THE HIGH COURT

[2024] IEHC 195

Record No.: 2022/109R

BETWEEN

ADNAN AHMAD SIDDIQI

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

Judgment of Mr Justice Oisín Quinn delivered on the 12 day of April 2024

Introduction

1. This is an appeal by way of a Case Stated against a Determination of the Tax Appeals Commissioner ("TAC") of 7 March 2022. The Case Stated seeks the opinion of the High Court on three questions pursuant to s949AQ of the Taxes Consolidation Act 1997 as amended ("TCA 1997").

Background

2. The Determination of the TAC addressed two separate issues raised by the Appellant taxpayer ("the Appellant").

3. Firstly, it concerned the Appellant's claim that for the period 2014-2017 he should be entitled to deduct the rent he was paying in respect of his home from rental income received by him during the same period in respect of his former home which he had to leave in circumstances where he and his family were subjected to racial harassment by people in the area of his former home. His claim that he and his family were subjected to serious incidents of harassment was supported by documentation supplied by the Gardaí.

4. The second issue concerns the tax treatment of an *ex gratia* sum of €84,903.76 due to the Appellant in May, 2014 from his former employer. That sum was payable along with a further sum of €4,416 by way of statutory redundancy on foot of a written agreement entitled "Compromise Agreement" entered into between the Appellant and his former employer on 24 March 2014. The Compromise Agreement was entered into while the Appellant was out of

work on sick leave and had a claim for racial discrimination pending before the Equality Tribunal. The Compromise Agreement required that claim to be withdrawn.

5. In relation to the first issue, the Revenue Commissioners (the "Revenue") contend that it is not permissible to deduct rent paid towards the taxpayer's home against rental income from the Appellant's former home.

6. Secondly, the Revenue treated the *ex gratia* payment as a payment connected with the termination of the Appellant's then employment as a Financial Accountant with his former employer, a car rental company, and taxed it as such. The principal reason for this, arises from the interpretation of the aforementioned "Compromise Agreement" which expressly describes the *ex gratia* payment as a termination payment; see Clause 2 thereof.

7. The Appellant is an accountant and while originally from Pakistan he has been living and working in Ireland since 2000. He argued that he should be allowed to deduct the rent he was paying for his new home, which is in a different area, from the rental income he received from his former home because the move was due to the failure of the Gardaí and by extension the State as he sees it, to address the harassment he and his family suffered in their former home. Secondly, the rent on his new home was higher than the rental income being received from his former home and as he had not wanted to move, he said there was a connection between the two that should make a deduction permissible which essentially reduced his tax liability in respect of this Case V, Schedule D income to nil.

8. In relation to the *ex gratia* payment, he said this was in reality consideration for the settlement of the pending claim he had brought to the Equality Tribunal for racial discrimination against his former employer, together with a potential claim for personal injuries for injury to his mental health as a result of this discrimination. Amounts paid in settlement of such claims would not be taxed at all, whereas the treatment by the Revenue of the *ex gratia* payment as a termination payment meant that an additional €21,871.99 was deducted by the Revenue.

9. The Appellant appealed the decision of the Revenue to the TAC on the 12 February 2019 and the appeal hearing was held on 17 February 2022. By Determination of 7 March 2022 the position of the Revenue was upheld.

10. The Appellant contends that this decision was erroneous. Consequently, the TAC has stated a case to the High Court by Case Stated dated 21 July 2022 raising three questions. The Case Stated was heard on 5 March 2024.

Amendment

11. At the commencement of the hearing, it emerged that there was an error with question three of the Case Stated. The Respondent applied to amend the question pursuant to the inherent jurisdiction of the Court. The error was relatively obvious and having allowed the Appellant (who was not legally represented) an opportunity to consider the matter he very reasonably confirmed he had no objection to the proposed amendment.

12. Accordingly, I made the amendment being satisfied that it came within the type of amendments that can properly be made by the Court pursuant to its inherent jurisdiction; see Sanfey J. in *O'Sullivan v Revenue Commissioners* [2021] IEHC 118 at para. 25.

The Case Stated as Amended

13. The Case Stated accordingly contains the following three questions of law for the opinion of the High Court (the amendment is underlined):-

    (1) Was the Commissioner correct in finding at paragraph 58 of the Determination that the Appellant had a charge to tax for the years 2014 – 2017 under Schedule D, Case V of the TCA 1997, on the grounds that it was not possible for the Appellant to claim any cost incurred renting his current home as an expense against the income accrued from his renting the Property, in circumstances where he left the Property in 2014 fearing for his own safety and that of his family?

    (2) Was the Commissioner correct in his interpretation of the written agreement as one made in consequence of, or otherwise in connection with, the termination of the Appellant's employment with the Employer within the meaning of section 123(1) of the TCA 1997?

    (3) If the answer to (2) is no, was the Commissioner correct in finding that the *ex gratia* sum paid to the Appellant was one <u>not</u> made in settlement of a relevant claim under a relevant act falling under section 192A of the TCA 1997, with the effect that he was not entitled to an exemption from income tax?

Applicable Legal Principles

14. The general legal principles applicable to considering a Case Stated pursuant to the TCA 1997 are well established and are helpfully summarised in the decision of the Supreme Court in *Mara v Hummingbird* [1982] ILRM 421 at page 426 where Kenny J states as follows:-

    > *"A case stated consists in part of findings on questions of primary fact… These findings on primary facts should not be set aside by the courts unless there was no evidence*

whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw."

15. In addition, in the context of the first question, Counsel for the Respondent submitted that as a matter of general principle the cost of living somewhere has always been treated in tax cases as a personal cost and never a deductible expense. Counsel helpfully drew attention to the decision of the House of Lords in *Ricketts v Colquhoun* [1926] AC 1. There, the Court was required to address the question of whether a barrister who was living in London and who was appointed as a part-time recorder in Portsmouth could deduct the cost, inter alia, of his hotel in Portsmouth. The court decided it was not deductible. Viscount Cave stated on page 6:-

> *"A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance."*

16. Next, in the context of the Appellant's submission that it would be unfair not to allow the deduction of the rent given the circumstances in which the Appellant found himself, Counsel for the Respondent referred to the well know dicta of Charleton J. in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49 who states at para 12:-

> *"Revenue law has no equity … tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute."*

17. Finally, in the context of the second and third questions of the Case Stated, which involve in part an interpretation of the Compromise Agreement, it is necessary to keep in mind the principles enunciated by the Supreme Court in relation to the interpretation of agreements in *Analog Devices B.V. v Zurich Insurance Company* [2005] 1 IR 274 and *Law Society v MIBI* [2017] IESC 31. These cases identify a number of interpretative principles, the most relevant of which are as follows: -

(i) the overarching principle to be applied in interpretating a legal document is to seek to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the making of the agreement;

(ii) the 'background knowledge', or as it is sometimes referred to, the 'matrix of fact', includes anything which would have affected the way in which the language would have been understood by a reasonable person;

(iii) evidence of previous negotiations and declarations of subjective intent are not admissible;

(iv) the meaning of words in the document is what the parties using the words against the relevant background would reasonably have understood those words to mean;

(v) the words should be given a single meaning which is the meaning both parties are taken to have agreed upon and that meaning is to be determined from a consideration of the agreement as a whole;

(vi) semantic and syntactical analysis of words should yield to common sense meanings if there is a conflict between the two.

Relevant Statutory Provisions

18. The following are the most relevant statutory provisions to this Case Stated:

Section 18 of the TCA 1997, Schedule D, Case V

"(2) Tax under Schedule D shall be charged under the following Cases:

...

Case V – Tax in respect of any rent in respect of any premises or any receipts in respect of any easement;"

Section 123(1) and (2) of the TCA 1997

"(1) This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or

indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodical payments (whether chargeable to tax or not) which would otherwise have been so made.

(2) Subject to section 201, income tax shall be charged under Schedule E in respect of any payment to which this section applies made to the holder or past holder of any office or employment, or to his or her executors or administrators, whether made by the person under whom he or she holds or held the office or employment or by any other person."

Section 192A of the TCA 1997 (as in force from 1 January 2004 to 29 September 2014)

"(1) In this section –

"relevant Act" means an enactment which contains provisions for the protection of employees' rights and entitlements or for the obligations of employers toward their employees;

"relevant authority" means any of the following –

a. a right commissioner,
b. the Director of Equality Investigations,
c. the Employment Appeals Tribunal,
d. the Labour Court,
e. the Circuit Court,
f. the High Court.

(2) Subject to subsections (3) and (5), this section applies to a payment under a relevant Act, to an employee or former employee by his or her employer or former employer, as the case may be, which is made, on or after 4 February 2004, in accordance with a recommendation, decision or a determination by a relevant authority in accordance with the provisions of that Act.

(3) A payment made in accordance with a settlement arrived at under a mediation process provided for in a relevant Act shall be treated as if it had been made in accordance with a recommendation, decision or determination under that Act of a relevant authority.

(4)(a) Subject to subsection (5) and without prejudice to any of the terms or conditions of an agreement referred to in this subsection, this section shall apply to a payment

(i) *made on or after 4 February 2004, under an agreement evidenced in writing, being an agreement between persons who are not connected with each other (within the meaning section 10), in settlement of a claim which –*

   i. *had it been made to a relevant authority, would have been a bona fide claim made under the provisions of a relevant Act,*
   ii. *is evidenced in writing, and*
   iii. *had the claim not been settled by the agreement, is likely to have been the subject of a recommendation, decision or determination under that Act by a relevant authority that a payment be made to the person making the claim,*

(ii) *The amount of which does not exceed the maximum payment which, in accordance, with a decision or determination by a relevant authority (other than the Circuit Court or the High Court) under the relevant Act, could have been made under that Act in relation to the claim, had the claim not been settled by agreement, and*

(iii) *where –*

(I) *copies of the agreement and the statement of claim are kept and retained by the employer, by or on behalf of whom the payment was made, for a period of six years from the day on which the payment was made, and*

(II) *the employer has made copies of the agreement and the statement of claim available to an officer where of the Revenue Commissioners where the officer has requested the employer to make those copies available to him or her.*

(b)

(i) *On being so requested by an officer of the Revenue Commissioners, an employer shall make available to the officer all copies of –*

(I) *such agreements as are referred to in paragraph (a) entered into by or on behalf of the employer, and*

(II) *the statements of claim related to those agreements,*

kept and retained by the employer in accordance with subparagraph (iii) of that paragraph.

(ii) *The officer may examine and take extracts from or copies of any documents made available to him or her under this subsection.*

(5) *This section shall not apply to so much of a payment under a relevant Act or agreement referred to in subsection (4) as is –*

(a) *a payment, however described, in respect of renumeration including arrears of renumeration, or*

(b) *a payment referred to in section 123(1) or 480(2)(a).*

(6) Payments to which this section applies shall be exempt from income tax and shall not be reckoned in computing total income for the purposes of the Income Tax Acts."

Submissions Regarding Question 1

19. Regarding this question, the Appellant submitted that he should be entitled to deduct the rent he was paying in respect of his new home as against the rental income received by him in respect of his former home which he had to leave in circumstances where he and his family were subjected to racial harassment by people in the area of his former home. As indicated above, his claim that he and his family were subjected to serious incidents of harassment was supported by Garda documentation.

20. The Respondent submitted that the TAC's reasoning and analysis was correct. The above-mentioned legal principles mean that even though one can feel great sympathy for the Appellant there is simply no proper legal basis for deducting the expense of renting one's own home against properly chargeable income in the form of rent (from the former family home) pursuant to Case V of Schedule D.

Decision on Question 1

21. I am satisfied that the decision of the TAC in relation to this question was correct.

22. While it is very unsatisfactory that the Appellant and his family were forced to leave their original family home due to racial harassment, that fact does not alter the legal question of whether the rent payable by the Appellant in respect of his new home should or should not be deductible as against properly chargeable profits in the form of rent from the former home.

23. As Charleton J. states in *Menolly* 'revenue law has no equity'. If the failure of the Gardaí or some other arm of the State to prevent the Appellant being seriously subjected to racial harassment to the extent that he had to leave his home may have given rise to some unspecified legal liability as against the State, this would not in any event permit the Appellant to, as it were, construct his own form of set off as against the Revenue, being as he saw it another arm of the State. The question of the tax liability is ultimately an issue to be determined by the relevant tax legislation.

24. While the Appellant did refer in passing to section 44 of the Finance Act 1967 (a provision designed to allow the Revenue give relief to persons prevented 'from using their land') this provision has been repealed and not replaced, as was carefully explained by counsel for the

Revenue by virtue of the provisions in section 65 of the Finance Act, 1969 and the 5th Schedule thereto.

25. Counsel for the Respondent helpfully drew attention to section 97 of the TCA 1997 and subsections (1) and (2) thereof. These provide for the deductions that are permissible as against Schedule D, Case V profits. The cost of renting one's own home is not such a deduction. While section 97(2)(a) does provide as a permissible deduction "the amount of any rent payable by the person chargeable in respect of the premises or in respect of a part of the premises", it is clear from the context that the reference in that provision to "the premises" is the premises which is generating the chargeable profit.

26. Accordingly, there is no permissible basis for departing from the general principle described above, in a different context, in *Ricketts*. The cost of putting a roof over your head is not a deductible expense.

Submissions Regarding Questions 2 and 3

27. The Appellant submitted that the purpose of the *ex gratia* payment was to compensate him for his claim that was then pending before the Equality Tribunal for alleged racial discrimination contrary to the Employment Equality Acts. He was on sick leave at the time of the Compromise Agreement in March 2014 when a mediation under the auspices of the Equality Tribunal had been pending. He had been on sick leave since June 2013 due to stress suffered, he claimed, from racial discrimination, harassment and alleged victimisation by his employer. He said he would also likely have sought damages for personal injuries. Compensation for claims of this sort is exempt from tax by virtue of section 192A and section 201(2)(a) of the TCA, 1997. That is what the *ex gratia* sum was for, he said. The statutory redundancy payment was for the termination of his job, he claimed.

28. The Respondent submitted that the TAC was correct in his interpretation of the Compromise Agreement and correct therefore to find that the *ex gratia* payment was properly treated by the Revenue as a termination payment within the meaning of section 123 of the TCA, 1997 thereby attracting the benefit of the various exemptions and reliefs contained in section 201 of the TCA, 1997. Those benefits were duly applied by the Revenue, leading to the deduction for tax of approximately €22,000 from the *ex gratia* sum.

29. It was submitted by Revenue that once the *ex gratia* payment is seen as a termination payment that it is then to be excluded from the complete relief potentially available under section 192A

or 201(2)(a). This is because of the provisions of section 192A(5). This rationale equally excluded the consideration of whether or not the payment might have been for personal injuries.

30. In addition, the TAC had found that the provisions of section 192A "make plain that it is only payments arising from *issued* proceedings under one of the relevant acts described in subsection (1) [of section 192A] that can obtain exemption", see para 71 of the Determination. Therefore, on this logic, it was submitted that the payment could not get the benefit of section 192A in respect of any claims where no proceedings had issued.

31. Furthermore, it was pointed out the Compromise Agreement provided that the Appellant was ultimately to receive a net sum of €65,000 and that this is what he received.

32. Finally, attention was drawn to the fact that the Compromise Agreement itself proposed this type of tax treatment (namely treating the *ex gratia* sum as a termination payment) and that the Appellant had entered into that agreement with the benefit of legal advice from expert employment law solicitors.

<u>Decision on Questions 2 and 3</u>

33. Firstly, the TAC's interpretation of section 192A as outlined in paragraph 71 of the Determination is incorrect and this is a clear mistaken view of law within the sense set out in *Mara v Hummingbird*. While section 192A(2) and (3) involve scenarios where proceedings under section 192A(1) ('statutory employment claims') would have been issued, that is not the case with section 192A(4). There are a number of essential prerequisites to a payment coming within subsection 4 but having actually to have issued a claim is not one of them. The wording of subsection 4(a)(i)(I) refers to a payment made "… in settlement of a claim *which had it been made* to a [statutory employment rights body] would have been a bona fide claim …" (*italics added for emphasis*). This wording and the surrounding provisions indicate that the section 192A exemption can apply to scenarios where no proceedings or statutory employment claim has *issued*.

34. In truth, during exchanges at the hearing, Counsel for the Respondent did not seriously dispute this analysis. While there was some uncertainty due to the use of the phrase 'statement of claim' at various points in subsection 4 (see section 192A(4)(a)(iii)(I) and (II) for example) this does not mean a 'statement of claim' in the sense meant in the Rules of the Superior Courts. Indeed, the Appellant very helpfully had to hand during submissions a document described as the 'Tax and Duty Manual' produced by the Revenue, and which applies as a guide to various legislative provisions. In relation to section 192A the reference to a 'statement of claim' therein is

explained in this Manual as 'written documentation' the format of which 'will vary depending on the facts and circumstances' and, furthermore, it states '[t]he employee need not engage an external advisor to prepare such written documentation on their behalf and there is no requirement for the statement of claim to have been formally submitted to a [statutory employment rights body]'. This indicates that the drafters of the Revenue's own guide to the subsection did not interpret the words 'statement of claim' as a document akin to a pleading filed in court or with a statutory body.

35. The Appellant submitted some documents to the Revenue in relation to the context in which the Compromise Agreement was entered into. One letter of 6 August 2019 from the Appellant's former solicitors who represented him in the employment matter stated "please find enclosed a letter confirming that your employment dispute with [former employer] was settled". A further letter of 24 October 2018 was from the HR Director of the Appellant's former employer. It pointed out that the Appellant "did not attend work at any time during 2014" and that he "received a net payment in full and final settlement of any claim to employment at the end of his tenure with [the employer]".

36. The TAC at paragraph 69 decided that this correspondence "cannot override the clear contemporaneous written terms of an agreement concluded four years earlier [the Compromise Agreement]".

37. Based on the principles described above set out by the Supreme Court in *Analog Devices* and *Law Society v MIBI* I am not satisfied that the TAC approached the question of the interpretation of the Compromise Agreement correctly.

38. It is necessary for an objective analysis of the background context or 'matrix of fact' to be carried out. The correspondence from 2018 and indeed 2019 should have been seen as relevant as they referred back to the context of the settlement. Accordingly, at a minimum they should have been considered as part of the exercise of seeking to establish the background context or 'matrix of fact' to the Compromise Agreement.

39. The matrix of fact can be gleaned from both the Compromise Agreement itself and the documentation available. The assertion in the Compromise Agreement that the Appellant was being made redundant was not in question. Redundancy is a wholly lawful basis for terminating employment. If the termination of the Appellant's employment was for redundancy, then that payment would, aside from notice or any contractual entitlement to enhanced redundancy (none such was referred to), be a complete legal answer to any challenge to the lawfulness of the

termination. On the other hand, the settlement led to the equality claim being withdrawn. Accordingly, once statutory redundancy was being paid there should have been a real question as to why an additional sum of approximately €85,000 was being paid to an employee whose annual salary was approximately €57,000 and who had only commenced employment in 2011.

40. In addition, the Compromise Agreement provided for a payment of €10,000 plus VAT for legal fees for the Appellant's solicitors. Albeit it stated the payment was for "reasonable legal fees incurred by the Employee in obtaining advice on the terms of this Termination Agreement, such fees to be payable to his advisor within 21 days after the production of an invoice made out to the Employer for legal services in relation to the cessation of employment."

41. The Compromise Agreement provided for the withdrawal of the Appellant's then extant claim to the Equality Tribunal. Those were the only proceedings in existence at the time of the Compromise Agreement and those were the proceedings that were then withdrawn because of the Compromise Agreement.

42. The documentation provided by the Appellant and appended to the Case Stated indicates that the Equality Tribunal had scheduled a mediation between the parties for the 1 May 2014 and that in advance of that, and prior to the Compromise Agreement being entered into, the former employer's representative, according to the Equality Tribunal "has contacted the Tribunal to state that they are not in a position to confirm their attendance at mediation and that they are currently in negotiations with [the Appellant] and the [Appellant's] solicitor"; see email from the Equality Tribunal of 14 March 2014 at exhibit 3 to the Case Stated.

43. Section 192A(4) provides that, if certain criteria are met, a payment made in settlement of a statutory employment claim is exempt from tax, provided inter alia it is not a termination payment.

44. In the context of the foregoing, it is difficult to see how the TAC did not consider that the provisions of section 192A(4) had been engaged or at least required an examination of the documents that likely were in the former employer's possession as provided for in section 192A(4)(a) and (b).

45. Overall, I am satisfied that the failure to approach the issue in this manner was an error of law for the following reasons: -
    (a) there was no basis for inferring that the claim to the Equality Tribunal was other than a bona fide claim thereby meeting the requirement in section 192A(4)(a)(i)(I);

(b) the existence of the claim was evidenced in writing; section 192A(4)(a)(i)(II);

(c) as to whether the claim would 'likely' have led to an award in favour of the Appellant - so as to meet the requirement in section 192A(4)(a)(i)(III) - is not clear. However, the former employer agreed in the Compromise Agreement to pay the Appellant an additional €85,000 approximately on top of his statutory redundancy and the pending mediation date which had been scheduled by the Equality Tribunal appears to have been the trigger for the settlement negotiations which lead to the Compromise Agreement;

(d) the *ex gratia* amount was well over a year's pay of €57,000 but less than two years pay – the typical statutory maximum permitted for statutory employment claims; so the provisions of section 192A(4)(a)(ii) were not breached;

(e) whilst it was correct of counsel for the Revenue to submit that the burden of proof on the appeal to the TAC is on the taxpayer (see Charleton J in *Menolly Homes* at para 20), section 192A(4) clearly envisages a situation where the Revenue are entitled to seek and examine the documents concerning a payment made in 'settlement of a claim' of the type intended to be covered by section 192A, such as a claim to the Equality Tribunal for racial discrimination;

(f) these documents must be kept for six years by the employer. The initial decisions of the Revenue in relation to these matters were made before 12 February 2019, i.e., within 6 years of the Compromise Agreement between the Appellant and the Employer;

(g) accordingly while it is correct to observe (and somewhat unexplained) that the Appellant has not been clear about the precise nature and detail of his claim of racial discrimination to the Equality Tribunal, the provisions of section 192A(4) make it clear that the focus of the Revenue should be on the true substantive reason for the payment and that same is to be gleaned by an examination of both the 'agreement' (in this case the Compromise Agreement) and what is called the 'statement of claim' of the employee. The Revenue's Tax Manual on section 192A makes clear that the 'statement of claim' is not a single document but can include 'documentation' that disclose 'information such as the nature of the claim, the nature of the relationship between the parties involved or a high-level summary of the allegations and the impact of same'. Section 192A(4)(a)(iii) indicates that it is the employer who should retain these documents for six years and make them available to the Revenue who have specific powers to examine these documents and make copies; see section 192A(4)(b). In this case one would expect that the documents constituting the 'statement of claim' in relation to the Appellant's claim to the Equality Tribunal would include all of the documents filed with the Equality Tribunal and copied to or served on the former employer together with whatever correspondence was sent to the former employer by either the Appellant or his solicitors, Daniel Spring & Co. These documents would have been in the possession of the former employer and the Revenue has the power to request

and examine these from the employer and this examination is designed to facilitate a consideration of whether the criteria set out in section 192A(4) have been met, including the albeit potentially challenging question as to whether the claim would have been 'likely' to have resulted in an award in favour of the Appellant;

(h) notwithstanding the wording of the Compromise Agreement which did expressly describe the *ex gratia* payment as a 'termination payment' the overarching factual context set out above combined with the legal provisions of section 192A required the Appellant's assertion that the *ex gratia* sum was paid in compromise of his Equality Tribunal claim to be examined in the manner described above. The failure to do so was an error of law within the meaning set out in *Mara v Hummingbird*.

46. While it is correct to say that the Compromise Agreement ultimately was designed to provide that the Appellant would receive the net sum of €65,000 plus statutory redundancy and he did receive that sum, the real question required of the TAC on appeal was to consider the true substance of the *ex gratia* payment, that is the clear intention of the provisions of section 192A. The label the parties give is not determinative. There must be a genuine bona fide employment claim of the type described in section 192A(1) and (4). It must be evidenced in writing (this evidence can include documents setting out the nature of the employee's claim). It must have been 'likely' to lead to an award if it had not been settled. The amount paid must be no more than the maximum that could be awarded by the statutory body (the Equality Tribunal in this case). The employer must retain copies of the relevant documents for six years and must make them available for inspection by the Revenue. These conditions all indicate that the focus is on the true substantive nature of the payment. This approach of looking to the true nature of the arrangement rather than the label designated by the parties is consistent in tax law cases; see Carroll J. in *Sunday Tribune Ltd.* [1984] IR 505: "the Court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists, and it must do so regardless of how the parties describe themselves".

47. The fact that the Compromise Agreement provided that the Appellant was to get a net sum of €65,000 and that it was labelled a 'termination payment' could not be decisive if in fact the payment was made in settlement of a claim for racial discrimination to the Equality Tribunal. The dicta of Charleton J. in *Menolly Homes* (relied upon successfully by the Revenue in answer to Question 1 above) that 'revenue law has no equity' is a double-edged sword for the Revenue. It cuts both ways. If the payment of approximately €85,000.00 was in substance a payment of the type covered by section 192A(4) to settle a claim of racial discrimination to the Equality Tribunal (as in truth all of the contextual evidence suggests) then it is exempt from tax even if that means the Appellant gets a higher net payment than envisaged.

<u>Conclusion</u>

48. Accordingly for the foregoing reasons the Questions raised are answered as follows:

(1) Was the Commissioner correct in finding at paragraph 58 of the Determination that the Appellant had a charge to tax for the years 2014 – 2017 under Schedule D, Case V of the TCA 1997, on the grounds that it was not possible for the Appellant to claim any cost incurred renting his current home as an expense against the income accrued from his renting the Property, in circumstances where he left the Property in 2014 fearing for his own safety and that of his family?

Answer: Yes

(2) Was the Commissioner correct in his interpretation of the written agreement as one made in consequence of, or otherwise in connection with, the termination of the Appellant's employment with the Employer within the meaning of section 123(1) of the TCA 1997?

Answer: No

(3) If the answer to (2) is no, was the Commissioner correct in finding that the *ex gratia* sum paid to the Appellant was one <u>not</u> made in settlement of a relevant claim under a relevant act falling under section 192A of the TCA 1997, with the effect that he was not entitled to an exemption from income tax?

Answer: No