O'Brien v Quigley (Inspector of Taxes)

[2013] IEHC 398

HIGH COURT OF IRELAND
LAFFOY J
JUDGMENT DATE: 6 SEPTEMBER 2013

Double taxation – Ireland – Resident – Tie-breaker for individuals – Meaning of permanent home available – Whether taxpayer had permanent home available in Ireland – Residential property owned by company controlled by taxpayer – Extensive refurbishment during which house uninhabitable – One-year lease on house during which taxpayer stayed in house on visits to Ireland – Ireland-Portugal double taxation agreement, art 4(2).

Double taxation conventions – Ireland – Interpretation – Interpretation of international treaties – Whether interpretation to be affected by domestic Constitution – Vienna Convention on the Law of Treaties, arts 31, 32.

The taxpayer was an Irish national who moved to live in Portugal. At the same time a company he controlled bought a residential property in Ireland which was in good condition apart from the fact that the AGA cooker and other kitchen fixtures and fittings had been removed. The taxpayer, through the company, commissioned extensive refurbishments to the house from June 2000 for a period of 18 months, during part of which time it was described as a 'hard hat' site. In early 2002, when the works had been completed the taxpayer's wife took a one-year lease of the house and the taxpayer and his wife and children occupied the house during visits to Ireland. They vacated the house at the expiry of the lease. The taxpayer then conducted a transaction which exposed him to capital gains tax in the tax year 2000/2001 in Ireland if he were a resident of Ireland under the terms of the Ireland-Portugal double taxation agreement. The Irish revenue authorities considered that the taxpayer was resident in Ireland under the terms of art 4(2)(b) of the Ireland-Portugal double taxation agreement by virtue of having a 'permanent home available to him'. The revenue argued that it had been the taxpayer's choice to conduct extensive refurbishments and that the property had been available to him throughout the period.

Held (dismissing the appeal by the revenue):

(1) A double taxation agreement, as an international treaty, had to be interpreted with regard to international law and not by reference to the Constitution. A treaty could only have one meaning and that was its meaning in international law. Regard was to be had to the general principles of international law and the rules of interpretation set out in arts 31 and 32 of the Vienna Convention on the Law of Treaties even in respect of questions arising before Ireland acceded to the Vienna Convention as those rules reflected customary international law (see [6], [7], [10], below). *Kinsella v Revenue Comrs* (2007) 10 ITLR 63 applied.

(2) Interpretation of 'permanent home available' required not only that an abode be available to the taxpayer but that it be a home and be permanent. The concept of 'home' required a personal link with the accommodation, that it had the individual's stamp on in, or that the taxpayer's 'stuff' was there or that the taxpayer had lived in it at some time. 'Permanent' meant available for permanent use, not for visits or short stays and was a dwelling commensurate with the taxpayer's standard of living. A residential property could not be a permanent home without being occupied. There was no personal link between the taxpayer and the property; there was no evidence of intention that the property be for the permanent use of the taxpayer and as a matter of fact it had not been available at all times continuously as the property had undergone works which rendered the house unavailable for residential use for 18 months (see [44], [46]–[48], [50], below). *Geothermal Energy New Zealand Ltd v Comr of Inland Revenue* [1979] 2 NZLR 324 applied.

EDITOR'S NOTE

The sole issue in this case was whether the taxpayer had a permanent home available in Ireland while substantial building works were being carried out. It is a very nice example of the approach of the Irish court to the issue of interpretation of a tax treaty.

COMMENTARY

This case is an excellent example of how treaties should be interpreted, and it is good to see that the Irish High Court is in the forefront of the modern approach to tax treaty interpretation.

The interpretative material that Laffoy J (who is now a Judge of the Irish Supreme Court[1]) relied on included the OECD Commentaries, *Vogel on Double Taxation Conventions*, a 'multiplicity of authorities from other jurisdictions' (see [30]), including the New Zealand cases mentioned in [31] and [35], and the Vienna Convention on the Law of Treaties.

1 She was appointed in October 2013 shortly after this decision.

The issue was whether the taxpayer, who also had a permanent home in Portugal, had a permanent home available to him in Ireland during the tax year to 5 April 2001, which the Appeal Commissioner had decided that he did not. A company controlled by the taxpayer bought the property, 6 Raglan Road, Dublin, with completion in May 2000. The vendor took away the built-in AGA cooker and the kitchen units. Extensive building works[2] were carried out starting in June 2000 and continuing throughout 2001, followed by the company granting a lease to the taxpayer's wife from March 2002.

As set out in [25] the Appeal Commissioner's findings of fact, which cannot be appealed as any appeal is on a point of law only, were that (1) the property was not a 'home', which implied premises 'upon which people have put their own stamp and where they have lived for some time and where they had their stuff' (explained by the taxpayer's wife in [24] as meaning her and her family members' personal belongings, including items no longer in use and in storage); (2) because of the absence of kitchen units and a cooker the property was not 'available' from its acquisition on 10 May 2000; and (3) because of the building works it was not 'available' from June 2000.

Laffoy J decided at [50] that the Appeal Commissioner was correct in concluding that the property was not a home, that it was not permanent, and was not available at all times, the works preventing it from being available from June 2000. She was, in my respectful view, right to accept these as findings of fact by the Appeal Commissioner, at least on permanence and availability (I shall come back to *home*). Nobody would doubt that if the property was, in the architect's words (at [20]) 'a hard hat site' (which was not until January 2001) it was not available, but the matter is one of degree. At the other end of the spectrum, nobody would doubt that merely switching off the electricity at the mains would not make it unavailable. But the first month between completion on 10 May 2000 and the feasibility study work in June is more borderline. It is true that there was no cooker or kitchen units, but cooking facilities may be quite basic in the Commentary's example of a home including a rented furnished room (see [28]), and in any case the taxpayer could surely have gone out and bought a cooker (even a microwave) and managed without kitchen units if he had wanted to occupy the property. The Case Stated[3]

2 The extensive nature of the work can be judged from the Appeal Commissioner having evidence from: 'three architects; an electrical engineer; a civil construction engineer; a quantity surveyor; and a representative of the firm engaged to carry out refurbishment and joinery work and, in particular, work to the sixty windows in the house, thirty-eight of which were completely replaced.' See [20].

3 This is the case for the opinion of the court written by the Appeal Commissioner (the method of appealing that also existed in the UK until 1994).

(which unfortunately does not seem to have been published but which I have been able to obtain) paints a fuller picture in finding that 'The builders, architects, quantity surveyors and engineers entered the property during May 2000 for feasibility work which necessitated severing the water supply, plumbing, heating, together with removal of floors and the electrical wiring.' This seems a better reason for non-availability of the property than the cooker and kitchen cabinets. Another puzzling feature is that the conclusion in the Case Stated was that opening-up works started in June 2000, which the Judge naturally accepts, although earlier in the Case Stated the architect is recorded as saying that these took place in September 2000 and that the property could not be lived in from that time, suggesting that it could before then. In any case the non-availability of the property in May and June 2000 was a finding of fact, and it is not in the area that no reasonable judge could have found (see [12]).

While it is good that New Zealand (and other foreign[4]) authorities were cited, this needs to be done with circumspection. The *FFF v Comr of Inland Revenue* decision relied upon at [35] failed to refer to the OECD Commentaries and is obviously heavily influenced by New Zealand domestic law interpretation of expressions similar to the Model, 'permanent place of abode' (the case cited at [31] was on earlier law). I would entirely agree with Professor Craig Elliffe's criticism of the case: 'The unfortunate lack of any reference to the OECD Model Commentary means that the decision in [the *FFF* case] must be viewed with some misgivings as to whether it represents an accurate statement of the legal tests in the relevant tie-breaker paragraphs of art 4(2).'[5] This would have been a far better way of distinguishing the case than distinguishing it factually, as the tax authority did in [38], and as the Judge not unreasonably accepted at [40].

This raises the question of whether there was a similar omission in this case. In relation to *home* it is striking that nowhere in the Case Stated is the OECD Commentary's statement quoted that:

> 'As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room).'

4 Three were on treaty interpretation generally, one on suitability, and one on temporary inability to occupy. In addition, numerous authorities on UK and Irish domestic law were cited.

5 Craig Elliffe, *International and Cross-Border Taxation in New Zealand*, Thomson Reuters, Wellington, 2015 at 59. Professor Elliffe has also written a case note in *New Zealand Tax Planning Report,* no 2, May 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2104027.

Instead the Case Stated notes the taxpayer's contentions which quote three dictionaries, the meaning of the French *foyer*, the US Technical Explanation to its Model, a statement by the French Ministry in relation to their treaty with Switzerland, the Belgian official commentary, the New Zealand domestic law case cited at [31], two English non-tax cases, a case in the European Court of Human Rights, the Commentary to the OECD *estate and inheritance tax Model* (on the intention to return or abandon), several references in Irish legislation (three tax and one non-tax), and an Irish Supreme Court non-tax case. The closest it gets to quoting the above is that the taxpayer's contentions quote it, omitting the words in brackets, but in relation to permanent (after the Case had finished dealing with the contentions on *home*), with which the sentence following deals, both sentences being run together when quoted owing to the omission of the words in brackets. The Revenue are recorded as contending that 'permanent home' should be interpreted in accordance with the Vienna Convention and the OECD Commentaries, which makes the omission of quoting the Commentary in relation to home even more mysterious.

It was also good to see that Vogel (3rd edn, 1997—the decision is before the 4th edition in 2015) was quoted at [45] that, relying on the French (*foyer d'habitation permanent*[6]) and German (*ständige Wohnstätte*), home implies 'the seat of domestic life and interests,' and that 'the "home" concept is somewhat similar to the "centre of vital interests".' In other words, he seems to be saying, perhaps influenced by the German wording, that there are places to live that are not homes at all, and places to live that are of vital interest (however one determines that), which if existing in both states[7] results in treaty residence being resolved by reference to the *centre* of vital interests. While there is some historical support for this approach,[8] the quotation above from the Commentary seems to concentrate much more on *house* rather than *home*.[9] If his approach is influenced by the German expression it has little relevance to a treaty in

6 *Foyer* is literally fireside. The Case Stated quotes the French Ministry of Foreign Affairs in relation to permanent home in the treaty with Switzerland that 'By the use of the word "foyer" emotional and family links are called into play.'

7 If there is no permanent home in either state one jumps to habitual abode, see art 4(2)(b) of the Model.

8 The original OEEC Working Party proposal determined dual residence in 'the country in which he has his permanent home, that is to say, the centre of his vital interests, or, in other words, the place with which his personal ties are closest.' (27 May 1957, FC/WP2(57)1, available on www.taxtreatieshistory.org). But the two concepts became separated by the time of the Working Party's Fourth Report (5 November 1957). The quoted wording dates from the 1977 Model.

9 I will refrain from mentioning the book (and later film) 'A House is not a Home' by Polly Adler, as I did in my commentary to *Yates v HMRC* 15 ITLR 205 at 208.

English and Portuguese, and the same can be said of the French and Belgian interpretations relied on by the taxpayer which are presumably based on the French; this is so in spite of the Model having an official French version.

In English, the meaning of *home* can range from 'hearth and home'[10] to a pure place to live with no connotations of family. The former is the meaning in the New Zealand case on their former domestic law of 'the centre of gravity of the domestic life of the taxpayer' (see [32]) and in the Appeal Commissioner's finding that a home was somewhere 'upon which people have put their own stamp and where they have lived for some time and where they had their "stuff" ' (see [24]). Interestingly it is the latter meaning that is in fact adopted in New Zealand where the Revenue interpret the treaty wording quite differently from the former domestic law in the case: 'It is evident from the OECD commentary that the concept of "home" is used in its physical sense [the words from the Commentary are then quoted].'[11] If English has a range of meanings, what about the equally authoritative Portuguese version of the treaty which does not get a mention? I am told that *habitação permanente* covers a similar spectrum to the English. These factors demonstrate the importance of the OECD Commentary's inclusion of a rented furnished room, which certainly does not suggest a place on which one can put much of one's own stamp, or which could contain much of one's 'stuff.' The Appeal Commissioner decided that the property was not a home because there was no element of personal link, which the Judge (who does quote the Commentary in full at [28]) upheld at [50] but without observing that the Commentary had not been quoted by the Appeal Commissioner at all in relation to *home*. It seems to me arguable that in these circumstances the Appeal Commissioner's finding of fact should not be respected, and that perhaps the Judge should have remitted the case for the Commentary to be taken into account.[12]

Finally, Laffoy J described at [51] the following contentions of the Revenue as fundamentally flawed (rightly, in my view): (1) that the property could be used as a home from 10 May 2000 onwards, (2) that the refurbishment work initiated by the taxpayer did not mean that it ceased to be a permanent home available to him, (3) that the taxpayer's decision to commence the refurbishment works which made the house

10 Obviously conveying the same thought as the French *foyer* (see n.6).

11 See http://www.ird.govt.nz/resources/9/2/9227e1f5-aaac-4bab-8bf1–5ef527fd4441/IS+1603.pdf at [245].

12 Although the case has already been long drawn out enough with the Appeal Commissioner's hearing and oral decision in 2003, the Case Stated in December 2011, and the High Court decision in 2013.

uninhabitable during part of the year 2000–01 did not alter the status as a permanent home available to him, (4) that during 2000–01, it remained a permanent home by remaining continuously under his control, and (5) that the property was at his disposition and was therefore available to him from completion of the acquisition. These contentions that (in effect) in determining availability one should ignore the building work because it was initiated by the taxpayer, and because the property was under his control and disposition, cannot be relevant to the simple question of whether the property was 'available' but merely went to the issue being one of fact.

In short, while having reservations about how some of the interpretative material is treated I commend this as an excellent example of the correct approach to tax treaty interpretation, although I should have liked to have seen at least one of the parties refer to the Portuguese version of the treaty.

John Avery Jones

Cases referred to

East Donegal Co-operative Livestock Mart Ltd v A-G [1970] IR 317, Ire SC.

FFF v Comr of Inland Revenue [2011] NZTRA 8.

Geothermal Energy New Zealand Ltd v Comr of Inland Revenue [1979] 2 NZLR 324, Auck SC.

Iveagh (Earl of) v Revenue Comrs [1930] IR 386.

Kinsella v Revenue Comrs [2007] IEHC 250, (2007) 10 ITLR 63, [2011] 2 IR 417.

McGimpsey v Ireland [1988] IR 567.

Ó Culachain v McMullan Brothers Ltd [1995] 2 IR 217.

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6 September 2013. The following judgment was delivered.

LAFFOY J.

THE PROCEEDINGS AND PROCEDURAL BACKGROUND

[1] The background to this Case Stated was that during the tax year 1999/2000 the appellant disposed of 5,734,000 shares in Esat Telecom in