matter another way, the profits and gains in the Schedules must be established before a taxpayer can consider sheltering income by way of loss relief.

31. Mr. Fitzpatrick 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 *not* 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 *not* 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.

36. However, if there were a doubt, it seems clear than the purpose of the domicile levy is to ensure that wealthy individuals do not use tax shelters and tax avoidance schemes to pay little or no income tax relative to their income – this is because the definition of world-wide income makes it clear that it is, to use a general term, the 'gross income', and not a person's income after various deductions for the purposes of calculating her tax bill, which is to be used in calculating her 'world-wide income'. It would appear to defeat this purpose, if a person with a gross income of say €5 million could reduce her tax bill below €200,000 by the use of tax shelters and could avoid the domicile levy by claiming that these same tax shelters meant that her world-wide income was below €1 million.

37. Interpreting s. 531AA in a manner which disregards such tax shelters (in this case capital allowances) in determining the individual's world-wide income would appear to this Court to be consistent with that purpose.

Is paying USC the same as paying income tax?

38. The next question to be answered is whether Mr. Fitzgerald's payment of over €200,000 in USC in 2011 meant that he was a person whose liability to income tax was €200,000 or more and therefore he was not subject to the domicile levy (as he was not a '*relevant individual'* under 531AA(1).

39. Universal social charge was a new tax introduced in s. 531AM of the 1997 Act. This section provides, in part, as follows:

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

40. It is relevant to note that the phrase 'income tax' is not defined in the Tax Acts or the Income Tax Acts. Accordingly, Mr. Fitzgerald claims that, since USC is a tax 'in respect of income' that his payment of USC means that he is not subject to the domicile levy as he has in fact paid 'income tax' of €200,000 or more.

41. However, an analysis of various sections of the 1997 Act illustrate to this Court that USC is treated under our tax code as very different to income tax. Therefore one cannot, in this Court's opinion, 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 'relevant individual' in s. 531AA of the 1997 Act.

42. In particular section 531AS(1) states:

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

43. Thus, this section provides that USC is to be payable "as if it were" income tax. While this is not determinative, or indeed the most important factor, as to whether USC and income tax might be one and the same, it does however indicate that there is a *prima facie* distinction between income tax on the one hand and USC on the other hand.

44. Of more significance is the fact that it was common case (since both parties relied on English authorities) that the approach to income tax in this jurisdiction is similar to that in England, namely that it is done on the basis of various schedules or heads of charge in the tax legislation. As noted by Wilberforce LJ in *Lord Chetwode v. Inland Revenue Commissioners* [1977] 1 All ER 638 at 641:

> "It is notorious that there is not and never has been any definition of income in the UK tax code. What, as income is chargeable with income tax is left to be determined according to particular heads of charge under the Schedules."

45. Crucially, USC is not charged in accordance with the Schedules and accordingly this supports a finding that USC is not 'income tax' for the purposes of the domicile levy.

46. In addition, Section 531AS(3) states:

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

47. This section makes it clear that USC is permitted to be stated in one sum along with income tax, thereby making clear once again the distinction between the two taxes.

48. In particular s. 531AX(1) provides that:

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

49. In this section once again, it is made clear that USC is treated as being very different to income tax as it is regarded as being '*in addition to'* income tax.

50. Section 531AX(2) states:

> "Excess tax credits or reliefs which are available to an individual may not be set against any charge to universal social charge which is due and payable for a tax year."

51. Once again a distinction between income tax and USC is made clear, since the various credits and reliefs which would be available against income tax are stated not to be available against USC – as a result of this section it seems that USC is a tax, which it is difficult for a person to avoid paying by using tax avoidance, tax shelters, pension contributions etc.

52. This Court would also observe that at the relevant time, the rates of income tax were 20% and 41%, while the rates regarding USC were very different. Thus, while USC was paid in respect of income, people on the same income did not necessarily pay the same percentage rate, e.g. a person of 69 years of age with an income of €100,000 paid at the rate of 7% (the rate applicable to the majority of that income), while a person of 71 years of age with the same income paid at the rate of 4%.

53. The cumulative effect of all these reasons is that this Court concludes that the reference in the definition of '*relevant individual'* to a person having paid less than €200,000 in income tax is not a reference to a person having paid less than €200,000 in USC.

54. The matter is very clear in this Court's view and so it is not necessary to look at the purpose of the legislation. However, if one did, the apparent purpose of the domicile levy is, in this Court's view, consistent with interpreting the terms 'income tax' in the definition of 'relevant individual' as not including USC.

55. This is because the apparent purpose of the domicile levy (to be derived from the wording of the legislation) is to ensure that high earners, who use tax shelters and tax avoidance schemes to reduce their income tax bill below €200,000, at least pay a domicile levy to the Revenue in those situations.

56. In this context, it is important to note that the USC is not a tax which is generally subject to tax avoidance or tax shelters and so is not a tax that can be easily avoided or perhaps avoided at all, and in any case it is paid at a relatively modest rate (the maximum rate at the time was at 7% (there was a 10% rate for '*non-employment'* income over €100,000) compared to the marginal income tax rate of 41%.

57. In these circumstances, it would appear to go against the apparent purpose of the domicile levy (to circumvent the use of tax shelters) to enable an individual avoid the domicile levy by claiming that, while he had contributed no 'income tax' because of his use of tax shelters, he had contributed over €200,000 in USC (which in any case he could not shelter from tax) and this should be treated as 'income tax'.

CONCLUSION

58. For all these reasons, this Court concludes that Mr. Fitzgerald did have a 'world-wide income' of in excess of €1 million and his payment of over €200,000 in USC did not exempt him from paying the domicile levy. Accordingly, this Court will answer each of the questions in the case stated in the negative.

59. Insofar as the form of order is concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention one week from delivery of this judgment, at 10.45am.