APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2025] IECA 123

Appeal Number: 2024/276

Allen J.

Butler J.

McDonald J.

BETWEEN/

SUSQUEHANNA INTERNATIONAL SECURITIES LIMITED,

SUSQUEHANNA INTERNATIONAL GROUP LIMITED,

AND

SUSQUEHANNA ATLANTIC LIMITED

APPELLANTS

- AND –

THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 27th day of May, 2025

Introduction

1. This is an appeal by Susquehanna International Securities Limited and Susquehanna International Group Limited *("the Taxpayers")* against the judgment of the High Court (O'Moore J.) delivered on 2nd October, 2024 ([2024] IEHC 569) and consequent order made on 18th October, 2024 allowing an appeal by way of case stated by the Revenue Commissioners *("Revenue")* against a Determination of the Tax Appeals Commission *("TAC")* which found that the Taxpayers were entitled to avail of group relief pursuant to s. 411 of the Taxes Consolidation Act, 1997 *("TCA")*.

2. Section 411 TCA provides for the surrender of relief between members of groups of companies and consortia. On the face of s. 411, group relief is confined to companies which are resident for the purposes of tax in a Member State of the E.U. or in an E.E.A. State with which arrangements have been made affording relief from double taxation. The Taxpayers do not directly qualify for group relief under s. 411 TCA because their parent company is not registered in the E.U. or in an E.E.A. state but contend that by the terms of the Double Taxation Treaty between Ireland and the United States of America they are entitled to be treated no less favourably than they would have been if their parent was resident in Ireland.

3. The cornerstone of the Taxpayers' case is a decision of the Court of Appeal in England in *Revenue and Customs Commissioners v. FCE Bank plc* [2013] STC 14. FCE Bank plc and Ford Motor Co. Ltd. were two U.K. resident subsidiaries of Ford Motor Co., a company resident in the U.S. A claim for group relief was refused because under the then applicable legislation a non-U.K. resident company could not be part of a group. FCE Bank claimed that the domestic group relief provisions of the Income and Corporation Taxes Act, 1988 were contrary to the non-discrimination provision in Article 24.5 of the Double Taxation Convention between the U.K. and the U.S. The Court of Appeal in England – upholding the decision of the Upper Tribunal, which in turn had upheld the decision of the First Tier Tribunal – found that the only reason for the difference in treatment was the residence of Ford Motor Co. Rimer L.J. (Black and Pill L.JJ. concurring) said that:-

> *"38. ... The purpose and effect of art 24(5) are to outlaw the admittedly discriminatory tax treatment to which (but for the convention) FCE would be subject as the directly held subsidiary of a US resident company as compared with the more favourable tax treatment to which it would be entitled if it were the directly held subsidiary of a UK resident company. That shows, in my judgment, that the only reason for the difference in treatment in the present case is the fact of FMC's US residence."*

4. Revenue accepts that *FCE Bank plc* represents the law in Ireland. The core issue between the parties is the materiality of the fact that the Taxpayers' parent is fiscally transparent for the purposes of U.S. tax law. Revenue's case is that the Taxpayers' parent – because it is a disregarded entity for the purpose of U.S. tax law – is neither *"liable to tax"* for the purposes of the Double Taxation Treaty, nor *"resident for the purposes of tax"* for the purposes of Irish tax law.

Factual background

5. The Taxpayers are Irish resident companies which are part of a group, the ultimate parent of which is a single member Delaware limited liability company *("LLC")* called Susquehanna International Holdings LLC *("SIH LLC")*. It has its central management and control in the United States.

6. SIH LLC is in turn owned by a Delaware limited liability partnership, SIH Partners LLLP, the members of which are six Delaware *"S corporations"*, each of which is owned by one of five U.S. national and U.S. resident businessmen.

7. Under the laws of the State of Delaware, a LLC is a body corporate. Its characteristics include separate legal personality, perpetual succession, the ability to be distinguished from its members, the ability to own property, and the capacity to litigate. I am not certain that it is correctly described in the Taxpayers' submissions as a creature of U.S. law – as opposed to Delaware law – but it makes no difference. One of the grounds on which the Taxpayers were refused the relief claimed was that SIH LLC was not a body corporate. The TAC found that it was, and Revenue has accepted that finding.

8. What distinguishes Delaware LLCs in general, and SIH LLC in particular, from the corporate creatures with which we are familiar on this side of the Atlantic is that it is fiscally transparent. Under U.S. Federal income tax law a LLC is treated as a *"disregarded entity"*. It may elect to be treated as a corporation – and so to be taxed – but under what were described in evidence before the Tax Appeals Commission as the default rules, it is disregarded unless it has so elected. As a disregarded entity, SIH LLC has no income tax filing obligations itself, rather its income is declared and taxed in the hands of its ultimate owners.

9. The evidence before the TAC was – and the TAC found – that LLCs are *"the most predominant entity"* in Delaware, outnumbering corporations by a factor of three to one. The Taxpayers emphasised that there are very large numbers of LLCs in the U.S. and that such entities are very commonly used in corporate structures but were unable to bring me to see how this was at all relevant.

10. SIH Partners LLLP is also fiscally transparent. The members of SIH Partners LLLP are so called *"S corporations"*. They are so called because they are closely held corporations which – as it was put in the evidence before the TAC – have elected to be taxed on a pass-through basis under Subchapter S of Chapter 1 of the U.S. Internal Revenue Code. Again as it was put in evidence before the TAC, a corporation that elects for S corporation status is not taxed at the entity level. In other words, an S corporation is not taxed at all. Rather its income is taxed in the hands of the ultimate owners.

11. SIH LLC, its sole member SIH Partners LLLP, and its six S corporation members are all fiscally transparent. The income of SIH LLC is ultimately taxed in the hands of the five U.S. nationals by whom it is ultimately owned.

12. The United States Internal Revenue Code imposes income tax on individuals and on legal persons. The income of individuals is taxed under Section 1, Part 1 of the Code as *"Tax on Individuals"*. The income of legal persons who are classified for tax purposes as corporations – other than S corporations – is taxed under Section 11, Part II as *"Tax on Corporations"*.

13. In 2010 and 2011 the Taxpayers claimed group relief under s. 411 of the Taxes Consolidation Act, 1997. Revenue refused those claims and issued notices of amended assessment, which the Taxpayers appealed to the TAC.

The TAC Determination

14. The TAC issued its Determination on 12th April, 2019. By letter dated 2nd May, 2019 Revenue gave notice in accordance with s. 949AP TCA that it considered the Determination to be erroneous on eight points of law; and requiring the TAC to state and sign a case for the opinion of the High Court: which it did on 17th June, 2019.

15. One of the peculiarities of the more recent practice is that while the case stated is drafted by the TAC, the questions of law are identified by the party who asserts an error or errors of law. The Determination in this case ran to 75 pages and the case stated – which followed the pattern of the Determination – to 59 pages. On close examination, it rather appears that in formulating the questions of law for the opinion of the High Court, Revenue to a considerable extent focused on what the TAC would have needed to decide to find in favour of the Taxpayers, rather than what it in fact decided.

16. The Determination, on page 1, set out the three issues which the parties had agreed were to be determined by the TAC, which were:-

(a) Is SIH LLC, a limited liability company in the United States incorporated under the law of Delaware, a *"company"* for the purposes of TCA, section 411?

(b) If such an entity is to be regarded as a *"company"*, is it resident in the U.S. for the purposes of tax?

(c) What, if any, is the impact of anti-discrimination provision contained in Article 25 of the DTA?

17. The TAC found that SIH LLC was a body corporate, and, as I have said, Revenue has accepted that finding. However, both the finding and the concession were ambiguous. The issue – and the first question posed to the TAC – was not whether SIH LLC was a company for the purposes of TCA generally but whether it was *"a 'company' for the purposes of TCA, section 411."* As I will come to, s. 411 does not apply to all companies but only to companies which are resident for the purposes of tax in a Member State. When, at para. 93, the Commissioner came to his analysis, he reformulated the first question as:-

> *"(a) Is SIH LLC, a limited liability company in the United States incorporated under the law of Delaware, a company as defined by TCA section 4 to include inter alia, 'any body corporate' for the purposes of claiming group relief pursuant to TCA section 411?"*

18. That, with all due respect, was very confused.

19. Otherwise, the Determination set out at considerable length the evidence given to the TAC by the expert witnesses called on behalf of Revenue and the Taxpayers, respectively, and identified the differences of opinion between the experts as they had emerged in the course of cross-examination. It did not, however, engage with those differences, or clearly resolve them one way or the other. The provisions of s. 949AJ TCA are relevant in this context. Under s. 949AJ(6), the TAC is required to set out in its determinations, a statement of the material findings of fact made by it. This is almost entirely lacking in the determination made in this case. The TAC is the fact-finding tribunal in this process and it is therefore crucial that it should make and clearly set out all necessary findings of fact on the evidence before it. Similarly, the Determination set out at considerable length the legal submissions on behalf of the parties, but the analysis and conclusions were confused. Again, s. 949AJ is relevant in this context. The TAC is required under s. 949AJ(6) to set out a statement of the reasons for its determinations. At para. 123 the Commissioner appears to have found that SIH LLC was not resident in the U.S. and was not liable to tax in the U.S., but at para. 152 concluded that *"...SIH LLC, as a 'body corporate' must be considered to be and as a consequence is liable to tax in the US … by virtue of all of its income is fully and comprehensively taxed under the US Code albeit at the member level."*

20. The body of the case stated reflected the Determination and posed for the opinion of the High Court the eight questions of law formulated by Revenue. I am bound to say that it was by no means clear from the text of the Determination that the TAC had in fact come to the conclusions on which the questions were premised but the premise of the questions was that he had and the appeal both in the High Court and in this Court was argued on the basis that he had so found.

The High Court judgment

21. By the time the case stated came before the High Court the eight questions had reduced to two but, it seems to me, this was more because the questions had been reformulated rather than because the issues had narrowed. The two issues identified in the High Court judgment were:-

(i) Whether the fiscally transparent status of SIH LLC deprived the Taxpayers of the ability to rely on the anti-discrimination provisions of the DTA, and

(ii) Independently of the provisions of the DTA, whether the fiscally transparent nature of SIH LLC meant that the Taxpayers were not entitled to group relief under the provisions of s. 411 TCA.

22. The High Court judgment, at para. 3(i), identified the first of these issues as being whether the financially transparent nature of SIH LLC deprived it of the ability to rely on the provisions of the DTA but this, I think, was obviously a slip of the pen. It is clear from the judgment that the central issue was whether Revenue's refusal of the Taxpayers' claims for group relief amounted to discrimination against them, contrary to the DTA.

23. At para. 7 of his judgment, the High Court judge acknowledged the risk of oversimplifying matters before saying that the taxes which would have been payable by SIH LLC, had it elected to be taxed as a corporation, were paid by the five individuals who are its ultimate owners. It was, in my view, a significant oversimplification. At one level, it is correct in that under the U.S. Code, both corporations and individuals pay income tax. However, there appears to have been no evidence before the TAC – and certainly there is no finding – that the rules for assessing *"Tax on Individuals"* and *"Tax on Corporations"* were the same, or that the amount of the tax which was paid by the five individuals was the same as the amount that would have been payable by SIH LLC had it elected to be taxed as a corporation. In the written and oral submissions of the Taxpayers on the appeal it was said that the tax paid by the individuals was *"the same tax"* as would have been paid if it was paid by the LLC but it was clarified that what was meant was that the tax was of the same character – income tax – and not amount. This, as I will come to, is significant when it comes to analyse the Taxpayers' arguments and the lynchpin authority on which their argument is based and on which they urge that we should place particular reliance.

24. For the reasons given in his written judgment – to which I will return – the High Court judge found that the TAC had erred in law both in holding that SIH LLC was resident in the

U.S. within the meaning of Article 4 of the DTA, and in holding that the Taxpayers were entitled to relief under s. 411 of the TCA.

The appeal

25. By notice of appeal filed on 9th December, 2024, the Taxpayers appealed against the judgment and order of the High Court on ten grounds, which in their written submissions were reformulated as – rather than really being reduced to – three questions. Revenue's written submissions addressed the questions so re-formulated and the appeal was argued on that basis. The three questions were:-

> *"(1) Does SIH LLC satisfy the definition of 'resident of a contracting state' by virtue of being 'liable to tax' under Article 4.1 DTA?*
>
> *(2) Where the Taxpayers are indirectly owned by residents of the U.S., is it necessary to establish that SIH LLC satisfies the definition of 'resident of a contracting state' to enable the Taxpayers to rely on Article 25 DTA?*
>
> *(3) If the Taxpayers are entitled to rely on the Article 25 DTA, is Revenue entitled to discriminate against the Taxpayers on the ground that their parent company is fiscally transparent?"*

Liable to tax

26. On 28th July, 1997, the Governments of Ireland and the United States of America concluded a Double Taxation Treaty described as a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains. As the parties, the TAC, and the High Court judge have, I will refer to it as the DTA.

27. Article 25.4 DTA provides that:-

> *"4. 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 any*

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."

28. By Article 2 DTA, the Convention applies to U.S. Federal income tax and Irish income tax, corporation tax and capital gains tax.

29. By Article 3 DTA the term *"person"* includes a company, and the term *"company"* means any body corporate or any entity that is treated as a body corporate for tax purposes. The term *"national"* means any citizen of a Contracting State and any legal person, association, or other entity deriving its status as such from the laws in force in that State. The terms *"enterprise of a contracting State"* and *"enterprise of the other Contracting State"* mean, respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State.

30. By Article 4 DTA, the term *"resident of a Contracting State"* means *"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."*

31. The U.S. Internal Revenue Code does not have a definition of *"residence"* for corporations or other business entities but, for the purposes of Article 25.4 DTA, those by whom the capital of the Taxpayers is owned and controlled must be *"liable to tax"*.

32. The Taxpayers also relied on the prohibition of discrimination in Article 25.1 DTA, not because it was applicable to them – which they acknowledged it was not – but as demonstrating – it was said – the breadth of the prohibition on discrimination. Article 25.1 provides, insofar as is material, that:-

> *"1. Nationals of a Contracting State shall not be subjected on any 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. …"

33. The term *"national"* is defined in Article 3(i) as meaning any citizen or any legal person, entity or association, or other entity deriving its status as such from the laws in force in that State; the term *"person"* in Article 3(a) includes a company; and the term *"company"* is defined in Article 3(b) as any body corporate or any entity which is treated as a body corporate for tax purposes.

34. In this case, of course – as was acknowledged – the Taxpayers are Irish nationals so that Article 25.1 cannot apply directly to them. I am bound to say that I do not see in the protection conferred by Article 25.1 on nationals against *"taxation or any requirement connected therewith which is other or more burdensome"* any greater breadth than the protection conferred by Article 25.4 on enterprises, the capital of which is wholly or partly owned or controlled directly or indirectly by one or more residents of the other Contracting State, which is expressed in identical terms. If the Taxpayers are part of a qualifying *"enterprise"* they are entitled to precisely the same protection against discrimination as *"nationals"*.

35. The parties were agreed as to the principles to be applied in the construction of treaties. It is useful to recall them.

36. The Vienna Convention on the Law of Treaties (1969) provides in section 3 for the Interpretation of Treaties. Article 31 prescribes the general rule of interpretation. The rules are quite different to those that apply in Ireland to the construction of contracts and the construction of legislation.

37. Article 31 requires that:-

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

38. Both sides relied on the judgment of Kelly J. (as he then was) in *Kinsella v. Revenue Commissioners* [2011] 2 I.R. 417, in which he said, at para. 44:-

> *"44. In accordance with what is prescribed in 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 hereon. This has been done in a number of cases such as Thiel v. Federal Commissioner of Taxation (1990) 17 C.L.R. 388 and Sun Life Assurance Company of Canada v. Pearson (HMIT) [1986] S.T.C. 335."

39. This statement of the law was approved by Laffoy J. in *O'Brien v. Quigley* [2013] 1 I.R. 790.

40. The approach which is to be taken to the interpretation of treaties was elaborated on by Mummery J. (as he then was) in *IRC v. Commerzbank* [1990] STC 285, a case which concerned the interpretation of the double taxation treaty between the U.K. and the U.S. The judgment shows that the parties were agreed that the correct approach was that which had been set down by the House of Lords in *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, and which had been adopted in three later cases, summarised at pp. 298 and 299 of the report. Tying what he said back to the speeches of the Law Lords in *Fothergill*, Mummery J. (at pp. 297 and 298) set out the required approach as follows:-

"(1) It is necessary to look first for a clear meaning of the words used in the relevant article of the convention, bearing in mind that 'consideration of the purpose of an enactment is always a legitimate part of the process of interpretation': per Lord Wilberforce (at 272) and Lord Scarman (294). A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty: per Lord Fraser (at 285) and Lord Scarman (at 290). A literal interpretation may be obviously inconsistent with the purposes of the particular article or of the treaty as a whole. If the provisions of a particular article

are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instrument: per Lord Diplock (at 279).

(2) The process of interpretation should take account of the fact that –

'The language of an international convention has not been chosen by an English Parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in James Buchanan & Co. v. Babco Forwarding & Shipping (UK) Limited, [1978] AC 141 at 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation': per Lord Diplock (at 281 – 282) and Lord Scarman (at 293).

(3) Among those principles is the general principle of international law, now embodied in art 31(1) of the Vienna Convention on the Law of Treaties, that ' a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. A similar principle is expressed in slightly different terms in McNair's The Law of Treaties (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is 'the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances'. It is also stated in that work (p 366) that references to the primary necessity of giving effect to 'the plain terms' of a treaty or construing words according to their 'general and ordinary meaning' or their 'natural

signification' are to be a starting point or prima facie guide and 'cannot be allowed to obstruct the essential quest in the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them'.

(4) If the adoption of this approach to the article leads to a result which is manifestly absurd or unreasonable recourse may be had to the 'supplementary means of interpretation' including travaux préparatoires: per Lord Diplock (at 282) referring to art 32 of the Vienna Convention, which came into force after the conclusion of this double taxation convention, but codified an already existing principle of public international law. See also Lord Fraser (at 287) and Lord Scarman (at 294).

(5) Subsequent commentaries on a convention or treaty have persuasive *value only, depending on the cogency of their reasoning. Similarly, decisions of foreign courts on the interpretation of a convention or treaty text depend for their authority on the reputation and status of the court in question: per Lord Diplock (at 283 – 284) and Lord Scarman (at 295).*

(6) Aids to the interpretation of a treaty such as travaux préparatoires, international case law and the writings of jurists are not a substitute for a study of the terms of the convention. Their use is discretionary, not mandatory, depending, for example, on the relevance of such material and the weight to be attached to it: per Lord Scarman (at 294)."

41. I will come to the parties' submissions as to the meaning of the words *"liable to tax"* but if I am to first look for a clear meaning of the words, I cannot forbear to say that they must mean what they say. In the years under consideration, SIH LLC did not pay tax. It did not have to pay tax. It was not obliged to file tax returns. It prepared accounts and had them audited but that had nothing to do with the Internal Revenue. Its income was taxed in the hands of its ultimate owners, but as their income.

42. I bear in mind the purpose of the DTA. The declared purpose of the DTA is the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains. Part of that purpose is the protection of nationals and enterprises of the contracting states against discrimination. If – as it is – the purpose of the treaty is to avoid double taxation, it seems to me that it stands to reason that it should only apply to persons who otherwise would be exposed to a liability to pay tax. SIH LLC had no such exposure.

43. The High Court judge, at paras. 63 and 64, identified the primary purpose of the DTA as the avoidance of double taxation and the prevention of fiscal evasion and also that the prevention of discrimination was one of the purposes of the treaty. Although the long title does not refer to the prevention of discrimination it is clearly one of the purposes of the DTA. I fully agree with the statement at para. 64 of the High Court judgment that the cohort of persons who are not to be discriminated against is confined to such enterprises as are owned or controlled by entities which are liable to tax in another contracting state.

44. The Taxpayers' core submission was that because SIH LLC was incorporated under the laws of Delaware and had its centre of management and control there, it was *"liable to tax"* in the U.S. Revenue's core submission was that because SIH LLC was a disregarded entity it was not – although incorporated under the laws of Delaware – liable to tax *"under the laws of that State."*

45. SIH LLC is incorporated in Delaware and has its seat in Delaware and so is potentially at risk of being brought within the tax net. But it seems to me that a potential future liability to tax is different to a present liability and *a fortiori* a past liability. The issue on this appeal is whether SIH LLC was liable for tax in the relevant years. I cannot see that it was.

46. Both sides relied on the judgment of Judge Berner in *Weiser v. Revenue and Customs Commissioners* [2012] SFTD 1381, a decision of the U.K. First Tier Tribunal. Judge Berner distilled from the judgment of Arden L.J. in the then fairly recently decided case of *Bayfine UK v. Revenue and Customs Commissioners* [2011] STC 717 six principles to be applied in the construction of a double tax treaty. The report shows that counsel for HMRC was content to rely on the then most recent restatement in *Bayfine* of the principles laid down in *Fothergill* and gathered together in *Commerzbank*, as opposed to the earlier authorities themselves, but Arden L.J. in *Bayfine* cites both *Fothergill* and *Commerzbank* and quotes extensively from *Commerzbank*. It is no criticism of *Weiser* to say that as far as the applicable principles are concerned, it establishes nothing new.

47. The issue in *Weiser* was whether a U.K. pension, which was exempt from Israeli tax for the first ten years of the pensioner's residence in Israel, was *"subject to"* Israel tax. Judge Berner found – as HMRC had argued – that there was a distinction to be drawn between *"subject to tax"* and *"liable to tax."* He found that the ordinary meaning of the relevant provision of the U.K.-Israel double taxation convention was that the taxpayer's U.K. pension income was only exempt from U.K. tax if it was chargeable to Israel tax. The judgment is relied on by the Taxpayers as containing interesting material on what *"liable to tax"* means – which it does – but the *ratio* of the judgment is simply that the U.K. income which was exempt from Israel tax was not subject to Israel tax.

48. Counsel for the Taxpayers emphasised the submission of counsel for HMRC – implicitly accepted by Judge Berner – that:-

> *"There is … an internationally recognised distinction between the two which gives the expression 'liable to tax' a broader meaning than the expression 'subject to tax'. … 'liable to tax' is understood to require only an abstract liability to taxation on income in the sense that a contracting state may exercise its 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 to be within the charge to tax in the sense that a contracting state must include the income in question in question in the computation of the individual's taxable income with the result that tax will ordinarily be payable subject to deduction for allowances or reliefs, etc."

49. Mr. Weiser was resident in Israel for tax purposes. His core argument was that he was chargeable to Israel tax but that Israel had made a sovereign decision not to levy tax on his pension income. HMRC's argument was that Mr. Weiser's case confused the expressions *"liable to tax"* and *"subject to tax"*: from which I infer that HMRC accepted that Mr. Weiser was liable to Israel tax, although his U.K. pension was exempt from tax for the first ten years of his residence in Israel. It is clear from all of the authorities, I think, that a person may be liable to tax without being obliged to pay any tax. Thus, a calculation of the taxpayer's liability by the application of any applicable exemptions or allowances at nil, is not only consistent with but predicated upon the taxpayer being liable to tax. In this case there could be no calculation of any liability to tax because SIH LLC was outside the charge to tax.

50. Mr. McCullough S.C. for the Taxpayers points to the fact that SIH LLC is incorporated in Delaware and had its central management and control in Delaware; which of course it is and it does. These, he says, are two of the criteria referred to in Article 4 of the DTA by reference to which a *"resident of a Contracting State"* is defined; which they are. However, it seems to me that the fact that an LLC might be made liable to tax is not the same as it being, in fact, liable to tax. The evidence was that a domestic U.S. LLC may elect to be treated as a corporation for Federal income tax purposes and it is accepted by Revenue that if SIH LLC had so elected it would have been subject to Federal tax and so liable to Federal tax. But it did not so elect. The flaw in the Taxpayers' argument, in my view, is that it conflates potential liability to tax with actual liability to tax.

51. *TD Securities (USA) LLC v. Her Majesty the Queen* 12 ITLR 783 was relied on by the Taxpayers as the central authority in relation to anti-discrimination. It is a 2010 decision of the Tax Court of Canada which concerned the treatment of a U.S. LLC under the Canada-U.S. double taxation treaty. The court found that the LLC was entitled to rely on the anti-discrimination provision of the Canada-U.S. treaty.

52. TD Securities (USA) LLC *("TD LLC")* was a Delaware registered LLC which conducted business in Canada and which was wholly owned by another U.S. company. According to the headnote, the taxpayer had elected to be treated as a flow-through or disregarded entity and its income was taxed in the hands of its owners. The text of the judgment, however, shows that TD LLC had not filed an election and accordingly – by default – was a disregarded entity under the U.S. Code: which chimes with the evidence in this case.

53. The structure of the TD group was different to the Susquehanna group in that the sole member of TD LLC, TD Holdings II Inc., was a corporation; which in turn was wholly owned by another corporation, Toronto Dominion Holdings (USA) Inc. Under the U.S. Code, all of the income of TD LLC was included in the income of TD Holdings II Inc., and the income of TD Holdings II Inc. was consolidated with the income of Toronto Dominion Holdings (USA) Inc. The group had been reorganised with a view to allowing the consolidation of the losses and gains of the subsidiaries of TD Holdings II Inc. for U.S. income tax purposes. The consequence of the difference in the structure is that the income of the LLC was taxed in the hands of a corporation under Section 11, Part II of the U.S. Code as *"Tax on Corporations"* and, to that extent, was *"the same tax"* as would have been paid by the LLC had it elected to be taxed as a corporation. This, as I will come to, played a significant part in the conclusion of the court.

54. TD LLC was a U.S. broker dealer headquartered in New York and had a branch in Canada for the purpose of serving its U.S. customers. As it was required to do, it reported its branch profits in its Canadian tax returns. As is often the case in tax cases, the facts are complicated. Under the relevant Canadian Act, a non-resident carrying on business in Canada was liable for an additional 25% tax on its Canadian net after-tax income but under the Canada-U.S. treaty there was a reduced rate of 5% available to Canadian branches of U.S. resident companies. The ultimate question to be determined by the court was whether, as a matter of Canadian law, TD LLC was entitled to the benefits of the treaty. The Canada Revenue Agency took the view that the LLC was not resident in the U.S. because it was not liable to tax there. TD LLC's appeal against the refusal by the Canada Revenue Agency of the 5% rate was heard by Boyle J. over four days.

55. The Canadian tax authorities stood over their refusal of the 5% rate primarily on the basis that TD LLC was not a U.S. resident as it was not liable to U.S. tax. TD LLC argued that the phrase *"liable to tax"* was not defined in the treaty and was to be interpreted by the Canadian court as *"… different from the mere determination whether a person is required to pay tax on its income under the US Code."* Alternatively, it argued that the phrase must be given a liberal and purposive interpretation designed to achieve the purpose of the treaty.

56. Boyle J. examined the text of the Canada-U.S. treaty, a number of subsequent protocols, the U.S. Technical explanations of the treaty and the protocols, and Canadian revenue practice in relation to other fiscally transparent entities. In his consideration of the principles to be applied in the interpretation of the treaty, he noted that the Vienna Convention authorised regard to subsequent practice in the application of the treaty. At para. 51, Boyle J. found that there was a tension between the ordinary meaning of the terms used in the treaty and its object and purpose. This, he said, was a case in which *"it prima facie appears that a strict application of the terms used to define resident of a contracting state leads to an unreasonable result and* *thus, regard to supplementary means of interpretation is appropriate as part of the required analysis. The prima facie unreasonableness is demonstrated by, amongst other things, the fact that a strict application of the text would conflict with how both countries have interpreted and applied the treaty to government entities, not-for-profit organisations, pension funds and … partnerships which are themselves also fiscally transparent flow-through entities."*

57. I pause here to observe that Article 4 of the Ireland-U.S. DTA includes in the definition of *"resident of a Contracting State"* a qualified governmental entity; a pension trust; charitable or other exempt organisations that meets the requirements set out in Article 4.1.c, and those investment entities identified in Article 4.1.d. I accept the submission on behalf of Revenue that since the treaty expressly covers those entities, they are not useful comparators in assessing the reasonableness of the interpretation of Article 4.1.a, which is limited in its application to persons who are liable to tax. In the Irish context, any comparison with the treatment of partnerships or other fiscally transparent flow-through entities does not arise. Therefore, there is not in this case any *prima facie* unreasonableness by reference to the manner in which other fiscally transparent entities are treated.

58. Having examined in detail the OECD Commentary on the application of the Model Treaty to partnerships, Boyle J. turned first to the *Canadian Interpretation and Administration* and then to the *US Interpretation and Administration*.

59. The long-standing practice of the Canada Revenue Agency was that the partners in a fiscally transparent partnership were entitled to treaty benefits, and that it would treat partnerships and S corporations as resident in the U.S. Boyle J. was of the view (para. 85) that the treatment of LLCs was anomalous and *"entirely irreconcilable with the Canadian government's approach to foreign partnerships."* He said that:-

> *"[87] This court concludes, from the overwhelming consistency of the Canadian government's approach to fiscally transparent entities and to other entities which are*

not liable to tax under a treaty partner's domestic legislation, that it was not intended that an entity whose income was fully and comprehensively taxed in the other contracting state would be denied the benefit of a treaty simply because its income was taxed by the other country at the level of its shareholder, members or partners."

60. Boyle J. also relied on the finding of the Supreme Court of Canada in *Crown Forest Industries Ltd. v. Canada* [1995] 2 SCR 802, 125 DLR (4^{th}) 485 that the purposes of the Canada-U.S. treaty included the promotion of international trade between the two countries and the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems.

61. As to the U.S. interpretation and administration, Boyle J. found that:-

> *"[89] … All of the US material before the court confirms that the approach of the US authorities to the interpretation and application of the tax treaties to fiscally transparent entities is consistent with the OECD look-through approach."*

And that:-

> *"[95] It is clear from the above that the US has throughout intended that the entitlement to treaty benefits of income earned by a fiscally transparent entity such as a partnership or LLC be determined at the member level using a look-through approach and that the US has consistently interpreted art IV of the US treaty to permit or require that approach."*

62. Boyle J. concluded that:-

> *"[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 a 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*

member, 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). …"

63. Later, at para. 101, he said that:-

"[101] … The court concludes that implicit in the clear intention of the OECD countries, including Canada and the US, that treaty benefits be enjoyed by TD LLC in the present circumstances, and given the context of the Canadian and US tax regimes and the text of the US treaty:

(i) TD LLC must be considered to be a resident of the US for the purposes of the US treaty otherwise the treaty could not apply;

(ii) TC 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 art 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."

64. Mr. McCullough relies on *TD Securities* as demonstrating the purposive approach that should be taken to the interpretation of the DTA. He accepts that *TD Securities* does not stand for the proposition that every U.S. LLC is entitled to treaty benefits but suggests that it stands for the proposition that SIH LLC is entitled to treaty benefits where its income is fully and comprehensively taxed, albeit in the hands of its members.

65. The High Court judge first of all distinguished *TD Securities* and then, separately, declined to follow its reasoning. He found (at para. 64) that the prevention of discrimination was one of the purposes of the DTA and (at para. 65) expressed the view that there was no case law which directly addresses the construction of Article 4 DTA having regard to the non-discrimination provisions. He acknowledged that *TD Securities* does deal with the question of whether a *"fiscally transparent"* Delaware LLC – such as SIH LLC – was *"liable to tax"* but suggested that the interpretation placed by Boyle J. on the phrase *"liable to tax"* was by reference to achieving other objects and purposes of the Canada-U.S. treaty, and not any anti-discrimination objective.

66. *TD Securities* was, as the judge said – and as Revenue emphasises – classically, a double taxation case but, respectfully, I do not see this as basis on which it ought to be distinguished. As I understand the treaty, the DTA applies in precisely the same way to double taxation and non-discrimination. The beneficiaries of both the protection against double taxation and the protection against discrimination are ultimately persons who are residents of a Contracting State. Persons qualify as residents of a Contracting State if they are liable to tax therein. Thus – as it was put in argument – the gateway to the protections is the same. I respectfully cannot see that the interpretation of Article 4 DTA might depend upon or be influenced by the ultimate goal of the person invoking the treaty. The overall objective of the treaty, as I see it, is to ensure that the residents of the Contracting States are treated in the same way.

67. I agree with the judge that the interpretation placed by Boyle J. on the phrase *"liable to tax"* took into account objects and purposes other than non-discrimination. As already noted, Boyle J. took account of the finding of the Supreme Court of Canada in *Crown Forest*

Industries that the purposes of the Canada-U.S. treaty included the promotion of international trade between those countries and the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems. Like the judge, I am prepared to accept for the purposes of the appeal, that a secondary purpose or objective of the DTA might be to mitigate such administrative complexities. I also agree that any such ancillary goal could only become a relevant factor in the interpretation of the DTA if there was evidence and meaningful submissions in relation to any such complexities; which there was not.

68. *TD Securities* is, in my view, distinguishable on two grounds: first, that it was based on a finding that the income of TD LLC was subject to full and comprehensive taxation in the hands of a corporation, and secondly that the reasoning and conclusion were firmly rooted in U.S. and Canadian interpretation and practice.

69. As to the taxation of the income of SIH LLC, the height of the evidence is that it was taxed in the hands of the five individuals under Section 1, Part 1 of the Code as *"Tax on Individuals"*. There was no evidence or finding as to why the ultimate owners elected to be taxed in the way in which they were; or, perhaps, strictly speaking, acquiesced in being taxed in that way by the operation of the default rules. If it is true that there was no evidence that the amount of tax was any different than the tax that would otherwise have been payable under Section 11, Part II as *"Tax on Corporations"*, the point is that neither was there any evidence that the tax was the same. Therefore, in my view, the evidential ground was not laid for Mr. McCullough's submission that the income of SIH LLC was as fully and comprehensively taxed as it otherwise would have been. Moreover, there was no evidence in this case of any intention that treaty benefits should attach to income, as opposed to persons.

70. As to the interpretation of Article 4 DTA, it is true that *TD Securities* was concerned with the interpretation of the same phrase in the OECD Model Treaty and that the U.S. was party to the Canada-U.S. treaty and the DTA, but in my view the absence of any evidence equivalent to the evidence of U.S. and Canadian interpretation and practice clearly distinguishes this case.

71. That apart, it seems to me that in principle the rules applicable to the interpretation of treaties require the exercise of considerable caution when dealing with the judgments of other courts. The Taxpayers' submission that the same phrase in the OECD Model Treaty should have the same meaning across all jurisdictions is superficially attractive but fails to take account of the fact that all Double Taxation Treaties, although based on the same models, are bilateral.

72. As Arden L.J. observed in *Bayfine UK v. Revenue and Customs Commissioners* [2011] STC 717, there is no court with jurisdiction to give authoritative rulings on the interpretation of any double taxation treaty. The quest of a court called upon to interpret an international treaty is the subjective intention of the parties rather than the objective meaning of the agreement, or what the treaty might have conveyed to a reasonable person with all of the background knowledge that would have been reasonably available to the parties at the time of conclusion of the agreement. It seems to me that in principle, the identity of the counterparty state and all of the circumstances of the relationship between the states must be material factors in determining the intention of the party states in negotiating and concluding a treaty. The circumstances may be such that the intention of the parties to two or more treaties is the same, but I do not consider that the fact that there is one common party is a reliable guide. It will be instructive to look at the decisions of other courts in interpreting treaties based on the same model, but it must be borne in mind that they are all bilateral.

73. It seems to me that once the judgment in *TD Securities* is shorn of all the evidence in relation to purpose, interpretation and practice on which Boyle J. relied in coming to the conclusion he did, it tends to support the argument advanced by Revenue in this case. I do not believe that it is unfair to say that the *ratio* of *TD Securities* is that the phrase *"liable to tax"* was not to be given its plain meaning because of the result that would have inevitably followed. Absent evidence of any unreasonable consequence, it seems to me that there is no warrant for concluding that the words mean anything other than what they say. In *TD Securities* the taxpayer was able to demonstrate that it was being treated differently to other fiscally transparent entities for the reason that it was a fiscally transparent entity. Boyle J. was persuaded that the result of applying the plain meaning of the words *"liable to tax"* would be unreasonable, and for that reason departed from the plain meaning of the words. In this case, the Taxpayers cannot do the same.

74. The High Court judge, at para. 69, set out the three conclusions set out by Boyle J. in *TS Securities* at para. 101, and in the following paragraphs expressed his disagreement with them.

75. The judge expressed the view that Boyle J.'s reasoning that TD LLC must be considered to be a resident of the U.S. for the purposes of the U.S. treaty as otherwise the treaty could not apply was not especially forceful. I agree. It was effectively an acknowledgement that Boyle J. was searching for a way to avoid a conclusion to which he otherwise would have been driven by the plain meaning of the words.

76. As to Boyle J.'s conclusion that TD LLC must be considered to be liable to tax by virtue of all of its income being fully and comprehensively taxed under the U.S. Code, albeit at the member level, I agree with the judge that this conflated the taxation of the LLC with the taxation of the income and ignored the legal separation between the entity and the members. The DTA applies to persons who are liable to tax, not to income that is liable to be taxed.

77. I also agree with the judge that the same can be said as to the reason for which Boyle J. concluded that the income of TD LLC must be considered to be subject to full and comprehensive taxation. The fact that the income was ultimately subject to taxation did not, in my view, go to show that the LLC was liable to tax.

78. In support of the interpretation of Article 4 for which it contended, Revenue relied on the Protocol to the DTA, which was signed at the same time as the DTA itself. This provided that:-

> *"At the time of signing the Convention between the Government of the United States of America and the Government of Ireland ... the undersigned have agreed that the following provisions 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 the income, profit or gain of that resident to the extent it is treated as such for the purposes of the taxation laws of the first-mentioned Contracting State. ..."*

79. The High Court judgment shows (para. 17) that in that court the Revenue placed heavy reliance on the Protocol but the judge (para. 87) was of the view that it did no more than provide an element of confirmation for the view that he had already reached as to the interpretation of the phrase *"liable to tax"* but did not lead to that conclusion. On the appeal to this Court, Revenue's reliance on the Protocol was limited to submitting that it was of some relevance.

80. I am not sure that the Protocol actually adds anything to the Convention. In principle, the tax treatment in the U.S. of U.S. income is a matter of U.S. law. Similarly, in principle, in Irish law, the tax treatment in the U.S. of U.S. income will be determined by reference to U.S. law. It seems to me that the common approach evident from the Protocol – that fiscally transparent entities are to be disregarded and the income of such entities treated as the income of those who received it – no more than confirmed – at least in the case of Ireland – the approach that would be taken. As far as the persuasiveness of *TD Securities* is concerned, the significance of the Protocol is that – unlike all of the materials considered by Boyle J. – it does not point to, still less compel, a departure from the clear meaning of the words used in Article 4.

81. In the course of argument, the Court was referred to the fairly trenchant criticism of *TD Securities* in the long editor's note by Mr. Angelo Nikolakakis in the International Tax Law Reports but I do not think that it is significantly helpful for present purposes. Mr. Nikolakakis is a Canadian tax lawyer whose criticisms are as much based on the views he offers as to Canadian law and practice as on the reasoning of the judgment. He does, however, make the obvious point that Boyle J.'s analysis seems to equate the taxation of the members of the entity with the taxation of the entity itself, thereby, as he puts it *"effectively ignoring this rather fundamental separation."*

82. Like the High Court judge, my focus in examining *TD Securities* has been on the extent – if at all – to which it persuades me that SIH LLC is *"liable to tax"* within the meaning of Article 4 DTA. For the reasons given, it does not so persuade me. As McDonnell J. later recalled in a 2016 judgment of the Federal Court of Canada in *CGI Holding LLC v. National Revenue* 19 ILTR 692, Boyle J. noted that *TD Securities* did not stand for the proposition that every U.S. LLC was entitled to treaty benefits.

83. Leaving aside any difference in computation or amount between tax on individuals and tax on corporations, it is instructive to focus on the fact that SIH LLC's income was taxed in the hands of the individuals.

84. *Vogel on Double Taxation Conventions* (5^{th} Ed.) (2022) in his commentary on Article 4 of the Model Conventions proposes (at para. 27) that:-

"The person in question must be liable to tax (or in the French version: Assujettie à l'impôt). While the OECD and UN MC does not define the term 'liable' it is clear that the ***person who owes the tax himself*** *is liable to tax. "* [Emphasis original.]

85. The parties were agreed that there is a difference between *"subject to tax"* and *"liable to tax"* and that the concept of liable to tax was wider than subject to tax. Mr. McCullough argued that a fiscally transparent company had at least an abstract liability to tax in that its status could be changed by a change in the law, and so was to be regarded as being within the tax net. I am not persuaded. It seems to me that whether a company is or is not liable to tax depends on its current status and that the effect of a change in status would be to bring into the tax net a company which previously was not within the net.

86. In this case, Vogel's analysis is instructive. It can hardly be controversial that the person who owes the tax himself is liable to tax. In this case the tax – or at least tax – on the income of SIH LLC has been paid by its five U.S. resident owners. Immediately before they paid the tax, they owed the tax, and to arrive at a point at which they owed the tax, they must have been liable to tax. The whole point of the fiscal transparency of the LLC and the entities between it and the ultimate owners is to ensure that the income of the LLC is only taxed once. It seems to me that the Taxpayers' arguments as to the abstract or theoretical liability of the LLC fail to recognise that the five individuals were liable to tax. If – as they were – the five individuals were liable to tax on the income, it seems to me to follow that SIH LLC was not.

87. For completeness I recall that one of the cases to which the Court was referred was an unreported decision of the Income Tax Appellate Tribunal Delhi Benches in *General Motors Company, USA v. ACIT Circle International Taxation* ITA No. 2360/Del/2022. The decision, with no disrespect, is not easy to follow but the conclusion was that *"... the LLC is essentially 'liable to tax' but the income is attributed to its tax owner and such tax is imposed and paid by its respective tax owner, like US consolidated group rules where all affiliated US corporations* *file a single US federal income tax return."* The decision, I think, was relied on as a case in which the benefits of a double taxation treaty were extended to a fiscally transparent entity rather than as having articulated any clear principle. I would not presume to say whether it is right or wrong but on the evidence given to the TAC in this case, a finding that:- *"... the assessee is liable to tax in the resident State by virtue of US Income-tax Law as an LLC is given an option to either be taxed as a corporation or to be taxed as a disregarded entity ... wherein the income of the LLC is clubbed in the hands of its owner who merely discharge the tax that is assessable in the case of the LLC"* would not have been open. While Mr. McCullough referred to *General Motors Company, USA* he did not dwell on it. Neither will I.

88. Mr. McCullough sought to make much of the fact that there is no authority contrary to *TD Securities* and *General Motors*, which I understand to mean no case in which a fiscally transparent entity had been refused treaty benefits by reason of its fiscal transparency. For the reasons given, I believe that those cases are clearly distinguishable but if, for the sake of argument, they were authority for the propositions for which they are relied on, I do not believe that the absence of contrary authority could make them any more or less persuasive. For the reasons given, I agree with the judge that they are not persuasive and the fact that they are the only authorities is not a good reason to follow them.

89. In opening and closing, Mr. McCullough urged that the Court should take a purposive approach to the interpretation of the DTA and specifically should construe it so as to give effect to the non-discrimination purpose. However, the purpose is to be determined by reference to the intention of the parties and that intention – with due regard to the applicable rules – is to be determined by first looking at the language of the treaty. By Article 4, the DTA applies to residents of the Contracting States who, under the laws of that State, are liable to tax by reason of their domicile, residence, place of management and so forth. It seems to me that the appeal for a purposive approach tends to suppose that there is a general policy of prohibiting discrimination and then to stretch the words of the DTA. I respectfully see no basis on which it might be thought that the purpose of the DTA was other or wider than the prevention of discrimination against enterprises the capital of which is owned or controlled by residents who are liable to tax under the laws of the State in which they are resident.

90. The purpose of Article 25, says Mr. McCullough, is non-discrimination. I agree. It would, says Mr. McCollough be:-

> *"… perverse to say that when you are faced with an article whose policy purpose is absolutely clear, that of avoiding non-discrimination [recte. that of avoiding discrimination], to suggest that that shouldn't fully inform your interpretation of that article when you come to interpret it, there's actually no authority produced for the proposition that when you can discern a clear policy purpose in a particular section of a treaty that policy purpose shouldn't centrally inform your interpretation of that provision."*

91. But, with all due respect, this submission is circular. The clear purpose of Article 25.4 is to prohibit discrimination against enterprises in the application of tax rules by reference to the residence of those by whom the capital in the enterprise is owned or controlled.

92. Mr. McCullough argues that it cannot tenably be suggested that the same phrase in the same article can have two different meanings in what he described as the same treaty, that is to say two treaties based on the same OECD model. To an Irish lawyer or judge seeking the objective meaning of a contract or statute, that is certainly an attractive submission but the search when interpreting a treaty is for the intention of the parties to that particular treaty rather than a universal meaning of the text. In any event, the premise of the argument that the same phrase in the DTA must have the same meaning as was ascribed to it in *TD Securities* is that *TD Securities* was not only correctly decided but ought to be followed unless it can be distinguished. That, not to put a tooth in it, is wrong. The correct approach to a judgment of a foreign court on the interpretation of a different international treaty based on the same template is to examine whether or the extent to which it is persuasive: which is the approach which the trial judge took.

93. For the reasons given, I believe that *TD Securities* is clearly distinguishable but quite separately, I do not find it persuasive. *TD Securities* is not distinguishable on the basis that the phrase *"liable to tax"* in the DTA has one meaning for double taxation and another for the purpose of non-discrimination, and I did not understand Revenue to argue that it did.

94. The fourth of the eight questions of law posed for the opinion of the High Court was whether the TAC erred in law in holding that SIH LLC was a resident of the U.S. within the meaning of Article 4 of the DTA. For the reasons given, I am satisfied that the High Court judge was correct in answering that question in the affirmative.

95. My conclusion on the first of the three questions formulated for the purposes of the appeal is determinative but in deference to the arguments I will deal relatively briefly with the other two.

Indirect ownership

96. In the formulation of the issues between the parties for the purposes of this appeal, the first question was whether SIH LLC came within the definition of *"person resident of a Contracting State"* in Article 4 DTA. The second was whether the Taxpayers met what was described in argument as the gateway requirement in Article 25.4 of showing that they were under the control, directly or indirectly, of a resident of another Contracting State. And the third was whether they could establish discriminatory treatment. While identifying the first and second questions separately, it was acknowledged that those questions were linked. It seems to me that all three are linked.

97. The primary case made by the Taxpayers as to their entitlement to rely on Article 25.4 was that they are indirectly owned by the five U.S. resident individuals; and their secondary position was that they were entitled to rely on the DTA because they are directly owned by SIH LLC, which – they argued – is a resident in a Contracting State.

98. The premise of the Taxpayers' secondary position on the second question – that SIH LLC is a resident of a Contracting State – is that it is liable to tax in the U.S. That was precisely the first question.

99. The factual premise of the Taxpayers' primary case – that the capital of the enterprise is indirectly owned by one or more residents of a Contracting State – is perfectly clear and is accepted by Revenue. But if the fact that the capital in the Taxpayers is indirectly owned by the five U.S. resident nationals is sufficient to get them through the gateway, it is difficult to see where they can hope to go from there. The endgame for the Taxpayers is to show that they were discriminated against because they were denied group relief which is available under s. 411 TCA to the subsidiaries of an E.U. or E.E.A. parent. By s. 411(1)(a) TCA, two companies are deemed to be members of a group of companies if one company is the 75% subsidiary of the other company or both companies are subsidiaries of a third company. The Taxpayers are subsidiaries of SIH LLC, and the foundation of the claim of discrimination is that they have been subjected to taxation or a requirement connected therewith which is other or more burdensome than the taxation and connected requirements which applies to groups of companies to which the provisions of s. 411 apply. Leaving to one side the elephant in the room that s. 411 applies only to companies which are resident for the purposes of tax in a Member State, the foundation of the claim of discrimination is that as subsidiaries of a U.S. company they have been treated differently to the subsidiaries of an E.U. or E.E.A. parent.

100. Since the availability of group relief under s. 411 TCA is based on direct ownership and the discrimination sought to be established is discrimination between comparable groups, it is difficult to see the point of meeting a gateway requirement of indirect ownership. Certainly Ms. Goodman thought so and she shooed the Taxpayers through the gate.

The assessment of discrimination

101. Part of Mr. McCullough's submission is that although the wording of Article 4 DTA and s. 411 TCA are different, if he established that SIH LLC was *"liable to tax"* under Article 4 DTA, it was very difficult to see how it would not also be *"resident in [the U.S.] for the purposes of tax"*, as required by s. 411 TCA. I agree, and it appears to me to cut both ways. The effect of the conclusion to which I have come that SIH LLC is not *"liable to tax"* is that the Taxpayers are not entitled to rely on the DTA but if, for the sake of argument, they were entitled to rely on the DTA, they could hardly be heard to say that although not *"liable to tax"* in the U.S., SIH LLC was nevertheless *"resident [there] for the purposes of tax."*

102. As I said in the introduction, the cornerstone of the Taxpayers' case is the decision of the Court of Appeal in England in *Revenue and Customs Commissioners v. FCE Bank plc*, which I have summarised. FCE Bank was discriminated against because Ford Motor Co. was resident in the U.S.

103. On this appeal, it was common case that, although not so expressly stated in *FCE Bank plc*, four essential questions could be abstracted from it, which are:-

> *"(1) Are the claimants wholly owned or controlled ... by one of more persons who are resident(s) of the U.S. within the meaning of Article 4 DTA?*
>
> *(2) If so, what are the 'similar enterprises' ...?*
>
> *(3) Are the claimants discriminated against relative to this comparator?*
>
> *(4) If so, what are the grounds of discrimination?"*

104. It is accepted by Revenue that because the capital in SIH LLC is indirectly owned by residents of the U.S., the first question can be answered in favour of the Taxpayers. The question, as I have said, is where can they go from there? The next step is to identify a similar enterprise.

105. *Vogel on Double Taxation Conventions* (5^{th} Ed.) (2022) at para. 109 states that:-

"Article 24(5) OECD and UN [Model Conventions] prohibits other or more burdensome taxation ***which is caused*** *by the fact that the shareholders are residents of the other Contracting State. The denial of the benefit must be by reason of ownership or control by a non-resident. In order to find out whether the discrimination is based exclusively on the criterion of residence of the shareholders one has to conduct the following test …: Deem the shareholders to be a resident of the Contracting State in which the enterprise is a resident and leave all other facts unchanged."* [Emphasis original.]

106. It was common case that the appropriate comparator was to be identified by changing one thing and leaving all other facts unchanged.

107. In the commentary on Article 24(5) of the Model Convention, at paras. 114 and 115, *Vogel* states:-

"The enterprise must not, on account of some or all of its capital being held by non-resident shareholders, be subject to taxation other or more burdensome than the taxation of a ***similar enterprise of the taxing State****. The object of comparison is a* ***domestic enterprise which has only resident shareholders*** *not a domestic enterprise owned by residents of third states. …*

The OECD MC fails to indicate any criteria for testing similarity. The US I.R.S. believes that the foreign-owned enterprise should be compared with a domestically owned enterprise carrying on similar activities. The question whether one enterprise is similar to another enterprise cannot be answered in abstracto. The answer depends according to which criteria the tax law of the host State makes distinctions. If a different activity results in a different tax liability then the two enterprises are only in a similar situation if they exercise the same activity. If the tax law of the host State *distinguishes between different legal forms then the two enterprises are only in a similar situation if they have the same form."*

108. Mr. McCullough argues that the only difference between this case and *FCE Bank plc* is that Ford Motor Co. was not fiscally transparent. Otherwise – he says – it's precisely on all fours. That is true. He submits that it would be unreasonable to discriminate against SIH LLC purely on the basis that it is treated as a transparent entity for U.S. tax purposes. The problem with this analysis is that it seeks to airbrush out or wish away the fact that the application of the DTA is limited to persons who are liable to tax: which SIH LLC is not. The unreasonableness which Boyle J. found in *TD Securities* was in the different treatment of comparable fiscally transparent entities. In this case, the Taxpayers cannot show that the TCA treats any other fiscally transparent entity differently to the way in which they are treated.

109. The Taxpayers argue that the essential criterion for the granting of group relief is simply that the holding company and the subsidiary are members of a group. That is all very well as far as it goes but s. 411 TCA requires that the companies in the group not only be companies for the purposes of TCA generally, but that they should be resident in the E.U. or E.A.A. for the purposes of tax.

110. The Taxpayers put up three suggested comparators.

111. In the first it was proposed to substitute for the U.S. incorporated and U.S. controlled, fiscally transparent SIH LLC, a U.S. incorporated but Irish resident LLC. It might have been SIH LLC itself. On the Taxpayers' argument, all that was done was to change the foreign company to an Irish company and see what happens but that appears to me to be obviously wrong. The substitution of an Irish resident LLC would change not only the domicile of the direct shareholder but its tax status.

112. It was accepted by Revenue that a group in which the parent was a U.S. registered company which was resident in Ireland for the purposes of tax would meet the requirements of

s. 411 TCA, but it was contested that the proposed comparator was comparable. A U.S. registered parent which was resident in Ireland would be within the scope of Irish corporation tax. SIH LLC is not. Mr. McCullough acknowledged that the proposed comparator would be within the scope of Irish corporation tax because that is what Irish law requires but argued that if the two were not comparable, a test was being set up that was incapable of being met. I respectfully disagree. The identification of a comparator is a hypothetical exercise. The onus is on the Taxpayers to establish that they have been discriminated against by comparison with other similar enterprises. It seems to me that they cannot do that without first identifying a similar enterprise. The fact that the first proposed comparator is not comparable goes only to show that it does not meet the test. That said, I do not doubt the impossibility of identifying a comparator to demonstrate discrimination on a prohibited ground unless there is, in fact, discrimination on a prohibited ground.

113. The starting point is that Revenue acknowledges that the Taxpayers are being treated differently than they would be if they were subsidiaries of an Irish resident parent. The parties are agreed that the reason for the different treatment is that SIH LLC is fiscally transparent. The object of the exercise is to establish whether that different treatment is attributable to a prohibited ground – the tax residence of the owners – but the proposed substitution of a U.S. registered LLC resident in Ireland (and so resident in Ireland for the purposes of corporation tax) would change the criterion on which the different treatment is based, as well as the seat.

114. The Taxpayers sought to put in play the notional tax liability of the proposed substituted U.S. LLC on dividends it might receive from its subsidiaries or on gains from the disposal of shares in its subsidiaries but this, in my firm view, is a distraction.

115. Revenue agrees that in the scenario of the Taxpayers' first proposed substitution the subsidiaries would be entitled to group relief. Revenue also agrees that if SIH LLC was resident for tax purposes in the U.S., its subsidiaries would be entitled to group relief. To my mind this underlines that Revenue is correct in its submission that the reason for the different treatment is not the residence of the owners.

116. The Taxpayers' second suggested comparator was a structure in which Irish resident ultimate shareholders were substituted for U.S. resident ultimate shareholders and an Irish body corporate for the U.S. LLC. The Irish company, it was said, could elect to be a disregarded entity for U.S. tax purposes: but there was no evidence of that. Moreover, it was acknowledged that the default position for a U.S. LLC was that it was disregarded for tax purposes unless it opted in, while the default position for an Irish company was that it was liable to U.S. tax unless it opted out. Mr. McCullough was unable to identify any finding in the Determination that would have laid the ground for the proposition that an Irish company could become a disregarded entity in U.S. law and – quite rightly – accepted that absent such a finding, the Court could not take account of it. In any event, a hypothetical Irish resident company which elected to be a disregarded entity for the purposes of U.S. law would need to be resident in Ireland for the purposes of tax if its subsidiaries were to qualify for group relief.

117. The Appellants' third suggested comparator was to substitute an Irish resident body corporate – which had elected to be disregarded for the purposes of U.S. income tax – for the U.S. LLC, but keep the U.S. resident ultimate shareholders in each case. Again, the evidential ground had not been laid for the proposition that such a structure would be comparable for the purposes of U.S. tax law, and it plainly was not comparable for the purposes of Irish tax law, for the good and sufficient reason that – by contrast with SIH LLC – it would be resident in Ireland for the purposes of tax.

118. It was acknowledged that the proposed comparators were not fiscally transparent, but it was said that it made no sense to contemplate that they might be because fiscal transparency was not recognised in Irish law. This, it seems to me, recognises that the reason for the different treatment is the fiscal transparency of SIH LLC and that the Taxpayers are being treated no less favourably than the subsidiaries of any other fiscally transparent company.

119. Revenue countered with two suggested comparators, the first being the substitution for SIH LLC of a hypothetical fiscally transparent Irish body corporate, and the second being the substitution for the five U.S. resident individual shareholders of five Irish resident individual shareholders. In the first scenario, it was said, the hypothetical fiscally transparent Irish body corporate would not be resident in Ireland for the purposes of corporation tax and so would not qualify as a parent; and in the second the tax treatment of the Irish subsidiaries of the U.S. LLC would be no different. I agree. Revenue's suggested comparators demonstrate that the different treatment of fiscally transparent entities is based on their fiscal transparency and not any of the prohibited grounds.

120. Ms. Goodman referred to the Commentary on Article 24 of the OECD Model Convention – which corresponds to Article 25 of the DTA.

121. The opening paragraph of the commentary on Article 24 is that:-

> *"This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, the Article should not be unduly extended to cover so-called 'indirect' discrimination."*

122. Para. 3 states:-

> *"The various provisions of Article 24 prevent differences in tax treatment that are solely based on specific grounds (e.g. nationality, in the case of paragraph 1). Thus, for these provisions to apply, other relevant aspects must be the same. The various provisions of Article 24 use different words to achieve that result (e.g. 'in the same*

circumstances' in paragraphs 1 and 2; 'carrying on the same activities' in paragraph 3; 'similar enterprises' in paragraph 5). Also, while the Article seeks to eliminate distinctions that are solely based on certain grounds, it is not intended to provide foreign nationals, residents or domestic enterprises owned or controlled by non-residents with a tax treatment that is better than that of nationals, residents or domestic enterprises owned or controlled by residents (see, for example, paragraph 34 below).

123. Revenue proposes a third scenario in which a Brazilian company is substituted for SIH LLC with, alternatively, five Irish resident shareholders and five U.S. resident shareholders. The third scenario is not proposed as a comparator but as an illustration of the fact that s. 411 TCA requires more than that the parent company should be a body corporate. Brazil is chosen on the basis that there is no Double Taxation Treaty between Ireland and Brazil, and so no basis on which group relief could be claimed on non-discrimination grounds. In either scenario, the Brazilian company would not be resident in Ireland for tax purposes and the structures would not qualify under s. 411.

124. In my view, the appropriate comparator is Revenue's second proposed comparator, in which the only change is in the residence of the ultimate individual owners. In the case of that comparator, what got the Taxpayers through the Article 25.4 gateway was the fact that their capital was indirectly owned and controlled by the residents of a Contracting State. It seems to me to follow that the similar enterprise is to be identified by substituting Irish indirect control for U.S. indirect control. If that is done, it is evident that the different treatment of the Taxpayers compared to subsidiaries of an Irish company is not by reference to the ownership and control of the capital in SIH LLC.

Conclusion

125. The Taxpayers' claims for group relief under s. 411 TCA for the years 2010 and 2011 were disallowed on the ground that under U.S. tax law they were fiscally transparent.

126. The Taxpayers' case was that the refusal of the relief claimed amounted to discrimination against them contrary to Article 25.4 of the Double Taxation Treaty between Ireland and the United States of America.

127. For the reasons given, I have concluded that the High Court judge was correct in finding that the Taxpayers' parent company, by reason of its fiscal transparency, was not liable to tax in the U.S. and accordingly was not resident in the U.S. within the meaning of Article 4 of the Double Taxation Treaty; and in finding that the Taxpayers were not entitled to group relief under s. 411 of the Taxes Consolidation Act.

128. I would dismiss the appeal and affirm the order of the High Court.

129. Provisionally, it seems to me that Revenue is entitled to an order for the costs of the appeal. If the Taxpayers wish to contend for any other order they may, within ten days of the electronic delivery of this judgment, notify the office and the Revenue Solicitor, in which event the panel will reconvene to deal with the question of costs.

130. As this judgment is being delivered electronically Butler and McDonald JJ. have authorised me to say that they agree with it and with the orders proposed.